Online Intermediary Liability for
Hate Speech under Chinese Laws

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A. Introduction

According to the Statistical Report on Internet Development in China published by the China Internet Network Information Center, the population of Internet users in China in 2015 increased and China now has the largest number of online users. There are 6.68 hundred million Internet users, which constitutes one fifth of total online users in the world. By June 2015, China had 3.57 million websites, 1.63 million of which are websites registered under the CN domain. There are 22.31 million domain names, 12.25 million of which are CN domains. Based on statistics over the last five years, the Chinese Internet industry has developed steadily and consistently.

Generally speaking, hate speech is speech that attacks a person or group on the basis of attributes such as gender, ethnic origin, religion, race, disability, or sexual orientation. In China, there is no widely accepted definition of hate speech among legislative agencies, judiciaries, or scholars. Unlike some other countries, China has no single statute that regulates hate speech. Instead, Chinese regulations on hate speech are sparsely located in different parts of various rules and regulations.

This paper will be divided into three main parts. The first part will study the Chinese legal framework. In China, there are four layers of law regulating online hate speech; as such, the civil law and the criminal law offer specific regulations on hate speech in light of the fundamental principles provided by the Constitution. In addition, there are several administrative regulations and judicial explanations that specify the content and responsibilities relating to online hate speech. Meanwhile, the Chinese Internet industry actively participates in the battle against online hate speech in the form of self-regulation.

The second part focuses on the regulations that combat online hate speech in China. Beginning with definition of Internet service provider (“ISP”), there is no unified legal definition of ISPs in current Chinese laws or regulations. This part will then discuss online hate speech. It will explore the scope of online hate speech in light of several special Internet administrative regulations. Then, this part will focus on the tort liability of ISPs from two perspectives: direct infringement and indirect infringement.

The third part concerns cases. Even though there is no precedent in China, there are five completed cases that discuss various topics, including the obligation of disclosure, the “Notice-and-Takedown” regime and the duty of care of regarding hate speech on their websites. Each of these topics are of great importance and influence, and can be a point of reference for dealing with future, similar cases.
B. Legal Framework

Though there is no statue on hate speech in China, there are many laws that could serve as a legal basis for combating hate speech.

I. Constitution

Under Article 4 of the Constitution of China, discrimination against and oppression of any nationality is prohibited; any act which undermines the unity of the nationalities or instigates division is prohibited.\(^1\) Under Article 36, citizens enjoy freedom of religious belief, and no state organ, public organization or individual may discriminate against citizens who believe in, or against, any religion.\(^2\) Under Article 38, the personal dignity of citizens is inviolable.\(^3\) Insult, libel, false accusation or false incrimination directed at citizens by any means is prohibited.\(^4\) According to Article 33 of the Constitution, all citizens of China are equal before the law. In general, hate speech that discriminates on the basis of ethnicity, religion or gender is prohibited by the Constitution. However, the Constitution is not directly enforceable in specific cases. Instead, certain constitutional principles shed light on the specific regulations in civil and criminal law that could be used directly in a case.\(^5\)

II. Civil Law

In the wake of the commercialization of the media and the loose political environment, citizens enjoy the freedom of speech to discuss religion, gender equality, sexual orientation, and other issues through different kinds of media. Inevitably, some forms of speech are discriminatory, and some may even constitute hate speech.

1. Citizens’ Gender Equality or Sexual Orientation

Many rural people in China hold the attitude that sons are better than daughters. Additionally, there is some inequality when it comes to sexual minorities. The victims are entitled to compensation for his or her reputational losses under Article 120 of

\(^1\) XIANFA art. 4 (1982) (China).
\(^2\) Id. art. 36.
\(^3\) Id. art. 38.
\(^4\) Id.
\(^5\) See Xia Yong, Several Theoretical Issues Confronting Constitutional Reform in China, 2003 Soc. Sci. in China.
China’s Civil Law. Under Article 101 of the Civil Law, citizens shall enjoy the right of reputation; the personality of citizens shall be protected by law, and the use of insults, libelous statements or other means to damage the reputation of citizens is prohibited.

2. Citizens’ Ethnicity or Religion

Regional discrimination, characterized as obvious prejudice against people based on their place of birth, has long been part of society in China. Because of cultural and economic differences and inequality, people from the same ethnic group would have prejudice towards each other. Regional discrimination is usually expressed in verbal attacks, or mostly expressed in regional jokes or regional speech used to attack others on the Internet. Regional discrimination speech is even observed in film, television programs, and plays. In China, due to the large difference between urban and rural development, and unbalanced economic development between the eastern coastal region and the mid-western region, city dwellers’ regional discrimination towards countryman, as well as discriminatory speech towards some specific provinces in China (such as Henan Province, Xinjiang Province) is frequently seen on the Internet. Each time there is a public event, regional discrimination often manifests in intensely aggressive and insulting speech on the Internet.

III. Criminal Law

1. Human Dignity

6 Minfa Tongze (民法通则) [General Principles of the Civil Laws of China] (promulgated by the Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 01, 1986, revised Aug. 27, 2009), art. 120, 2016 FAGUI HUIBAN 2-3 [hereinafter Civil Law]. (“If a citizen’s right of personal name, portrait, reputation or honour is infringed upon, he shall the right to demand that the infringement be stopped, his reputation rehabilitated, the ill effects eliminated and an apology made; he may also demand compensation for losses.”)

7 Id. art. 101.


9 Id.
Under Article 246 of the Criminal Law of China,\(^\text{10}\) whoever, by violence and other methods, publicly humiliates another person, shall be sentenced to a fixed-term imprisonment of not more than three years if the circumstances are serious. According to the Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate,\(^\text{11}\) the same defamatory information is actually clicked or browsed more than 5,000 times, or is forwarded more than 500 times. Viewing this information can cause derangement, self-mutilation, suicide or other serious consequence to the victim or his or her close relatives. These circumstances of defaming another person through the Internet are considered a “serious circumstance.”\(^\text{12}\)

Meanwhile, Article 246 of the Criminal Law describes “slander.” Defamation of another person through an information network shall be deemed as having “seriously undermined social order or the state's interests”\(^\text{13}\) if it leads to any: (1) mass incidents, (2) disorder of a public place, (3) ethnic or religious conflicts, or (4) the defamation of persons which then causes adverse social consequences. The punishment for this crime is that he or she shall be sentenced to a fixed-term


\(^{11}\) Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan guanyu Banli Liyong Wangluo Xinxi Shishi Feibang Deng Xingshi Anjian Shiyong FalüRuogan Wenti de Jieshi (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事 案件适用法律若干问题的解释) [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases on the Use of Information Networks to Commit Defamation and Other Similar Criminal Offenses] (promulgated by the Supreme People’s Court of China, Sept. 06, 2013, effective Sept. 10, 2103), CLI.3.209618 (Beida Fabao) [hereinafter The Application of Law in the Handling of Criminal Cases on the Use of Information Networks].

\(^{12}\) Any of the following circumstances of defamation through an information network shall be deemed a “serious consequence” if: (1) the same defamatory information is actually clicked or browsed more than 5,000 times or is forwarded more than 500 times; (2) it causes derangement, self-mutilation, suicide or any other serious consequence to the victim or his or her close relative; (3) it defames another person after previously being administratively sanctioned for defamation within a period of two years; or (4) any other serious circumstances occurs. Id.; see also Criminal Law, supra note 10, art. 246, ¶ 1.

\(^{13}\) Criminal Law, supra note 10, art. 3.
imprisonment of not more than three years, and the case shall belong to the investigating activities of the public security organs.14

2. Ethnic Hatred

In China, there are some illegal publications and television broadcasts that advocate for ethnic hatred; these programs break the relationships of equality, unity and mutual assistance among all of China's nationalities. If someone commits this crime and the circumstances are lenient, he or she shall be punished under Article 47 of the Public Security Administration Punishments Law of China.15

If the circumstances are serious, the perpetrator shall be punished under the Criminal Law. Under Article 249, those provoking ethnic hatred or discrimination, if the case is serious, are to be sentenced to no more than three years in prison, put under criminal detention or surveillance, or deprived of their political rights.16 If the case is especially serious, the perpetration is to be sentenced to three to ten years in prison. Under Article 250 of the Criminal Law, individuals who publish materials that discriminate or insult minority nationalities may be sentenced to a fixed-term imprisonment of not more than three years.17 In this article, the content of “materials” mainly relates to the social customs and habits of minority nationalities, including diets, costumes, marriages, funerals, festivals, etiquette and so on.

Even though both Article 249 and Article 250 deal with hate speech directed towards certain ethnicities, there are some distinctions between them. Firstly, Article 249 mainly deals with speech that harms the equality and unity among 56 nationalities,

14 Id. art. 246 (“Those openly insulting others using force or other methods or those fabricating stories to slander others, if the case is serious, are to be sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights. Those committing crimes mentioned above are to be investigated only if they are sued, with the exception of cases that seriously undermine social order or the state's interests”).

15 Anyone who stir up hatred or discrimination among ethnic groups, or publishes any content discriminating or insulting any minority ethnic group shall be detained for not less than 10 days but not more than 15 days, and may be concurrently fined 1,000 yuan. Zhian Guanli Chufa Fa (治安管理处罚法) [Public Security Administration Punishments Law of China] (promulgated by the Standing Comm. of the Nat’l People’s Cong., Aug. 28, 2005, effective Mar. 01, 2006), art. 47, 2016 FAGUI HUIBAN 3-92 [hereinafter Public Security Administration Punishments Law].

16 Criminal Law, supra note 10, art. 249.

17 Id. art. 250.
while Article 250 mainly address speech that damages the right to preserve customs and habits.

Secondly, these crimes focus on different objects. Article 249 addresses 56 nationalities, including the Han nationality. However, the crime of publishing materials that insults minority nationalities only addresses 55 minority nationalities.

Finally, the methods by which offenders commit the crime of provoking ethnic hatred are broader than the crime of publishing materials that insult minority nationalities. The former embodies language, words or other methods, but the latter includes books, magazines, videos, recordings and so on.

3. Religion

Hate speech that attacks religion is usually identified as extremism in China. As for extremism, Chinese laws hold the view that extremism incites hatred, discrimination and violence through the distortion of religious doctrine or other methods. Moreover, extremism is a hotbed of terrorism, and the Chinese government takes all measures to prohibit and tackle extremism and terrorism, including prohibition of using mobile devices, the Internet, videos, publications and so on to propagate extremism and terrorism.

4. National Security

China is a unified multi-ethnic country with 55 ethnic minorities. There are many religions in China, such as Christianity, Islam and Taoism. Safeguarding national unity is the most important part of Chinese history and culture. There are some kinds of speech that strongly advocates for violence and terrorism; this threatens the territorial integrity and the national security. Therefore, any speech that is likely to incite ethnic conflicts or hatred endangers national unity and safety. Under Article 103 and 105 of the Criminal Law, whoever incites others to split the State; undermine the unity of the country; organize, plot or carry out the scheme of subverting the State

18 Xinjiang Weiwuer Zizhiqu Shishi Zhonghua Renmin Gongheguo Fan Kongbu Zhuyi Fa(新疆维吾尔自治区实施《中华人民共和国反恐怖主义法》办法) [Implementation Measures for the Counterterrorism Law in Xinjiang Uygur Autonomous Region] (promulgated by the Standing Comm. People’s Cong. Of Xinjiang Uygur Autonomous Region, July 29, 2016, effective Aug. 01, 2016), art. 7, 2016 FAGUI HUIBAN.
19 Id. art. 6.6.
power; or overthrow the socialist system, commits the crime of endangering national security.\textsuperscript{20}

IV. Administrative Law

Different media sectors have the same requirement that certain contents cannot be published.\textsuperscript{21} All sectors of the media should follow Article 25 of the Regulation on the Administration of Publication. This Article defines ten categories of prohibited contents, including contents that endanger the unity of the nation and territorial integrity, or contents that incite national hatred or discrimination.\textsuperscript{22} If an individual violates this article, he or she should shoulder an administrative penalty. The perpetrator shall be ordered by the Administration Department of Publication to cease the business within a time limit for rectification, and any publications and illegal

\textsuperscript{20} Criminal Law, \textit{supra} note 10, arts. 103, 105.
\textsuperscript{22} The following contents are prohibited from being included in any publication that:(1) defies the basic principles determined in the Constitution; (2) endanger the unity of the nation, sovereignty or territorial integrity; (3) divulge secrets of the State, endanger national security or damage the honor or benefits of the State; (4) incite the national hatred or discrimination, undermine the solidarity of the nations, or infringe upon national customs and habits; (5) propagate evil cults or superstition; (6) disturb the public order or destroy the public stability; (7) propagate obscenity, gambling, violence or instigate crimes; (8) insult or slander others, or infringe upon the lawful rights and interests of others; (9) endanger public ethics or the fine folk cultural traditions; (10) other contents prohibited by laws, administrative regulations or provisions of the State. Chuban Guanli Tiaoli (出版管理条例) [Regulation on the Administration of Publication] (promulgated by the State Council of China, Dec. 25, 2001, effective Feb. 01, 2002, revised Feb. 06, 2016), art. 25, CLI.2.270929 (Beida Fabao) [hereinafter Regulation on the Administration of Publication].
proceeds shall be confiscated. If the case is serious, the perpetrator’s license shall be revoked by the original organ issuing the license.  

C. The Definition of ISP and the Scope of Online Hate Speech

The development of the Internet offers unprecedented platforms, such as BBS and blogs, for citizens to express their opinions and thoughts. However, online hate speech is hard to control because dissemination through the Internet is fast, convenient, and reaches a wide range of consumers. Likewise, the anonymous attributes of the Internet make it harder to track the sources of information.

In coping with the increasing hate speech that occurs online, China has enacted a law specifying the following issues. First, the law defines the scope of online hate speech. Second, it specifies the responsibilities of the ISP.

I. The Definition of ISP in China

Strictly speaking, the network platform is not a concept in Chinese law, but rather is known as the ISP, as stipulated in Chinese law. It is a pity that there is no clear definition of ISP in Chinese laws, regulations or judicial interpretations. Similar expressions with the same meaning are seen in different laws, regulations and judicial interpretations. This makes the use of the conceptual term extremely confusing. Although the concept of the ISP is used in Article 36 of Tort Law, there is no specific interpretation or classification therein. Since there is no legal definition, this paper will refer to all Internet platforms as ISPs.

II. The Scope of Online Hate Speech

In 2000, the State Council promulgated the Administration of Internet Information Services, which categorized online hate speech into five groups, including speech that: (1) incites ethnic hatred or racial discrimination or damages inter-ethnic unity; (2) propagates the destruction of religious freedom; (3) insults or slanders a third party or infringes upon the lawful rights and interests of a third party; (4) propagates

\[23\] Id. art. 62.
\[24\] Qinquan Zeren Fa (侵权责任法) [Tort Law of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective Jul. 01, 2010), art.36, CLI.1.125300 (Beida Fabao) [hereinafter Tort Law].
violence, murder, or fear, or incites the commission of crimes, and (5) compromises State security, subverts State power or damages national unity.25

In the wake of the fight against online hate speech, China has enacted several regulations that are consistent with the Administration of Internet Information Services Procedures. These regulations include the Decision of the Standing Committee of the National People’s Congress on Preserving Computer Network Security,26 Management Provisions on Electronic Bulletin Services on the Internet,27 Interim Provisions of the Information Office of the State Council and the Ministry of Information Industry on the Administration of Internet Websites' Engaging in News Publication Services,28 Interim Provisions on the Administration of Internet Culture,29 Measures for the Archival Administration of Non-operational Internet

25 Hulianwang Xinxi Fuwu Guanli Banfa (互联网信息服务管理办法) [Regulation on Internet Information Service of China] (promulgated by the State Council of China, Sept. 25, 2000, effective Sept. 25, 2000, revised Jan. 08, 2011), art. 15, CLI.2.174868 (Beida Fabao) [hereinafter Regulation on Internet Information Service].


29 Hulianwang Wenhua Guanli Zanxing Guiding (互联网文化管理暂行规定) [Interim Provisions on the Administration of Internet Culture] (promulgated by the Ministry of Culture of China, Feb. 17, 2011, effective Apr. 01, 2011), art. 16, CLI.4.147100 (Beida Fabao).
Information Services,\textsuperscript{30} Administrative Provisions on Internet Audio-Visual Program Service,\textsuperscript{31} and Telecommunication Regulation of China.\textsuperscript{32}

In 2016, Article 9 of the newly promulgated Cybersecurity Law was drafted with similar provisions as the above-noted regulations,\textsuperscript{33} stating that any individual or organization shall observe the Constitution and other laws, and shall not use the Internet to threaten national security, propagate terrorism and extremism, advocate for ethnic hatred or racial discrimination, or insult or slander third parties’ or others’ lawful rights.

However, the five categories of prohibited speech specified in the Administration of Internet Information Services Procedures do not all belong to online hate speech. Intent and consequences also need to be taken into consideration. It is without doubt that terrorism speech,\textsuperscript{34} and extremist speech\textsuperscript{35} are considered hate speech in China. In 2014, the enactment of the Anti-Terrorism Law further helped define the scope of

\textsuperscript{30} Fei Jingyingxing Hulianwang Xinxi Fuwu Beian Guanli Banfa (非经营性互联网信息服务备案管理办法) [Measures for the Archival Administration of Non-Operational Internet Information Services] (promulgated by the Ministration of Information Industry of the People’s Repbulic of China, Feb. 08, 2005, effective Mar. 20, 2005), art. 16, CLI.4.56963 (Beida Fabao).


\textsuperscript{32} Zhonghua Renmin Gongheguo Dianxin Tiaoli (电信条例) [Telecommunication Regulation of China] (promulgated by the State Council of China, Sept. 25, 2000, effective Sept. 25, 2000, revised Feb. 06, 2016), art. 56, CLI.2.267182 (Beida Fabao).

\textsuperscript{33} Wangluo Anquan Fa (网络安全法) [Cybersecurity Law of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 07, 2016, effective Jun. 01, 2017), art.9, CLI.1.283838 (Beida Fabao) [hereinafter Cybersecurity Law].

\textsuperscript{34} The state shall combat all forms of terrorism, legally ban terrorist organizations, and in accordance with the law, investigate the legal liability of anyone who organizes, plans, prepares for, or conducts any terrorist activity, advocates terrorism, instigates any terrorist activity, organizes, leads or participates in any terrorist organization, or provides assistance to any terrorist activity. Fan Kongbu Zhuyi Fa (反恐怖主义法) [Counterterrorism Law of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 27, 2015, effective Jan. 01, 2016), art. 2, 2016 FAGUI HUIBAN 3-116 [hereinafter Counterterrorism Law].

\textsuperscript{35} The state shall combat all forms of extremism, such as the incitement to hatred and discrimination and agitation for violence by distorting religious doctrine or other methods, so as to eliminate the ideological basis of terrorism. \textit{Id.} art 4.
online hate speech. Under this law, whoever uses speech to incite ethnic hatred shall be considered to be engaged in terrorism.\textsuperscript{36} Whoever destroys religious freedom online by using the following methods should be considered to be conducting terrorism and disseminating online hate speech, including: (1) insulting and discriminating against other ethnicities and religions, (2) threatening people to leave their dwellings who are from other ethnic groups or believe in other religions, or (3) distorting or defaming the State’s religious laws and regulations.\textsuperscript{37}

\section*{D. The Tort Liability of ISP}

In line with Chinese laws, the ISPs shoulder the burden of criminal, civil and administrative liability. Under Article 20 of Regulation on Internet Information Service, those who violate this regulation by producing, copying, publishing or distributing information as prohibited in Article 15 shall face criminal charges if the acts constitute crimes.\textsuperscript{38} If the acts do not constitute crimes, the perpetrator shall be sanctioned by the public security or State security authorities in accordance with the Public Security Administration Punishments Law\textsuperscript{39} and the Administrative Measures for the Security Protection of Computer Information Networks Linked to the

\begin{quote}
36 For the purpose of this Law, “terrorism” means any proposition or activity that, by means of violence, sabotage or threat, generates social panic, undermines public security, infringes upon personal and property rights, or menaces state authorities and international organizations, with the aim to realize political, ideological and other purposes. \textit{Id.} art. 3.
37 \textit{Id.} art. 81.
38 ISPs shall not produce, copy, publish or distribute information that: (1) is against the Cardinal Principles set forth in the Constitution; (2) is detrimental to State security, State secrecy, State power or national unification; (3) is detrimental to State honour and interests; (4) instigates ethnic hatred or discrimination and is detrimental to national unity; (5) is detrimental to State religious policies, or propagates heretical or superstitious ideas; (6) disseminates rumours, disrupting social order and stability; (7) disseminates obscenity, pornography, force, brutality and terror, or crime-abetting; (8) humiliates or slanders others, or trespasses against the lawful rights and interests of others; or (9) is other contents forbidden by laws and regulations. Regulation on Internet Information Service, \textit{supra} note 25, art. 15.
39 Public Security Administration Punishments Law, \textit{supra} note 15, arts. 42, 47.
\end{quote}
Internet. Profitable ISPs shall be ordered by the authority issuing the Service License temporarily to suspend their services, or their service licenses may be revoked. Non-profitable ISPs shall be ordered by the record-filing authority to close their websites either temporarily or permanently.

As for the tort liability of ISPs, there are two main sources of law: (1) Article 36 of the Tort Law, and (2) the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Civil Disputes Over Infringements Upon Personal Rights and Interests Through Information Networks.

I. Direct Infringement

A direct tort on the Internet means that network users or ISPs have used the network to commit a tort directly against others’ rights and interests –deliberately or negligently. The fault liability mechanism shall apply. Article 36.1 of the Tort Law stipulates that a network user or ISP who infringes upon the civil rights or interests of another person through the network assumes tort liability. To define ISPs’ direct torts concerning hate speech is easy: check if the ISP has directly made, duplicated, published, or spread any hate speech.

II. Indirect Infringement

An indirect tort on the Internet does not means a person commits the tort directly against others’ rights and interests. Rather, this means that the person provides helpful material when he or she knows or should have known that others are committing or going to commit a direct tort, either by act or omission. The fault liability mechanism also applies to indirect torts. The ISP takes responsibility on the basis that the provider does not fulfill the duty of care; liability is not based on ownership.41

Under Article 36.2 of the Tort Law, where a network user commits a tort through the network services, the victim of the tort shall be entitled to notify the network service


41 Zhu Feng. 信息时代网络服务商(ISP)的间接侵权责任[Indirect Tort Responsibility of Network Service Businessmen in the Information Era] [J]. 河北法学 [Hebei Law Science], 2000. (China)
provider to take such necessary measures as deletion, blocking or disconnection. If, after being notified, the network service provider fails to take the necessary measures in a timely manner, the network service provider shall be jointly and severally liable for any additional harm alongside the tortious network user. Under Article 36.3 of the Tort Law, where a network service provider knows that a network user is infringing upon the civil rights or interests of another person through its network services and fails to take the necessary measures, the network service provider shall be jointly and severally liable for any additional harm alongside the tortious network user.

1. The obligation of disclosure information

According to Articles 36.2 and 36.3 of Tort Law, ISPs could claim liability exemptions by explaining that the hate speech was published by network users. But due to Internet anonymity, it is usually hard for the victims to know the real identity of the infringer. What’s more, under Article 119 of Civil Procedure Law of China, an action to be instituted must meet some conditions, one of which is that there is a clear defendant. Therefore, ISPs shall undertake the information disclosure obligation.

a. Origin of the Obligation

Under Article 14 of Regulation on Internet Information, an ISP who provides news, publications or electronic bulletin boards shall keep records of the information it provides, the publishing date and the Internet address or domain name. ISPs who provide Internet connections shall keep records of the connection time, account number, the Internet address or domain name and the telephone number of their users. Such records shall be kept for 60 days and shall be provided to the relevant authorities for verification when so requested.

b. Contents of Disclosure

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42 Tort Law, supra note 24, art. 36.2.
43 Id. art. 36.3.
45 See also Management Provision on Electronic Bulletin Services on the Internet, supra note 27, art. 15.
Under Article 4 of Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Cases involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks, where the plaintiff files a lawsuit against an ISP, and the ISP makes a defense on the ground that the suspected infringing information is issued by the network user, the People’s Court may, based on the plaintiff’s request and the specific case circumstances, order the ISP to provide the People’s Court with the name, contact information, network address and other information which can then determine the identity of the network user suspected of infringement.

c. Methods of Disclosure Obligation

There are primarily two processes of how ISPs disclose information to the world: the often described private process and the public process. The so-called private process refers to the process where the victim may directly claim from the ISP without resorting to any national authorities or the judicial process. The so-called public process refers to the process where the victim has no right to directly request that the ISP disclose the real identity information of the actor, and so the victim must go through the judicial process and file with the court. The court will then order the ISP to disclose the identity information of the network user, who is the suspected infringer.

In Internet copyright tort cases that apply the private disclosure process, the copyright owner will claim the network registration information of the infringer from the ISP.\textsuperscript{46} In Internet personal right tort cases that apply the public disclosure process, in cases

\textsuperscript{46} Zuigao Renmin Fayuan Guanyu Shenli Sheji Jisuanji Wangluo Zhuzuoquan Jiufen Anjian Shiyong Falv Ruogan Wenti de Jieshi (最高人民法院关于审理涉及计算机网络著作权纠纷案件适用法律若干问题的解释) [Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Law in the Trial of Cases Involving Copyright Disputes Over Computer Networks] (promulgated by the Supreme People’s Court of China, Dec. 19, 2000, effective Nov. 22, 2006, expired Dec. 17, 2012), arts. 5, 7, CLI.3.82171 (Beida Fabao).
where online hate speech infringes on another’s right of reputation, the ISP must provide the network user’s personal information to identify the suspected infringer.47

2. The “Notice-and-Takedown” regime

If ISPs and the publishers who use hate speech online are not in coordination, and who are both merely information passing carriers of hate speech, ISPs shall take responsibility of “Notice-and-Takedown.” Under Article 36.2 of the Tort Law, the victim of the tortious conduct shall be entitled to notify the network service provider to take necessary measures such as deletion, blockage or disconnection.

If online hate speech is regarded as terrorist or extremist speech, the ISP shall cease the transmission immediately, preserve relevant records, delete relevant information, and report to the public security authorities or any other relevant departments.48

47 Zuigao Renmin Fayuan Guanyu Shenli Liyong Xinxi Wangluo Qinhai Renshen Quanyi Minshi Jiufen Anjian Shiyong Falv Ruogan Wenti de Guiding (最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定) [Provision of the Supreme People’s Court on Several Issues Concerning the Application of the Law in the Trial of Cases Involving Disputes Over Infringements Upon Personal Rights and Interests Through Information Networks] (promulgated by the Supreme People’s Court of China, Aug. 21, 2014, effective Oct. 10, 2014), art. 4, CLI.3.235297 (Beida Fabao) [hereinafter Provision of the Supreme People’s Court on Several Issues Concerning the Application of the Law in the Trial of Cases Involving Disputes Over Infringements Upon Personal Rights and Interests Through Information Networks].
Besides, under Article 14 and 15 of the Regulation on the Protection of the Right to Communicate Works to the Public Over Information Networks, if an ISP provides information storage space or provides searching and linking services, and 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, he or she can submit a written notification to the ISP. The ISP, 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 another’s right.

a. Valid Notices

The notice to be sent by the victim must comply with specific contents and form requirements to constitute a valid notice; this is the victim’s mandatory obligation in

48 Telecommunications business operators and Internet service providers shall, in accordance with the provisions of laws and administrative regulations, put into practice network security and information content supervision rules, and technical measures for security protection, so as to avoid the dissemination of information with any terrorist or extremist content. If they discover any information with terrorist or extremist content, they shall cease the transmission immediately, preserve relevant records, delete relevant information, and report to public security authorities or the relevant departments. Network communications, telecommunications, public security, national security and other competent departments shall, according to the division of their powers and duties, order in a timely manner the relevant entities to cease the transmission of and delete the relevant information with any terrorist or extremist content, or close the relevant websites and terminate the provision of the relevant services. Relevant entities shall immediately enforce such orders and preserve the relevant records, and assist in investigation. Competent telecommunications departments shall take technical measures to block the dissemination of information with any terrorist or extremist content available on the international Internet. Counterterrorism Law, supra note 34, art. 16.
order to exercise the right of notice.49 Under Article 5 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Civil Disputes Over Infringements Upon Personal Rights and Interests Through Information Networks, a valid notice sent to a ISP by the infringed party in writing should contain the following contents: (1) the name and contact information of the informant; (2) the network address against which necessary measures shall be taken as required or the relevant information sufficient enough to determine the infringement; and (3) the grounds of the informant for deleting the relevant information.

b. Validity of Defective Notices

When there are slight flaws in the notices the tort victim provides, such as incorrect network addresses, inaccurate tort victim identity information, or a lack of supporting ownership evidence, the notice will be defined as an unqualified notice. The ISP could claim a liability exemption for not deleting the information.

c. What is Taking Measures“In Time”

After being notified, if the network service provider fails to take the necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user. Under Article 6 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of

49 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. Xinxi Wangluo Chuanboquan Baohu Tiaoli(信息网络传播权保护条例) [Regulation on the Protection of the Right to Communicate Works to the Public Over Information Networks] (promulgated by the State Council of China, May 18, 2006, effective July 01, 2006, revised Mar. 01, 2014) art. 14, CLI.2.194533 (Beida Fabao) [hereinafter Regulation on the Protection of the Right to Communicate Works to the Public Over Information Networks].
Cases Involving Civil Disputes Over Infringements upon Personal Rights and Interests through Information Networks, determining whether the necessary measures such as deletion, blocking and disconnection are taken by the ISP in a timely manner is based on several factors. These factors include: the nature of network services, the form and degree of accuracy of the effective notice, the type and extent of rights and interests infringed upon by the network information, and other relevant factors.

d. Counter-notice

After reviewing the notice, the ISP shall take the necessary measures and resend the notice to the infringer. When the network user receives the notice from ISP, and believes the contents or works provided do not damage others’ rights and interests, the network user may provide a written statement to the ISP and request the ISP’s adoption of corresponding recovery measures. However, this rule does not apply when data recovery is impossible due to the restriction of technical conditions. This is known as the Counter-notice Rule.50

Under Article 7 and 8 of the Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Cases involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks, where a network user who has been deleted, blocked or disconnected claims that the ISP should assume the liability for the breach of contract or tort liability, the ISP can make a defense on the ground of receipt of notice. What’s more, if an ISP incorrectly takes action due to the notice of the informant, the victim can request that the informant assume the tort liability.

3. The duty of care

If the ISP clearly knows about a network user’s use of network services to infringe upon a civil right or interest of another person through its network services, and the ISP does not take the necessary actions, the ISP shall be held jointly and severally liable with the network user for all damages under the theory of contributory infringement. The key point is whether the ISP had knowledge, or to what extent the ISP undertook any duty of care.

50 Provision of the Supreme People’s Court on Several Issues Concerning the Application of the Law in the Trial of Cases Involving Disputes Over Infringements Upon Personal Rights and Interests Through Information Networks, supra note 43, art. 7.2; Regulation on the Protection of the Right to Communicate Works to the Public Over Information Networks, supra note 49, arts. 15-17.
Under Article 9 of Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Cases involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks, the People’s Court shall take seven factors into comprehensive consideration when determining whether the ISP “knows, including “whether the ISP handles the infringing network information manually or automatically by such means as recommendation, ranking, selection, editing, review and amendment.”

On one hand, an ISP is not held liable for general review. In the judicial practice, we should cautiously define if the ISP “knows” that the network user utilized network services to commit the infringement. If the standard has a broad scope, ISPs will, in fact, be made to undertake general review duties. This would probably put extra operational costs on ISPs and prohibit the development of the Internet industry. On the other hand, Chinese law has not stipulated different contents for the duty of care according to different types of ISPs. For instance, in comparison to electronic notice ISPs and instant messaging ISPs, ISPs involved in accessing and caching services should be held to a lower duty of care.

E. Non-law Instruments

In China, law is not the only avenue to regulate online hate speech. Self-regulation through Internet associations also plays a crucial role in regulating online hate speech. In 2001, the Internet Society of China was established [“the Society”], and began making and implementing rules and self-regulation conventions to regulate online hate speech.

51 The seven factors include: (1) whether the ISP handles the infringing network information manually or automatically by means such as recommendation, ranking, selection, editing or review and amendment; (2) the required information management capability of the ISP and the nature, form, and possibility of infringement of services provided by the ISP; (3) the type and obviousness of the network information’s infringement on personal rights and interests; (4) the social impact of such information or page views within a certain time; (5) the technical possibility of infringement prevention measures taken by the ISP and whether the corresponding reasonable measure has been taken; (6) whether the ISP has taken the corresponding reasonable measure against the repeated infringements or the same infringing information of the same network user; and (7) other factors relating to the case.
Since 2001, several self-regulation conventions have been enacted, including the: Self-regulation Convention of Internet Industry, Search Engine Service Providers’ Self-regulation on Illegal and Unhealthy Information, Self-regulation Convention on Blog Services, and Regulations on Message Services. All of these self-regulations require that the Internet companies and other Internet participants observe relevant regulations on the Internet, and require that Internet users refrain from producing, publishing or disseminating certain kinds of speech, including speech that: threatens national security, damages national unity, incites hatred or racial discrimination, damages the national religious policy or advocates for violence, murder or dangerous acts.

Internet companies have also united to stop online hate speech. On November 2014, 29 Internet companies, including Tencent, signed “the letter of commitment on self-discipline management of post comments” (“the Letter”), which requires all the online users not to deliver 18 categories of speech, including speech that “incites ethnic hatred and racial discrimination, and ethnic unity”. If any of the prohibited forms of speech are posted online, the Letter requires that companies should take measures. These measures include: conducting pre-warnings, refusing to publish such speech, prohibiting users from commenting on such posts, and permanently shutting down the users’ account. Online websites must keep record of any speech that violate the Letter and report the violations to the relevant governmental agencies.

52 Zhongguo Hulianwang Hangye Zilv Gongyue (中国互联网行业自律公约) [Self-regulation Convention of Internet Industry] (promulgated by the Internet Soc. of China, Dec. 03, 2001, effective Dec. 03, 2001), art. 9, CLI.6.39661 (Beida Fabao) [hereinafter Self-regulation Convention of Internet Industry].
54 Boke Fuwu Zilv Gongyue (博客服务自律公约) [Self-Regulation Convention on Blog Services] (promulgated by the Internet Society of China, Aug. 21, 2007, effective Aug. 21, 2007), art. 9, CLI.6.96513 (Beida Fabao).
55 Duanxinxi Fuwu Guifan (短信信息服务规范) [Regulation on Message Services] (promulgated by the Internet Soc. of China, July 17, 2008, effective July 17, 2008), art. 5, CLI.6.228133 (Beida Fabao).
By considering the following three examples in the social media context, we can see that Internet companies have comprehensive provisions to tackle online hate speech.

I. Tencent WeChat

WeChat/Weixin[微信] is the world's fastest growing social app, which brings together messaging, social communication and games all within an easy-to-use app. Developed by Tencent and released in 2011, WeChat had empowered over 760 million monthly active users worldwide by the end of May 2016, and has become the most popular social platform in China.57

Under the Prohibited Activities Clauses of WeChat’s Acceptable Use Policy, users are banned from the following activities: breaching any laws or regulations; creating a risk of loss or damage to any person; harming or exploiting any person in any way including via bullying, harassment or threats of violence. Furthermore, users are prohibited from submitting, uploading, transmitting or displaying through WeChat any content that is hateful, harassing, abusive, racially or ethnically offensive, defamatory, or humiliating to other people.58

II. Sina Microblog

Sina Microblog/Weibo [新浪微博] is one of the most popular microblogging website in China. Sina Microblog is a Twitter-like social networking service site, which Sina Corporation created in 2009. By the fourth quarter of 2015, Sina Microblog had 106 million daily users.59 Many famous people in China have a Sina Microblog account and millions of messages are posted everyday on this site.

Under Article 4.8.6 of the Agreement of Sina Microblog Service,60 users are forbidden to upload, post or diffuse through Sina Microblog’s platform any contents that contain hateful, racially offensive, or abusive information.

III. Baidu Tieba

57 微信月活跃用户破 7.6 亿，快赶上 QQ 了，TMTPost (May 19, 2016), http://www.tmtpost.com/1712130.html (China).
Baidu Tieba/Post Bar (百度贴吧) is a Chinese social network platform established by Baidu in 2003. Baidu is the largest Chinese search engine company. Users create a bar by choosing a keyword based on names, films, clubs, games, books and so on. Here, the “bar” is a forum that provides a place for users to post words, pictures and videos on the keyword and to communicate. As of 2015, Baidu Tieba has more than eight million bars created by about 300 million users, with more than one billion posts every day.\footnote{61}

Under Article 8 of Agreement of Baidu Tieba,\footnote{62} users cannot violate relevant laws, especially the Administrative Measures for the Security Protection of Computer Information Networks Linked to the Internet,\footnote{63} the Regulation on Internet Information Service of China,\footnote{64} the Management Provisions on Electronic Bulletin Services on the Internet,\footnote{65} the Decision of the Standing Committee of the National People’s Congress on Preserving Computer Network Security,\footnote{66} or the Provisions for the Administration of Internet News Information Services.\footnote{67} Users are prohibited from posting and propagating any content that defies the basic principles determined by the Constitution, or content that: endangers the unity of the nation and national security, or incites national hatred or discrimination, or insults others.

F. Cases

I. China’s First Case of Regional Discrimination

In March 2005, the Longxin Local Police Station of Long Gang Sub-bureau of Shenzhen Municipal Public Security Bureau hung banners in its jurisdiction that read


\textit{See} Administrative Measures for the Security Protection of Computer Information Networks Linked to the Internet, \textit{supra} note 40.

\textit{See} Regulation on Internet Information Service, \textit{supra} note 25.

\textit{See} Management Provision on Electronic Bulletin Services on the Internet, \textit{supra} note 27.


“Be Determined to Fight against Henan Racketeering Gangs” and “Awards of 500 Yuan for Reporting and Assisting to Break Racketeering Crimes Committed by Henan Gangs.” The behavior caused strong dissatisfaction among the Henan People. They believed the Shenzhen police banners implied that all racketeering crimes within the jurisdiction were committed by the Henan people. The police’s behavior could have led to discrimination against the Henan People by local residents, or even hostility or opposition. On April 15, Ren Chengyu and Li Dongzhao, two residents of Zhengzhou City of the Henan Province, sued Long Gang Sub-bureau of the Shenzhen Municipal Public Security Bureau. As law-abiding citizens born in Henan, the two plaintiffs felt severely insulted. So, they filed a civil lawsuit to the People’s Court of Zhengzhou of the Hi-tech Industrial Development Zone, asserting that their respective reputations had been infringed by the police’s behavior. The plaintiff’s requested that the court order the defendants to make a public apology to the plaintiffs regarding the infringing acts, and that the apology by published by the news media at the state level and be recognized by the People’s Court. The People’s Court accepted this lawsuit.

In February of 2006, both litigants voluntarily reached the following agreement under the court’s conciliation: the defendant, Long Gang Sub-bureau of Shenzhen Municipal Public Security Bureau, shall make an apology to the plaintiffs, Henan citizen Ren Chengyu and Li Dongzhao; and the plaintiffs shall forgive the defendant and voluntarily waive other litigation claims. Although this case was settled with conciliation and the defendant made an apology, it caused many disputes.

1. Legal Disputes:

   a. What’s the case-filing basis for this case?

   This case was accepted as a civil lawsuit in compliance with the stipulations of the Civil Procedure Act and the Judicial Interpretations of the Supreme Judicial Court. In the “Facts and Reasons” section of the indictment submitted by the two plaintiffs, they asserted that the behavior of Long Gang Sub-bureau of Shenzhen Municipal Public Security Bureau’s violated the basic principle of “equality before the law” in the Constitution of China. However, in China, articles and clauses of the Constitution cannot be directly taken as judicial authority. The plaintiff is required to quote specific branch laws. In addition, there is no dedicated law that regulates regional discrimination behaviors in China. So, the plaintiffs accused the defendant of infringing a citizen’s right of reputation in order to bring a suit.

   b. Who has qualification to be the plaintiff?

   According to Article 108 of Civil Procedure Law, several conditions must be met before a lawsuit is filed, including: (1) the plaintiff must be a citizen, legal person, or
an organization with a direct interest in the case; (2) there must be a specific defendant; (3) there must be a concrete claim, a factual basis for the claim, and a cause of action for the lawsuit; and (4) the court must have the jurisdiction to accept the case. But who is a suitable plaintiff when the cause of action is the right of reputation? Because the banner of the Shenzhen police infringed on the reputation of all Henan law-abiding citizens, did the two Henan citizens who brought the case have a direct interest in the case? And if the two Henan citizens do, in fact, have a direct interest in the case, can these two Henan citizens represent all Henan peoples to file such a lawsuit for reputational infringement?

In many ways this case reflects the legal loopholes of China’s Civil law and Civil Procedure Act. With respect to comments or words that infringe on personal dignity, if the comments cause any serious consequence, China’s judiciary authorities have the right to investigate for criminal liability, such as crime of defamation or crime of insult. If the circumstances do not constitute a crime, civil liability shall be investigated. However, China’s laws currently only stipulate that in the case of infringement of personal dignity, the victim also has the right to allege reputational infringement. However, if a group’s reputation is infringed, there is a great legal dispute with respect to whether an individual can represent the whole group to file a lawsuit. Although class actions and representative actions are stipulated in China’s Civil Procedure Law, a precondition is that the individual must acquire authorization of all members of this group, which is obviously impossible when the group consists of people within a region, nation or of a certain minority. Therefore, an individual can only prove his/her direct interest with the case, which also comes with large uncertainties.

II. China’s First Case of Blog Reputation Infringement

In September 2005, Chen Tangfa, an associate professor at the School of Journalism & Communication of Nanjing University, found a blog on the website BlogCN that contained insulting contents about him. In a BlogCN mood diary named “Rubbish Person and Rubbish Textbook,” the blogger “K007” used insulting phrases such as “rubbish person,” “wretched person,” and “rogue” to insult Chen Tangfa. These insulted specifically referenced Chen Tangfa. This weblog was uploaded on the website on June 24, 2005, it had already been online for more than two months when Chen Tangfa found it. Chen Tangfa instantly called the customer service hotline of BlogCN, which is headquartered in Hangzhou City, Zhejiang Province. He requested that BlogCN delete the post. However, according to BlogCN’s reply, the post could

68 Civil Procedure Law, supra note 44, art. 108.
not be deleted unless Chen Tangfa could provide written materials to prove that the victim in the post “Rubbish Person and Rubbish Textbook” was actually him.

Afterwards, Chen Tangfa called Blog CN many times to negotiate. However, the website kept its original attitude. It did not delete the post “Rubbish Person and Rubbish Textbook” from its website.

On October 14, 2005, Chen Tangfa went to Nanjing Notary Public Office and applied to have the post “Rubbish Person and Rubbish Textbook” notarized. On November 2, 2005, Chen Tangfa filed a lawsuit in the Gulou District People’s Court of Nanjing City, Jiangsu Province (“Gulou District People’s Court”) against BlogCN. He requested that the court order BlogCN to stop the infringement and pay him RMB 10,000 as compensation for mental injury. After accepting the copy of the indictment, BlogCN declared that it had no corporate capacity. During the hearing process, the Gulou District People’s Court verified that BlogCN is just a general website registered by BlogCN and was not qualified to be the subject of a lawsuit. On December 7, 2005, Chen Tangfa withdrew the lawsuit due to the lack of a valid subject. He then filed a lawsuit against Hangzhou Blog Information Technology Co., Ltd..

On August 2, the Gulou District People’s Court publicly pronounced the judgment on the case of Hangzhou Blog Information Technology Co., Ltd.’s filed by Chen Tangfa. The court ruled that the defendant did not directly damage Chen Tangfa’s reputation, but it also did not delete the relevant hostile posts in time due to its incorrect judgment standards for harmful information and insufficient supervision after finding harmful information. So, the court required the defendant to publish a statement of apology to Chen Tangfa on BlogCN within five days after the effective date of the judgement and to pay Tangfa RMB 1,000 for his economic loss.

1. Legal Disputes: What requirements should the notice of infringement meet?

In this case, the plaintiff believed that he had performed the obligation to give notice to the defendant by informing the defendant of the damaging content over the phone. The plaintiff believed that the defendant had an obligation to delete the relevant information after being informed. However, according to the defendant, the form of notice – a telephone call – was not in compliance with the constitutive requirements to notify a person of infringement, and the plaintiff failed to provide any evidence to prove that he was, in fact, the object of the attack by those hostile words. So, the defendant did not take any measures and had no fault.

Currently, China’s laws lack specific stipulations with respect to the constitutive requirements to notify an individual of infringement. Only the laws of copyright
infringement have some relevant stipulations. According to the stipulations of the Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks, the form of notice of infringement is not limited to written forms of notification, but also includes oral forms of notification. With respect to the contents of the notice, the victim should provide relevant certificates to prove his/her identity as well as evidence to prove the infringing facts, such as the website address containing the infringing statements. Unfortunately, such stipulations are limited in the copyright field. For those cases unrelated to copyright, no unified stipulations exist in the law.

III. Ilham Tohti Case

Ilham Tohti is a Uyghur teacher at Minzu University of China. On January 1, 2014, he was arrested by Urumqi police under suspicion of secession.69 Ilham Tohti was publicly prosecuted by the People’s Procuratorate of Urumqi City on July 30, 2014. On September 17 and 18, 2014, the trial began. Two lawyers appointed by relatives of the defendant appeared in court to defend Ilham Tohti. On September 23, the Urumqi Intermediate People’s Court’s sentenced Ilham Tohti to life in prison and confiscation of all of his property. After appeal, the original judgment was sustained.

During the court hearing process, the video materials exhibited by the public prosecutor verified that Ilham Tohti promoted violence many times in class at Minzu University of China. Ilham Tohti had expressed that he did not “consider violent protest as terrorist activities.”70 Ilham also stated that, “for Uyghur people, this government is just like the Japanese invader. You can fight against it and beat it back by all means.” In addition, on the website Tohti established, “Uyghur Online,” more

69 The crime of splitting state means organizing, plotting, or acting to split up China or undermine national unification. Usually, there are two forms of the Crime: one is to provoke ethnic relations, create national unrest, engage in national division, undermine the unity of all nationalities and national unity; the second is to engage in local separatist, separate pseudo-government, resist the leadership of central government. See supra note 10, art. 103.
than 100 articles containing contents related to separatism were published. These articles caused severe consequences, instigating and generating national hatred. After the Bachu Violent Incident on April 23, 2013, the Tohti publicly promoted violence based on this incident. He declared that “they are heroes and admired by me, because they dare to fight against violence by means of violent rebellions” and “as a peaceful man, maybe I will kill people for rebellion.” On October 28, another violent terrorist incident occurred in Beijing. Ilham Tohti declared in an article published on his WeChat Moments (Friend Circle) that this incident was not a terrorist incident. In addition, affected by incendiary articles published on “Uyghur Online” and Ilham Tohti’s incendiary speech, people led by Maimaitijiang Abdullah plotted and committed illegal gathering. This caused severe criminal consequences such as beatings, destruction of property, and robberies on July 5 in Urumqi, leaving 197 people dead and 1,700 wounded.

IV. Cai Jiming v. Baidu

The plaintiff, Cai Jiming, is a member of China’s CPPCC. In 2007, he issued a proposal on holiday reform, which led to public concerns. Internet users posted insulting and slanderous words and pictures of “Cai Jiming Ba” in Baidu Tieba, which

71 See Uygiu teacher involved in separatist activities, supra note 70; Uygor scholar sentenced to life in prison for secession, supra note 70; Separatist Uygar teacher jailed for life, supra note 70.
73 Several people drove a jeep with a Xinjiang number plate to crash into a crowd of people at midday. This is a deadly car crash at Beijing’s Tian’anman Square that killed five people and have labeled it a terrorist attack. Police say Beijing car incident was terrorist attack, detain 5 suspects, SHANGHAIDAILY (Oct. 31, 2013), http://www.shanghaidaily.com/nation/Police-say-Beijing-car-incident-was-terrorist-attack-detain-5-suspects/shdaily.shtml.
74 See Uygiu teacher involved in separatist activities, supra note 70; Uygor scholar sentenced to life in prison for secession, supra note 70; Separatist Uygar teacher jailed for life, supra note 70.
77 The Chinese People's Political Consultative Conference.
78 The Golden Week (黄金周) is the name given to a semi-annual 7-day national holiday in China, implemented in 2000. In 2007, Cai jiming issued a proposal on holiday reform that China need abolish Golden Week, and increasing the number of traditional holidays. 蔡继明怒告百度的来龙去脉 [The ins and outs of Cai Jiming case], TENCENT NEWS (Jun. 16, 2010), http://news.qq.com/a/20100611/001688.htm.
was created and maintained by Baidu. Furthermore, Cai’s personal information, such as his mobile and home telephone numbers, were also revealed.

Baidu enacted the service rules of “Baidu Tieba” and the complaint procedures at the striking place of “Baidu Tieba.”\(^79\) These rules and procedures specify that any user, who discovers any post that is: suspected of insulting or slandering others, infringes on another’s legitimate interests, or breaks the Tieba Agreement, is entitled to make a complaint according to the complaint procedures.\(^80\) Cai authorized Wenyan Liang to inform Baidu via telephone about the insulting posts, but Baidu failed to deal with it. Afterwards, Liang applied to serve as the administrator of “Cai Jiming Ba,” but his application was denied.\(^81\) Liang sent a message to the Tieba management group, applying to delete the posts, but the group did not respond.

On October 13, 2009, Cai authorized a lawyer to send a letter to Baidu, requesting that Baidu perform its legal obligation by deleting the infringing comments and closing the “Cai Jiming Ba.” Upon receipt of the letter, Baidu deleted those posts suspected of infringement. Cai filed a lawsuit against Baidu to request it to delete any infringing information, to close the “Cai Jiming Ba,” to disclose the personal information of those posting infringing information, and to provide compensation for any losses.\(^82\)

1. Judgment

According to the first instance in the Haidian Court of Beijing, the ISP shall not be deemed to have “knowledge” of the infringement due to the fact that there is information suspected of infringing civil rights and interests on its online platform, and the ISP has no legal obligation to review all of the posts on Tieba.\(^83\) In terms of the Management Provisions on Electronic Bulletin Services on the Internet,\(^84\) ISPs only perform the obligations of recording,\(^85\) deleting, providing a complaint channel

\(^79\) See Administrative Measures for the Security Protection of Computer Information Networks Linked to the Internet, supra note 40; see also 百度贴吧投诉规则 [Baidu Post Bar Complaint Rule], Baidu, http://static.tieba.baidu.com/tb/tsgz/ (China)[hereinafter Baidu Post Bar Complaint Rule].

\(^80\) Baidu Post Bar Complaint Rule, supra note 79, arts. 2-4.

\(^81\) Id.

\(^82\) Id.

\(^83\) 八起利用信息网络侵害人身权益典型案例之二 [The Second Case of Eight Typical Cases of Infringement of Personal Rights by Using Internet](http://www.sciencedaily.com/releases/2014/12/141202140232.htm) (promulgated by the Supreme People’s Court of China, Dec.10, 2014), CLC.C.3386999 (Beida Fabao).

\(^84\) This law became effective in 2009 and expired in 2014.

\(^85\) Under Article 14 of Management Provisions on Electronic Bulletin Services on the Internet, the electronic bulletin service provider shall record the contents of the information released in its system, time of release, website name. Copies of the record shall be kept for 60 days. Management Provision on Electronic Bulletin Services on the Internet, supra note 27, art. 14.
for obligees and ensuring the validity of the channel.\textsuperscript{86} Because Baidu performed these obligations, it did not break any legal obligation. Baidu immediately deleted the infringing information upon receipt of the lawyer’s letter on October 15, 2009, and so it did not undertake any tort liability. Considering that Baidu deleted the infringing information and took measures against the posting of new infringing information, there were no legal grounds for Cai to request Baidu to close the “Cai Jiming Ba.” Moreover, Cai became a public figure and attracted the attention of the public due to the event of “National Holiday Reform.” Considering the supervision of public opinions and the freedom of speech, the public may express different voices. Besides, “Cai Jiming Ba” is just a channel through which the public makes comments on public figures and events. Thus, the request for closing the “Cai Jiming Ba” was unsupported.

Under Articles 14 and 15 of the Management Provisions on Electronic Bulletin Services in Internet, the fact that Baidu did not directly provide the information of the Internet users who posted infringing messages to Cai was justified. Baidu can only provide this kind of information when requested by State organs, such as the court.

However, pursuant to the second instance in Beijing No. 1 Intermediate People’s Court, Baidu was liable in tort because it did not take the necessary measures during the period from the time from when Liang made a complaint to the time when Baidu received the formal lawyer’s letter. Furthermore, Baidu failed to delete the related information until after it received the lawyer’s letter, which extended the damage. There, Baidu was liable for additional harm. In accordance with the specific circumstance of the case, Baidu compensated RMB 100,000 to Cai as a mental comfort.

2. Comments

This case involves the boundary of ISP liability and is significant in two aspects. First, this case is significant due to the way in which the notifier gives notice and the effects of this action in relation to the ISPs obligations. ISP shall take necessary measures where any notifier gives notice as required.\textsuperscript{87} Second, whether ISPs have knowledge about the infringement of others’ rights and interests by Internet users can be based not only on the fact of the infringing activities arising in its service system or platform.

\textsuperscript{86} \textit{Id.} arts. 6, 13.
\textsuperscript{87} Management Provision on Electronic Bulletin Services on the Internet, \textit{supra} note 27, art. 14.
V. Yanmou v. Sina, Baidu

When a person published an article involving the privacy of the plaintiff in the Sina Blog, the plaintiff, Yan, successively sent a lawyer’s letter to Sina and Baidu. This letter request that they take the necessary measures. Sina failed to submit any evidence that it had taken necessary measures – such as the deletion of the article – while Baidu provided evidence that it had removed the link and deleted the article. The plaintiff filed a lawsuit, claiming the infringing disclosure of personal information by these companies.

1. Judgment

The Haidian Court of Beijing, found that Sina assumed adverse legal consequences because it could not certify that it had performed the obligations of giving advance and prompt notice, and regulated the information in accordance with the Management Provisions on Electronic Bulletin Services on the Internet. The court ruled that Baidu was not liable for tort because it had fulfilled its obligations by: providing the complaint channel and putting it on the home page of Baidu website, setting the complaint link and the right statement, and definitively indicating the duty of care of users. Sina was liable because it could not certify that it had taken the necessary measures when it received the notification from the plaintiff, while Baidu was not subject to liability because it had removed the link and deleted the article.

The plaintiff requested that Sina provide the IP address and all registration information of the blogger, including but not limited to the name, address, and contact information. As the two blogs involved the personality interests of the plaintiff, the plaintiff was entitled to know the personal information of the blogger to claim for rights.

88 Yanmou Su Xinlang he Baidu An (闫某诉新浪和百度案) [Yan v. Sina, Baidu]. Eight Typical Cases of Infringement of Personal Rights by Using Internet] (promulgated by the Supreme People’s Court of China, Dec. 10, 2014), CLI.C.3387006 (Beida Fabao).
89 Sina Blog is the most popular Blog in China.
90 Baidu is the most popular search engine in China.
92 Id. art. 14.