

Secondary Liability of P2P-like service in China:

Kuro Case and Its Impact

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I. Kuro Case: the first case against P2P Provider

Shanghai Push Sound Music & Entertainment Co.,Ltd., a recording company ¹brought copyright infringement action against Beijing Kuro Co.,Ltd.(Kuro) et al², the Internet Service Provider (ISP)that facilitated the transmission and retention of digital audio files by its users in November2005.³ The Second Intermediate Court of Beijing Municipality

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¹The general agent of EMI (ELECTRICAL AND MUSICAL INDUSTRIESLTD) in China

² Beijing Kuro is a subsidiary of Taiwan Kuro Co.,Ltd which developed the Kuro Peer-to-Peer file-sharing software; and in this case it provided technical support for another defendant, Beijing Boshengfang'an info.& tech. Co.,Ltd, the factual owner of website kuro.com.cn and Kuro software in Mainland China. There is a doubt the both companies are the same one. See the opinion by the Second Intermediate Court of Beijing Municipality at

http://www.it-lawfirm.com/ipr_Html/07_03/2007-3/19/2007031909452089_2.html

³ This was the first copyright infringement case concerning Peer-to-Peer file-sharing service in China and consequently was highly focused by the Internet Service Providers, copyright holders and even network users. Cf. *Beijing Ciwen Studio Inc. v. Guangzhou Shulian software Technology Inc.* held by *Guangzhou Intermediate Court* In fact, the first P2P service involved case with similar underlying facts decided by the Intermediate Court of Guangzhou in July 2006, in which, the court held that the defendant internet service was infringing and ruled in favor of the copyright holders. The reasoning, however, is disappointing because the court did not address the issue of secondary liability in its opinion as it held the defendant primarily liable for direct



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made its decision of this case in December 2006 and held that the defendants abetted and facilitated the copyright infringing conduct of its network users' illegal uploading and communicating 53 songs through the internet⁴ either in MP3 or other digital formats to the public on information networks.⁵

Kuro was an ISP that facilitates the exchanging music in MP3 format between and among its users.⁶ Similar to American Napster, when installing and running Kuro musicshare software, the user (registering demanded, called requesting user) was able to directly download available music files from other users (called host users) saved in so-called Kuro's user library created by the latter on their computer hard

infringement of **Right of Communication through Information Network** belonged to the plaintiff. See the opinion by the Court at the blog of Wangqian, a famous IP scholar in China at <http://blog.sina.com.cn/u/46a2d1f5010006mx>

⁴ The plaintiff enjoyed the neighboring copyright of the 53 songs. See Article 41, 47(4) of **Copyright Law of PRC**, in this case, plaintiff, as the producer of 53 songs, has the right to authorize others to communicate the songs to the public on an information network and the right to obtain remuneration therefore.

⁵ Network users' action of uploading which though has never been sued, in fact, constitute the action of communicating to the public the sound recording on an information network. The Court herein held correctly; few courts however, have ruled its illegitimacy definitely and affect the imposition of secondary liability.

⁶ P2P technology, in fact, can be used to communicate files in almost all formats on network; and Kuro only transmit music/song files herein.



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drives for sharing through network (a process just called "peer-to-peer" file sharing).⁷ Kuro even published its classifications and ranks on its internet website to give some introductions and recommendations of the music.⁸

II. The New Trend of P2P Liability in Kuro Case

Since it was the first case in which P2P service is held liable for joint

⁷ In this process, Kuro server communicates the host user' internet address to the requesting user, which help establish a connection between them so that the requesting user is free to download a copy of the content of the music files over the internet; Being different from Napster and Grokster, StreamCast later on, Kuro charges each user 20 yuan per month for complete service that means Kuro receive revenue directly from users; whether Kuro generate income by selling the advertising space is not clear. What should be noticed is that the business model employed by Kuro would be paragon that establishes cooperative relations between copyright holder and the P2P service. (Kuro negotiated with copyright holder or the organization of copyright collective management and got its authorization of some songs while the 53 songs herein fell out of the scope thereof.) How to perfect this business model is a question to be researched.

⁸ The lists of music/songs names are not completely based on the available files uploaded by the host users for transfer. This situation, to some extent, indicated that Kuro itself did not engage in the transmission of unauthorized digital files. Plaintiff, purportedly once produced evidence in court that demonstrate Kuro has arranged counterfeit host users to upload the songs involved in the case. But we cannot see in the court's opinion.



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infringement in China,⁹ the court's opinion was said to provide a landmark that can be followed by other courts when facing the similar issues.

The reasoning and holding is quite remarkable notwithstanding a bit too prudent because it indicates that China, in fact, has its own legal basis for penalizing the indirect wrongdoer for copyright through network though PRC copyright law does not include specific provisions on secondary copyright infringement. Civil law and the relevant interpretations establish legal theory of joint infringement, which can be relied upon to distinguish secondary liability from indirect liability on network copyright issues; however, it is applicable limited to contributory infringement and inducement of infringement where the test standard is still equivocal, not to mention imposition of vicarious liability of ISP.¹⁰

⁹ The court held Kuro was liable for direct infringement of the users' actionable upload (communication) of copyrighted songs pursuant to the Article 130 of PRC General Principle of Civil Law with prescribing the tort infringement liability. **Article 130** provides that if two or more persons jointly infringe upon another person's rights and cause him damage, they shall bear joint liability.

¹⁰ Under such Principles, a necessary element of secondary liability is fault, i.e. individuals or entities will not be held secondarily liable for consequences beyond their intention or reasonable expectation. While the provision is so general that it still lacks operability. For example, test standard of a requesting factor of joint tort i.e. actual knowledge or constructive knowledge is even difficult to establish and the burden of proof is also to be clearly allocated. It is clear that the new Regulations on



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When facing the more and more popular advanced file sharing software with decentralized architecture like Grokster, KaZaA and Bit Torrent, whether the distributor will be held liable for secondary infringement under the present theory of civil tort is uncertain and in dispute.

There is always a lag between active law and the development of society and technology in flux, especially obvious in the civil law countries like China without judge-made law. There is no doubt that the creative work should be encouraged and a copyright holder should secure a fair return for his creative labor; however, in fixing secondary copyright liability, the law we need is to strike a necessary balance between a copyright holder's legitimate demand for effective--not merely symbolic--protection of the statutory monopoly,¹¹ and the rights and interests of others affected including disseminator(ISP) and network users (the public) and to manage the tension between the competing values of supporting creativity through copyright protection and promoting technological innovation by reasonably limiting infringement

the Protection of the Right of Communication through Information promulgated by the State Council mirrors the principle in the US Copyright Act(DMCA) and it does not conclude specific provision involving P2P-like(including both centralized and decentralized architecture) liability or safe harbor.

¹¹ [Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, at 943\(2005\)](#)



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liability.¹²

III. P2P users v. Fair Use

PRC Copyright Law grants a copyright holder a variety of exclusive rights to use and authorize the use of his work under the proper terms and conditions. Generally, anyone who violates any of the exclusive rights of the copyright owner is an infringer of copyright.¹³ Unlicensed use of the copyright, however, is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the statute. All reproductions of copyrighted work are not within exclusive domain of copyright owners; some are in the public domain.¹⁴ P2P users' activities of downloading of copyrighted music are virtually reproducing conducts without permission; according to Article 22 (1) of Copyright Law, however, if only for the purpose of the users' own private self-entertainment, these reproductions constitute fair use¹⁵.

¹² Grokster, super note 10, at 914

¹³ That means carrying out any conduct subject to such rights without legal reason constitutes copyright infringement.

¹⁴ Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, at 433 (1984)

¹⁵ Article 22(1) provides: use of a published work for the purposes of the user's own private study, research or self-entertainment, the work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and



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This rule of fair use is obviously unfair because such use is substantively commercial in that it could save users the expense of purchasing the entire and authorized copies, and is likely to impair market of the works by reducing sales.¹⁶ Therefore, there is a necessity that

of course the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced. The use herein includes but not limited to reproduction of work.

The doctrine of fair use has been called, with some justification, "the most troublesome in the whole law of copyright." See *Sony*, Super note 12, at 475; Subject to the general three-step test set up in Article 9 of Berne Convention. That is, such exception or limitation shall only be applied in certain special cases that do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holders.

Article 9 (2) of the Berne Convention provides: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". The rule of fair use in China is hard to say to have satisfied the requirement of Berne Convention and the later WTC. Under this situation, Chinese court must be highly circumspect in construing the scope of fair-use exception when contemplating a calculus of interests of between copyright holders and the public.

¹⁶ See The Recording Industry Association of America , 2002 Consumer Profile , 2003 Consumer Profile; The Effect of File Sharing on Record Sales An Empirical Analysis; *A&M Records, Inc v. Napster*,239F.3d1004, at 1016,1004(9Cir.2001);and *Metro-Goldwyn-Mayer Studios,Inc.v.Grokster,Ltd.*, 545 U.S. 913,at 946(2005)

Obviously, downloading of digital audio files containing copyrighted music, through Internet service that facilitated transmission and retention of such files by its users, was not fair use of copyrighted works, as such use was not transformative, 17



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China revise its provisions of fair use referencing the lawmaking mode of material standard test in order to provide better copyright protection against the online piracy.¹⁷ The specific rules of fair use should not ignore the local political, cultural and legal reality.¹⁸

IV. The Solutions/Good Law We Need

Developed countries walk in front on the way and to reference or

U.S.C.A. § 107

¹⁷ 17 U.S.C. § 107 provides: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-- "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; "(2) the nature of the copyrighted work; "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and "(4) the effect of the use upon the potential market for or value of the copyrighted work."

¹⁸ see Peter K. Yu, P2P and the Future of Private Copying, 76 U. Colo. L. Rev. 653, 668 (2005) Any rule disregarding the Chinese political, economic and cultural reality, no matter how advanced it is, will merely exist in the books. To be really effective, laws must be accompanied by a legal culture that fosters voluntary compliance; and any legal culture is not built in one day, China needs time, patience and all-around means to form that culture.



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even mirror their rules of law may be a short cut, but we should never disregard the indigenous reality-our Confucian culture, political system, economic development level and legal resources.¹⁹

Based on the analysis above, and pertinent opinion of scholars, there are some possible solutions as all-around as possible that, in my opinion, could be more effective when facing the intricate and embarrassing P2P-like issues in China as follows:

In the field of Legislature, there leaves many works to do. Firstly, to create a rule or rules of law that could determine secondary liability. It is not clear and proper enough in PRC law and its interpretation because the interests at issue here concern not only private thing but also the public. To establish the rule(s), we should attach importance to fair use system in the network environment²⁰; and also try to overcome the deficiency of Sony' standard (substantial noninfringing uses) and inducement theory and; introduce vicarious liability.²¹

¹⁹ Maybe ten-year-long the Cultural Revolution coordinated massive socialist campaigns that emphasized the fraudulent and predatory welfare of the State and in defiance of private property and personal creativity and the anarchic times make a deep impact on the society so profoundly that it will take a long time more to eradicate.

²⁰ For example, we define different standard of fair use according to the respective nature of works (i.e. the more creative more the higher level of protection)

²¹ To be brief, Sony's rule has its flaw that it seems to be possibly regarded to lean



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Secondly, a compulsory compensation is a convenient way to make up the losses of copyright holders owing to the secondary copyright infringement. The difficulty herein is how to determine the scope of royalty payer and how to allocate the revenue among the mass of copyright holders because it concern equity and rationality. Finally, it is good to provide an economic incentive for the dual-use technology developers/distributors which adhere to the law and encourage protecting copyright consciously. Similarly, how to scheme such a premium system applicable is still hard to accomplish.

For Copyright holders and the relevant industry, it's helpful to use copyright protection technologies.²² Furthermore, the copyright industry should try to offer premium that is unobtainable in the pirated goods and charge a more flexible and optional price; and cooperate with the P2P-like network service and create new reasonable business model should be better than vicious competition.

too much in favor of protecting communication technology nowadays; and inducement theory premises liability on purposeful, culpable expression and conduct leaves significant uncertainty whether the technology developers/distributors shielded from copyright liability as they bring valuable new technologies to market.

²²These copyright protection technologies are known as Digital Rights Management ("DRM") including encryption, digital watermarking, and the use of trusted systems, may help reducing being pirated online. However, it cost too much and may, to some extent, conflict with fair use; besides the measures entice emulative hackers.