INTERMEDIARY LIABILITY OF WEBSITE OPERATORS IN PRIVACY CASES IN CHINA

by

QIAN TAO*

The internet industry in China has made great advances in recent years. In fact, China now has the greatest number of internet users in the world.[1] Privacy is one of the biggest concerns with this development since the dissemination of information has become easier and more uncontrollable.[2] I intend to introduce the legal framework of privacy protection in China and outline the existing rules for intermediary liability of website operators, especially the Tort Liability Law of 2010. By discussing three important privacy cases, I try to summarize the courts' opinions on the liability of website operators and address key unresolved questions in the existing law.

KEYWORDS

Intermediary liability, China, privacy, notice and take-down, monitor

1. INTRODUCTION

There are two main legal issues concerning privacy in cyberspace. One is how to prevent website operators misusing the personal data of their registered users, and the other is how to prevent internet users disclosing data concerning others in cyberspace which can have several potential con-

* Qian Tao is a PhD candidate in Private Law at Scuola Superiore Sant'Anna, Pisa.The author wishes to thank Bart van der Sloot for useful suggestions and Keiva Carr for language revision. E-mail: q.tao@sssup.it

1 According to the recent CNNIC (China Internet Network Information Center) Newsletter of Latest Internet Development, the number of national internet users reached 417 million by the end of May 2010.

2 See also Slouka, M. 1995, War of the Worlds: Cyberspace and the High-tech Assault on Reality, Basic Books, New York.

sequences, such as cyber stalking, cyber harassment, cyber ostracism, impersonation, denigration, etc. This article focuses on the latter legal issue.

When internet users disclose data concerning others or in other words violate the privacy of others in cyberspace, an issue concerning many actors involved becomes apparent, for example, those who have uploaded the contents, the parties who claim that their privacy has been infringed and the internet operators, acting as intermediaries, who supply the online service. There is no doubt that the users should bear direct responsibility and therefore liability. Nevertheless, many scholars have embarked on a debate concerning the indirect liability of website operators since they are not publishers like newspapers or broadcasters like TV in the traditional sense. The victims are inclined to sue the website operators, because not only are these entities likely to have deeper pockets but they are also probably easier to find[3]. Those internet content providers who have editorial responsibility for the information published on their systems are excluded from my discussions in this article. So in the following part, I intend to introduce the legal framework of privacy protection and liability rules for invasion of privacy in China.

2. CHINESE RULES

2.1. GENERAL PRIVACY RULES

The legislation concerning the right to privacy in China fell behind the western countries due to historical and cultural reasons. The Chinese Constitutional law (1982) provides protection for the right to dignity. Article 38 providers "the personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means are prohibited". It would seem from the wording that the legislators didn't really consider privacy as an underlying interest within the scope of dignity.[4] With this said however, most scholars agree that the spirit of this article should be the constitutional basis for privacy protection in the very general sense.[5] Article 37 prohibits unlawful strip search, article 39 provides a right to respect for one's home, and article 40 provides a right to

[3] Wilson, S. 2002, 'Corporate Criticism on the Internet: The Fine Line between Anonymous Speech and Cybersmear', Pepp. L. Rev, vol. 29, pp. 533-584.

[4] When drafting the constitutional law in 1982, the legislators strived to provide protection to dignity of citizens in order to repair reputational damages of many citizens during the Great Proletarian Cultural Revolution (1966-1976) and recall the respect to others' dignity. See more in Lin L. F. 2008, 'Human Dignity and Personal Dignity: on Interpretation Scheme of No.38 of the PRC Constitution', Zhejiang Social Science, vol. 3, pp. 45-55.

respect for one's correspondence. These are privacy issues, but these articles touch only upon spatial privacy in a physical space. Compared with Article 8 of the European Convention on Human Rights, the Chinese equivalent article doesn't include "respect for one's private and family life" which may cover the decisional privacy and informational privacy by adopting a somewhat broad interpretation.

In Chinese private law, privacy isn't clearly contained in the section of "Rights to Personality" in the General Principles of the Civil Law (GPCL) which came into force in 1987. However, "Interpretation of the Supreme People's Court (SPC) on Several Issues concerning the Implementation of the GPCL" (1988) provides that "In case anyone discloses the privacy of any other person in writing or orally…, such acts shall be determined as acts infringing upon the citizen's right to reputation". In 1993, the SPC issued another interpretation on "Several Issues about the Trial of Cases Concerning the Right to Reputation" which further confirms the principle in the Interpretation above. In 2001, the SPC issued the "Interpretation on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts", which contains compensation for emotional damages of privacy disclosure. Therefore, for a long time, privacy was protected under the right to reputation. In other words, the judges held a privacy violation only when the disclosure of one's data resulted in damages to a person's reputation[6], however, right to privacy was also mentioned rarely in a couple of cases[7]. From July 2010, privacy claim can be treated as a separate claim from reputation cases definitely. In the Chinese Tort Liability Law, which came into force on July 1st, 2010, the right to privacy is stipulated clearly in article 2 as a civil right. Therefore, privacy protection can employ all the tort rules.

2.2. PRIVACY RULES IN RELATION TO CYBERSPACE

In the Tort Liability Law, Article 36, which is contained in chapter four entitled "the specific regulation on the subject of liability", provides for a general regulation for privacy infringements on the internet. It provides that:

---

[5] See Qi, Q. H. 2005, 'Restrictive Regulations on the Basic Civil Rights in the Constitution of China', Journal of Henan Administrative Institute of Politics and Law, vol. 2, pp. 32-39.

[6] Chinese are more concerned with reputation as opposed to privacy due to cultural and historical reasons.

[7] For instance, Wang Weining v. Yunnan Telecom Ltd (2004), Jiang Fenglan v. Shi Feng, Xie Xiaojun, Huayang Ltd (2002).

"when an internet user conducts unlawful acts by using an internet service, the victim has the right to notify the internet service provider to take necessary measures such as taking down the content in dispute, blocking access to the content, disconnecting the link to the content and the like. The provider shall jointly bear tort liability with the internet user within the scope of further loss due to the failure of taking necessary measures expeditiously upon receiving the notification of claimed infringement. The internet service provider shall jointly bear tort liability with the internet user if it knows the internet user conducts unlawful acts by using its internet service without taking necessary measures."

Before the Tort Liability Law, there were also several administrative regulations and provisions related to legal problems on internet[8]. "The Administrative Regulation on Internet Information Service" issued by the State Council on September 25, 2000, provides that internet information service providers[9] shall not produce, reproduce, post or disseminate information with contents that insult or slander a third party or infringe upon the lawful rights and interests of a third party (art.15). If an internet information service provider discovers information transmitted through its website, which clearly falls within the scope of Article 15 hereof, it shall immediately stop the transmission, save relevant records and report to the relevant State authority (art.16). Thirteen days later, the Ministry of the Information Industry issued another regulation entitled "the Administrative Provisions on Internet Electronic Messaging Services (EMS)"[10] which provides that the EMS provider should post its rules on a prominent place of its website and warn the online subscribers of the legal liability they must bear for their posts. On December 20, 2007 the Ministry of the Information Industry and the State Administration of Radio, Film, and Television jointly issued "the Administrative Provisions on Internet Audiovisual Program Services"[11],which provides that when providing, uploading and streaming services of audi-

[8] In China, "law" shall be read by the National People's Congress which is China's highest organ of state power or read by its Standing Committee in some cases. The State Council, which is the highest administrative organ of the central government of China, involves the drawing up and amending of administrative regulations in accordance with Laws. The respective departments of the State Council, for example, Ministry of Information Industry, have the power to issue orders and provisions within the jurisdiction of their respective responsibilities in accordance with Laws and Regulations.

[9] Art. 2 provides "internet information services" means the service activity of providing information services through the internet to online subscribers.

[10] The term "Electronic Messaging Services" is defined as "acts enabling online subscribers to publish information on the internet in an interactive form, such as bulletin boards, whiteboards, discussion forums, chat rooms and message boards".

ovisual materials, such as video sharing, the service providers should warn users not to upload audiovisual contents that invade others' privacy.[12]

We can deduce certain duties of the website operator from these rules set out above: (1) to warn/alert properly its users of the obligations which they are subjected to by law and about the risks implied by non-compliance; (2) to discover the apparently illegal contents; (3) to take necessary measures expeditiously once the operator learns that its user is violating the privacy of others by its service. Furthermore, we can induce the liability of the website operator from these duties. The liability is based on the fact that it knows the unlawful contents but has not taken down them expeditiously. So it can be called a kind of knowledge based liability. The knowledge here originates when it has known of the infringement after receiving the notification of the infringing contents or when it should have known the apparently illegal contents. Under the first situation, the website operator is jointly liable for the damage which is incurred after notification; under the second situation, the website operator is jointly liable for the damage which is incurred from the moment that the operator learns of the infringement.

In juridical practice, more arguments are indeed focusing on these duties and different interpretations of these rules. Regarding the first duty, website operators fulfill it usually by terms of use or "warning" when users make posts. Whether the terms of use can relieve the website operators of liability is rather a problem of contract law. For this reason, I prefer to argue it separately in another article. With respect to the second duty, the word "discovering" imposes a monitoring obligation on website operators and the phrase "apparently illegal content" required a test of implied consciousness which is difficult for judges to be determinate because it is an objective question if the infringing activity would have been apparent to a reasonable person under the same or similar circumstances, while, whether the website operator was aware of this infringement is a subjective question. Another question here is whether and to what extent the monitoring obligation should be borne by website operators. As for the third duty, what are the requirements of the format that this notice must comply with? Who can effect-

[11] Art. 2 provides the Internet-based audiovisual program services should cover producing, compiling, integrating and providing audiovisual programs to the public via Internet and providing services for others to upload and broadcast audiovisual programs.

[12] In the Audiovisual Media Services Directive (2010/13/EU), the media service providers exclude natural or legal persons who merely transmit programs for which the editorial responsibility lies with third parties, but the Chinese provisions include those.

ively notify? Should the notice list each infringing file? How fast can be considered to be expeditiously? In other words, the questions revolve around the standard of notice and take-down. The following cases exemplify court opinions on these questions in last five years in China.

3. CASE STUDIES

I now proceed to examine three famous cases in China from different periods in order to give a general description of case decisions and changes from 2006 to 2010. The first two cases concern internet forums, which are defined as a kind of electronic messaging services in Chinese rules. The third concerns search engine services. All three cases took place before the Tort Liability Law came into force, so they all were heard by the courts in the name of reputation suits.

3.1. ZHANG FU (ZHANG) V. TIANYA ONLINE NETWORK TECHNOLOGY CO.,LTD (TIANYA)[13]

Tianya.cn is the most popular interactive online forum with more than 30 million registered members in China. A user with the nickname "toothache-girl" was quite active and welcome in this virtual community. Another user with the nickname "one hundred flavors" made a post disclosing that "the real identity of "toothache-girl was a male employee in a press company". After investigation, "toothache-girl" mistook Zhang for "one hundred flavors" and published a post which disclosed Zhang's home address, mobile phone number, home phone number, IP address, family members' information for revenge on June 12, 2006. After receiving a large number of nuisance telephone calls, Zhang made a complaint to Tianya and the posts in question were taken down 35 hours after the complaint.

Zhang sued on the basis that Tianya unreasonably delayed in removing these posts that effectively disclosed his private information. The slow response resulted in the fact that his personal information was exposed to the public for 72 hours in total and clicked by users more than 50,000 times. Tianya argued that: (1) it has no editorial responsibility because it cannot monitor contents created by users before publication; (2) the filtering capabilities of internet forum platforms cannot automatically filter contents in-

[13] People's Court of Taojiang County, Hunan Province. The whole text of court's decision hasn't been published. All information is from the online People's Court Daily, http://oldfyb2009.chinacourt.org/public/detail.php?id=104467 [Accessed Dec 29 2010].

cluding personal information; (3) these posts had been taken down as soon as possible after the complaint was received.

The main issue in this case concerned the word "expeditiously". Two questions arose: one concerned the length of time website operators should continue to fulfill their monitoring duty after information has been posted by a user, and the other concerned the timeframe for removing the post in question after notification has been received. The court avoided discussing both these questions since there was no clear definition under the laws at that time. Instead, the court imposed liability on the defendant based on the specific monitoring obligation. It held that:

"It is true that the website operator is not able to edit and control the user generated contents before they are posted by users, but they can monitor after that, and stop the dissemination of unlawful contents by taking the contents down expeditiously or taking some technological measures to filter or screen them. This post-monitoring should be active and comprehensive, rather than passive. If the service provider's responsibility to take down unlawful information is only based on notification by the victim, it is unfair for the victim because his right to complain is treated as an obligation in order to protect his legitimate right."

Ultimately, the court held in December 2006 that Tianya failed to comply with the monitoring duty sufficiently and indulged the dissemination of unlawful information on its system; therefore, Tianya was liable for Zhang's damages.

This case is similar to the 1995 Stratton Oakmont case[14] in New York, in which the Nassau County Supreme Court held the defendant Prodigy Services liable for defamatory contents posted on its electronic bulletin board. The next year, the Congress of the US overruled this decision by passing Section 230 of the Communications Decency Act that grants interactive computer service providers an exemption from liability for user generated contents. Two years after the Chinese case, the situation in China also changed. The following is a similar case with the same defendant but a different result.

[14] Stratton Oakmont. Inc. v. Prodigy Services Co., 1995 WL 323710, (N.Y. Sup. 1995).

3.2.WANG FEI V. TIANYA ONLINE NETWORK TECHNOLOGY CO., LTD (TIANYA)[15]

A post on Tianya.cn made on January 10, 2008 relayed in detail the whole story concerning a piece of recent hot news: a wife killed herself because of her husband's betrayal. Wang was the husband. Many users followed the post and commented on it. Among these comments, Wang's personal information, such as his phone number and home address, was repeatedly mentioned. As a result, Wang received a high volume of calls and angry and derogatory messages. More seriously, some calls amounted to death threats. Tianya took down the post and the following comments on March 15, 2008.

In this particular case, Wang failed to supply any proof to substantiate his notification claim that he made to Tianya requesting the removal of the contents in question. Thus, the question turned to whether Tianya had reason to know of the unlawful posts. If the answer was in the negative, Tianya could not have been at fault since it removed the contents in question before the lawsuit, an action which could be considered as the point in time that it became aware of the infringement. If the answer was in the affirmative, this judgment could be based on the active monitoring of unlawful contents, or the condition that the infringement was so apparent that Tianya should have known even if there was no monitoring obligation.

The court confirmed that Tianya, as a message service provider, did in fact have a monitoring obligation. However, it further stated that:

"As it is known to all, the internet is developing so fast in China that there is uncountable information generated by users on Tianya.cn every day. Due to the vast amount of materials hosted, it is impossible to police every post based on the existing and common web managing mode and technological methods. Hence, Tianya.cn shall remove posts in question only on discovering them by itself or after notification by a victim."

Therefore, taking into account the wide, rapid, real-time, casual, interactive features of the internet as a media, the court of first instance ruled on December 18, 2008 that Tianya.cn was not liable because it had cancelled the posts in question before the initiation of Wang's lawsuit. The court of appeal upheld the judgment on December 23, 2009.

[15] People's Court of Chaoyang District, Beijing. N 29277, 2008.

We can see from the decision that the "notice" is the most important factor in judging the website operator's obligation to take-down unlawful contents. If there is no notice notifying the infringement the contents in question can be kept on the web until the lawsuit begins, since the website operator has no specific obligation to monitor every post based on current limits of technology and the enormous amount of information transferred, unless the infringement is apparent. In sum, the court's attitude toward the monitoring standard has changed from an active to a relatively passive level. But, there was one question ignored by the court: was the infringement apparent? Two years later, a court in Beijing decided another similar case which dealt with this question.

3.3. YIN HONG V. BAIDU.INC (BAIDU)[16]

Yin is a graduate from Shanghai Maritime University. Baidu is the leading search engine service provider in China. Yin's ex-boyfriend posted nude photos of Yin on KDC online forum for revenge on May 8, 2009, and those photos were copied and pasted rapidly on many other websites. Yin made a statement in Shi Dai Newspaper asking all websites to take measures to remove the photos along with related reports on May 13, 2009. But after this statement, thousands of links, which included photos and personal information of Yin, could still be found by searching "Yin Hong" or "Maritime Girl" as keywords on Baidu.com. Yin claimed that Baidu's search engine service promoted the dissemination of photos, therefore, increased the damage caused to her.

There should be four steps for deciding this case. First, whether the defendant should monitor the links of nude photos beforehand. If yes, the defendant was supposed to know the illegal contents searched out by its service, and remove those links, because nude images are defined as pornographic material which is absolutely forbidden in China. If the answer is no, Baidu should filter the results after having received notification from the plaintiff. Consequently, we need decide if the statement in the newspaper constitutes a valid notice. If it is valid, Baidu should have filtered the results upon notification, if it is not valid, we need to discuss whether the infringement was apparent enough that Baidu should have discovered. The last

[16] People's court of Jing An District, Shanghai. The whole text of court's decision hasn't been published. All information is from the chinacourt.org which is a website approved by SPC. http://www.chinacourt.org/html/article/201007/01/416589.shtml [Accessed Nov 20 2010].

step is to decide whether Baidu has taken down the links properly. In other words, should Baidu remove all links concerned thoroughly or just in a superficial manner.

In relation to the first question, Baidu argued the search engine was based on a technical information location tool. It couldn't identify contents which may invade others' rights automatically; nevertheless, Baidu continued to monitor illegal contents and removed the links to the nude photos of Yin even before her claim. The court ignored discussing the monitoring standard of search engines and instead carried out the knowledge test. The court opined that after these photos were disclosed on the internet on May 8, 2009, it became the hottest topic being reported by much of the media and many newspapers had even posted it on their home pages. Therefore, Baidu should have been aware of the infringement. The court accepted the defendant's argument that the statement in the local newspaper didn't constitute a valid notice, but the reason for the disqualification was that the subject of the declaration was unclear because it was signed off with "Ms.YH" instead of Yin's full name. In any case, this was irrelevant in deciding on Baidu's knowledge. Regarding the take-down standard, Baidu argued that there were new posts continually which generated new URLs. On the basis of this, it was impossible to remove all links even manually. The court rejected Baidu's defense and held that Baidu failed to take necessary measures expeditiously, especially after "Yin" became a keyword for news. Finally, the court of first instance held Baidu liable on June 30, 2010. Then, Baidu has appealed. Then final decision hasn't made yet.

From the current decision, we can see that the court opined that the defendant had implied consciousness because of the particularity of the news, especially since it was considered "hot" news. It is similar to the "red flag" criteria[17] used in the US. We can note then the attempt of the court to change from a standard of passive monitoring to a relatively moderate one.

3.4 CONCLUSION

From these three cases, we can see that the monitoring standard adopted by courts shifted from a strict one, to a more loose one and finally to a moderate standard from 2006 to 2010. This trend is in line with the background at that time. The phenomenon of cyber targeting and cyber bullying began in

[17] Once the website operator becomes aware of a "red flag" from which infringing activity is apparent, notice of specific infringing files is not required. It will lose the limitation of liability if it takes no action.

2006 in China, so the court tries to impose a strict monitoring obligation on website operators as a deterrent effect in order to control information on the internet. In 2008, web 2.0 became more and more important and so in order to promote the internet as a market a loose monitoring standard was adopted. Focus has now turned to trying to achieve a balance between controlling the increasing infringements and promoting internet development and free speech. For this reason, a moderate monitoring obligation was adopted in the third case. There is no case concerning our discussion after the implementation of the Tort Liability Law of July 1, 2010. Therefore, it is unclear how the courts will interpret the wording of art.36. In any case, there are still many aspects in need of further clarification.

4. REMAINING QUESTIONS

4.1 MONITORING STANDARD

The active monitoring mode in the first case may effectively reduce online infringements. However, it may also place website operators in a difficult position in relation to the evaluation of complaints and consequently may result in the removal of all contents in order to avoid any possible liability. This strict monitoring would result in disproportionate burdens on website operators and high costs of access to basic services which ultimately should be paid by users. Moreover, it may have significant repercussions on freedom of expression. However, we have to admit that the passive monitoring mode in the second case may cause a surge of infringements. What's more, some website operators post unlawful contents in the name of users simply to attract more visits. Both privacy and free speech are essential for our autonomy, self-development, freedom, and democracy. We have to make some modest sacrifices on both sides[18].

In Europe, the E-Commerce Directive (2000/31/EC) prevents Member States from imposing on internet intermediaries who offer mere conduit, caching and hosting services a general obligation to monitor the information they store or transmit or a general obligation to actively seek out facts and circumstances indicating illegal activities. However, there is still legal uncertainty. The liability of a search engine is not covered by the Directive and Member States are motivated to provide for additional legal clarity.

[18] Solove, D. J. 2007, The Future Of Reputation:Gossip, Rumor, and Privacy on The Internet,Yale University Press, New Haven, CT, p. 190.

More important, it is unclear under which conditions a user-created-content platform qualifies as a hosting service in the sense of art.14 of the Directive[19]. Now, the neutrality position of internet intermediaries is becoming increasingly doubtful since some are no longer editorially neutral about content. They are much more active and involved with contents originating from third parties. Besides, some website operators have both content service and technical service and merge them together. Therefore, it is difficult to decide in the legal status in cases of infringement.

The Chinese Tort Liability Law doesn't classify internet service providers nor does it provide for separate liability rules. Even though it is criticised by many scholars, but in some sense, just because of the legal uncertainty in Chinese law, courts would be more flexible on a case-by-case basis. This flexibility seems to properly meet the diversity of website operators. In comparison, the European approach seems to become more and more unsatisfactory. However, considering that more and more websites perform several different functions and the wide variety of websites is always expanding in scope, both the monitoring obligation and classification of websites are tough questions for legislators.

4.2. NOTICE AND TAKE-DOWN STANDARD

In respect of the notice and take-down procedure in a privacy case, there is a lack of guidance. We have explicit rules for the notice and take-down procedure in copyright law, but they can't be applied in the circumstance of violation of the right to privacy or reputational right because copyright infringement proves much more difficult to identify as opposed to an infringement of personal rights. So copyright law burdens the copyrighter with the duty of monitoring the infringement and notifying the website operator with regards to format requirement. The counter-notice and put-back procedure has also been supplied in order to protect original authors of contested work against unjustified or false removal. There are no such detailed provisions concerning who is qualified to give notice and the format of notice in a privacy case. If, regardless of the validity of the notice, anyone can initiate the notice and take down procedure and remove any materials they dislike, it would result in intentional or unintentional abuses of reporting and wrong accusations. As was stated by the American court in the Zeran

[19] IDATE,TNO and IViR, User-Created-Content: Supporting a Participative Information Society, final report, SMART 2007/2008, p. 229.

case, "in light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability."[20] On the other hand, public interests constitute a limitation of privacy protection. An individual cannot use the privacy action to hide his or her wrongdoings[21], for example, when internet is used to disclose official corruptions. Besides, as we well know, public figures have lower expectations from privacy. However, when someone who is not public figure but nonetheless holds a position of influence and is involved in a public debate or general concern, and the online information concerning him/her is truthful and newsworthy, the removal upon a simple notice may also conflict with the freedom of information, a right of the public. Concerning the take-down standard, there is no quantitative standard to judge an expeditious removal upon notification. However, it would not be impossible to set up this kind of standard. The level of being expeditious in a privacy or defamation case should be a little lower than in a copyright case, because the former requires the website operator to carry out a careful rapid investigation of the circumstances surrounding the contents in question, a legal judgment regarding the unlawful character of the information, and an on-the-spot decision whether to risk liability by maintaining the continued publication of the contents. The latter on the other hand leaves room for a shorter decision making process since valid notice from the copyrighter shall consist of copyright proofs and the website operators simply need to consider the truth of these proofs. So the decision to take down the contents in a privacy disclosure or defamation case is based on a subjective test, as opposed to the more objective test governing copyright infringement cases.

5. CONCLUSION

With the worldwide development of participatory networked platforms, such as video content sites, social networking sites, online gaming websites, virtual worlds etc, there will be more and more national and transnational cases concerning the liability of those websites for contents generated by their users. There are still many unclear legal aspects in China and rules

[20] Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937, 118 S. Ct. 2341, 141 L. Ed. 2d 712 (1998).

[21] Moreham, N. 2005, 'The Protection of Privacy in English Common Law: a Doctrinal and Theoretical Analysis', Law Q. Rev, vol. 121, pp. 628-644.

concerning intermediary liability of website operators aren't fully harmonised among China, the EU and the US.

In cyberspace, the most effective way to strike a balance between allowing internet users to express themselves online and preventing them from revealing privacy about others is to regulate the intermediary liability of website operators. The Chinese rules haven't provided a clear immunity provision like section 230 of CDA in the US or the E-Commerce Directive in the EU. The existing rules leave much interpretative space for judges. This vagueness may finally have a negative effect on free speech on the Internet. As Jack Balkin has mentioned, intermediary liability produces a phenomenon called collateral censorship which simultaneously leads to too much censorship and too little innovation, and also could give incentives for wealthy online service providers to develop filtering mechanisms to weed out potentially actionable speech.[22]

The liability exemption of website operators in China is highly dependent on the test of knowledge of infringement and notice and take-down procedure, which still lack clear guidance. The E-Commerce Directive also faces the same problem in relation to the notice and take-down procedure as is faced by the Chinese rules. It is advisable to set a more detailed framework for notice and take down, to define/vary the circle of parties that can use such procedures more closely and to indicate what the effects of such procedures are.[23]

Admittedly, art. 36 of the Tort Liability Law is a significant step for releasing the liability of website operators who are acting as intermediaries in China. We wait with abated breath for the detailed interpretations of the Tort Liability Law from the Supreme People's Court of China so that these issues could be clarified. The limitation of intermediary liability of website operators should be guaranteed, otherwise, the aim of the Chinese government to develop a healthy, liberal and democratic internet will remain a far-fetched dream.

---

[22] Balkin, J. M. 2009, 'The Future of Free Expression in a Digital Age', 36 Pepp L. Rev. 707.

[23] van Eijk N. A. N. M., van Engers T. M.,Wiersma C., Jasser C. A., Abel W 2010, Moving towards Balance: A study into duties of care on the Internet. http://www.ivir.nl/publications/vaneijk/Moving_Towards_Balance.pdf [Accessed Dec 20 2010].