Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU

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Abstract The Chinese judiciary has taken a different approach to solving the problem of whether a hyperlink itself constitutes an act of communication of the content made accessible on a third-party website to the public under copyright law. In accordance with the overwhelming “server test”, hosting a link on a website that refers to another website containing a copyright work cannot truly be found liable for direct infringement of the right of communication to the public for the copyright work under Chinese copyright law, while, according to the arguable “new public” criterion in EU case law, the linker must require the consent of the right holder if the link addresses the linked-to work to a “new public”. Comparative reviews indicate that both jurisdictions share a criterion that the linker’s subjective knowledge and financial interests be taken into account when deciding whether the linker should be liable on the one hand and there is apparent divergence on the other hand. Chinese courts rely mainly on joint liability to burden linkers with a duty of care for infringement online, whilst the CJEU focuses on primary liability for infringement of the right of communication to the public under the EU legislation. When compared to the CJEU’s approach of combining the requirements for direct and indirect copyright liability, making a clear distinction between direct and indirect copyright liability in China appears more logical, but this is still being challenged in a number of contested situations.

Keywords Right of communication to the public via information networks · Hyperlink · Joint liability · Copyright · China

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1 Introduction

Despite the fact that linking has been an essential technological part of search engines since the beginning of the internet age, its legal position is still a controversial issue in both China and Europe. As an independent tool by which users move from site to site, there is more control over the provision of links and more human intervention than in the case of search engines.¹ However, it is the control and the intervention involved during the digital transmissions that creates a greater possibility of a linker being liable for the linking. The problem is to what extent the control or the intervention makes the linker liable for the infringing content on the linked-to third-party website.

With respect to the legal position of hyperlinks, Chinese copyright law confronts the same questions arising from acts of linking that make copyright works available to the public online in European countries: in the first instance, whether a hyperlink posted by a linker does or does not infringe the right of communication to the public via information networks within the meaning of Art. 10(12) of the Chinese Copyright Law 2001 (CCL 2001);² and secondly, whether the linker is liable for infringements of copyright for content stored on the server of a third-party website.

Although the new right of communication to the public via information networks was introduced into Chinese legislation, as had been the case with EU legislation, a narrower Chinese version of the right has been implemented in a different way from that of the EU in regard to cases that involve hyperlinks. The alleged linkers and the linked-to third parties would be tied together through the provisions of joint liability within the meaning of Art. 36 of Chinese Tort Law 2009, which is the core provision encompassed by several regulations and judicial interpretations.³ Meanwhile, the right of communication to the public under the EU legislation has been a struggle in regard to covering hyperlinks. Comparative reviews indicate that both jurisdictions share a criterion that a linker's subjective knowledge and financial interests would be taken into account when deciding whether the linker should be liable, and there is apparent divergence in that Chinese courts mainly rely on joint liability to burden linkers with a duty of care for infringement online, while the Court of Justice of the European Union (CJEU) focuses on the primary liability for infringement of the right of communication to the public under Art. 3(1) of Directive 2001/29/EC.⁴

¹ Rowland D et al. (2012), p. 330.

² The English translation of the China Copyright Law 2001 (the CCL 2001) is available at: <http://www.wipo.int/wipolex/en/details.jsp?id=6062>. Accessed 16 May 2017. It should be noted that the term "information networks" as used in the CCL 2001 is not limited to the internet, but also covers other digital networks. The CCL 2001 was amended in 2010, and the CCL 2010 has made slight changes with regard to the right of communication to the public via information networks. On 31 March 2012, the National Copyright Administration of the PRC released its draft of proposed amendments to the CCL 2010. As of the date of writing this article, the proposed amendments have yet to be approved.

³ Wan (2011), p. 375.

⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

In this article, part one begins by offering a brief introduction of the right of communication to the public via information networks in Chinese copyright law. Compared to the right of communication to the public under Art. 3(1) of Directive 2001/29/EC, the Chinese version of the right recognises a narrower right which refers to the right of making available to the public. Undertaking comparative reviews, part two examines the common points and the differences among the Chinese server test, substantial display test and the CJEU's "new public" criterion in the hyperlink cases. Linkers may not be liable for primary infringement of the right of communication to the public via information networks in China, but for joint liability if the linked-to content is illegally available on a third-party website. Part three reviews the factors of subjective knowledge and financial purpose which must be examined when determining the liability of linkers in China and the EU respectively. Part four concludes that, when compared to the CJEU's approach of combining the requirements for direct copyright liability and indirect copyright liability, making a clear distinction between direct and indirect copyright liability, as is the case in the Chinese approach, appears more logical, but this is still being challenged in a number of contested situations.

2 Chinese Right of Communication to the Public via Information Networks

Having been obliged to protect the intellectual property rights of foreigners since the adoption of more general reforms and the government's policy of opening up in 1979, China has subsequently complied with most major international intellectual property treaties,⁵ enacting the China Copyright Law 1990 (CCL 1990). Since the end of the twentieth century as the use of the internet and other technologies, which can produce unlimited perfect copies of copyright material in digital format, were extended in China, many disputes caused by unauthorised transmissions of copyright works have occurred.⁶ Even before amending the CCL 1990, Chinese courts had found themselves in a new battleground against the piracy of music and movies which came about as a result of new digital technologies, including hyperlinks, as they were not able to explain precisely which exclusive right had been infringed by the defendant, even though it seemed obvious to the courts that the defendants had committed an infringement.⁷ While uploading immensely broadens the distribution of materials online, it was hardly covered by the Chinese reproduction right, public performance right, or broadcasting right, which had not been explicitly extended to cover transmission online.⁸ In the case *Wangmeng and*

⁵ China joined the major international organisations, protecting intellectual property rights since the 1980s.

⁶ Leung (2006), p. 151; Zhang (2006), p. 149.

⁷ *Undergraduate Magazine v. Jingxiang Co.*, Er Zhong Zhi Chu Zi Di No.18 (Beijing Second Intermediate People's Court, 2000). In this case, uploading copyright material to the internet was categorised as an act of reproduction by the court. At that time, a person who placed illegal material on the internet without authorisation had also been sued in China for infringement or violation of an individual's rights, such as the right to privacy.

⁸ Wang (2009a, b), p. 12; Sun (2005), p. 223.

others v. Cenpok Interconnecting Telecom Co. Ltd. (Wangmeng), an operator of a website posted works authored by six well-known Chinese novelists on its website without permission.⁹ Finding in favour of the plaintiffs, the Beijing Haidian District People's Court (Haidian Court) held that although the CCL 1990 was not up to date with the newly developed technology of the internet, it could be understood that the digitisation of a work was only a change of format, and no derivative work was created simply by the process of digitisation. But the court did not further address the issues of whether the act of digitising works is copying or not, nor whether the work posted on the internet is copyrightable. Although the court found the defendant was liable on the basis of ambiguous "unauthorised exploiting of copyright works", it indicated the willingness of the court to apply existing principles to cases involving the internet, and so set the stage for legislative intervention.¹⁰

At the international level, the World Copyright Treaty 1996 (WCT) set out the minimum standard for the protection of temporary copies in online transmissions¹¹ and, as a result, developed countries urged China to provide protection for works transmitted online in order to comply with the potential obligation under the WCT. Therefore a new right governing communication of information online was introduced in China. According to Art. 10(12) of the CCL 2001, copyright owners enjoy the right of "communication of information on networks, that is, the right to communicate a work to the public, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them".¹²

And in 2006, the Regulations on Protection of the Right of Communication to the Public via Information Networks (Regulations 2006)¹³ explain further workable detailed norms concerning the practical exercise of the right. The right consists of both the right of communication itself, and the right to authorise other persons to disseminate the works, performances, or sound and video recordings to the public through information networks.¹⁴

In the EU, the right of communication to the public was set out in Directive 2001/29/EC according to Art. 8 of the WCT which covers all situations where the copyright work is made available to the public to access at a time and from a place

⁹ *Wangmeng and others v. Cenpok Interconnecting Telecom Co. Ltd.*, Hai Zhi Chu Zi Di No. 57 (Beijing Haidian District People's Court, 1999).

¹⁰ Liu (2011), p. 227.

¹¹ Art. 8 of the WCT.

¹² Art. 10(12) of the CCL 2001.

¹³ The English translation of the Regulations 2006 is available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=182147. Accessed 16 May 2017. Regulations issued by the Chinese State Council, as the highest administrative organ of the central government, are binding on courts. According to the Chinese legal system, when there is ambiguity in the statutory language or a loophole in the law, regulations can limit or expand the scope of lawful unauthorised use. The Regulations 2006 were amended by the Decision of the State Council on Amending the Regulation on Protection of the Right of Communication to the Public via Information Networks on 30 January 2013.

¹⁴ Arts. 1, 3, 26 of the Regulations 2006.

chosen by a member of the public and other communication to the public.¹⁵ It obliges the EU's right of communication to the public to maintain technological neutrality: it covers not only the traditional broadcasting right, but also extends it to cover the act of making available to the public online. The Chinese definition of the right of communication to the public, however, is limited to a right to control on-demand transmission online in such a way that members of the public may access these works from a place and at a time individually chosen by them, rather than a broader right that encompasses traditional forms of communication to the public such as broadcasts. The right of communication to the public under the CCL 2001 actually refers to the right of making available to the public. Nevertheless, sharing a common base of the provisions in the WCT provides a foundation of comparative study which highlights two different explanations of how the right of making available to the public has been implemented in the hyperlink cases in two jurisdictions.

3 Hyperlinks: The Disputes on the Criteria of Direct Liability for the Infringement of the Right of Communication to the Public in China and the EU

3.1 The Server Test Has Been Established in China

In a significant series of precedents, including two *Baidu* cases and the *Fanya* case, Chinese courts have developed an arguable criterion to determine whether a communication to the public via information networks takes place in linking. The underlying facts of the two *Baidu* cases, which were heard in 2005, are largely identical: the International Federation of the Phonographic Industry (IFPI) claimed that the service offered by Baidu, the biggest search engine in China, for searching for music/songs in mp3 or other digital formats infringed upon the right of communication to the public via information networks by linking to music online without permission and facilitating illegal downloading.¹⁶ Upon entry of a search request, Baidu's mp3 searching service provided users with an index of artists or songs, together with their respective hyperlinks, to download from third-party websites.

Despite the similarity between the cases, their outcomes were not uniform. In *Baidu I*, the Haidian Court held that the note "downloading from mp3.baidu.com", which was displayed in the pop-up window when users clicked the names of the music/songs as links in the search result, clearly proved that Baidu's distribution activity was in contravention of the right of communication to the public via information networks under the CCL 2001. In arriving at this conclusion, the court was heavily influenced by the fact that Baidu indirectly profited from the mp3 file-downloading service through the banner advertisements. Unfortunately for the IFPI

¹⁵ Art. 8 of the WCT.

¹⁶ *IFPI v. Baidu*, Hai Min Chu Zi Di No. 14665 (Beijing Haidian District People's Court, 2005). The parties in *Baidu I* reached reconciliation in the appeal proceedings.

and its members, in *Baidu II*, the Beijing First Intermediate People's Court overturned the earlier ruling of the Haidian Court in *Baidu I* and held that the note saying "downloading from mp3.baidu.com" in the pop-up window meant that the download interface page, instead of the infringing copies of the relevant music/songs, was saved on Baidu's server.¹⁷ Therefore, the note in the pop-up window did not prove that Baidu had itself engaged in any distribution of infringing copies of music/songs.¹⁸ In the appeal, the Beijing High People's Court confirmed this decision, holding that Baidu's provision of the mp3 searching service did not constitute an infringement of the right of communication to the public via information networks.¹⁹ The Beijing High People's Court stated:

Uploading works to the server of a network freely available to the public constitutes the act of communicating to the public via the network, the result of which is making the websites in which the works have been stored available to the members of the public, who can access the websites at the time and the place chosen by themselves. Therefore, the standard to find infringement of the right of communication to the public via information networks is whether or not the acts concerned are unauthorised if they conduct such features as uploading those which are available to the public.²⁰

This statement makes clear that uploading content instead of hosting a hyperlink constitutes an act of communication to the public via information networks under the CCL 2001.²¹ According to the Beijing High People's Court, the work stored on a server would be found by users as long as it is not deleted from the server. A link merely extends the scope of communication to enable more users to access the work rather than making the work available to the public once again. Thus, hosting a hyperlink to the server on which the work has already been made available to the public would not make a linker liable for infringement of the right of communication to the public via information networks. This is called the "server test" by which Chinese courts decide whether a linker primarily infringes copyright or not.

Since that time, the server test has dominated copyright legal practice in determining whether a transmission online constitutes an act of communication to the public via information networks within the meaning of the CCL 2001 and the Regulations 2006. In January 2010, the Beijing First Intermediate People's Court decided that providing a hyperlink to mp3s did not amount to a violation of copyright law because Baidu itself was not hosting the songs.²² In July 2010, the same court confirmed the Haidian Court's decision that the on-screen display of lyrics of the songs went beyond the essential functions of a search engine and

¹⁷ *Cinepoly Records Ltd. v. Baidu*, Yi Zhong Min Chu Zi Di No. 8478 (Beijing First Intermediate People's Court, 2005).

¹⁸ Wang (2009a, b), p. 3.

¹⁹ *IFPI v. Baidu*, Gao Min Zhong Zi Di No. 594 (Beijing High People's Court, 2007).

²⁰ *Ibid.*

²¹ Wang (2006), p. 11.

²² *Universal Music Ltd. v. Baidu*, Yi Zhong Min Chu Zi Di No. 02435 (Beijing First Intermediate People's Court, 2010).

constituted direct infringement of the reproduction right and the right of communication to the public via information networks on the ground that the lyrics in question were uploaded by Baidu and stored on Baidu's server instead of the third-party websites.²³ The court pointed out that the linking service to mp3s stored on the third-party websites would be influenced by the litigation: merely providing links to third-party websites does not constitute infringement, but hosting illegal content does. In 2015, the Beijing Intellectual Property Court (Beijing IP Court) in *Beijing Shengshi Jiaoyang Culture Ltd. v. Beijing Dongyi Shiguang Net Ltd.* clearly stated that despite objectively widening the scope of distribution of the works in question, the linking itself is outside the control of the right of communication to the public via information networks; only if the operator of the linked-to website was infringing would the linker be liable for its facilitating service.²⁴

The recent legislation reflects the server test. Article 3 of the Judicial Interpretation of the Supreme People's Court of Several Issues Regarding Applicable Laws for Hearing Copyright Disputes on the Infringement of the Right of Communication to the Public via Information Networks 2012 (Judicial Interpretation 2012) implies that the server test should be applied when courts decide whether a service constitutes communication to the public via information networks within the meaning of Art. 10(12) of the CCL 2001, stating that "a service provider posts works ... into a network making them available to the public ... by uploading to the servers, setting share-folders, or installing file-sharing software and so on".²⁵

Nevertheless, the server test has been challenged even whilst it has dominated judgments in regard to the liability of the linkers made by Chinese courts, and supported by commentators.²⁶ Wang Yanfang, the judge in the Chinese Supreme People's Court, argues that materials can be loaded technically onto the World Wide Web without storage or transit by a server according to advanced internet technologies such as clouds; hence it is inaccurate to consider the act of communication to the public specifically from other transmissions online simply on the basis of the server test. She concludes that the concept of the act of

²³ *Baidu v. MCSC*, Yi Zhong Min Zhong Zi Di No. 10275 (Beijing First Intermediate People's Court, 2010). The Musical Copyright Society of China (MCSC) is an officially recognised, non-profit social organisation for the collective administration of music copyright in China.

²⁴ *Beijing Shengshi Jiaoyang Culture Ltd. v. Beijing Dongyi Shiguang Net Ltd.*, Jing Zhi Min Zhong Zi Di No. 796 (Beijing IP Court, 2015). The Beijing Intellectual Property Court was founded in November 2014 to manage all the intellectual property cases over which the Beijing Intermediate People's Courts previously had jurisdiction.

²⁵ Art. 3 of the Judicial Interpretation 2012. Judicial Interpretation of the Supreme People's Court of Several Issues Regarding Applicable Laws for Hearing Copyright Disputes on the Infringement of the Right of Communication to the Public via Information Networks, 2012, No. 20. Under the Constitution of the P.R.C., the Supreme People's Court is not independent of the legislative or executive branches of government, but authorised to provide judicial interpretations on the application of the law for the purpose of resolving concrete legal problems. Judicial interpretations have a special position in the legal framework and have become an increasingly important source of law. For the legal function of the Chinese Supreme People's Court, see Slate (2005–2006), p. 665; Conk (2007), p. 935.

²⁶ Wang (2010), p. 85; Wang (2016), p. 23; Liu (2017), p. 22; Chen (2016a, b), p. 17.

communication to the public via information networks should be explained broadly in order to increase the pace of development of the technologies.²⁷ Some commentators suggest that the right of communication to the public via information networks should not be limited to the act of uploading, which is the primary step of a transmission online according to the server test, but rather consider whether the linker actually provides the works to end users and whether the original linked-to website is substantially replaced in order for end users to view the content.²⁸ Others believe that Chinese legal practice concerning the liability of the linkers with regard to infringement of the right of communication to the public via information networks has further narrowed the scope of the right than the meaning of the right in international treaties.²⁹ By interpreting the relevant provisions in international conventions in detail, some scholars point out that the right of making works available covers actions of making available directly and actions of making available indirectly, and that the latter may be used as a theoretical basis to regulate links.³⁰ Meanwhile, Chinese judicial practice has begun to become divided in its decisions with regard to determining the linkers' direct liability for the provision of links.

3.2 The User's Perception Test and the Substantial Display Test

Despite the fact that the server test has been implemented in most online copyright disputes, the "user's perception test" and the "substantial display test" have started to appear in Chinese legal practice. The user's perception test was discussed by the Beijing IP Court in *Hunan Kuaile Yangguang Entertainment Ltd. v. Tongfang Corp. (Rabbit Video)*.³¹ In this case, the plaintiff claimed that the defendant made the copyright content available to the public by incorporating the Rabbit Video app in the set-top box that the defendant manufactured. The lower court affirmed the plaintiff's argument that users of the set-top box would perceive that the alleged content was made available by the Rabbit Video app on the ground that, from the user's visual experience, they would not have been taken to another website during the whole process of the service. This argument is called the "user's perception test" according to which the appearance of hyperlinks shown on the screen of the user's computer is the decisive factor when the courts determine whether the linking constitutes an act of communication to the public via information networks or not. The courts must consider what impression the appearance of the viewed website creates for end users. For example, when a user clicks the link, would a specific address of a linked-to website or the source of the linked-to content show on the subsequent page on the screen of the user's computer? Could the user recognise that the viewed webpage is hosted by another website instead of the linking website? An

²⁷ Wang (2013), p. 16.

²⁸ Zhang and Meng (2014), p. 29; Chen (2016a, b), p. 67.

²⁹ Yang (2017), p. 3.

³⁰ Wan (2017), p. 33.

³¹ *Hunan Kuaile Yangguang Entertainment Ltd. v. Tongfang Co.*, Jing Zhi Min Zhong Zi Di No. 559 (Beijing IP Court, 2015).

act of hosting a link would constitute communication to the public via information networks when the answers to the above questions regarding the appearance of a webpage are negative, and so, at first glance, the linked-to website can easily appear to be material created by or hosted on the linking website. Therefore, the visual experience of the users, which might lead to confusion on their part in regard to the real source of the viewed content, instead of technical features, determines whether the linking constitutes an act of communication to the public via information networks.

The Beijing IP Court, however, reversed the decision of the lower court and emphasised again that the server test should be applied, and that hosting a hyperlink does not constitute an act of making works available to the public under copyright law. The divergence between the Beijing IP Court and the lower court in regard to the case actually involved the question of which criterion should be applied: the server test or the user's perception test. The user's perception test has been challenged due to its introduction of the subjective perception of users regarding the process of determining the copyright liability of the linker; hence, other Chinese local courts have recommended the substantial display test. In the case *Shanghai Huandian Information Tech Ltd. v. Shanghai Juli Media Ltd.*, the defendant was sued for infringement of the right of communication to the public via information networks on the ground that three copyright video files had been played on the defendant's website without the right holder's permission.³² The Shanghai Pudong New District People's Court (Pudong Court) found that the address of the network which appeared on the viewed webpage was still that of the defendant during the whole process of playing videos; therefore end users would watch the videos without being taken to a third-party website. The court rejected the defendant's claims that the videos in question were uploaded by third parties and that it simply provided storage space for the third parties. Therefore the court held that the defendant's website had effectively substituted the linked-to website and communicated the copyright works to the public without permission according to the meaning of the term "communication" within the CCL 2001, rather than that it had only located information online. This approach is called the "substantial display test". The substantial display test determines that by redirecting users to the linked-to website without any visible sign of this, a linking website appears to display the linked-to website and becomes the provider of the content for users, and thereby might communicate the linked-to website's content to the public. It is claimed that the linking website actually appropriates the financial interests of the original website because there seems to be no necessity for users to transfer to the original website on which the content is hosted.

The substantial display test does not differ greatly from the user's perception test in that the determination of the user's subjective perception in relation to the viewed webpage relies on whether and how the linking website objectively shows the information of the linked-to website. The problem, however, lies in whether it is relevant if the public believes, perceives or senses that it has been directed to

³² *Shanghai Huandian Information Tech. Ltd. v. Shanghai Juli Media Ltd.*, Pu Min San Chu (Zhi) Zi Di No. 138 (Shanghai Pudong New District People's Court, 2015).

another website and in deciding whether a particular link results in communication to the public. Is it appropriate to introduce the factor of the user's subjective confusion, which is generally applicable in trademark law, to copyright disputes which would be resolved with the purpose of protection and promotion of works rather than protecting the consumer's interests? In general, whether hyperlinks are liable for copyright infringement depends on the technical and legal features of hyperlinks instead of the subjective perception or appearance of links.

3.3 The “New Public” Criterion in the CJEU Case Law

In Europe, the CJEU has taken a different approach, named the “new public” criterion, to managing the similar issue of whether putting a hyperlink on a website constitutes a “communication to the public” under Directive 2001/29/EC. In the case *Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SL (SGAE)* we find the CJEU's first reference to the requirement of a new public.³³ In *SGAE*, a hotel retransmitted television broadcast signals to TVs in individual hotel rooms. The CJEU took the view that a transmission was made to a new public where the communication was made by a broadcasting organisation “other than the original one” because the recipient public was different from the one at which the original communication was directed. This approach was confirmed in *Football Association Premier League Ltd. and others v. QC Leisure and others (FAPL)* which expressly considered the new public as a stand-alone criterion for infringement.³⁴ The case *ITV Broadcasting Ltd. and others v. TV Catchup Ltd. (TVCatchup)* framed the contours of the “new public” requirement, which is to be taken into consideration only where the retransmission takes place through the same technical means and is therefore subject to a single act of authorisation.³⁵ In this case, the defendant operated an online service, which enabled its subscribers in the UK to watch “near-live” streams of free-to-air television broadcasts, including those transmitted by the claimants who owned the copyright under national law in their broadcasts. *TVCatchup* jointly applied the combination of the “new public” and “special technical means” criteria as the determinant factors in deciding infringement of the communication right.³⁶

Although it is debatable whether or not the “new public” criterion is compatible with Art. 11^{bis} of the Berne Convention and Art. 8 of the WCT,³⁷ the CJEU still applied it to the linking cases. In *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB (Svensson)*, the CJEU held that the provision on a

³³ *Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SL*, EU:C:2006:764 (CJEU (Third Chamber)).

³⁴ C-403/08 *Football Association Premier League, Ltd. and others v. QC Leisure and others*, EU:C:2011:631 (CJEU (Grand Chamber)).

³⁵ C-607/11 *ITV Broadcasting Ltd. and others v. TV Catchup Ltd. (No. 2)*, EU:C:2012:147 (CJEU (Fourth Chamber)).

³⁶ Karapapa (2017), p. 71; ALAI (2014), p. 149.

³⁷ Some commentators argue that although the conclusion of the *SGAE* was correct, the reasoning was incorrect in applying a “new public” criterion to a cable retransmission. See Makeen (2010), p. 59; Ficcor (2014), pp. 1–15.

website of clickable links to works freely available on another website does not constitute an “act of communication to the public”, and therefore is not a copyright infringement.³⁸ Only when the additional requirement of reaching a new public is met does the provision of a hyperlink require the copyright holder’s authorisation.³⁹ The CJEU held that there was no new public in this case because the public targeted by the initial communication consisted of all potential visitors to the site: the website was freely accessible without any access restrictions. Users will be considered a new public when the link constitutes an intervention without which those users would not be able to access the transmitted works.

This view was reiterated in the case *BestWater International GmbH v. Mebes (BestWater)*,⁴⁰ where the CJEU applied the *Svensson* approach to cases of framing content. Moreover, the CJEU further explained in the case *C More Entertainment AB v. Sandberg* that Art. 3(2) of Directive 2001/29/EC had to be interpreted as not precluding national legislation extending the exclusive right of the broadcasting organisations referred to in Art. 3(2)(d) as regards acts of communication to the public, which live internet broadcasts of sporting fixtures might constitute, provided that such an extension did not undermine copyright protection.⁴¹

3.4 The “New Public” Criterion v. the Server Test and the Substantial Display Test

Despite being based on the same international provisions, the CJEU’s “new public” criterion and the Chinese server test reflect the different opinions on the interpretation of Art. 8 of the WCT. One basic argument of the server test is the proposition that no act of making available to the public takes place without the actual uploading of a work to a server. It comes from the explanation of the authoritative treaties discussing the interpretation of the WCT:

the act of “making available” to the public for access covers the offering of works for access and extends to the entire transmission to the user, if such transmission takes place. Accordingly, the mere establishment of a server which may be accessed individually by members of the public and at their choice regarding time and place constitutes the act of making available under Art. 8 of the WCT.⁴²

³⁸ C-466/12 *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB*, EU:C:2014:76 (CJEU (Fourth Chamber)).

³⁹ *Ibid.*

⁴⁰ C-348/13 *BestWater International GmbH v. Mebes*, EU:C:2014:2315 (CJEU).

⁴¹ C-279/13 *C More Entertainment AB v. Sandberg*, EU:C:2015:199 (CJEU (Ninth Chamber)), paras. 22, 29–31, 36–37. In this case, the Swedish Supreme Court asked the CJEU if Member States might give wider protection to the exclusive rights of authors by enabling “communication to the public” to cover a greater range of acts than that provided for in Art. 3(2) of Directive 2001/29/EC.

⁴² Reinbothe and von Lewinski (2002), p. 108.

Accordingly, Professor Wang Qian notes that the actual meaning of “communication” refers to the transmission from a source that is formed in the process of this transmission.⁴³ Thus, forming a source of transmission is a pre-requirement for an act of communication within the meaning of international institutions. From this point of view, a hyperlink is more like a reference or signpost than a source of a communication, as the operators of the linked-to website still fully control the process of making the works available.⁴⁴ The linking would cease to be effective once the linked-to websites delete or remove the content from their servers; thus, a link could not replace a linked-to website in online transmissions. Therefore, it is irrelevant whether the link takes the user to specific content in a way that makes it clear to the user that he/she has been taken to a third-party website, so that the user is not aware that he/she is accessing the content from a third-party website.

In contrast, the “new public” criterion is based on the opinion by which the scope of the making available right may encompass certain forms of indirect supplying of works. In the case of hyperlinks, “though the source of the communication is ultimately another site, the user’s selection would control. If so, then the WCT’s ‘making available’ right will reach acts of certain indirect infringement.”⁴⁵ From the CJEU’s perspective, Art. 8 of the WCT covers initial and subsequent transmissions regardless of the technology employed to effect the first or subsequent transmissions.⁴⁶ As a matter of principle, the provision of hyperlinks to copyright works clearly falls well within the frame of a subsequent transmission.

Svensson’s method, however, is similar to the Chinese substantial display test. From a technical perspective, the CJEU noted the indispensable role played by the linker and the deliberate nature of its intervention. In other words, the linker makes an “act of communication to the public” when it intervenes, where, in the absence of that intervention, its customers would not theoretically be able to enjoy the work. In the absence of the right holder’s permission, linking may be directly infringing the right of communication to the public via information networks under the scrutiny of the substantial display test. Due to the interference of the links, the linking website actually is a new source of communication, thus the linking is an act of communication to the public via information networks.⁴⁷ The substantial display test in China and *Svensson’s* method might lead to the same result, and both reflect the arguments in regard to the essence of what exactly making works available is and to what extent the intervention of the hyperlinks involved amounts to an act of making available.

It is worth noting that the Chinese courts have never mentioned the “new public” to differentiate the targeted public of the linked-to website, if it has one, from the other public who might access the content in question only through the links, as the CJEU has done. A linking itself does not amount to an act of communication to the public via information networks within the CCL 2001 if the linked-to content is

⁴³ Wang (2016) (*supra* note 26), p. 23.

⁴⁴ Strowel and Hanley (2009), p. 71.

⁴⁵ Ricketson and Ginsburg (2006), pp. 747–748.

⁴⁶ Rosén (2016), p. 342.

⁴⁷ Yang (*supra* note 29), p. 3.

lawfully available to the public on third-party websites irrespective of whether the linking targets the new public or not. *Svensson's* method implies that where there is no new public for the linked-to website and it does not have any technological restrictions to access, then the linking is not an act of communication to the public. In China, however, according to the server test, technological restrictions on the linked-to websites have no relation to the linker's copyright liability for infringement of the right of communication to the public via information networks. This is not to say that all hyperlinks are equally innocent. If linking breaks through the technological restrictions on the site on which the protected works appears, or where the work is no longer available to the public on the site on which it was initially communicated, the linker might be liable for circumvention under the provisions on anti-circumvention of technological protection measures within the CCL 2001.⁴⁸ Moreover, the liability of the linker would rely on other grounds of action, such as unfair competition, if the linked-to website is a commercial site supported by advertising revenues. If the linked-to website illegally makes works available, the linker might be jointly liable for copyright infringement. In comparative terms, the "new public" criterion may lead to some serious problems, such as implying that the application of copyright depends on applying technological restrictions of access, which appears to be a kind of formal requirement as a condition of protection;⁴⁹ or it may extend the exhaustion of rights, which concerns only the right of distribution and no other rights under international treaties and the EU directives, to the case of copyright holders posting their works on websites without setting any technical restrictions.⁵⁰

4 Direct Liability or Indirect Liability of Linkers for Copyright Infringement

Both jurisdictions have to confront the same question of whether a linker is liable if the linked-to website infringes the right of communication to the public. Relying mainly on joint liability, there is no necessity for Chinese courts to examine the linker's joint liability if the linked-to website does not directly infringe the right of communication to the public via information networks in the first instance. In Europe, however, this is a debatable question. As Arnold L.J. acknowledged in the British case *Paramount Home Entertainment International Ltd. v. British Sky Broadcasting Ltd.*, it is arguable that it makes no difference whether or not the source of the copyright work to which the hyperlink links is licensed by the copyright owner.⁵¹ Some scholars have asked a similar question: can it be regarded as a contribution to such communication in cases where the link points to a website that infringes copyright owners' rights?⁵² This question came about following

⁴⁸ Arts. 4, 48 of the CCL 2001.

⁴⁹ Ficsor (*supra* note 37), p. 36.

⁵⁰ Rosén (*supra* note 46), p. 343; Clark and Dickenson (2017), p. 265.

⁵¹ *Paramount Home Entertainment International Ltd. v. British Sky Broadcasting Ltd.*, [2013] EWHC 3479 (Ch); [2014] E.C.D.R. 7 (The High Court of Justice (Chancery Division), November 2013), para. 32.

⁵² von Lewinski and Walter (2010), p. 985 (para. 11.3.36).

Svensson and BestWater. Yet GS Media BV v. Sanoma Media Netherlands BV (GS Media) offers a solution.⁵³

4.1 Joint Liability in the Chinese Tort Liability System and Copyright Law

There is no category of “direct infringement” or “secondary infringement”, such as in U.S. copyright law, nor a concept of “authorisation liability”, such as that in UK copyright law. Under the CCL 2001, all the infringing acts enumerated in Arts. 46–47 are direct infringing acts.⁵⁴ There is no explicit provision defining the indirect copyright liability of Internet Service Providers (ISPs) in Chinese copyright law; rather, it relies on the provisions with regard to joint tort liability under Chinese civil law. Article 130 of the General Principles of Civil Code 1986 (GPCC 1986) imposes the joint tort liability if “two or more persons jointly infringe a right and cause loss to another, they must bear joint tort liability”.⁵⁵ As a supplement to the provision on joint tort liability in the GPCC 1986, Art. 148 of the Opinion of the Supreme People’s Court on Questions Concerning the Implementation of the General Principles of Civil Code 1986 (Opinions 1988) states that “those who aid and abet others in committing infringing acts are joint tortfeasors, and should bear joint liability and several liability with the tortfeasor”.⁵⁶ The Chinese Tort Law 2009 offers a similar definition of joint liability.⁵⁷ According to these provisions, if two or more persons jointly infringe upon another person’s rights and cause him damage, they shall bear joint liability. This is so-called “complementary causation” liability which is one type of concurrent tortfeasorship. Under the Tort Law 2009, concurrent tortfeasorship is not explicitly regulated but assumed as a doctrinal category in the provision of joint and several tort liability.⁵⁸ According to complementary causation, the harm that leads to liability only occurs through the concurrence of two or more similar or dissimilar tortious actions, each of which alone would have been irrelevant to liability. No single action, but instead several concurrent actions

⁵³ C-160/15 *GS Media BV v. Sanoma Media Netherlands BV*, EU:C: 2016:644 (CJEU (2nd Chamber)).

⁵⁴ Art. 46 of the CCL 2001 enumerates 11 infringements of copyright in which infringers should bear civil liability and Art. 47 of the CCL 2001 enumerates eight infringements of copyright in which infringers should bear administrative and criminal liability.

⁵⁵ Art. 130 of the GPCC 1986. China General Principles of Civil Code (GPCC 1986), English version available at: <http://www.wipo.int/wipolex/en/details.jsp?id=6595>. Accessed 16 May 2017. In China, passing the General Provisions of Civil Code 2017 (GPCC 2017) on 15 March 2017 by the National People’s Congress (NPC) was the first step towards promulgating a comprehensive civil code, but the GPCC 1986 has not yet been repealed. The official English version of the GPCC 2017 was still not available to the public online by June 2017.

⁵⁶ Art. 148 of the Opinions 1988. Opinions of the Chinese Supreme People’s Court have the same legal position as the Judicial Interpretations of the Chinese Supreme People’s Court.

⁵⁷ Arts. 8–9 of China Tort Law 2009. The English version of the China Tort Law 2009 is available at: <http://www.wipo.int/wipolex/en/details.jsp?id=6596>. Accessed 14 May 2017. Art. 8 states that “if two or more persons jointly commit a tort, causing harm to another person, they shall be liable jointly and severally”. Art. 9 states that “anyone who abets or aids another to commit a tortious act shall bear joint and several liability with the tortfeasor”.

⁵⁸ Another two types of concurrent tortfeasorship include “alternative causation” and “additive causation”.

together fulfil the requirements for liability under tort. It is argued that, because the word “aid” in Chinese delivers the meaning of “assist” or “encourage”, and the word “abet” in Chinese is understood as helping or encouraging others to do something wrong, the joint tort liability in the Opinions 1988 and the Tort Law 2009 actually parallels the criteria of indirect liability like contributory liability in the U.S.⁵⁹

For copyright disputes, the Judicial Interpretation of the Supreme People’s Court of Several Issues Regarding Applicable Laws for Hearing Cases in Internet Copyright Dispute (the Judicial Interpretation 2000), which was amended twice by the Supreme People’s Court in 2003 and 2006, firstly explains joint liability, stating that an ISP might be found jointly liable with other infringing parties provided that: “An ISP involves itself in the infringement of copyright committed by another party via the Internet; or *aids or abets* a third party to do so [emphasis added]”.⁶⁰ By using the terms “aid” and “abet”, the provision clearly indicates that an ISP that facilitates third-party copyright infringement will be found jointly liable. But the scope and effect of this provision remains weak due to the Judicial Interpretation’s limited legal status.⁶¹

Article 36 of the Tort Law 2009 imposes joint liability on an ISP since, if it “knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm together with the network user”.⁶²

The knowledge or the subjective state of the joint tortfeasor is not explicitly stipulated in the Tort Law 2009. But the “safe harbour” provisions in the Regulations 2006 arguably imply the necessity of subjective awareness of the situation to impute joint liability to an ISP.⁶³ Articles 20–23 of the Regulations 2006 are regarded as the Chinese “safe harbour” defence, according to which ISPs would be exempted from liability for compensation as long as they offer (1) automatic access to services and do not select or modify the transferred contents; (2) automatic caching for the purpose of enhancing network transmission efficiency; and (3) information storage space to the public through the information network; (4) searching or linking services to a work.⁶⁴ The fourth situation is set out with a takedown-notice procedure as a prerequisite to enjoying the “safe harbour”:

A provider, which *upon receiving a written notification of the right holder*, disconnects the link to an infringing work, performance, or sound or video recording in accordance with the provisions of these Regulations *bears no liability for compensation*; however, if they *know or should have known* that

⁵⁹ Wei (2011), p. 510.

⁶⁰ Art. 4 of the Judicial Interpretation 2000.

⁶¹ Bublick (2011), p. 36.

⁶² Art. 36 of Tort Law 2009.

⁶³ Arts. 20–23 of the Regulations 2006. It is worth noting that formal legislative provisions on the liability of ISPs are set out in Chinese tort law instead of Chinese copyright law, but affirmative defences such as the “safe harbour” provisions appear in Chinese copyright law instead of Chinese tort law.

⁶⁴ Arts. 20–23 of the Regulations 2006.

the linked work, performance, or sound or video recording is an infringement, they shall bear the joint liability for infringement.⁶⁵ [Emphasis added.]

Accordingly, at least having constructive knowledge would draw a linker out of the safe harbour. In other words, if a linker knew or should have known that the linked work has infringed, he/she would not be sheltered by the “safe harbour” even though it satisfied the takedown-notice procedure. Therefore, the “knew or should have known” elements in the latter part of Art. 23 of the Regulations 2006 are more crucial than the takedown-notice procedure which has little meaning other than to prove the defendant’s knowledge of infringement to copyright owners.⁶⁶ From a plain reading of Art. 23, even if the right holder did not issue any warning letters or notices to the linker, as long as the copyright owner can prove that the linker had actual or constructive knowledge of infringement, liability might occur. In fact, the same evidence that established the defendant’s subjective situation of “know or has reasonable grounds to know” so as to lose the protection of the “safe harbour” also establishes the defendant’s subjective situation of joint liability.

4.2 “Organisation” or “Edition” Factors to Prove Knowledge in Regard to a Linker’s Joint Liability: *Yahoo!China*, *Fanya* and the Judicial Interpretation 2012

Chinese judicial practice has implied that the provision of a mere hyperlink itself could not constitute either direct or joint liability, but actively organising the results of a search could amount to joint liability. In 2007, 11 recording companies of IFPI sued AliBaBa Inc. (*Yahoo!China*) for both primary and joint liability for having linked to the music stored in third-party servers by indexing a list of songs or a list of singers for the users’ convenience.⁶⁷ The defendant organised the results of searches and formed various systematic categories. It was far more convenient for the user to use the provided index to search for a song and listen to it, or download it at a later time, than to type terms into a blank search-box. In the matter of direct infringement, the Beijing High People’s Court based its decision on the server test and held that the defendant was only providing “searching/linking services” and was not directly liable for copyright infringement.⁶⁸ As to indirect infringement, the court found that by indexing a list of pop music, there was little possibility of linking to legitimate music because almost all lists linking to the pop music in question had been uploaded by third parties without permission. The defendant was held jointly liable for infringement of the right of communication to the public via information networks on the grounds that the defendant was in a position to

⁶⁵ Art. 23 of the Regulations 2006.

⁶⁶ Wan (2006), p. 525.

⁶⁷ *Warner Music Hong Kong v. AliBaBa Inc. (Yahoo!China)*, Er Zhong Min Chu Zi Di No. 2625 (Beijing Second Intermediate People’s Court, 2007). The case numbers of the 11 cases were from Er Zhong Min Chu Zi Di No. 2621 to Er Zhong Min Chu Zi Di No. 2631.

⁶⁸ *Warner Music Hong Kong v. AliBaBa Inc. (Yahoo!China)*, Gao Min Zhong Zi Di No. 1184 (Beijing High People’s Court, 2007).

facilitate the distribution of the works, and should have known that the result of the searches might be infringing.⁶⁹

This opinion was supported by the same court in *Fanya E-commerce Ltd. v. Baidu (Fanya)* in 2007.⁷⁰ In contrast to *Yahoo!China*, in *Fanya* none of the pop music in question had appeared in any of Baidu's lists. The only way to search for the music files was by typing keywords into a blank search-box.⁷¹ The Beijing High People's Court upheld the lower court's decision that no infringement was found, in that the act of providing a blank search-box service which could be used both legally and illegally would be insufficient to constitute contribution to infringements of a communication right committed by others.⁷² By sending a clear signal that the act of "organisation" or "edition" is a very important factor in weighing the joint liability of the defendant, the opinion of the court in *Yahoo!China* and *Fanya* emphasised that the search providers' knowledge of infringement and their reaction to that knowledge amounted to establishing illicit subjective awareness because of the search providers' "organising" acts.

Summarising the total of those judicial experiences, the Chinese Supreme People's Court issued the Judicial Interpretation 2012 in which subjective awareness is expressively required to establish an ISP's joint liability. In Art. 7 of the Judicial Interpretation 2012, aiding infringement refers to the fact that the ISPs knew or should have known that network users were committing infringement of the right of communication to the public via information networks by using their internet services but failed to take any necessary measures such as deleting, blocking or disconnecting, among other measures in order to stop such acts, or provide assistance such as technical support.⁷³ The Judicial Interpretation 2012 requires fault on the part of the defendant, including "knowing" or "should have known", as the subjective factor to determine if service providers should bear aiding liability.⁷⁴ Compared to simple "organisation" or "edition" factors established in legal practice, the new provisions require Chinese courts to examine the following elements when determining whether ISPs "know or should have known":

the ISPs' capability of information management, the types and popularity of works, performances, audio-visual recordings disseminated and degree of obviousness of the infringed information, whether the ISPs have actively *chosen, edited, modified or recommended* the works, performances, audio-visual recordings, whether the ISPs have actively taken any reasonable measures to prevent infringement, whether the ISPs have implemented a convenient program to receive infringement notices and whether the ISPs have

⁶⁹ In the earlier *Wangmeng* case (*supra* note 9), the service provider was found to be in a situation of control.

⁷⁰ *Zhejiang Fanya E-commerce Ltd. v. Baidu*, Yi Zhong Min Chu Zi Di No. 6274 (Beijing First Intermediate People's Court, 2006).

⁷¹ *Ibid.*

⁷² *Zhejiang Fanya E-commerce Ltd. v. Baidu*, Gao Min Chu Zi Di No. 1201 (Beijing High People's Court, 2007).

⁷³ Art. 7 of the Judicial Interpretation 2012.

⁷⁴ Art. 8 of the Judicial Interpretation 2012.

made reasonable responses to the said infringement notices, and whether proper measures are taken by the ISPs towards network users committing repetitive infringement acts.⁷⁵ [Emphasis added.]

Accordingly, the linker's organisation or editing of the result of linking has reached a standard by which Chinese courts could presume the defendant's knowledge of the infringement on the linked-to website. This presumed knowledge is rebuttable.

By thoroughly analysing *Yahoo!China*, *Fanya* and Art. 9 of the Judicial Interpretation 2012, it shows that in China linking itself is outside the control of the right of communication to the public via information networks if the linked-to content is lawful; and the linker would be liable for its facilitating service only when it knew or should have known that the linked-to website was infringing but it did not take the necessary measures to remove the links. The Chinese judiciary has conflated the "knowledge" elements with the "organisation" when determining whether linkers are jointly liable for infringement.

4.3 Subjective Knowledge: Examining Primary Liability in the EU – *GS Media*

In *GS Media*, the Dutch Supreme Court asked the CJEU whether a hyperlink to a copyright work, which had been made available unlawfully, i.e. without the right holder's consent, could constitute a communication to the public under Art. 3(1) Directive 2001/29/EC. In its analysis, the CJEU firstly emphasised that *Svensson*'s method should not be interpreted in a way that the linking to unauthorised content is excluded from the concept of communication to the public under Directive 2001/29/EC. The CJEU then held that it was unreasonable to rule that a person who links to a "freely available" work, and in doing so "is not in pursuit of profit", should become liable for communication to the public if the work was made available on the linked-to website without the consent of the copyright owner unless the person knows or ought to have known of the lack of authorisation.

It is clear that, according to the CJEU, links to content made available to the public without the rights holder's permission may or may not be viewed as acts of communication to a "new public", and it depends on the linker's subjective knowledge with regard to the fact that a linked-to website is making works available to the public without the right holder's permission. Knowledge that linked-to content is infringing is the trigger, but in order to prove the linker's knowledge, the CJEU in *GS Media* introduced the financial factor as a requirement to determine the act of communication. *GS Media* differentiated between actors acting for financial gain and those who are not by placing the burden of proof differently in the two instances: if the linker is not acting in pursuit of profit, then the claimant will need to prove knowledge. If the linker is acting in pursuit of profit, then knowledge will be presumed, but that presumption is one of fact and therefore rebuttable. Apparently, according to the CJEU, central in the finding of infringement of the right of communication was the profit-making nature of the activity as a determinant factor

⁷⁵ Art. 9 of the Judicial Interpretation 2012.

in establishing that the website had knowledge of the infringing activity. The CJEU took the view that striking a balance between for-profit and not-for-profit activities provided the high level of protection for authors that is required by Art. 3(1), while at the same time permitting the necessary freedom of expression.⁷⁶

4.4 Direct Liability or Indirect Liability?

The linker's subjective element and financial interests are two important factors in both Chinese courts and the CJEU when determining liability for the act of hosting links. Turning to the factor of subjective knowledge to determine the liability of linkers, the approach shared by the two jurisdictions seems more balanced and discreet, while it may result in some crucial factors being vague and in need of further clarification, such as profit-making intent. A number of additional conditions which must be satisfied have doctrinal standing but do not expressly feature in statutory language.⁷⁷ Meanwhile, the divergence of the two approaches in these two jurisdictions must be noted. The factor of subjective knowledge is examined when Chinese courts determine whether the linker should be jointly liable for infringement of the linked-to website according to the Chinese Judiciary Interpretation 2012. By contrast, the CJEU in *GS Media* examined subjective elements (and then financial interests) in order to determine the linker's direct liability: if the linker knowingly hosts a link to content available to third parties without the right holder's permission, the act of linking amounts to a communication to the public under Art. 3(1) Directive 2001/29/EC. As Clarks and Dickenson state, it (the CJEU's approach) is a "novel criterion"⁷⁸ because it is never required to prove direct copyright liability for a prevention right such as the right of communication to the public under the relative provisions either at the national level or the international level. Apparently, the CJEU goes beyond the ambit of direct copyright liability, which is mostly strict liability under Directive 2001/29/EC.⁷⁹ The decision could prove uncomfortable for the courts of some Member States since it confirms the requirement of a knowledge test in the case of primary infringement. For example, under the Copyright Designs and Patents Act 1988 (CDPA 1988) there is strict liability for all primary infringement, and a knowledge test exists only in the case of secondary infringement.⁸⁰ The question of whether the linker itself is indirectly liable for a third party's infringing by making copyright works available to the public is still left open in *GS Media*. Compared to the CJEU's approach of attributing direct liability to linkers by combining two factors, subjective knowledge and financial interests, which are often used to determine indirect liability, making a clear distinction between direct copyright liability and indirect copyright liability, the Chinese approach appears more logical. While the "new public" criterion in the EU case law has been criticised as being applied in hyperlink cases with flaws, the

⁷⁶ Ross (2016), p. 18.

⁷⁷ Karapapa (*supra* note 36), p. 81.

⁷⁸ Clark and Dickenson (*supra* note 50), p. 278.

⁷⁹ *Ibid.*

⁸⁰ Secs. 22–26 of the CDPA 1988.

real challenges may come from the fact that there is no common conception of indirect liability within the EU legal framework.

It is noteworthy that the CJEU did not follow the Advocate General's opinion in this case. Advocate General Wathelet took the view that linking to unauthorised content which is freely available on the internet is not a communication to the public, indeed it is not a communication at all.⁸¹ In his view the communication is instead conducted by the initial uploader. This actually mirrors the opinion of Chinese scholars who support the server test, according to which only initially uploading works to the server of a website can amount to an act of communication to the public via information networks under Chinese copyright law.

This different position can be demonstrated in two cases with similar facts in the two jurisdictions. In *Stichting Brein v. Wullems (t/a Filmspeler)*, the defendant offered a media player for sale, namely a device that acted as a medium between a source of images and/or sound signals from the internet and a TV.⁸² The players are sold with numerous third-party applications that contain hyperlinks to websites on which access is provided to films, series and (live) sports matches, without the consent of the right holders. The claimants commenced proceedings arguing that Wullems, by offering hyperlinks to sources where recent films, series and live broadcasts are offered in a clearly illegal manner, communicates them to the public within the meaning of Arts. 2–3 of Directive 2001/29/EC. Following the *Svensson* approach and *GS Media*, the CJEU held that marketing the so-called Filmspeler hardware could itself amount to “communication to the public” within the meaning of Art. 3(1) Directive 2001/29/EC in that Wullems, in full knowledge of the consequences of his conduct, pre-installed on the multimedia player add-ons that make it possible to access protected works and to watch those works on a television screen.⁸³ This was different to the question of the Chinese counterpart, the *Rabbit Video* case mentioned above, in which the Chinese court held that, according to the server test, the defendant's act of hosting a hyperlink in an app stored inside the TV set-top box did not constitute an act of communication to the public via information networks because it did not initially make infringing video available online.

This divergence may lead to different solutions to the same question in the two jurisdictions: does linking amount to communication to the public when freely available linked-to content is unauthorised, but the right holder has authorised a copy to be made freely available elsewhere on the internet? According to the logic of *Svensson*, it may not amount to a communication to the public because there is no new public – the work is already authorised for all internet users. The reasoning in *GS Media* does not expressly clarify this point and appears contradictory. In the judgment of *GS Media*, the CJEU on the one hand confirms *Svensson*'s method but on the other hand states that “copyright holders may act not only against the initial publication of their work on a website, but also against any person posting for profit a hyperlink to the work illegally published on that website”.⁸⁴ All the questions

⁸¹ Opinion of A.G. Wathelet in *GS Media*, EU:C:2016:221, para. 63.

⁸² C-527/15 *Stichting Brein v. Wullems (t/a Filmspeler)*, EU:C:2017:300 (CJEU (Second Chamber)).

⁸³ *Ibid.*

⁸⁴ Case *GS Media* (*supra* note 53), paras. 52, 53.

appear to turn on the profit-making feature of the linking. If this occurs in China, Chinese courts might find joint liability for aiding the infringement of a third-party website if the linker did not take measures promptly to delete, block or remove the links once it knew of or should have known of the infringement, rather than the linker's direct liability for an act of communication to the public via information networks. There are still challenges for both China and the EU, such as how linkers prove that they did not have that knowledge or presumed knowledge and what checks they should carry out prior to posting. It appears that linkers in China should check whether the linked-to content is lawful or unlawful if they have direct financial interests in the linking, while in the EU they are supposed to check that the linked-to website has some restrictions to access which might result in making the linking target a new public.

5 Conclusion

Compared with the EU right of communication to the public, the Chinese counterpart is perceived to be much narrower in nature: the services of facilitating users' access to content or making users' access easier are exempted from the right of communication to the public under Chinese copyright law. In regard to the situation of hyperlinks, there is still dispute about which test should be applicable to the question of whether the act of hosting a hyperlink to copyright content made available on third-party websites amounts to an act of communication to the public under copyright legislation. Nevertheless, the server test arguably dominates the decisions made by Chinese courts which obviously hold that hosting a link to the content on a third-party website cannot itself constitute a communication to the public under Chinese copyright law. Comparative study indicates that the Chinese server test takes a different approach to that of the series of EU cases, including *Svensson*, in which linking to copyright works that were already available online constituted a "communication to the public" unless the linking did not address a new public. Whether there is a new public turns on the question of whether the copyright works on the linked-to website are accessed freely. Obviously, the "new public" criterion and the "substantial display" test in Chinese jurisprudence share the reasoning regarding the role of linking in internet transmissions: whether it serves as an indispensable intervention, without which the users of the link cannot access the copyright works on the linked-to website. But not all Chinese judges and legislators have been convinced by the substantial display test. The divergence boils down to the distinction of the explanation of the related international provisions.

The linker could be found jointly liable by Chinese courts for facilitating a third party's infringement of the right of communication to the public via information networks if the linker has not taken the necessary measures of blocking, deleting, or removing the link when he/she knew or should have known of the unlawful content on the third-party website. The Chinese approach also differs from the CJEU's reasoning in *GS Media*, according to which linking to a copyright work that was previously published online without the copyright owner's consent constitutes a "communication to the public" of that work under Art. 3(1) of Directive 2001/29/

EC, unless the linker had “no knowledge” that the work was originally published illegally. Both jurisdictions share a criterion that the linker’s subjective knowledge and financial interests are taken into account when determining whether the linker should be liable for infringement if the liability is direct or indirect. Considering this situation more logically, making a clear distinction between direct copyright liability and indirect copyright liability, which is the case in the Chinese approach, appears better suited to the purpose of striking a reasonable balance between the interests of authors and of society in regard to the copyright system, even though this situation is still being challenged by some unresolved issues.

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