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# **Application of the “Notice and Takedown Rule” to New Types of Network Service Providers: An Analysis of the WeChat Mini Programs Case**

Shuanghui Wang

Adjunct Research Assistant, Centre for Technology, Robotics, Artificial  
Intelligence & the Law, Faculty of Law, NUS

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# Application of the “Notice and Takedown Rule” to New Types of Network Service Providers: An Analysis of the WeChat Mini Programs Case

Shuanghui Wang\*

**Abstract:** The issue of liabilities for copyright infringement of new types of network service providers has become an important legal issue in the context of development of the Internet. In particular, the widely discussed **WeChat Mini Programs** case in China focuses on whether the WeChat Mini Programs platform constituted an “automatic network access or transmission service provider”, and whether it was subject to the “notice and takedown” obligation. Based on China’s legal provisions and drawing on the relevant U.S. regulations and cases, the WeChat Mini Programs platform should not be simply classified as a “network automatic access (transmission) service provider”, and the relationship between China’s Tort Law and the Information Networks Regulation should be carefully analyzed based on the specific circumstances.

## Introduction

The development of digital technology and the Internet industry has reformed the global economy and human society, and one of its most direct, complex and profound manifestation is the way our copyright systems have changed. As technology continues to evolve, the intersection and interaction between technology and copyright law becomes subtle and intricate.<sup>1</sup> The use and dissemination of works, and even the definition of what constitutes copyrighted works continues to change with the development of new technologies and the emergence of new business models.<sup>2</sup> However, innovation is often accompanied by new instances of intellectual property infringements, herein arising from the provision of new types of network services with unique technologies and service attributes.<sup>3</sup> Because of their uniqueness, the question of whether existing network infringement liability rules can be applied to these new types of network services is often raised in practice. This has therein become an

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\* LL.B., Tsinghua University, and Adjunct Research Assistant, Centre for Technology, Robotics, AI and the Law (TRAIL), National University of Singapore.

<sup>1</sup> Ryan Roemer, “The Digital Evolution: Freenet and the Future of Copyright on the Internet” [2002] UCLA J. L. & Tech 5.

<sup>2</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 27.

<sup>3</sup> Xiangiun Kung, “Application of ‘Internet Article’ to New Types of Network Service From ‘Notice-and-Takedown’ Rule to ‘Notice and Taking Necessary Measures” [2020] 1 Zheng Fa Lun Cong 52.

important legal issue in the context of development of the Internet.

One such instance is the case of *Hangzhou Daodou Network Technology Co., Ltd. v. Changsha Baizan Network Technology Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd.*, decided on February 27, 2019 by the Hangzhou Internet Court. In the present case, hereinafter “WeChat Mini Programs case”,<sup>4</sup> Chinese courts had as a first, the opportunity to decide on the issue of ‘whether a network service provider (“WeChat”) was liable for operating a platform (“WeChat Mini Programs platform”) within which a third party allegedly provided three Mini Programs that contained infringing content.’<sup>5</sup> In its verdict, the Court found that WeChat was not liable for the infringing content uploaded by the third party and made available via the three Mini-Programs that were accessed on its platform,<sup>6</sup> and the same was thereafter upheld by the Intermediate People’s Court of Hangzhou.<sup>7</sup> This case caused considerable controversy amongst the legal circles in China, entertaining debates as to whether the WeChat Mini Programs platform constituted a “network automatic access (transmission) service provider” and whether WeChat was subject to the “notice and takedown” obligation.<sup>8</sup>

There exist great differences in the elements, the nature of services, and the control capabilities of users’ behaviors, between different types of new network service providers that arose from the technological revolution. The distinction between network service providers is important but difficult to be grasped in practice.<sup>9</sup>

The United States is the birthplace of the “safe harbor” system, and its “Digital Millennium Copyright Act” (hereinafter “DMCA”) has established a set of “safe harbor” rules.<sup>10</sup> Specifically, Section 512 of the DMCA exempts under four categories, network service providers from being liable for monetary remedies if they meet the requirements listed in this section.<sup>11</sup> Furthermore, based on the different characteristics of the services provided by network service providers, Section 512 of the DCMA

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<sup>4</sup> [2018] Zhe 0192 Min Chu No.7184.

<sup>5</sup> See “Hangzhou Internet Court Gave its Judgment to the First Infringement Case involving WeChat Mini Programs” , *Xinhua Net* (27 February 2019) <[http://www.xinhuanet.com/legal/2019-02/27/c\\_1124172282.htm](http://www.xinhuanet.com/legal/2019-02/27/c_1124172282.htm)>.

<sup>6</sup> *Ibid.*

<sup>7</sup> [2019] Zhe 01 Min Zhong No.4268.

<sup>8</sup> See e.g., Meng Chu, “Cold Thinking after the First Case of Mini Programs infringement: On the Boundary of the Infringement Shielding Obligation of Network Access Providers” [2019] <<http://www.ciplawyer.cn/html/qtbg/20190312/141490.html>> ; Wei Liu, “The Boundary of the Platform’s Copyright Infringement Liability: A Brief Comment on the First-instance Judgment of the WeChat Mini Programs,” [2019] <<http://www.yidianzixun.com/article/0LOvZdwV>>.

<sup>9</sup> Xiaocao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms — With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 27.

<sup>10</sup> Jie Wang, “Regulating Hosting ISPs’ Responsibilities for Copyright Infringement: The Freedom to Operate in the US, EU and China” [2018] Springer 34.

<sup>11</sup> Digital Millennium Copyright Act, (US) § 512 (1998).

stipulates different requirements for each such safe harbor.<sup>12</sup> In addition, the detailed legislative history of the United States also offers supplementary explanations for the definition of related concepts and understanding of rules.<sup>13</sup> When applying the law, the court must first ascertain the concise language of the law. If the law is unclear, U.S. courts can also rely on the legislative history to understand the provisions of the entire law, including its goals and policies, thus determining the intentions of Congress.<sup>14</sup> Consequently, when analyzing these new types of network service providers in practice, we can learn from the mature experience of the DCMA. Based on this understanding, the author will first summarize the background and facts of the WeChat Mini Programs case, explain the “notice and takedown” rule in the different legislations in China, and then further analyze how to apply the “notice and takedown” rule to the WeChat Mini Programs platform with reference to the DCMA.

## I. Summary of the WeChat Mini Programs Case

### A. What are WeChat Mini Programs?

WeChat Mini Programs are the “sub-applications” within the WeChat ecosystem.<sup>15</sup> WeChat allows third party companies to develop Mini Programs that can be used without downloading or installing, and users can scan or search to open the applications.<sup>16</sup> According to the “WeChat Mini Programs Access Guide” provided by Tencent’s “WeChat Public Platform” official website, the product positioning and function introduction of the Mini Programs are expressed as “a brand-new way to connect users and services, which can be easily accessed and disseminated within WeChat with an excellent user experience”.<sup>17</sup> Up until 2021, there are more than 4.3 million WeChat Mini Programs, with around 410 million daily active users.<sup>18</sup>

Although WeChat Mini Programs have gained traction, there are still many drawbacks to them. To begin with, Mini Programs must be developed in a specific “language”,<sup>19</sup> namely in a JavaScript framework, as developed by Tencent, where

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<sup>12</sup> Jie Wang, “Regulating Hosting ISPs’ Responsibilities for Copyright Infringement: The Freedom to Operate in the US, EU and China” [2018] Springer 34.

<sup>13</sup> See “Wipo Copyright Treaties Implementation And On-Line Copyright Infringement Liability Limitation: [1997-1998] 105<sup>th</sup> Congress , H. R. REP. 105—551, 61.

<sup>14</sup> (1997) 129 F. 3d 1069, 1070.

<sup>15</sup> Thomas Graziani, “What are WeChat Mini-Programs? A Simple Introduction” (6 November 2019) <<https://walkthechat.com/wechat-mini-programs-simple-introduction/>>.

<sup>16</sup> “WeChat Mini Programs” *Baidu Baike* <<https://baike.baidu.com/item/微信小程序/20171697?fr=aladdin>>.

<sup>17</sup> “WeChat Mini Program Access Guide” (11 January 2017) <<https://developers.weixin.qq.com/community/develop/doc/2c58b2aa1d932e62df2e9ce8b360c192>>.

<sup>18</sup> Thomas Graziani, “What are WeChat Mini-Programs? A Simple Introduction” (06 November 2019) <<https://walkthechat.com/wechat-mini-programs-simple-introduction/>>.

<sup>19</sup> *Ibid.*

developers have to write wxml and wxss, instead of the traditional html and css, and leverage this framework for all their further development.<sup>20</sup> Furthermore, all updates to Mini Programs have to be submitted to Tencent.<sup>21</sup>

## *B. Facts and Adjudication in the WeChat Mini Programs Case*

### **1. Facts**

The plaintiff **Hangzhou Daodou Network Technology Co., Ltd.**, (hereinafter “Daodou”) enjoys an exclusive license to the online dissemination right of a copyrighted series of online psychology tutorials. Daodou discovered that infringing copies of these tutorials were available on three separate Mini-Programs that were developed, operated and owned by the first defendant **Changsha Baizan Network Technology Co., Ltd.**, (hereinafter “Baizhan”). Therefore, Daodou complained to Tencent and requested that it use its authority as the platform owner to disconnect the three Mini Programs. Tencent argued that it did not have any obligation to do so under the law and also in view of certain objective technical reasons.<sup>22</sup>

### **2. First Instance**

At First Instance, the Hangzhou Internet Court found that WeChat was not liable for the copyright infringing content uploaded to the three Mini-Programs that ran via its public account platform. In its holding, the Court stated that there are different categories of network service providers as recognized under Articles 20 to 23 of the *Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks* (hereinafter “Information Networks Regulation”), namely network service providers who provide network access services, cache services, information storage, and searching or linking services. These different types of network service providers have differing degree of editing rights over their platform content, such that their corresponding liabilities are also different.<sup>23</sup> In case of fundamental network services such as network access services, the network service providers cannot control the information transmitted by its users, and do not have any ability or power to interfere with the content being disseminated.<sup>24</sup>

Basic network service providers are generally unable to censor user-uploaded content, and their ability to judge and identify infringing content is very weak, being

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> [2018] Zhe 0192 Min Chu No.7184.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

unable to accurately delete infringing content or even cut off network services related to such infringing content. Its undifferentiated technicality and passiveness thereby determine that it should bear different responsibilities from the other types of network service providers.<sup>25</sup> The Court found that Article 20 of the Regulation exempted such network service providers from damage liabilities, and therefore, such network service providers were not subject to the “notice and takedown” obligation. Only information storage space, or search and link service providers that can determine whether specific content infringes others’ rights, and can effectively curb the infringement in a timely manner are subject to the “notice and takedown” rule in Article 14 to 16 of the Information Networks Regulation. The Court further stated that the definition of “network service provider” under Article 36 of the Tort law of China should be interpreted as per the purpose limited explanation method, i.e., the “network service provider” should not include automatic access or transmission and other basic network service providers.<sup>26</sup>

In this case, the WeChat Mini Programs are a set of framework web pages independently operated by the developer. They only communicate with the developer server through a designated domain name. The data in the developer server is not stored in Tencent, and the developer directly provides data and services to users through Mini Programs. Therefore, the Mini Program services provided by Tencent to Baizan is similar to the automatic access and automatic transmission services that are specified under Article 20 of the Information Networks Regulation, and the “notice and takedown” rule cannot be applied to this case.<sup>27</sup> In addition, judging from the necessary measures that Tencent can take, since the content of the Mini Programs is stored on the developer’s server, and the Mini Programs only communicate with the developer’s server through the developer’s domain name as a port, Tencent does have access to the content in the developer server technically, let alone being able to delete the infringing content from the said server. If the infringing information must be blocked, the only technical measures Tencent could take are to completely close the communication port, and cut off the communication channel between the users and developers, i.e., completely deleting the Mini Programs. However, the complete deletion of the Mini Programs is not the “positioning removal”<sup>28</sup> effect pursued by “taking necessary measures” as required by the law. In summary, based on legal provisions and objective technical factors, when the content of the Mini Programs infringes upon others’ rights and/or interests, Tencent should not be required to remove the Mini Programs completely.

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

The Court also pointed out that, although the “notice and takedown” rule does not apply to Tencent as a basic network service provider in this case, it should, however, be subject to other legal obligations. On the one hand, according to Article 28 and Article 47 of the Cybersecurity Law of the People’s Republic of China, when criminal offences are involved, Tencent not only has an obligation to assist in law enforcement, but also to actively review pornography, terrorism, gambling, and other obvious illegal information. If Tencent discovers information that is prohibited by laws or administrative regulations from being released or transmitted, it should take technically feasible measures to stop the transmission of such information immediately.<sup>29</sup> On the other hand, Tencent must verify the real names of the Mini Programs developers, and publicize them so as to ensure that right holders can effectively and timely protect their rights.<sup>30</sup> Additionally, Tencent should rely on scientific and reasonable management mechanisms, intellectual property protection, and other disciplinary mechanisms to maintain a balance between rights protection and technological neutrality, whilst also maintaining a network environment and competition order that protects intellectual property rights.<sup>31</sup>

### 3. Second Instance

At Second Instance, the Intermediate People’s Court of Hangzhou City, Zhejiang Province upheld the original verdict for different reasons.<sup>32</sup> The Second Instance Court believed that the WeChat Mini Programs service provided by Tencent does not constitute one under the four types of services stipulated in the Information Networks Regulation. Therefore, the relevant provisions of the Regulation should not be applied to this case.<sup>33</sup> Whether Tencent’s actions constituted as aiding infringement in this case should be instead determined in accordance with Article 36 of Tort Law. In this case, Daodou did not send an infringement notice to Tencent, requiring it to take necessary measures, nor did Tencent know of Baizan’s alleged copyright infringement. According to Article 36 of Tort Law therefore, Tencent does not have fault, and is not liable for assisting said infringement.<sup>34</sup>

Regarding Daodou’s request for Tencent to immediately delete the infringing WeChat Mini Programs, there are a few points to take into consideration. First, Baizan had already taken down the three Mini Programs after Daodou filed the lawsuit. Secondly, the necessary measures stipulated in Article 36 of Tort Law include but are not limited to deleting, blocking, and disconnecting links. Even if the works on the alleged Mini Programs still exist, deleting the three Mini Programs completely does not

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> [2019] Zhe 01 Min Zhong No.4268.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

target the specific alleged infringing work. Instead, it will terminate all network services of the Mini Programs. Herein, the severity of this measure clearly exceeds the damage caused by the alleged infringement in this case. Therefore, Tencent should not be required to remove the WeChat Mini Programs involved in the case completely.<sup>35</sup> Nevertheless, when Tencent receives a valid notice from the right holder, even if the alleged infringing work cannot be deleted, it does not mean that other necessary measures in accordance with Article 36 of the Tort Law<sup>36</sup> should not be taken. As for what necessary measures Tencent should take, the same should comprehensively consider the nature, form, and type of the relevant network services, the manifestations, characteristics, and the severity of the alleged infringements, amongst other factors. These should be technically achievable and reasonable, and not exceed necessary limits, so as to achieve a balance of interests amongst the right holders, network service providers, and the network users.<sup>37</sup>

### **III. The “Notice and takedown” Rule in the Tort Law of the PRC and the Information Networks Regulation**

The First Instance Court and the Second Instance Court in the WeChat Mini Programs case adopted different legal paths and methods in applying the “notice and takedown” rule to the WeChat Mini Programs platform. The First Instance Court held that the WeChat Mini Programs platform service was similar to automatic access and automatic transmission services as under the Information Networks Regulation, which the “notice and takedown” rule cannot be applied to. Therefore, the “network service providers” as under Article 36 of Tort Law should not include automatic access and automatic transmission services providers.<sup>38</sup> The Second Instance Court believed that the WeChat Mini Programs service provided by Tencent does not constitute as one of the four types of services stipulated under the Information Networks Regulation, and therefore, the case would be determined in accordance with Article 36 of Tort Law.<sup>39</sup> It is obvious that the major controversy between the decisions by the First Instance Court and the Second Instance Court is the relationship between Tort Law and the Information Networks Regulation, as well as how to apply the “notice and takedown” rule specified in these two legislations. The author will herein now examine the “notice and takedown” rule in Tort Law and the Information Networks Regulation.

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> [2018] Zhe 0192 Min Chu No.7184.

<sup>39</sup> [2019] Zhe 01 Min Zhong No.4268.



### A. Tort Law of the PRC

In 2009, the Tort Law of the People's Republic of China was enacted and promulgated by the Standing Committee of the National People's Congress.<sup>40</sup> When the Tort Law was still in drafting, there were lots of cases that involved the network service providers' services being used for defamation, copyright, and trademark infringement, so legislators in China felt that it was necessary to draft a specific provision with regard to a network service providers' liability.<sup>41</sup> According to Article 36 of the Tort Law, a network user or network service provider who infringes upon the civil right or interest of another person through said network shall assume liability under tort. Where a network user commits a tort through the network services, the victim of the tort shall be entitled to notify the network service provider to take necessary measures such as deletion, block or disconnection of the infringing activity. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm alongside the network user. Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network service and fails to take necessary measures to stop it as such, it shall be jointly and severally liable for any additional harm alongside the network user.<sup>42</sup>

According to the interpretation of the legislators, as for the "necessary measures" stipulated in the Article 36 of the Tort Law, *"depending on the types of technical services provided, the obligations assumed by different types of network service providers should also be different after receiving infringement notices. For network service providers that provide information storage space and search or link services, after receiving a notice of infringement, they should take necessary measures such as deleting, blocking, and disconnecting the infringing information. By contrast, network automatic access or automatic transmission service providers and cache service providers shall, after receiving a notice of infringement, take necessary measures within the technically possible scope. If taking these measures will cause them to violate the universal service obligations and will increase their unreasonable burden technically and economically, the network service providers can just forward the infringement notice to the corresponding website. Since all network information must be transmitted through the access service, many right holders will require the access service providers to delete the infringing information. If the obligation of such service providers to take necessary measures are not limited, it may hinder the normal development of the*

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<sup>40</sup> "Chairman's Order of the PRC", *The Central People's Government of the People's Republic of China* (26 December 2009) <[http://www.gov.cn/flfg/2009-12/26/content\\_1497435.htm](http://www.gov.cn/flfg/2009-12/26/content_1497435.htm)>.

<sup>41</sup> Jie Wang, "Regulating Hosting ISPs' Responsibilities for Copyright Infringement: The Freedom to Operate in the US, EU and China" [2018] Springer 32.

<sup>42</sup> Tort Liability Law, PCR (2009) Art 36.

*network industry.*"<sup>43</sup> Based on this, "necessary measures" should be measures that are compatible with the corresponding network services, and whether they are compatible should be determined based on the characteristics of the network services and industrial development needs.<sup>44</sup> Moreover, in accordance with the spirit of the aforementioned legislation and the reality of curbing Internet infringement, "other necessary measures" do not have to be equivalent to "deleting, blocking, and disconnecting" specified in the Article 36 of the Tort Law.<sup>45</sup>

### *B. Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks*

In the late 1990s, with the prevalence of the internet in China, more and more cases of copyright infringement over the Internet were appealed to the courts.<sup>46</sup> For instance, in 1999, a hosting network service provider was held liable for making two literary works publicly available on its platform upon a user's request but without the copyright owner's authorization.<sup>47</sup> Nevertheless, the legislators in China had not prepared well for providing a regulation for this complex issue at that time. Therefore, in order to solve the problems that had already emerged, in 2000, the Supreme Peoples' Court in China promulgated a Judicial Interpretation relating to copyright disputes on the internet, particularly about network service providers' liability, which used the DMCA 512 as an important reference.<sup>48</sup> According to this Interpretation, the hosting network service provider, who actually knows of its subscriber's infringement through its internet services, or after receiving an evidential warning notice from its copyright owners but still doesn't take any measures to eliminate such infringement, will take responsibility for the infringement.<sup>49</sup> Besides, the Internet Interpretation (2000) stipulates that a network service provider shall be exempted from the liability of breach of contract, if it removes the alleged infringing content by following the competent notice, and a

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<sup>43</sup> Shengming Wang, "Civil Law Office, Legal Work Committee of the National People's Congress. Interpretation and Legislative Background of 'The Tort Liability Law of the People's Republic of China'" [2010] People's Court Press 53.

<sup>44</sup> Xiangjun Kong, "Application of 'Internet Article' to New Types of Network Service——From 'Notice-and-Takedown' Rule to 'Notice and Taking Necessary Measures'" [2020] 1 Zheng Fa Lun Cong 52 57.

<sup>45</sup> Ibid.

<sup>46</sup> Jie Wang, "Regulating Hosting ISPs' Responsibilities for Copyright Infringement: The Freedom to Operate in the US, EU and China" [2018] Springer 39.

<sup>47</sup> See, "Gazette of the Supreme People's Court" No.1/2000 at 28. This case was heard by Haidian District Court (First Instance) and Beijing 1st Intermediate People's Court (Second Instance), and both courts held the defendant liable. In 2000, this case was selected as a leading case by Supreme Peoples' Court.

<sup>48</sup> "Interpretation of the Supreme People's Court on Certain Issues Related to the Application of Law in the Trial of Cases Involving Computer Network Copyright Disputes (thereafter Internet Interpretation (2000))" *Supreme People's Court*, Fa Shi [2000] No. 48 (22 November 2000).

<sup>49</sup> Ibid art. 5.

copyright owner shall be responsible for the damage caused by his wrong notice.<sup>50</sup>

In the following years after promulgating the Internet Interpretation (2000), the development of the Internet went far beyond the expectation of the People's Supreme Court when it had provided this Interpretation—as it soon found that a lot of cases involving new technologies could not be regulated within the framework of this Judicial Interpretation.<sup>51</sup> On the other side, the provisions in Internet Interpretation (2000) were so general that it left a lot of room for the lower courts to interpret the same in terms of their understanding, which further resulted in major problems in judicial practice.<sup>52</sup> Therefore, in order to solve the above-mentioned problems, in 2006, the State Council in China enacted the Information Networks Regulation as further revised in 2013.<sup>53</sup>

The Information Networks Regulation established the “notice and takedown” rule for the protection of the right to communicate works over information networks under Articles 14 to 17 and Article 24.<sup>54</sup> Specifically, these provisions in the Information Networks Regulation provided for the specific types of network providers to whom the “notice and takedown” rule could be applied to,<sup>55</sup> the measures that the network service providers should take after receiving such notices,<sup>56</sup> restoration of the takedowns,<sup>57</sup> and the liabilities that accompany issuance of wrongful notices.

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<sup>50</sup> Ibid art. 8.

<sup>51</sup> Jie Wang, “Regulating Hosting ISPs’ Responsibilities for Copyright Infringement: The Freedom to Operate in the US, EU and China” [2018] Springer 39-40.

<sup>52</sup> Ibid.

<sup>53</sup> “Decree of the State Council of China”, *The Central People’s Government of the People’s Republic of China* (29 May 2006) <[http://www.gov.cn/zwggk/2006-05/29/content\\_294000.htm](http://www.gov.cn/zwggk/2006-05/29/content_294000.htm)>.

<sup>54</sup> Information Networks Regulation, PCR (1996) art 14-17 & 24.

<sup>55</sup> Internet Networks Regulation, PCR (1996) art 14: “*As for a network service provider that provides information storage space or provides searching and linking services, if the owner believes that a work, performance, or audio-visual recording involved in its services has infringed upon his or her own right to communicate works to the public over information networks, or has deleted or altered his or her own electronic information management right, he or she can submit a written notification to the network service provider and require that the network service provider delete the work, performance, or audio-visual recording or disconnect the link with the work, performance, or audio-visual recording. The notification shall include the following contents: 1. The name, contact information, and address of the owner; 2. The title and web address of the infringed work, performance, or audio-visual recording that must be deleted or the web addresses of the link that must be disconnected; 3. Preliminary materials to prove the infringement. The owner shall be responsible for the authenticity of this notification.*”

<sup>56</sup> Internet Networks Regulation, PCR (1996) art 15: “*The network service provider, after receiving notification from the owner, shall immediately delete or disconnect the link to the work, performance, or audio-visual recording suspected of infringing on an other's right, and meanwhile shall transfer the notification to the service object of the work, performance, or audio-visual recording; if the network address of the service object is not clear and the notification cannot be transferred, the network service provider shall publicize the content of the notification through the information network.*”

<sup>57</sup> Internet Networks Regulation, PCR (1996) art 16: “*After receiving the notification transferred by the network service provider, if the service object feels the provided work, performance, or audio-visual recording has not infringed on an other's right, he or she can submit a written notification to the network service provider requesting that the deleted work, performance, or audio-visual recording be recovered or reconnected to the discontinued link. The written notification shall include the following contents: 1. The name, contact information and address of the service object; 2. The title and web address of the*

Drawing on the DMCA, the Information Networks Regulation differentiates between four types of network service providers. Articles 20-23 lists these four types, namely (a) network automatic access or automatic transmission service providers; (b) cache service providers; (c) information storage space service providers; and (d) search or link service providers.<sup>58</sup> Based on their abilities to edit and control network information content and the nature of their services, the Information Networks Regulation stipulates different exemption requirements and obligations for each such type.

The first type is network automatic access or automatic transmission service providers. According to Article 20 of the Information Networks Regulation, under the following circumstances, a network service provider that provides automatic access services according to the instructions of the service object, or provides automatic transmission services of the works, performances, or audio-visual recordings to its service objects, shall not be liable for compensation: (1) having not selected or altered the transmitted work, performance, or audio-visual recording; (2) having provided the work, performance, or audio-visual recording to the designated service object, and having prevented others beyond the designated service objects from obtaining access.<sup>59</sup> The “automatic access (transmission) services providers” stipulated as under Article 20 of the Information Networks Regulations corresponds to the “transitory digital network communications” service providers as in Article 512(a) of the DMCA.<sup>60</sup> These types of entities are the most basic network service providers, and fall into the category of absolute technological neutrality. Therefore, they are provided with the absolute safe harbor protection.<sup>61</sup> In principle, the network automatic access or automatic transmission service providers are not liable for infringement by their users, and are not subject to “notice and takedown” obligations. Section 512(a) of the DMCA protects “transitory digital network communications” service providers and provides adequate safe harbors for such network service providers who constitute “pure conduit”. If they meet the threshold eligibility requirements set out in Article 512(i), they are not required to take further actions, especially the obligations of “notice and takedown”.<sup>62</sup> Hence, while Article 36 of China’s Tort Law imposes the requirement of “notice and takedown” on all network service providers without distinction<sup>63</sup>, as per Article 20 of the

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*work, performance, or audio-visual recording to be resumed; 3. Preliminary materials to prove that there has been no infringement. The service object shall be responsible for the authenticity of this written notification.”*

<sup>58</sup> Internet Networks Regulation, PCR (1996) art 20-23.

<sup>59</sup> Internet Networks Regulation, PCR (1996) art 20.

<sup>60</sup> Digital Millennium Copyright Act, (US) § 512(a) (1998).

<sup>61</sup> Xiaocao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 28.

<sup>62</sup> Digital Millennium Copyright Act, (US) § 512(a) (1998).

<sup>63</sup> Tort Liability Law, PCR (2009) art 36.

Information Networks Regulation, “network automatic access or automatic transmission” service providers are not subject to the obligation of “notice and takedown”.<sup>64</sup>

The second to fourth types of network service providers are cache service providers, information storage space service providers, and search or link service providers. Based on the general principle of technological neutrality and promotion of network platform services, the law does not require network service providers to actively review the infringements on their websites.<sup>65</sup> However, in view of the connection between the aforementioned second-fourth type of network service providers and their content, and their more convenient monitoring, the law created the “notice and takedown” rule as a passive activation mechanism, which requires such network service providers to exercise certain control over infringements that may be occurring due to the transmission of works within their network systems, otherwise they be liable for right holders’ losses.<sup>66</sup> In other words, the exemption can only be invoked when reasonable takedown measures are taken after the right holder notifies the network service providers of the infringement. Although Article 14 of the Information Networks Regulation only stipulates the application of the “notice and takedown” rule to the information storage space service providers and search or link service providers,<sup>67</sup> it can be inferred from Article 36 of Tort Law and Articles 21 of the Information Networks Regulation that the aforementioned requirement also applies to the cache service providers.<sup>68</sup> Once these three types of network service providers have reasonably fulfilled the obligation of “notice and takedown”, they can then be granted with the corresponding safe harbor exemption from liability. The regulations regarding these network service providers in China are similar to the “safe harbor” rule of the DMCA, which exempts certain such entities from liability for their platform users infringement, but only when they perform the obligation of “notice and takedown”.<sup>69</sup>

### *C. Analysis of the “Notice and Takedown” Rule in the Two Legislations*

There are several differences between the “notice and takedown” rule stipulated under Tort Law and the Information Networks Regulation. First, the Information

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<sup>64</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 28.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Internet Networks Regulation, PCR (1996) art 14.

<sup>68</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 28.

<sup>69</sup> Digital Millennium Copyright Act, (US) § 512 (1998).

Networks Regulation is only applied to the infringement of the right to communicate works to the public over information networks. By contrast, Article 36 of the Tort Law applies whenever a network user infringes upon other person's rights or interests through network services.<sup>70</sup> Besides, Article 36 of the Tort Law applies to all "network service providers",<sup>71</sup> and does not classify them such as the Information Networks Regulation does. Furthermore, the measures to be taken by the network service providers after receiving a right holders' notice only includes "deleting" and "disconnecting"<sup>72</sup> under Article 14 of the Information Networks Regulation, while Article 36 of Tort Law expands upon these measures to include all "necessary measures", encompassing "deletion, blocking, disconnection and other necessary measures",<sup>73</sup> which are obviously different from the exhaustive list of measures under the Information Networks Regulation. The diversity and generality of the term "necessary measures" is further designed to meet the needs of the diversified and dynamic development of network services.<sup>74</sup> "Deleting, blocking, and disconnecting" are typical and common measures to stop infringement in a timely manner, but they are also severe measures. If such severe measures are not suitable for some network services, other suitable measures can be taken, which leaves room for the interpretation of "necessary measures".<sup>75</sup> Lastly, the Information Networks Regulation provides for the system of the "notice and takedown" rule, including "counter notices" and "restoration"<sup>76</sup>, while Tort Law only provides for "notice and necessary measures". This may have resulted due to the complexity of the circumstances to which Article 36 of the Tort Law applies, and the need to keep the text of the Tort Law simple.<sup>77</sup>

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<sup>70</sup> Tort Liability Law, PCR (2009) art 36.

<sup>71</sup> Ibid.

<sup>72</sup> Internet Networks Regulation, PCR (1996), art 14.

<sup>73</sup> Tort Liability Law, PCR (2009) art 36.

<sup>74</sup> See Beijing Intellectual Property Court [2017] Jing 73 Min Zhong No. 1194 Civil Judgment: "*On the basis of the 'notice and takedown' rule stipulated in the Regulation on the Protection of the Right to Dissemination of Information Networks for specific network service providers, Article 36(2) of the Tort Law is aimed at a wider range of network service providers and types of services and therefore, stipulates the 'notice plus necessary measures' rule. This provision adopts an open attitude to the necessary measures that network service providers should take to prevent the expansion of infringement after receiving effective notice from the right holder, taking into account the right holder's claim of copyright and trademark. It not only takes into account the nature of rights holders' claims of copyright, trademark rights, or personality rights, and the difficulty in judging infringement, but also considers that network service providers may not be limited to providing 'information storage space services' and 'search and link services'. Simply taking removal measures or other equivalent measures after receiving a valid notice may cause undue harm to the legitimate interests of network service providers or their users that provide services of other nature.*"

<sup>75</sup> Xiangjun Kong, "Application of 'Internet Article' to New Types of Network Service——From 'Notice-and-Takedown' Rule to 'Notice and Taking Necessary Measures'" [2020] 1 Zheng Fa Lun Cong 52 57.

<sup>76</sup> Internet Networks Regulation, PCR (1996), art 16- 17.

<sup>77</sup> Xiangjun Kong, "Application of 'Internet Article' to New Types of Network Service——From 'Notice-and-Takedown' Rule to 'Notice and Taking Necessary Measures'" [2020] 1 Zheng Fa Lun Cong 52 57.

## IV. The Application of the “Notice and Takedown” Rule to WeChat Mini Programs

### A. The Application Order of Tort Law and the Information Networks Regulation

Within the context of network infringement, Tort Law and the Information Networks Regulation constitute an intertwined relationship between general law and special law, old law and new law, and upper and lower law.<sup>78</sup> To be specific- first, Tort Law is a general law for tort liability, and a new law as compared to the Information Network Regulation. Second, the Information Network Regulation is an administrative regulation enacted by the State Council, authorized by the Copyright Law of the PRC,<sup>79</sup> and therefore, Tort Law is superior to the Information Network Regulation. Third, in terms of protection of the right to communicate works to the public over information networks, the Information Networks Regulation is a special law compared to Article 36 under Tort Liability. This intertwined relationship determines that when deciding whether to apply Tort Law or the Information Networks Regulation, the exact situation must be considered.<sup>80</sup>

To sum up, in a situation of infringement of the right to communicate works to the public over information networks, the Information Networks Regulation shall be applied as priority only if its provisions are not inconsistent with Tort Law.<sup>81</sup> In addition, considering that Tort Law is a much higher-level and a new law, when there is no applicable provision in the Information Networks Regulation, the provisions of Tort Law can be applied as a supplement to the special law.<sup>82</sup> In the case of *Alibaba Cloud Computing Co., Ltd. v. Beijing Ledong Zhuoyue Technology Co., Ltd.*, given that cloud server leasing services should not be included in the four types of services that are specified in the Information Networks Regulation, the Court applied Article 36 of the Tort Law to Alibaba. That is, since Article 32, Paragraph 2 of Tort Law adopts the “notice and necessary measures” rule and applies it to all network service providers, when the cloud server leasing services are not included in the four categories stipulated under the Information Networks Regulation, Article 36 of the Tort Law can be applied,

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<sup>78</sup> Ibid.

<sup>79</sup> Internet Networks Regulation, PCR (1996), art 1.

<sup>80</sup> Xiangjun Kong, “Application of ‘Internet Article’ to New Types of Network Service——From ‘Notice-and-Takedown’ Rule to ‘Notice and Taking Necessary Measures’” [2020] 1 Zheng Fa Lun Cong 52 57.

<sup>81</sup> Ibid.

<sup>82</sup> Legislation Law, PRC, art 88 stipulates that: “*The effect of laws shall be higher than that of administrative regulations, local regulations, and rules.*” Legislation Law, PRC, art 92 stipulates that: “*For laws, administrative regulations, local regulations, autonomous regulations, separate regulations, or rules developed by the same authority, if there is any discrepancy between special provisions and general provisions, special provisions shall prevail; if there is any discrepancy between new provisions and old provisions, new provisions shall prevail.*”

and the specific measures constituting necessary measures shall be determined based on the specific attributes of the services.<sup>83</sup>

Based on the above analysis, in the context of infringement of the right to communicate works to the public over information networks, when applying the “notice and takedown” rule, the Information Networks Regulation should be considered first. Consequently, the first factor to be considered in the WeChat Mini Programs case is whether the WeChat Mini Programs platform constitutes one of the four types of network service providers that are as stipulated in the Information Networks Regulation.

## B. Which type of network service provider does the WeChat Mini Programs platform constitute?

### 1. Eligibility Conditions for Safe Harbor Rules in China

Currently, China does not clearly specify the threshold for network service providers to be eligible for the safe harbor rule.<sup>84</sup> However, Article 36, Paragraph 2 under Tort Law stipulates the responsibility of network service providers when they know that their users are infringing upon the civil rights or interests of another person,<sup>85</sup> and Articles 20-23 under the Information Networks Regulation also enumerate many specific requirements relating to the exemption of network service providers’ liability.<sup>86</sup>

By comparison, under the safe harbor system in the United States, no matter which type of network service provider, they must first meet the threshold requirements listed in Section 512(i) of the DMCA before they can be exempted from liabilities.<sup>87</sup> According to the Section 512(i) of the DMCA, only if the network service providers have adopted and implemented policies to terminate repeat infringers and accommodate standard technical measures, would they be eligible for the limitations on liabilities provided under Section 512(a) through (d) of the DMCA.<sup>88</sup> In other words,

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<sup>83</sup> [2017] Jing 73 Min Zhong No.1194.

<sup>84</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 28.

<sup>85</sup> Tort Liability Law, PCR (2009) art 36.

<sup>86</sup> Internet Networks Regulation, PCR (1996), art 20- 23.

<sup>87</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 28.

<sup>88</sup> Digital Millennium Copyright Act, (US) § 512(i) (1998): “(1)Accommodation of technology.—The limitations on liability established by this section shall apply to a service provider only if the service provider— (A)has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and (B)accommodates and does not interfere with standard technical measures.

(2)Definition.—As used in this subsection, the term “standard technical measures” means technical



although the definition of network service providers vary based on their specific types, only if the conditions of Section 512(i) are met, will courts continue to explore whether the network service provider has met the requirements of any type of safe harbor protection and be exempted from the obligations of “notice and takedown”.<sup>89</sup>

In the *Ellison v. Robertson* case, the court reiterated that Section 512(i)(1)(A) had three separate requirements for a service provider to fulfill: (a) adopting a policy that provides for the termination of service access for repeat copyright infringers under appropriate circumstances; (b) informing users of the service policy; and (c) implementing the policy in a reasonable manner.<sup>90</sup> It is worth noting that the focus of the DMCA Section 512(i) is on repeat infringers rather than on the infringing content.<sup>91</sup> Of course, these eligibility conditions are not intended to suggest that “a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing”.<sup>92</sup> However, the adopted intellectual property protection policies and notification requirements are designed to ensure that those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should have a good knowledge that “there is a realistic threat of losing that access.”<sup>93</sup> However, if the network service provider receives a valid notice identifying one of its users as a repeat infringer—substantially meeting the requirements of Section 512(c) (3) (A)—but does not terminate its relationship with such user, it will be deemed that its policy of terminating repeat infringers has not been implemented reasonably.<sup>94</sup>

In the WeChat Mini Programs case, the focus is on whether Tencent can be provided with the first type of safe harbor protection, or whether it meets the eligibility conditions for an “automatic access (transmission) service provider” and thus is not subject to the “notice and takedown” obligation of. Although the safe harbor system provides maximum protection and preferential treatment for “automatic access (transmission) service providers” as a pure conduit, it should also have specific

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*measures that are used by copyright owners to identify or protect copyrighted works and— (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.”*

<sup>89</sup> See *LLC v. Cox Commc 'ns, Inc.*, [2018] 881 F. 3d 293 (4th Cir).

<sup>90</sup> See *Ellison v. Robertson* [2004] 357 F. 3d 1072, 1080 (9th Cir).

<sup>91</sup> See *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, [2002] 213 F. Supp. 2d 1146 1176 (C D Cal); *Costar Grp. Inc. v. Loopnet, Inc.*, [2001] 164 F Supp 2d 688 704 (D Md).

<sup>92</sup> See “Wipo Copyright Treaties Implementation And On-Line Copyright Infringement Liability Limitation: [1997-1998] 105<sup>th</sup> Congress , H. R. REP. 105—551, 61.

<sup>93</sup> *Ibid.*

<sup>94</sup> See *Perfect 10, Inc. v. CCBill*, [2004] LLC, 340 F Supp 2d 1077 1088 (C D Cal).

requirements for the qualification of this type of network service providers.<sup>95</sup> However, the requirements are currently quite ambiguous in China.<sup>96</sup>

## 2. Requirements of Network Automatic Access/Transmission Service Providers

China's Tort Law only uses the concept of network service providers in general and does not use the concept of "network automatic access (transmission) service providers".<sup>97</sup> Although the Information Networks Regulation uses the concept of "network automatic access (transmission) services",<sup>98</sup> it does not provide an accurate definition. Therefore, the question is as to how one understands the meaning of the term "network automatic access (transmission) service providers".

According to Article 20 of the Information Networks Regulation, in order to enter the safe harbor protection, on the one hand, the network service provider should provide "automatic access services" according to the instructions of the service object, or provide "automatic transmission services" of the works, performances, or audio-visual recordings to its service objects; and on the other hand, they need to meet the two requirements, namely (1) having not selected or altered the transmitted work, performance, or audio-visual recording; and (2) having provided the work, performance, or audio-visual recording to the designated service objects, and having prevented others beyond the designated service objects from obtaining access.<sup>99</sup> To understand these requirements sought of network automatic access (transmission) service providers, we can refer to Section 512(a) and 512(k)(1)(A) of the DMCA, which are more mature than the Chinese legislations. The above-mentioned provisions of the DMCA set out five necessary elements<sup>100</sup> which limit the scope of activities of the eligible network service providers to the role as a "conduit" for other people's communications.<sup>101</sup>

(1) Conduit-only function element. This is the first element of network automatic access (transmission) service providers. The Information Networks Regulation does not clearly provide for this element, but we can infer the same from the two conditions stipulated under Article 14, especially "having not selected or altered the transmitted work, performance, or audio-visual recording", that the network automatic access (transmission) service providers should play the role of a conduit. The term "service provider" in Article 512(a) of the DMCA is what we call an automatic network access

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<sup>95</sup> Xiaocao Li, "The Application of 'Safe Harbor' and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case" [2019] 5 Departmental Law Monograph 26 29

<sup>96</sup> *Ibid.*

<sup>97</sup> Tort Liability Law, PCR (2009) art 36.

<sup>98</sup> Internet Networks Regulation, PCR (1996), art 20.

<sup>99</sup> *Ibid.*

<sup>100</sup> 17 USC (2012) § 512 (a) (1) ~ (5).

<sup>101</sup> Xiaocao Li, "The Application of 'Safe Harbor' and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case" [2019] 5 Departmental Law Monograph 26 29.

(transmission) service provider, that refers to an entity offering the transmission, routing, or providing for connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.<sup>102</sup> This independent definition originated from the provisions on "telecommunications" in the Communications Act of 1934<sup>103</sup>, which recognized that the functions covered by Section 512(a) are essentially "conduit-only functions".<sup>104</sup> The legislative committee also appropriately adjusted the definition of a "service provider" under Section 512(k)(1)(A) to ensure that it captured offerings over the Internet and other online media. Generally speaking, broadband, DSL, dial-up and high-speed Internet service providers constitute automatic network access (transmission) service providers. A common feature of these service providers is that the "conduit" role of these service providers is extremely strong, or that the service is completely technology-neutral and has nothing to do with the content. The role as a "conduit" of the network automatic access (transmission) service providers is very different from the other types of network service providers. Although the services provided by the latter are not content services, they are more or less related to content.<sup>105</sup> By contrast, the automatic network access (transmission) service providers only serve as a "conduit" for other people's communication.

(2) "Digital" and "online" element. Should the subjects stipulated in Article 20 of the Information Networks Regulation be limited to the scope of digital online service providers? The answer to this question can be seen from the name of the Information Networks Regulation; "information network" indicates that the automatic access (transmission) service providers should be both digital and online. According to Section 512(k)(1)(A) of the DMCA, the term "service provider" marks an entity offering transmission, routing, or providing of connections for digital online communications, between or among points specified by a user and the material of the user's choosing, without modification to the contents of the material as sent or received.<sup>106</sup> Based on U.S. legislative history, the "online" element stands for when communication must be conducted through interactive computer networks such as the internet. Therefore, wireless broadcasters of a cable TV system or satellite TV service are not eligible, unless they provide users with online access to a digital network, such as the internet, or they provide transmission, routing, or connection to connect materials to such a

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<sup>102</sup> 17 USC (2012) § 512(k)(1)(A).

<sup>103</sup> 47 USC (2014) § 153(48).

<sup>104</sup> See "Wipo Copyright Treaties Implementation And On-Line Copyright Infringement Liability Limitation: [1997-1998] 105<sup>th</sup> Congress, H. R. REP. 105—551, 61.

<sup>105</sup> Mike Scott, "Safe Harbors Under the Digital Millennium Copyright Act" [2006] 9 N.Y.U. J. Legis. & Pub. Pol'y 99 120.

<sup>106</sup> See 17 USC (2012) § 512(k)(1)(A).

network and then only with respect to those functions.<sup>107</sup>

(3) “Through a system” element. Article 20 of the Information Networks Regulation implicitly requires that network service providers transmit by themselves.<sup>108</sup> That is, the automatic access (transmission) service should be based on its own system, instead of completing the transmission in any way, without having it go through its own system. Otherwise, the network service provider will not constitute as access or transmission “conduit”.<sup>109</sup> According to Section 512(a) of the DMCA, a requirement of this type of safe harbor protection is that the network service provider transmits, routes, or provides access to data information “through a system or network controlled or operated by or for the service provider.”<sup>110</sup>

(4) “Without modification” element. Article 20 of the Information Networks Regulation stipulates that an important constituent element of network automatic access (transmission) service providers is “having not selected or altered the transmitted work, performance, or audio-visual recording”.<sup>111</sup> Section 512(a)(5) of the DMCA also has similar provisions. One thing to note is that a network service provider will not be disqualified as a network automatic access or transmission service providers just because it changes the form of the materials, as long as it does not change the contents of the materials.<sup>112</sup> For example, there may be bold or italics in the transmission of e-mails that are not caused by the format code contained in the sender’s message to the receiver.<sup>113</sup>

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<sup>107</sup> See “Wipo Copyright Treaties Implementation And On-Line Copyright Infringement Liability Limitation: [1997-1998] 105<sup>th</sup> Congress , H. R. REP. 105—551, 63.

<sup>108</sup> Internet Networks Regulation, PCR (1996), art 20.

<sup>109</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 30.

<sup>110</sup> Digital Millennium Copyright Act, (US) § 512(a) (1998) stipulates that: “*Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—(1) the transmission of the material was initiated by or at the direction of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content.*”

<sup>111</sup> Internet Networks Regulation, PCR (1996), art 20.

<sup>112</sup> See “Wipo Copyright Treaties Implementation And On-Line Copyright Infringement Liability Limitation: [1997-1998] 105<sup>th</sup> Congress , H. R. REP. 105—551, 63.

<sup>113</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With

### 3. Analysis of the WeChat Mini Programs Case

In the WeChat Mini Programs case, since Tencent claimed that the WeChat Mini Programs platform constitutes the network automatic access (transmission) service providers,<sup>114</sup> it must first demonstrate that the platform meets the abovementioned four elements. Tencent argued that “the Mini Programs platform does not store the developer’s specific service content and that it is not an information storage service space. The content on the Mini Programs is provided by the developer directly to the user. Technically, the Mini Programs platform cannot take measures against specific service content provided by the developer.”<sup>115</sup> The author believes that it is difficult to draw the conclusion that the WeChat Mini Programs are pure conduit from this argument. Besides, the Hangzhou Internet Court also held that “Mini programs developers directly provide users with their web pages and content through the connection service provided by the Mini Programs”,<sup>116</sup> and that “from the perspective of the technical principles of the Mini Programs, the Mini Programs are a set of framework web page architectures independently operated by the developer. It only communicates with the developer server through a designated domain name. The data in the developer server is not stored in Tencent. The developer directly provides data and services to the users through Mini Programs.”<sup>117</sup> It seems that the Hangzhou Internet Court also recognized that the Mini Programs platform does not fully comply with the “conduit” characteristics of access and transmission of information “through its own system”, and that the users’ data information is not completely transmitted through the Mini Programs’ own system.<sup>118</sup>

Consequently, whether the Mini Programs platform constitutes a network automatic access (transmission) service provider is still in doubt. In fact, if Tencent wants benefit of the first type of safe harbor protection, it not only needs to prove that it has the characteristics of a “conduit”, but also needs to provide detailed evidence that it only provides conduit services. Although the WeChat Mini Programs platform can prove that it does not provide “automatic storage services” or “information storage space”, it is difficult to refute its searching and linking services, and e-commerce functions. In this case, Baizan provided online display and playback services of the alleged infringing works on the WeChat Mini Programs platform through the three Mini

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Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 31.

<sup>114</sup> [2018] Zhe 0192 Min Chu No.7184.

<sup>115</sup> Ibid.

<sup>116</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 28.

<sup>117</sup> Ibid.

<sup>118</sup> Xiacao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 Departmental Law Monograph 26 31.

Programs owned and operated by Baizan. The content was provided and played by the developer through the platform service to its users, and the provision of the content was not independent from the WeChat Mini Programs platform. Therefore, it seems that the WeChat Mini Programs platform provided searching and linking services instead of automatic access (transmission) service.

Usually, search or link service providers cannot take measures against the content provided by third parties as well, but the Information Network Regulation still requires that such network service providers delete or disconnect the link with the infringing work after receiving the right holders' notices to the effect.<sup>119</sup> Actually, Tencent's WeChat Mini Programs platform had noted this, and took the "notice and takedown" obligation into account when establishing its operating specifications. Article 2 of the "WeChat Mini Program Operating Specifications" clearly stipulates that *"if we believe that your Mini Program has either violated our terms of service, platform rules, or applicable law, or has caused a negative impact on the WeChat Official Accounts Platform or the WeChat Open Platform, we have the right to take action against your Mini Program, such as restricting its access to the platform services, suspending it, requesting the deletion of data, or terminating the agreements"*.<sup>120</sup> Article 5.6 of the "WeChat Mini Program Operating Specifications" further stipulates that *"no developer is allowed to infringe upon other entities' intellectual property rights, such as the rights over the creation of texts, images, videos, audio, or software, by using Tencent's services independently or together with any third parties without Tencent's written consent. Depending on the severity of the violation, infringing items of non-compliant Mini Programs will be deleted, or such Mini Programs will be removed from the Mini Program platform in severe circumstances."*<sup>121</sup> "Restricting the Mini Program's access to the platform services", "suspending it" and "removing it from the Mini Program platform" as stipulated in these two articles are the same as the measures stipulated under Section 512(d)(3) of the DMCA, which applies to information location tools referring or linking a user to sites that contain infringing materials.<sup>122</sup> Therefore, if the

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<sup>119</sup> Internet Networks Regulation, PCR (1996), art 14.

<sup>120</sup> "WeChat Mini Program Operation Specification", *Weixin Docs*, <<https://developers.weixin.qq.com/miniprogram/en/product/#5-Regulations-on-Conducts>>.

<sup>121</sup> *Ibid.*

<sup>122</sup> Digital Millennium Copyright Act, (US) § 512(d)(3) (1998) stipulates that: *"A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider— (1)(A) does not have actual knowledge that the material or activity is infringing; (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for*

Mini Programs platform is characterized as a search engine offered by the WeChat, the “notice and takedown” rule as under the Information Networks Regulation can be applied to the WeChat Mini Programs platform.<sup>123</sup> In conclusion, the WeChat Mini Programs platform does not constitute the first type of network service provider due to the nature of its services, but can be classified as a search and link service provider. In this case, in order to be exempted from its liabilities, Tencent needs to fulfill the “notice and takedown” obligation.

The First Instance Court held that “judging from the necessary measures that Tencent can take, the content of the Mini Programs is stored on the developer's server, the Mini Programs only communicate with the developer's server through the developer's domain name as a port, so the Mini Programs platform cannot have access to the developer server content technically, let alone precisely delete the infringing content from the developer server. If infringing information has to be blocked, the only technical measure Tencent can take is to completely close the communication port and cut off the communication channel between users and developers, that is, the complete deletion of the Mini Programs. But the complete deletion of the Mini Programs is not the ‘positioning removal’ effect pursued by ‘taking necessary measures’ as required by the law.”<sup>124</sup> The Second Instance Court held the similar view in this regard.<sup>125</sup> However, it is problematic to refuse to require the network service providers to disconnect the link just because such measure does not have the “positioning removal” effect. Firstly, internet legal practice has formed a basic requirement of the so-called “measure rationality” for the fulfillment of these Internet platforms’ “notice and takedown” obligation. This means that measures and actions should be taken based on the existing technology and control capabilities, and should not be excessive.<sup>126</sup> Even if the “positioning removal” effect cannot be achieved based on the current technical capabilities, the reasonable measures that can be taken are not limited to the direct deletion of the links, let alone “the complete deletion of the Mini Programs”<sup>127</sup>. Secondly, the disconnection or removal of the WeChat Mini Programs is and would be in line with commercial/industry practices. As mentioned above, Tencent's WeChat Mini Programs platform includes “restricting the Mini Program's access to the platform services”, “suspending it” and “removing it from the Mini Program platform” in its

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*purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.”*

<sup>123</sup> Information Networks Regulation, PCR (1996) art 14.

<sup>124</sup> [2018] Zhe 0192 Min Chu No.7184.

<sup>125</sup> [2019] Zhe 01 Min Zhong No.4268.

<sup>126</sup> Xiaocao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms — With Comments on the First Mini Program Infringement Case” [2019] 5 *Departmental Law Monograph* 26 36.

<sup>127</sup> [2018] Zhe 0192 Min Chu No.7184.

“WeChat Mini Program Operating Specifications” as measures that could be taken by Tencent upon infringement of any entities’ intellectual property rights.<sup>128</sup> These specification should be seen as an agreement between the platform service provider and the Mini Programs operators. Since the deletion and removal of the Mini Programs have become a commercial practice that WeChat Mini Programs platform adopts, there is no need for the courts to determine these measures as inappropriate.<sup>129</sup>

## Conclusion

China’s first WeChat Mini Programs case demonstrates the complexity of the application of “safe harbor principles” to new network service providers. The relevant provisions of China’s “notice and takedown” rule lack clarity. Therefore, a more detailed interpretation of the legislations must be adopted to make a reasonable analysis of whether and how the WeChat Mini Programs platform can be provided with safe harbor protection.<sup>130</sup> In this case, the Hangzhou Internet Court classified the services of the WeChat Mini Programs platform as coming under the first category of network service providers, namely the “automatic access (transmission) service providers”. This classification seems to be too simplistic, leaving huge room for doubts and ambiguity.

The measures to be taken by the network service providers under Article 14 of the Information Networks Regulations are with respect to “deleting” works or “disconnecting the links” with the work, consequently applying to only specific types of network service providers.<sup>131</sup> By contrast, the measures under Article 36 of Tort Law include “deletion, block or disconnection and other necessary measures”,<sup>132</sup> and the application scope of the same is not limited to any specific types of network service providers. Therefore, it is unreasonable to exclude the network automatic access (transmission) service providers from the scope of the “network service providers” as stipulated under Article 36 of Tort Law. In the case of new network service providers such as the WeChat Mini Programs platform, we must first consider whether the “notice and takedown” rule stipulated under Article 14 of the Information Networks Regulation can be applied to such new network service provider, specifically whether this network

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<sup>128</sup> “WeChat Mini Program Operation Specification”, *Weixin Docs*, <<https://developers.weixin.qq.com/miniprogram/en/product/#5-Regulations-on-Conducts>>.

<sup>129</sup> Xiangjun Kong, “Application of ‘Internet Article’ to New Types of Network Service——From ‘Notice-and-Takedown’ Rule to ‘Notice and Taking Necessary Measures’” [2020] 1 *Zheng Fa Lun Cong* 52 61.

<sup>130</sup> Xiaocao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 *Departmental Law Monograph* 26 36.

<sup>131</sup> Xiaocao Li, “The Application of ‘Safe Harbor’ and Multiple Regulations on Internet Platforms —With Comments on the First Mini Program Infringement Case” [2019] 5 *Departmental Law Monograph* 26 36.

<sup>132</sup> Tort Liability Law, PCR (2009) art 36.



service provider constitutes the ‘network service providers’ as stipulated in this article. If the new network service provider does not constitute a network service provider that provides information storage space or searching and linking services, we should then consider applying Article 36 of Tort Law. The “necessary measures” stipulated as under Article 36 of the Tort Law can be interpreted openly, and when determining which necessary measures are suitable, the attributes of the specific network service should be considered.

On January 1, 2021, the Civil Code of the PRC came into effect. Articles 1194 to 1197 of the Civil Code stipulate the liabilities for network infringements.<sup>133</sup> Specifically, Articles 1195 and 1196 stipulate the “notice and takedown” rule and the “counter-notice”<sup>134</sup> rule of the safe harbor principle. According to the Article 1195 of the Civil Code, “where a network user commits a tortious act through using the network service, the right holder is entitled to notify the network service provider to take such necessary measures as deletion, block, or disconnection. The notice shall include the preliminary evidence establishing the tort and the real identity information of the right holder. After receiving the notice, the network service provider shall timely forward the notice to the relevant network user and take necessary measures based on the preliminary evidence establishing the tort and the type of service complained about. Where it fails to take necessary measures in time, it shall assume joint and several liability for the aggravated part of the damage with the network user. The right holder who causes damage to the network user or network service provider due to erroneous notification shall bear tort liability, unless otherwise provided by law.”<sup>135</sup>

There are two differences between the safe harbor rule as under the Civil Code and Article 36 of the Tort Law. On the one hand, in order to strike a better balance between the interests of right holders and network users, and prevent network service providers from assuming excessive censorship responsibilities,<sup>136</sup> the Civil Code requires that network service providers timely forward notices to the relevant network users<sup>137</sup> and

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<sup>133</sup> Lixin Yang, “Status and Obligations of Internet Service Provider in Safe Harbor Rules of Internet Infringement” [2020] 5 Journal of Fujian Normal University (Philosophy and Social Sciences Edition) 139.

<sup>134</sup> Civil Code, PRC (2020) art 1196 stipulates that: “After receiving the forwarded notice, the network user may submit a declaration of non-infringement to the network service provider, which shall include the preliminary evidence of non-infringement and the real identity information of the network user. After receiving the declaration, the network service provider shall forward it to the right holder who issued the notice, and inform him that he may file a complaint to the relevant department or a lawsuit with the people’s court. The network service provider shall timely terminate the measures taken where, within a reasonable period of time after the forwarded declaration reaches the right holder, it fails to receive notice that the right holder has filed a complaint or a lawsuit.”

<sup>135</sup> Civil Code, PRC (2020) art 1195.

<sup>136</sup> Xiao Cheng, “On the Rule of Notice in Cyber Torts of China Civil Code” [2020] 6 Wuhan University Journal (Philosophy & Social Science) 137 141.

<sup>137</sup> Civil Code, PRC (2020) art 1195.

adds the “counter-notice” procedure.<sup>138</sup> On the other hand, in order to avoid false notices which may jeopardize the rights and interests of network users and network service providers,<sup>139</sup> the Civil Code clearly requires the notices to include the preliminary evidence that establishes the tort and real identity information of the right holder.<sup>140</sup> At the same time, Article 1195 of the Civil Code also clearly stipulates the liability of the right holders in case of erroneous notifications.

Nevertheless, Paragraph 1 of Article 1195 of the Civil Code is essentially the same as the “notice and takedown” rule under Article 36, Paragraph 2 of Tort Law,<sup>141</sup> except that the Civil Code replaces the term “victim of the tort” with the term “right holder”, which is reasonable, because when a right holder sends the notice to the network service provider, it still cannot be determined whether the network user has actually infringed upon the right holder’s rights and whether the right holder is the victim of tort.<sup>142</sup> The measures to be taken by the network service provider after receiving the notices<sup>143</sup> and the application scope<sup>144</sup> of the “notice and takedown” rule are exactly the same in the Civil Code and the Tort Law.

Based on the above analysis, although the Civil Code of the People’s Republic of China has replaced Tort Law since January 1, 2021,<sup>145</sup> including the provisions of the “notice and takedown” rule, the above approaches to help analyze new types of network service providers should remain the same, i.e., when trying to apply the “notice and takedown” rule to new types of network service providers, the correct philosophy is to interpret legislation purposively, so as to keep up with technological changes, thus avoiding straightjacketing the law based on the specific circumstances to technology when the law was first enacted.

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<sup>138</sup> Civil Code, PRC (2020) art 1196.

<sup>139</sup> Xiao Cheng, “On the Rule of Notice in Cyber Torts of China Civil Code” [2020] 6 Wuhan University Journal (Philosophy & Social Science) 137 141.

<sup>140</sup> Civil Code, PRC (2020) art 1195.

<sup>141</sup> Tort Liability Law, PCR (2009) art 36 para 2 stipulates that: “Where a network user commits a tortious act through using the network service, the victim of the tort is entitled to notify the network service provider to take such necessary measures as deletion, block, or disconnection.”

<sup>142</sup> Lixin Yang, “Status and Obligations of Internet Service Provider in Safe Harbor Rules of Internet Infringement” [2020] 5 Journal of Fujian Normal University (Philosophy and Social Sciences Edition) 139 141.

<sup>143</sup> Both Article 1195 of the Civil Code and Article 36 of Tort Law stipulate that where a network user commits a tortious act through using the network service, the right holder is entitled to notify the network service provider to “take such necessary measures as deletion, block, or disconnection”.

<sup>144</sup> According to both Article 1195 of the Civil Code and Article 36 of Tort Law, the notice and takedown rule applies whenever “a network user commits a tortious act through using the network service”.

<sup>145</sup> Civil Code, PRC (2020) art 1195.