

Copyright and Privacy Protection of Network Live Programs

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Abstract: In the information age with the development of Internet technology, live network programs have been emerging this year as a new form of programs. Unlike traditional works, its real-time and non-interactive characteristics also make it a new challenge to the traditional intellectual property system. Not only that, live network programs also involve the public's personal information and peace of life and other related privacy issues. For these issues, there is no special legislation; as far as the regulation path is concerned, the regulation path of live network programs is also confused to a certain extent. For this reason, the relevant departments must clarify the classification and originality identification standards of live webcast programs, clarify their protection paths, improve the relevant security system, and reduce the chaos in the webcasting industry.

1. Elegant concept and legal analysis

1.1 The definition of network live broadcast program

Webcast programs are based on webcasting behavior, but there is no clear definition of webcasting behavior at present. Webcast has two characteristics: Internet-based and real-time.

In addition, webcasting behavior is a non-interactive behavior. Compared with traditional TV (video) live broadcast, webcasting is often characterized by high interactivity, and some scholars attribute to a kind of communication behavior that can realize two-way communication and interaction. Therefore, webcasting can be summarized as a non-interactive one-way or two-way activity, with the theme of sports events, live games, life scenes, etc., and published them on the Internet in real time.

Webcast programs are the total based on webcasting behavior. Some scholars believe that live webcast programs are "continuous pictures with or without sound" after being processed on the basis of the live webcast. It is no problem to regard traditional webcasts as the composition of a series of continuous pictures, but for some webcasts, such as voice webcasts, the scope of this definition needs to be expanded. At the same time, the production of live webcast programs includes, but is not limited to, the explanation of the host (anchor), subtitles, playback and close-up of pictures, etc. Some scholars also focus on the theme of webcasting programs. Because most webcasting programs such as sports events and online games are cultural and sports activities, they are defined as the combination of active pictures and sounds that reflect the cultural and sports activities on the spot. Sports activities generally refer to all recreational and sports activities. From the content point of view, sports activities are subordinate to the content of live webcasts. According to the case of "Typical Cases of Procuratorial Hearing Issued by the Supreme People's Procuratorate (the second batch)" in 2021, Shenzhen, Guangdong Province is the opinion of the Baoan District Procuratorate. The hearing was broadcast live and interacted in real time through the live webcast room. Therefore, it is not appropriate to limit the content of live webcasts only to cultural and sports activities.

To sum up, webcasting program is based on non-interactive webcasting behavior. A series of pictures or sounds of live events are shot and processed within a predetermined time by the live publisher, and then released to the network in real time through Internet technology, and the combination of sound and continuous pictures. Whether it is a one-way or two-way live broadcast, as long as it is recorded and processed in real time based on Internet technology, it should be regarded as a network live broadcast program.

1.2 Legal analysis

1.2.1 Copyright Protection of Network Live Programs

Copyright protection is based on works. According to the first paragraph of Article 3 of the Copyright Law, originality is a crucial work component. Some live webcasts are only used as marketing tools, or some live publishers only interact with the audience for life scenes and current events. These live webcasts are not original, do not belong to intellectual achievements, and constitute works. As for some live broadcasts based on the public perspective, most of them, such as sports events and live games, are original and reproducible intellectual achievements. For live webcasts that meet the requirements, the attributes of their works should be recognized, and relevant legal protection should be carried out.

In judicial practice, non-interactive network communication behaviors, including live webcasts, are adjusted through the right of information network communication. Take the infringement case of the online live broadcast of the "Holy Fire Yao Everest" program in 2008 as an example. The plaintiff CCTV International Company made a high-definition real-time live broadcast on the program with the authorization of CCTV, and the defendant, Century Dragon Company made a real-time broadcast on its website through the information network. The live broadcast program was classified into the adjustment range of information network communication right when the court ruled. Although the objects protected by the right of information network communication are similar to those of network live broadcast programs, the right of information network communication refers to the right to provide works to the public by wired or wireless way, so that the public can obtain works at the time and place of their choice. The right of information dissemination on the Internet protects works with interactive features, but obviously, live webcasts do not have this requirement. Theoretically, more scholars favor bringing webcasts into the adjustment range of broadcasting rights. "Open communication" generally refers to the copyright owner's communication through radio stations and TV stations. Although the right to broadcast is to disseminate or relay works by wired or wireless means publicly, it is also convincing to expand the explanation to bring the Internet form of live webcasts into the wireless range. For live webcasts whose attributes cannot be defined, it is necessary to supplement the existing legal system. For webcasts that have been included in the scope of copyright protection, the protection should be strengthened. As a double-edged sword, the Internet not only promotes the development of the webcasting industry, but also makes a large number of webcasting programs broadcast without permission. Not only that, a large number of live broadcast rooms will also play some audio works without the unity of the obligee, which infringes the copyright of the obligee. Therefore, while protecting the copyright of live webcasts, we should also strengthen supervision to prevent the publishers of live webcasts from infringing the rights of others.

1.2.2 Privacy protection involved in network live broadcast program

In the Internet age, the influence of live webcasts on the peace of public life is increasingly apparent. As an important legal interest of citizens, the right to privacy is often neglected in daily life. Privacy in civil law refers to "the peaceful life of natural persons and private space, private activities and private information that others don't want to know." The most common privacy problem in live webcasts is the invasion of private space and information, such as some anchor conferences entering private houses for recording without permission. The privacy rights of individuals should also be protected for some live webcasts recorded in public places. Some live broadcasts of online celebrities broadcast by anchors in public places are likely to capture the private activities and private information of "unintentional viewers" intentionally or unintentionally. As special privacy, the peace of life of natural people needs to be protected through the perfection and supplement of legal norms.

Consumer Protection Law protects consumers' personal information, and the collected personal information of consumers needs to be kept strictly confidential. However, consumers are often influenced by various marketing methods of operators to reduce their vigilance in the live reality show with marketing goods. Operators collect, process, use and even illegally sell consumers' personal information through Internet technology, affecting consumers' peace of life, and some private information may be leaked.

It is also controversial whether the personal information involved in the live webcast can be protected as private information. In legislation, the two concepts of personal information and privacy right are not completely distinguished. In the Civil Code, personal information and privacy rights also appear as the same chapter, with many overlapping provisions. As early as 2005, some scholars suggested that "private information" and "personal data" should be distinguished. Cross-use of the two will confuse the concepts and lead to big loopholes. In judicial practice, it is common to bring personal information protection and privacy litigation simultaneously; People's courts will also consider whether personal information is private information in advance when making judgments. Therefore, it is necessary to distinguish between "personal data" and "private information."

2. The Dilemma of Live Network Programs

2.1 Lack of consistency in accreditation standards

On the one hand, neither the Copyright Law of the People's Republic of China (hereinafter referred to as "Copyright Law") nor the Anti-Unfair Competition Law of the People's Republic of China (hereinafter referred to as "Anti-Unfair Competition Law") has made a clear definition of webcasting programs, and there are many different perspectives on the classification of webcasting programs. However, because the definition and classification criteria are not uniform, this indirectly leads to no clear answer in legislation as to whether or not live webcasts can be regarded as works or what kind of live webcasts can be included in the scope of copyright protection, which individual cases can only explain. On the other hand, there is also a lack of consistent standards for determining the degree of originality of works. Even if some live webcasts meet the requirements of originality, there is no accurate judgment on the nature of the works of the live webcasts.

Professor Wang Guozhu classified the webcasting cases, roughly dividing the webcasting programs into variety shows, sports events and electronic game competitions. Specifically, for variety shows, in the case of Youku Network Technology (Beijing) Co., Ltd. v. LeTV Information Technology (Beijing) Co., Ltd., the court held that the works involved (the webcasting variety show "Happy Comedy 2") belonged to "works created by similar filmmaking methods". However, in the well-known former variety show Happy Camp, the People's Court of Pudong New Area, Shanghai considered the variety show as "a video product that embodies certain intellectual creation". Although the variety shows Happy Camp was not conducted in the form of real-time webcast, it did not affect the nature of its works. Compared with video products, movies and movie-like works tend to have more originality. As an important form of live webcasts, Variety shows can often be protected as works, but its nature is not clear.

The same is true for live webcasts of sports events: after CCTV's 2008 "Deba Women's Football Match", a live webcast of sports events, was broadcast in real time by the defendant Century Dragon Information Network Co., Ltd., the court decided that the live webcasts belonged to the "video products" in the works; Tiantu Company broadcasted the Olympic Games involved without permission, and the court held that the Olympic Games could be protected as a movie-like work when judging. Because there is no detailed explanation on the criterion of "originality" in legislation, there are different judicial determinations on webcasts of the same nature.

In judicial practice, most people think that video game competition programs do not constitute works. For different kinds or even the same kind of webcasts, the judgment of whether they are works or not and the nature of works are different in judicial practice. This problem is mainly due to the fact that the identification of "originality" standards in legislation is not uniform, and the definition and classification of live webcasts are still unclear.

2.2 Regulatory paths are mixed

The protection of live network programs is mainly carried out in two ways: copyright protection and anti-unfair competition protection, while there are two protection paths of narrow copyright and neighboring rights in copyright protection. In most cases of live network programs, copyright protection is the main way, supplemented by anti-unfair competition. However, the protection mode

formed by this way is lack of systematic elucidation on preventive protection at first. Secondly, the two major protection paths also have their own limitations.

The webcast programs protected by narrow copyright are mainly aimed at some original webcast programs (works). At the same time, some cases also regard the fixed elements, whether the work is filmed on a certain medium, as the standard to distinguish between narrow copyright and neighboring rights. For example, in the case of copyright infringement and unfair competition disputes over "Chinese Super League tournament programs", the retrial court determined from a fixed point of view that the continuous pictures carried by the public signals of sports events constitute a kind of film works. The live program of the sports event is protected in two ways: narrow copyright and anti-unfair competition, and the narrow copyright and neighboring rights are distinguished by purpose interpretation and textual interpretation. The case is also known as the first case of a copyright dispute over live webcasts of domestic sports programs. Through the narrow sense of copyright protection, we can not only play preventive protection, but also take ex-post regulation. In a broad sense, copyright also includes neighboring rights. In the category of audio-visual works, it includes not only film works and film-like works, but also video works. However, the protection path of neighboring rights represented by video products is relatively narrow, and the level of legal protection is also low. At present, there is no perfect video products system in our country.

Based on the principle of fair competition, the Anti-unfair Competition Law protects all market subjects freely and equally to reduce unfair competition. The anti-unfair competition law can also be used as a separate way to protect live online programs, which cover a wide range of objects. In the case of Fish interest Company mentioned above, although the live video and audio of the game are not included in the scope of copyright protection as works, they can still be carried out in the way of anti-unfair competition. In most cases, the anti-unfair competition law can be used as supplementary protection of intellectual property rights: in some live network programs, especially those that cannot be classified as works, when this kind of live network programs cannot be protected by copyright, they are often protected by the anti-unfair competition law when they are unable to pass copyright protection, such as whether they violate good faith and business ethics. Because the protection of anti-unfair competition is a kind of ex-post relief, and it is impossible to prevent the infringement of live network programs, this path also has great limitations.

2.3 The guarantee system is not perfect

First, there is a lack of relevant legislation for live webcast. Live network programs are mainly regulated by two ways: copyright protection and anti-unfair competition, each of which has its limitations and is easy to be confused. Not only that, webcast programs and webcast platforms also have the possibility of direct or indirect infringement, and there is a lack of systematic consideration about the situation that may infringe upon public privacy. In the previous article, "Deba Women's Football match" and "copyright ownership and infringement dispute case of Dalian Tiantu Cable TV Network Co., Ltd." as an example, due to the lack of relevant professional legislation in the field of the live broadcast of sports events, as a result, there are different results for two cases of the same nature. However, only through the partial adjustment of the copyright Law or the Anti-unfair Competition Law, it may not be able to form an effective protection system.

Secondly, the system of punitive damages needs to be improved urgently, and the amount of legal damages may not be able to make up for the losses completely. There are mainly three kinds of compensatory compensation in the copyright Law: damages, legal compensation or infringement profits of the infringer and illegal gains. After the promulgation of the Civil Code, the system of punitive damages is also clear from the perspective of legislation. However, in the real judicial field, the application of punitive damages is rare and often needs to be used when the victim's loss is large. In the field of the live webcast, the most common infringement is the illegal broadcasting of programs (especially for live webcasts of sports events). Once the program is pirated, the foreseeable loss will be huge, if only 5000000 yuan as the legal amount of compensation may not fully make up for the loss of the right holder. Therefore, it is necessary to appropriately increase the amount of legal damages and strictly adopt the system of punitive damages in the field of webcast.

Finally, the regulation path is also confused, and the systematic judicial relief is urgently needed. As mentioned above, as far as the subject is concerned, the disunity of the identification standard of live network programs leads to different ways of judicial relief, even for live network programs of the same nature. As far as the right itself is concerned, there is also a great dispute over what kind of rights should be included in the protection of live network programs within the scope of copyright. Live network programs do not strictly belong to the adjustment scope of broadcasting rights. However, the constitutive elements of the right of information network dissemination are not in line with it. As far as the way of protection is concerned, there is no clear regulation on whether we can get ex-post relief through narrow copyright or neighboring-rights. Therefore, whether in preventive protection and judicial relief afterward, China's relevant intellectual property system is still not perfect.

3. The perfect path in the field of live webcast

3.1 Clarify the identification standard

First of all, based on the real-time and non-interactive particularity of live network programs, the definition and classification of network live programs need to be specifically expressed, and live network programs with different attributes should be protected in different ways. The technical media and behavior basis of live network programs also need to be clear. In the network era, the video and audio generated based on the live broadcast behavior of the network show a diversified trend, and its scientific classification can effectively avoid the impact of subjectivity. At the same time, when considering the classification criteria, we need to consider more categories of webcast as an emerging industry and include it. For example, whether live broadcast of voice or AI can be used as a live broadcast of webcast or which category it belongs to.

Secondly, the identification standard of originality of works needs to be regulated. The Supreme people's Court has pointed out in a case that a consistent standard cannot measure the standard of originality of a work. In spite of this, for works in the same field and of the same nature, the identification of originality should be unified whether to take the original "existence" as the defining standard or the degree of originality as the basis. With reference to the judgment of the originality standard in the United States, it can be refined to the field of live webcast programs, and a minimum standard can be set for the identification standard of originality, that is, the corresponding categories of webcast programs can be identified as works when they reach a minimum standard. The original purpose of copyright legislation is to protect the author's original expression, so we should consider whether the webcast needs a high degree of originality as a work.

Finally, the identification standard should be combined with the corresponding regulation path. Live webcast programs can be classified according to their technical means and content, and there are also different methods to determine the degree of originality. As far as the current stage is concerned, the regulation path of webcast is limited, so the current regulation path should be taken into account when formulating the identification standard. As far as e-sports games are concerned, when clarifying the identification standards of this large category of live network programs, we can combine the definition of narrow copyright and neighboring rights, of course, in the regulation path mentioned later, we should also take the split and originality identification standards of live network programs as considerations, and the two complement each other.

3.2 Clear regulation path

First of all, clarify the concept of audio-visual works and distinguish the protection objects and standards of narrow copyright and adjacent rights. The new law puts film works (including film-like works) and video works into the category of audio-visual works, but at the same time, the two protection paths are easy to be confused. Most live network programs can be brought into the adjustment scope of audio-visual works and video products. Compared with the protection of video products, audio-visual work is greater. Therefore, in the case of defining the category of webcast, it is necessary to investigate its nature to determine its applicable protection path.

Secondly, improve the video recording system. Some scholars believe that it is a general trend that

audio-visual works replace video products. Video products and works do not completely overlap, if video products are fully included in the scope of audio-visual works, it means that video products also need to meet the elements of originality. But in fact, according to the definition of "copyright Law implementation regulations", whether there is originality or not is not the constitutive element of video products. In the field of webcast, a considerable number of webcast programs do not aim at conveying personal feelings and expressing original ideas, but are protected by a video recording system. It can not only distinguish it from the webcast with a high degree of originality, but also protect the rights of the relevant subjects to a certain extent with the protection path of neighboring rights.

Finally, as a supplement to intellectual property law, anti-unfair competition law should be able to protect the rights and interests of the right holders at the same time as the path of copyright. In most cases involving live webcast, if the copyright path compensates the loss of the right holder, it is often no longer considered in the way of anti-unfair competition. However, the purpose of the Anti-unfair Competition Law is to combat unfair competition, which does not conflict with the regulation path of copyright. Therefore, on the basis of clarifying three different regulation paths, the Anti-unfair Competition Law should be considered as a parallel protection path.

3.3 Improve judicial relief

On the one hand, improve the relevant legislation in live network programs. At present, there are no special laws and regulations for live network programs in the field of intellectual property rights. Given all kinds of chaos of live network programs, we should first standardize them by legislation. In the field of copyright, the identification standards and protection paths of live webcast programs need to be improved, and some live webcast programs that cannot be protected as works also need to be protected. Moreover, the classification of live network programs in terms of content also needs to be combined with other elements, such as UGC (user produced content), PGC (professional production content) and OGC (professional production content), which are based on the subject as the classification standard. As long as the subject and object and corresponding technical requirements are taken into account at the same time, the identification standard of live network programs can be clearer and more specific. In the field of privacy, the problem of privacy caused by the rise of live network programs Brooks no delay. Only from the "Consumer Rights and Interests Protection Law" and other relevant laws and regulations cannot really effectively prevent the intrusion into the peace of public life, the disclosure of private information and other problems, so the protection of live network programs and norms need to build a complete legal system, the platform of live network programs, authors and the public can be standardized and reasonable protection.

On the other hand, punitive damages measures should be taken to increase the number of legal damages in view of the particularity of live webcast programs. In the field of copyright, China adopts the principle of comprehensive compensation, but in real judicial practice, many right holders cannot get reasonable compensation due to various subjective and objective reasons. According to the form of compensation specified in Article 54 of the Copyright Law, punitive damages can usually punish the infringer at 1-5 times the amount of the damages. For live network programs to take more stringent punitive damages measures can better safeguard the interests of the right holder while increasing the tort cost of the infringer, but also can play a preventive role. And even if some live network programs cannot apply the punitive damages system due to some subjective and objective reasons, they can appropriately increase the amount of legal compensation according to their actual losses or expected losses. In economic life, once the phenomenon of illegal broadcast of live network programs occurs, the economic loss caused by it is often higher than the current maximum amount of 5000000 yuan.

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