

The Research on Confirmation of Jurisdiction in Network Infringement Cases

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Abstract. Network jurisdictional issue is the new challenge to traditional legal system due to the emergence of the Internet. This paper analyzed the challenge of the network infringement to the Jurisdiction Principles of traditional private international law, and combined with some relative judicial practice to discuss the confirmation issues of the jurisdiction in network infringement cases.

Keywords: network infringement, confirmation of jurisdiction, principle of “forum non convenience”

1. Introduction

The invention of the computer marks the arrival of information revolution, while the emergence of the Internet generalizes the revolution all over the world, and deeply goes into all aspects of the social life, which has exerted profound and impressive influence in the legal system. Network infringement is one of the most outstanding issues. It not only takes a challenge to the jurisdiction theory, but also put forwards the pressing demands for the relevant practices.

2. The Confirmation of Jurisdiction in Traditional Private International Law

The jurisdiction of private international law, i.e. the jurisdiction of international civil and commercial cases, means that which country's court should judge a foreign-related civil and commercial case. [1]Before the Internet is widely used, private international law has a set of relatively complete jurisdictional principles. The confirmation of the jurisdiction over foreign-related civil and commercial cases depends on the basis of jurisdiction that it adopts. Here the basis refers to the subject or object of legal relationship in foreign-related civil and commercial cases or the fact of legal relationship has a certain relation to the court of some country. Owing to the existence, the country's court enjoys jurisdiction in these cases. In other words, the basis of jurisdiction can be interpreted as the reason why a country's court is entitled to bring to trial the civil and commercial cases with foreign factors. The jurisdiction of private international law in different legal system, has different classifications.^[2]

2.1. Country of Civil Law System

2.1.1. Based on region

The legal relations of foreign-related civil and commercial legal always have some special geographic relations with the jurisdiction of a country. The kind of special relation is the so-called regional basis. Being the basis which the International civil and commercial jurisdiction has been established, the regional basis has different forms of expression:

- Based on the accommodation, dwelling or temporary seat of parties.
- Based on the substance location.
- Based on the locality of litigation reason happened.

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2.1.2. Based on the nationality of the parties

This is the usual foundation that civil law system country determines jurisdiction principles. Despite the concrete methods from all the countries are not the same, for example, some countries have adopted the plaintiff's nationality, while others have adopted the defendant's nationality. As a kind of foundation, nationality determines the jurisdiction principle which is self-evident.

2.1.3. Based on the parties' request

It refers to the agreement among the parties, and they will bring the civil case among them to their selected court in some country. Generally speaking, all the countries hold the positive attitude to agreement jurisdiction, but all the countries have different attitudes to the limit degree for the agreement. Some countries' limit is strict, while others' is relatively loose.

2.2. Countries of Common Law System

Countries of common law system divide civil and commercial cases into action in personam and action in rem, its jurisdiction system takes "practical control" principle as its basic starting point.^[3]

2.2.1. Action in personam

It means to settle the rights and interests of the disputed subject, and the effectiveness of judgment by a court is also only related to the both parties in litigant. About action in personam, as long as the defendant of relevant case at the beginning of litigation is in the territory of country and court summons can be effectively given to him, then the court within country shall have the right to exert jurisdiction to the case. This is a genus personal jurisdiction. The actual appearance of defendant, having domicile, residence and place of business in the litigation state or citizenship and agreement of the litigation state and having finished certain behaviors within the state or its behavior having caused the influence in the state can be the basis for country's genus personal jurisdiction of common law system.

2.2.2. Action in rem

It refers to the lawsuit to safeguard property, aiming to confirm a particular property rights and the right of the parties by the judgment of the court. The judgment validity of the court not only restricts the relevant parties, but also all the others who have law relationship with the parties or the specific property. The jurisdiction of action in rem is based on relative parties' residence, habits residence or subject matter within court.

3. The Challenges of Network Infringement to Traditional Jurisdiction in Both Theory and Practice

As the representative of a new economic and new social pattern, the Internet inevitably has taken the huge, profound and comprehensive challenge to the traditional legal system based on the traditional society and civilization. Reflected in jurisdiction, objectivity, globalization and decentralized management of network space have caused a great impact on traditional jurisdiction in both theory and practice.^[4]

3.1. the Challenge of Network to Traditional Jurisdiction Theory

3.1.1. The globalization of network space makes boundary of jurisdiction area blurred

In physical space, by using time for several thousand years, people delimited boundaries and borders for ensure of their basis for territorial jurisdiction. However, unlike physical space, network space can not be divided into many areas. Because the network space is invisible, and Internet external devices are the only visible parts. But these external equipments are not the signs of ensuring network space boundaries at all.

3.1.2. The uncertainty of network space makes the basis for confirming traditional jurisdiction hard to be applied

The parties' nationality, residence, agreement and substance location can be the basis for confirming the principle of jurisdiction, mainly because they have some kind of regional connection with certain physical

space. However, in the network space, because of its fast speed and wide coverage, it is hard for people to confirm the connection with physic space.

The principle of personal jurisdiction has considerable rationality in physical space; however, it is difficult to confirm the nationality in the Internet space. Because the Internet is an open system, it is a kind of independent network faced to any countries and anyone. When using the Internet, the user is not asked to confirm his identity. Therefore, the connection between the country and the parties is quite weak. As increasingly frequent multinational flow of personnel, nationality's position as the connecting point is far less than ever before. So the significant of nationality as the connecting point is not big in the Internet cases.^[5]

It is reasonable that the territory connecting point own certainty and uniqueness in 'physical space'. The first principle that modern international law confirms the jurisdiction of one country is also the principle of territoriality. But in the virtual space, the Internet, borders will not have substantial significance. In traditional private international law, the locality of infringement can become the basis of jurisdiction. While in the network, the locality of infringement is much more complicated. The existing technology cannot be effectively used to fix the position of the online activities personnel.^[6]

3.2. the Challenge of Network to the Jurisdiction Practice

In judicial practice, the impact of network to the jurisdiction is mainly embodied in the frequent occurrence of the phenomenon of forum shopping.

The forum shopping, also known as choice of the court for lawsuit is the lawsuit behavior that the plaintiff chooses the court which may make the most advantageous judgment for him to obtain the judicial benefit. Because of the different laws, charging in different countries, the results of judgment will have a very huge difference.

The forum shopping is not peculiar phenomenon in the Internet. But under the environment of network, choosing a lawsuit site can be said the common characteristic of any case involved in the internet. Because most of the network case does not belong to the exclusive jurisdiction scope, several courts often own parallel jurisdiction. For example, the online defamation, at least the following countries can exert jurisdiction: infringer's country (defendant's country), infringement implementing country, infringement results occurred countries (according to the minimum relation standard, infringement results occurred countries can be hardly counted) and upload libel opinion ISP country (co-defendant), forward related opinion ISP country (co-defendant), etc. In such case, the plaintiff will often choose the advantageous location to suit.

If the traditional jurisdiction rules are mechanically use, the court with parallel jurisdiction will be difficult to be foreseen, naturally the number of court which can be 'chosen' by the parties will be unable to be estimated. It will lead that the court jurisdiction get filled with infinite contingency and unpredictability, and it is not to comply with the predictability that traditional private international law emphasizes.^[6]

4. The Usage of traditional Jurisdiction Rules in Network infringement Cases

Although scholars put forward some new theories about jurisdiction, and also these theories own their reasonable factors. However, from all the nations' current judicial practice, the courts in various countries are still trying to make the traditional jurisdiction rules flexible so they can be used in network space.

4.1. Place of Infringement

In the network infringement cases, the certainty of place infringement is much weaker, so it is very difficult to be affirmed. For this point, the place of infringement seems to lose the significance as the basis of jurisdiction.

But from basic theories of the jurisdiction, the basis for confirming jurisdiction, all have two characteristics: One is the stability, namely, this factor has relative stability in time and space, and it at least is sure. The second is relevance, namely, certain correlation has existed between factor and jurisdiction area.

According to the analysis above, it is hard to confirm infringement place in the network infringement cases due to the characteristics of the Internet; but in fact, new basis of jurisdiction does not generate so the

traditional jurisdiction concept still has the decisive significance. In the network infringement cases, the place of infringement is still the important factor to the courts in the judicial practice in different countries.^[7]

4.2. Locality of Plaintiff

The foundation for jurisdictional principles shall find a good balance between convenience of litigation and better safeguarding of the rights of parties. From the characteristics of network, due to infringement implementation through the network, the influence of infringement has constantly been expanding. The defendant through its infringement violates the plaintiff's interests, and its infringement consequences are often most serious in the location of the plaintiff. The defendant can foresee that the court of the plaintiff locality may exercise its jurisdiction to protect the interests of its local residents. Considering from foreign-related factors of the case, the globalization of network inevitably involves foreign defendant in the infringement cases. The plaintiff residence in some cases rightfully becomes the basis for jurisdiction to facilitate domestic the plaintiff's action, to safeguard state sovereignty, better protect the lawful rights and interests of the state and its inhabitants in accordance with law.^[8]

4.3. Principle of “Forum Non Convenience”

Most Internet infringement cases are not within the scope of exclusive jurisdiction. Several courts often own parallel jurisdiction and all the nations have the tendency to expand their nation's jurisdiction. In this case, if all courts only exert jurisdiction over the cases on the basis of domestic policy interests' demand, it will make the parties lack of foresight to the trial of cases. Even if one country court exercised jurisdiction and made judgment, it is possible that the judgment is refused to acknowledge and execute by other countries' courts due to the different understanding on jurisdiction issue. In addition, the phenomenon of forum shopping also appears more frequent. Therefore, in the present period that the network technology has not been fully grown and judicial practices are almost vacant, it is a very real problem that people should sustain the overall interests of network and balance of local interests in the countries, as possible as it can be to ease jurisdiction conflict of network infringement cases. So how to alleviate increasingly fierce jurisdiction conflicts in network infringement cases? Perhaps the principle of 'forum non convenience'-- traditional jurisdiction principle related to restriction to the jurisdiction of the courts from Common Law, can be the basis for solving jurisdiction of conflict in the network infringement cases.

The so-called principle of 'forum non convenience' means that in the international civil lawsuit activities, the plaintiffs are free to choose one country court and take proceedings, so they may choose the court which is advantageous to them and which is disadvantageous to the defendants. Although the court owns jurisdiction, if the trial brought a variety of inconvenience to the parties and administration of justice, it is unable to safeguard judicial justice and can not make justice solved swift and effectively. At this moment, if there is an alternative court with jurisdiction for litigation, the original court may make discretion and refuse to exercise its jurisdiction on the grounds that the court itself belongs to forum non convenience, according to the function and power or the request of the defendant.^[9]

The globalization and uncertainty of Internet in a certain extent has expanded the scope of jurisdiction factors. A network infringement may be confirmed its jurisdiction by many national courts' identification. When one country court accepts a network infringement case containing the complicated factors, it shall consider the domicile of the witness, the procedural availability of forcing the witnesses to appear in the court, the difficulty level of obtaining the evidence, the expense for showing up in the court, the possibility of compulsory execution court judgment, etc. If there are other country courts, which also enjoys jurisdiction over the case according to their laws and the courts will implement more rationally in the procedure and more satisfied to the plaintiff's intentions, the appellate court shall give up the jurisdiction of the case based on the principle of 'forum non convenience' by suspending or revoking lawsuits..

Apparently, in face of increasingly complex network environment and possible severe network jurisdiction conflicts, this principle has a very realistic significance in the reasonable distribution of international affairs and maintains the integrity of the network world. Admittedly, the adoption of the principle of 'forum non convenience' largely depends on the judges' discretion. The excessively expanding power of the judge can also jeopardize impartial judicature, and affect the integrity of network space.

However, the power of judge is easier to be regulated compared with the power of the country policy. If the balance scale between personal interest and public interest which is mastered by the judge can be confirmed, facing the expansive trend of exercising jurisdiction, the principle of 'forum non convenience' shall be a powerful tool to ease jurisdiction conflicts in network infringement cases.^[9]

5. The Legislation and Practice of China's Jurisdiction over Network Infringement Cases

5.1. the Provisions of China's Laws and Regulations Concerning Network Infringement Issues

The legal issues research related with network in China is relatively backward. Reflected in legislation, it shows the delay of the legislation. Currently, the relevant laws and regulations, which have been launched, mostly only own administrative characteristic. While, business properties, the laws to deal with the action of parties in the network involving the civil and commercial field are rarely.

"The supreme people's court on revising 'the explanation of some issues of the supreme people's court on the trial involving computer network copyright case during applying law' decision (II)" implemented on December 8, 2006. Clause 1 has provisioned the jurisdictional issues in network copyright infringement disputes. 'The people's court which is the place of infringement or the domicile of defendant enjoys the jurisdiction over the Network copyright infringement case. The place of infringement includes the place where the web server of implementing alleged infringement is in and where computer terminal equipment is located. When it is hard to confirm the place of infringement and defendant domicile, the location that the plaintiff finds computer terminal equipment with infringement content can be regarded as the place of infringement. In addition, in June 2001, Clause 2 in 'the explanation of some issues of the supreme people's court on the trial involving domain name of computer network case during applying law' also provisioned that the intermediate people's court enjoys the jurisdiction over the infringement case involving domain names which is the infringement place or is the defendant domicile. When it is hard to confirm the place of infringement and defendant domicile, the location that the plaintiff finds computer terminal equipment with this domain name can be regarded as the place of infringement.

Here, the word 'place of infringement' has new meaning, namely, 'the location of web server, computer terminal equipment of implementing alleged infringement', and that is the critical point through which the infringement works come to compute or they are the computer or server where the infringement operation is implemented, roughly belong to the category of 'infringement place'. When it is difficult to confirm both of the two locations, 'the location that the plaintiff finds equipment with infringement content can be regarded as the place of infringement,' which means the 'infringement results locality' being regarded as the place of infringement. At the moment, it is basically same to the provisions of the Law of Civil Procedure.

It can be seen that the principle of jurisdiction over network case in 'explanation' is treated as the place where the defendant is domiciled and where the infringement implements as the commons. The infringement result locality is treated as exception. This rule provides the confirmation of jurisdiction over such infringement case with the basis of law. Although, like the principle, the article is not perfect, it at least partly offsets insufficiency in the current law.

5.2. the Trial Characteristics of Network Infringement Case in China's Judicial Practice

China's courts have handled several network infringement cases; moreover, the jurisdictional issues in these cases have attracted some attention. The judicial judgments in these cases have such a few characteristics.

Firstly, due to the lack of new rules, by the methods of legal interpretation, under certain conditions, it is an inevitable choice for original rules are applied in network cases. In the relevant cases, the people's court actually expands the interpretation of 'infringement place' and 'infringement results locality", which can apply the traditional conflict article 'the courts where defendant's domicile or the place of infringement are enjoys the jurisdiction over the infringement claims.

Secondly, any country is reluctant to give up the opportunity to expand jurisdiction. Provided that the exertion of such jurisdiction is beneficial, it is the same in the network. The relevant judgments of our domestic courts show that the courts strive to look for the basis for exerting jurisdiction.

Once more, in the application of traditional rules, whether the basis of new jurisdiction appears, namely, whether the web constitutes a new jurisdiction foundation, as for this question, China just took the first step. After all, it is not a legal issues, it also largely involves the development of technology. Although the relevant judgments in domestic court are not explicit, as a new connecting factor, the appearance of the web has also not been ruled out.^[10]

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