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**ISP Copyright Liability:  
Towards an Enhanced Chinese ISP  
Copyright Liability Regime**

**By**  
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**TO MY HUSBAND, MY MOTHER AND MY BROTHER  
FOR THEIR PATIENCE AND INSEPARABLE SUPPORT**

**TO MY FATHER  
WHO OPENED UP THE INTELLECTUAL WORLD TO ME  
BUT PASSED AWAY  
AND COULD NOT SEE MY ACHIEVEMENT HE WISHED FOR**

**TO MY SUPERVISOR, MRS. CATHERINE COLSTON  
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**TO CAMPBELL BURNS RESEARCH SCHOLARSHIPS  
FOR FINANCIAL SUPPORT THROUGH MY RESEARCH**

## **Abstract**

ISP copyright liability for copyright infringement over the Internet is a now widely adopted approach for tackling extensive online copyright piracy in various jurisdictions. However, in China, the inconsistent ISP knowledge standard and the lack of peer-to-peer file-sharing liability provisions in the existing legal framework are among the factors that impede effective copyright law enforcement on the Internet.

The adoption of a broad knowledge standard and its application in case law, both in the U.S. and Germany, which have great influence on a Chinese ISP copyright liability system, are discussed along with a similar knowledge standard provided by the Chinese Online Copyright Regulations and its application to ultimately show the need of a broad knowledge standard in a Chinese ISP copyright liability system.

As for the liability issues over peer-to-peer file-sharing networks, analysis of several prominent cases and the enacted or proposed legislation in this regard in an international context sheds light on the importance of a filtering mandate in effectively deterring copyright piracy. In a Chinese context, the absence of peer-to-peer file-sharing liability legislation and the inadequacy of the applied provisions in the existing legislation entail the examination of the need and the possibility of the mandatory use of filters in a Chinese ISP copyright liability system.

For an enhanced Chinese ISP copyright liability regime, the thesis concludes with two recommendations that a broad ISP knowledge standard should be retained in the Chinese ISP copyright liability system and a filtering mandate is needed and should be legislated for efforts against widespread unlawful peer-to-peer file-sharing.

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## **CHAPTER 1:**

### **INTRODUCTION**

#### **1.1 About This Thesis: the Aim, Research Questions, and Methodologies**

With the Internet comes the ability to easily copy and transmit copyright works in a digital form without consent of copyright owners. The Internet has become an extremely efficient platform for disseminating pirated copyright works.<sup>1</sup> However, those unauthorised copying and transmission over the Internet is not easily tied to a particular place and a particular person; it therefore makes tracking infringements and online infringers even more difficult. Internet Service Providers (ISPs)<sup>2</sup> provide a wide range of services on the Internet and play a vital role in online transmission and dissemination of information. When Internet users who illegally upload and download copyright works without authorisation on the Internet are being sued as direct infringers by copyright owners or right holders, ISPs are also being targeted in the cases of online copyright infringements because the transmission and dissemination of illegal materials are mediated via ISPs' services.

ISP copyright liability issue has been hotly debated globally, and therefore its international implications should not be ignored. Though the approaches to ISP copyright liability differ in each individual jurisdiction, the borderless character of

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<sup>1</sup> The International Federation of the Phonographic Industry (IFPI) discovered in its Digital Music Report 2009 that a large part of peer-to-peer file-sharing is unauthorised copyrighted music and film, and it accounts for up to 80 per cent of all Internet traffic. This report also cited the general counsel of the US TV and film company NBC Universal, Rick Cotton who said that 'there was a tsunami of digital theft on the Internet that extended across multiple content sectors, most notoriously affecting music but also spreading across TV, movies, games, software and books.' See IFPI. (2009). 'Digital Music Report 2009' [WWW document] URL <http://www.ifpi.org/content/library/DMR2008.pdf> (visited 2009, January 20), p.23, p.29.

<sup>2</sup> 'Internet Service Providers (ISPs)' is the term commonly used to describe a company that provides computer users access to the Internet or other Internet-related services. It is named differently in the language of different countries' legislation, e.g. 'service provider' in Section 512 of the U.S. Copyright Act and the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce) and 'network service provider' in the Regulations on the Protection of the Right of Communication through the Information Networks of the P.R.C. ISPs discussed in this thesis are defined in 1.3 of this Chapter.



the Internet, however, determines that some common features are shared by approaches of various countries on this particular issue.

There was no legal instrument that addressed ISP copyright liability over the Internet when the first case<sup>3</sup> was brought to the court of the United States of America in 1993. Neither the WIPO treaties, the WIPO Copyright Treaty (the WCT)<sup>4</sup> and the WIPO Performance and Phonogram Treaty (the WPPT)<sup>5</sup> adopted in 1996 addressed such liability on the Internet;<sup>6</sup> nor did domestic law at that time. The United States of America attempted early on to impose liability on an ISP in *Playboy Enterprises v. Frena*<sup>7</sup> in 1993, and the court held the defendant, a BBS operator was liable for direct copyright liability. Nevertheless, the *Sega Enters. Ltd. v. MAPHIA*<sup>8</sup> court soon declared that direct liability was not appropriate for a BBS operator. Instead, the court held that the BBS operator should be liable for copyright protected video game distributed by its subscribers under the doctrine of contributory infringement because the BBS operator was fully aware of the unauthorised copying and had encouraged the infringement. One year later, the court of *Religious Technology Centre v. Netcom*

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<sup>3</sup> It refers to the American case of *Playboy Enterprises v. Frena* (*Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)) in which the court held that the defendant, a BBS operator was liable for direct copyright infringement, because '[it] supplied a product containing unauthorised copies of a copyrighted work. It did not matter that [defendant] claimed it had not made the infringing copies itself.'

<sup>4</sup> WIPO. (1996, December 20). 'The WIPO Copyright Treaty' [WWW document] URL [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html) (visited 2004, Feb 18)

<sup>5</sup> WIPO. (1996, December 20). 'The WIPO Performance and Phonogram Treaty' [WWW document] URL [http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs\\_wo034.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf) (visited 2004, Feb 18)

<sup>6</sup> The WIPO treaties did not address ISPs' liability over the Internet except an agreed statement to Article 8, saying that 'it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication.'<sup>6</sup> This clarification indicates that merely providing wires and equipment does not itself amount to an act of communication and therefore does not violate the 'making available' right of copyright owners.

<sup>7</sup> *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993). (In 1993, the plaintiff, Playboy Enterprises sued the defendant Frena, a BBS operator for providing services of uploading and downloading photographs for its fee-paying subscribers on its BBS. The plaintiff claimed that it owned exclusive copyrights for many of these photographs on the BBS, and the act of the defendant infringed its copyrights on those photographs. Having examined the facts and considered all the arguments, the court rejected the defendant's argument that it was not aware of the infringement and held that the BBS operator was liable for direct copyright infringement, because '[it] supplied a product containing unauthorised copies of a copyrighted work. It did not matter that [defendant] claimed it had not made the infringing copies itself.')

<sup>8</sup> *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994).

*On-Line Communication Services, Inc.*<sup>9</sup> made it much clearer that ISPs would be held liable for copyright infringement if they had sufficient knowledge of infringing activity and facilitated online communication.<sup>10</sup> Following a continuous development in the case law, concern was on the rise over the possibility of regulating ISP copyright liability while avoiding deterioration in protecting copyright works on the Internet. In an effort to provide effective online copyright protection and limit the potential liability for ISPs, the Congress of the United States of America passed the Digital Millennium Copyright Act of 1998 (the DMCA)<sup>11</sup>. The DMCA implemented two WIPO treaties; Title II of the DMCA (Section 512 of the U.S. Copyright Act) clarified ISP liability for copyright infringement over the Internet<sup>12</sup>. It was significant that Section 512 of the U.S. Copyright Act recognised that ISP liability should be determined depending on their services and a number of ‘safe harbours’<sup>13</sup> are given to ISPs those that simply act as ‘passive conduits’<sup>14</sup> or those that comply with elaborate procedures.

Combined with Section 512 of the U.S. Copyright Act, two general tort principles - vicarious liability<sup>15</sup> and contributory liability<sup>16</sup> - are applied to determine ISP liability for copyright infringement in the United States of America. Vicarious liability requires the defendant’s financial benefit from the infringement and the ability to control the infringement, whereas contributory liability requires the defendant

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<sup>9</sup> *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>10</sup> *Ibid.*

<sup>11</sup> The Digital Millennium Copyright Act. (1998, October 28). [WWW document]. URL <http://www.copyright.gov/title17/92appb.pdf> (visited 2005, Feb 20)

<sup>12</sup> ISP copyright liability was set forth in Title II of the Digital Millennium Copyright Act (Section 512 of the U.S. Copyright Act).

<sup>13</sup> ‘Safe harbours’ are the limitation of liability set forth in Section 512 (a) (b) (c) and (d) of the U.S. Copyright Act for ISP’s activities as transitory digital network communications, system caching, information residing on systems or networks at direction of users and information location tools.

<sup>14</sup> ‘Passive conduits’ refer to transitory digital network communications stipulated in Section 512 (a) (b) of the U.S. Copyright Act.

<sup>15</sup> Vicarious liability originated from tort law doctrine of agency - *respondeat superior*, it is the responsibility of the superior for the acts of their subordinate. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), pp.261-62 (noting connection between vicarious copyright liability and respondeat superior). See also *PRS v. Cyril Theatrical Syndicate, Ltd* [1924]1 K.B.1 and *PRS v. Mitchell & Booker* [1924]1 K.B. 762.

<sup>16</sup> Contributory liability stemmed from the tort theory of *enterprise* liability and it is from the notion that one who directly contributes to another’s infringement should be held accountable. See *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981) and *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

knowledge of infringement and its material contribution. In the United States of America, vicarious and contributory liability were established when the act of an ISP did not fall within the limitation of liability<sup>17</sup> set forth in Section 512 of the U.S. Copyright Act, and the act met requirements of the two liability principles. These two liability principles that borrowed from the common law of torts enabled the law to effectively analyse facts important to ISP copyright liability. They were also experienced greater expansion through a variety of cases<sup>18</sup>, which resulted in a broad interpretation of the elements including financial benefit, the ability to control, knowledge and material contribution. The development of knowledge requirement is most significant among them because it is fundamental in determining ISP copyright liability.

Nevertheless, vicarious liability and contributory liability cannot effectively analyse the facts and liability issues in the decentralised peer-to-peer file-sharing<sup>19</sup> liability cases. The courts of the United States of America had to seek a solution to the liability issue over decentralised peer-to-peer file-sharing networks. Consequently, an inducement liability principle<sup>20</sup> was introduced by the *Grokster*<sup>21</sup> court to determine liability of decentralised peer-to-peer file-sharing providers. The court also suggested the adoption of a filtering technology<sup>22</sup> mechanism for blocking unlawful file-sharing.

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<sup>17</sup> *Supra* note 13 and accompanying text.

<sup>18</sup> For example, the cases of *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*, *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981), *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), and *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003)

<sup>19</sup> Decentralised peer-to-peer file-sharing services are different from their predecessor – centralised peer-to-peer file-sharing such as Napster. Decentralised peer-to-peer file-sharing services do not store any content; the computers communicate directly with each other, not through central servers. Therefore, decentralised peer-to-peer file-sharing providers do not have actual knowledge of infringement owing to their software’s decentralised architecture.

<sup>20</sup> An inducement liability rule is a liability principle that is more commonly seen in the American Patent law. It was created by the *Grokster* court and was applied to liability of decentralised peer-to-peer file-sharing providers in the same case. A rule that ‘premises liability on purposeful, culpable expression and conduct does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.’ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005), at 2780

<sup>21</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005)

<sup>22</sup> A technical filtering measure can be defined as a technical action that limits the accessibility of Internet content. Technical filtering measures are computer (software) applications that work by blocking or filtering (categories) of illegal, harmful or otherwise unwanted content that a web browser or other Internet application is capable of displaying or downloading. The foregoing definition are

At the other side of the Atlantic, Germany was the first country<sup>23</sup> to pass overall legislation for all Internet-related contents liability. In the Media Services State Treaty 1997 (MediendiensteStaatsvertrag - MDStV)<sup>24</sup> and the Federal Teleservices Act 1997 (Teledienstegesetz - TDG)<sup>25</sup>, three different types of service providers<sup>26</sup> were distinguished, based on their varied functions on the Internet. Unlike that of its American counterpart, the German legislation regulated liability of service providers in a horizontal<sup>27</sup> way, therefore the laws did not focus on copyright materials only but dealt with all kinds of content issue. In order to implement a community level legislation regulating ISP liability – the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (the Electronic Commerce Directive)<sup>28</sup>, the TDG was revised in 2001<sup>29</sup> and was effective 1<sup>st</sup> January 2002. Nevertheless, the provisions in relation to ISP liability in the TDG 2001 were finally transposed into the German Telemedia Act

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given by 'Report by the Group of Specialists on Human Rights in the Information Society (MC-S-IS) on the Use and Impact of Technical Filtering Measures for Various Types of Content in the Online Environment, CM(2008)37 add 26 February 2008' (The Council of Europe, March 2008)

<sup>23</sup> In fact, the UK was the first country to have a law that dealt with ISP liability. The 1996 Defamation Act was enacted one year earlier than the Germany law; however, this Act was only in relation to the defamatory infringement.

<sup>24</sup> The Media Services State Treaty 1997 (MediendiensteStaatsvertrag - MDStV), (1997, July 13). [WWW document] URL <http://www.kuner.com/> (visited 2008, January 20) (English Version)

<sup>25</sup> The Federal Teleservices Act 1997 (Teledienstegesetz - TDG), (1997, July 22). [WWW document] URL <http://www.iuscomp.org/gla/statutes/TDG.htm#5> (English Version) (visited 2007, January 20) (The Federal Teleservices Act 1997 was part of the Information and Communications Services Act and entered into force in Germany on 1 August 1997. It dealt *inter alia* with the liability of online service providers. The Telemedia Act 2007 (Telemediengesetz-TMG) has now replaced it.)

<sup>26</sup> They are information providers, hosting service providers and access providers. See Section 5 (1) (2) and (3) of the TDG 1997.

<sup>27</sup> It means that the legislation was intended to provide immunity in respect of all, or at least a range of different types of content liability, not focus on liability in one single area.

<sup>28</sup> The European Parliament and the European Council, (2000, June 8). 'the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce)' [WWW document] URL <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF> (visited 2004, Feb 20)

<sup>29</sup> Germany implemented the Electronic Commerce Directive into its national law (Gesetz zum elektronischen Geschäftsverkehr - EGG) on 21 December 2001 and the provisions in the TDG 1997 were modified accordingly.

2007 (Telemediengesetz - TMG)<sup>30</sup> in an effort to unify regulations embedded respectively in three statutes<sup>31</sup>.

Many aspects of the Electronic Commerce Directive were adopted by the amended TDG 2001. Limitations of liability set forth in the Electronic Commerce Directive for ISP's activities as a mere conduit<sup>32</sup>, caching<sup>33</sup> and hosting<sup>34</sup> were also heavily reflected in the revised TDG 2001. According to the revised TDG, ISP copyright liability was rested on a knowledge-based liability in which ISPs should be sheltered from liability until the point where they gained actual knowledge or awareness of the infringing materials and they failed to exercise their control to remove or block access to the infringing materials upon such knowledge or awareness.

However, the concern arose as to whether knowledge requirement in the TDG 1997 was clear enough to decide copyright liability of an ISP. *Hit Bit Software GmbH v AOL Bertelsmann Online GmbH & Co KG*<sup>35</sup> precipitated a necessary legislative change on the knowledge standard. When Germany implemented the Electronic Commerce Directive into its national law (Gesetz zum elektronischen Geschäftsverkehr - EGG) in 2001, the initial knowledge requirement in Section 5 (2) & (4) of the TDG 1997, 'knowledge of the content' was replaced by 'knowledge of illegal activities or information' in Section 11 of the TDG 2001. Nevertheless, the new defined knowledge requirement had no capacity to address liability of peer-to-peer file-sharing emerged from the German Internet territory. While the courts struggled to address such liability, they shared the view with the courts of other

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<sup>30</sup> The German Telemedia Act 2007 (Telemediengesetz-TMG), (2007, March). [WWW document] URL <http://bundesrecht.juris.de/tmg/index.html> (German Version) (visited 2008, January 20)

<sup>31</sup> Here it refers to the Federal Teleservices Act 1997 (Teledienstegesetz-TDG), the Teleservices Data Protection Act 1997 (Gesetz über den Datenschutz bei Telediensten) and the Media Services State Treaty 1997 ((Mediendienstestaatsvertrag-MDStV)).

<sup>32</sup> Article 12 of the Electronic Commerce Directive (mere conduit is a service consisting of merely the transmission information or the provision of access to a communication network.)

<sup>33</sup> Article 13 of the Electronic Commerce Directive (caching is an activity which consists of the automatic, intermediate and temporary storage of information performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request.)

<sup>34</sup> Article 14 of the Electronic Commerce Directive (hosting is a service consisting of the storage of information provided by a recipient of the service.)

<sup>35</sup> *Hit Bit Software GmbH v. AOL Bertelsmann Online GmbH & Co KG*, [2001] E.C.D.R. 18, [2001] E.C.D.R. 27; [2002] E.C.C. 15

jurisdictions<sup>36</sup>. The court went on to suggest that the peer-to-peer file-sharing providers should take necessary measures such as filtering technologies to prevent dissemination of unlawful copyright contents and the intent of facilitating copyright infringement of peer-to-peer file-sharing providers may be determined by failing to take such measures. In the German court practice regarding ISP copyright liability over the Internet, the Copyright Act of Germany and its amendment have offered a specific legal ground for copyright violation on the Internet. Joint tort liability principle in the civil law of torts has been adopted all the way through as the legal foundation of ISP copyright liability. Further details in this regard will be examined later in Chapter 2 and 3 of the thesis.

In the developing countries such as China, ‘the Right of Communication through the Information Networks’<sup>37</sup>, as one of the exclusive rights that copyright owners should enjoy, was added into the amendment of the Copyright Act in 2001. However, no provision existed concerning ISP copyright liability for infringing such an exclusive right, apart from several court cases<sup>38</sup> adjudicated that ISPs should bear civil liability (joint tort liability) for their users’ copyright infringements. In November 2000, the Supreme Court of the P.R.C issued the Judicial Interpretation of Issues regarding

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<sup>36</sup> It refers to the solution implied in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd* in the U.S., *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd* in Australia and *SCRL Societe Belge des Auteurs, Compositeurs et Editeurs (Belgian Society of Authors, Composers and Publishers) v. SA Scarlet* in Belgium, where the courts suggested that the liability of peer-to-peer file-sharing providers can be determined by examining whether they have constructed necessary precautionary measures such as the application of filtering and blocking to prevent the dissemination of unauthorised copyright contents.

<sup>37</sup> It is defined as ‘the right to communicate to the public a work, by wire or wireless means in such a way that member of the public may access these works from a place and at a time individually chosen by them’ in Article 10 (12) of the Copyright Act of the People’s Republic of China.

<sup>38</sup> For example, in *Meng Wang, et al v. Beijing Cenpok Intercom Technology Co., Ltd (Wang Meng, et al v. Beijing Cenpok Intercom Technology Co., Ltd, No. 57* (the Beijing Haidian District People’s Court, 1999), No. 185 (the Beijing First Intermediate People’s Court, 1999)), the Beijing First Intermediate People’s Court affirmed the decision of the Beijing Haidian District People’s Court (the first instance) and held that the defendant had infringed the exploitation right of the plaintiffs by having uploaded the plaintiffs’ works on their website and enabled further dissemination of those works over the Internet without authorisation of the plaintiffs, their activity therefore constituted copyright infringement. In *Liu Jingsheng v. Sohu Aitexin Information Technology Ltd., (Jingsheng Liu v. Sohu Aitexin Information Technology Ltd., No. 128* (the Beijing Second Intermediate People’s Court, 2000)), the Second Intermediate People’s Court of Beijing decided that the defendant should assume civil liability, according to Paragraph 1 (8) of Article 45 of the Copyright Act of the P.R.C 1990 and paragraph 2 of Article 106 of the General Principles of Civil Code of the P.R.C. Because the that defendant failed to stop the disputed hyperlinks that directed users to the infringing copyright works of the plaintiff, when it had the knowledge that it had linked to the websites that hosted the infringing copyright works upon the notice of the plaintiff.

Applicable Laws for the Hearing of Copyright Dispute involving Computer Networks (the Judicial Interpretation)<sup>39</sup> in which issues in relation to online copyright protection were clarified and two categories of ISPs and their copyright liability were identified. A specific law dealing with online copyright protection and ISP copyright liability - the Regulations on the Protection of the Right of Communication through the Information Networks (the Regulations)<sup>40</sup> - was also enacted in 2006. Despite such a specific law that incorporated a general joint tort liability principle stipulated in the General Principle of the Civil Code of the P.R.C (the GPCC)<sup>41</sup>, copyright piracy on the Internet did not seem to be greatly diminished<sup>42</sup>. It is submitted that this may attribute to the inconsistency between the Judicial Interpretation and the Regulations with regard to ISPs knowledge requirement of infringement. While a thorough examination of a Chinese ISP copyright liability regime is undertaken in Chapter 2, the impact of the disparity of the knowledge standard is also discussed. As for liability issue over peer-to-peer file-sharing networks in China, there exist neither specific law nor provisions upon which the issue is to be addressed.

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<sup>39</sup> The Supreme People's Court of the P.R.C (2000, November 22). 'The Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks' [WWW document]. URL <http://www.chinaeclaw.com/english/readArticle.asp?id=2372> (English Version). Also available at URL [http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/list\\_column.jsp?BoardID=175&boardid=11501010111602](http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/list_column.jsp?BoardID=175&boardid=11501010111602) (Chinese Version, including 2000, 2003 and 2006 versions)

<sup>40</sup> The State Council of the P.R.C. (2006, May 18). 'The Regulations on the Protection of the Right of Communication through the Information Networks' [WWW document] URL <http://www.cpahkld.com/laws.htm> (English Version). See also [WWW document] URL <http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/detail.jsp?articleid=9400&boardpid=175&boardid=11501010111602> (Chinese Version) (visited 2006, August 20)

<sup>41</sup> The General Principles of Civil Code of the P.R.C (1986, April 16), translated by Whitmore Gray & Henry Ruiheng Zheng (52 Law & Contemporary Problems. 27 1989). Also available at URL <http://www.court.gov.cn/lawdata/law/civil/200807310022.htm> (Chinese Version)

<sup>42</sup> In the 2009 Special 301 Report of the office of the United States Trade Representative, it was argued that Internet copyright piracy remains high in China even with the existence of legislation addressing online copyright protection. ('Special 301' was created by the Congress of the United States of America when it passed the Omnibus Trade and Competitive Act of 1988, which amended the Trade Act of 1974. 'Special 301' requires the United States of America Trade Representative to identify those countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access for persons that rely on intellectual property protection. The 'Special 301' Report is an annual review of the global state of intellectual property rights protection and enforcement. This Report reflects the United States of America Administration's resolve to encourage and maintain effective IPR protection and enforcement worldwide.)

As it is mentioned earlier that the problem faced by China pertaining to Internet copyright protection and ISP copyright liability has been intensively argued both in the United States of America and Germany, in particular, ISPs knowledge requirement this thesis concerned was clarified in these two countries' legislation. Although the solution with regard to liability of decentralised peer-to-peer file-sharing providers is now debated in an international context, the filtering mandate recommended by their courts sufficiently established elements that can be considered as a starting point for further refinement of liability issue over decentralised peer-to-peer file-sharing copyright liability networks.

Having briefly reviewed approaches to ISP copyright liability in the United States of America and Germany and identified the root causes of the problem of a Chinese ISP copyright liability regime, it is now essential to introduce the aim of the thesis, research questions to be answered and methodologies which are anticipated to help answering research questions and achieving the aim of the thesis.

This research concentrates on an ISP copyright liability system in the United States of America, Germany and China and the development of such a system underpinned by the law of tort, without ignoring the possible solution being discussed in an international context in relation to liability issues emerging from a decentralised peer-to-peer file-sharing environment. After making comparison between China's legislation and case law and that of other jurisdictions, the thesis analyses that the inconsistent ISP knowledge requirement and the lack of peer-to-peer file-sharing liability provision are two causes of the problem, which have affected copyright law enforcement on the Internet. The thesis presents the evidence as to the incompleteness and inconsistency of the Chinese ISP copyright liability system based on the findings the thesis undertaken, and finally points out what can be done to improve the consistency and deficiency in an ISP copyright liability regime in order to formulate a number of specific recommendations to an enhanced ISP copyright liability system in China.



Necessarily, to fulfil the aim sets forth in the research, research questions of the thesis need to be identified and answered:

1. A broad knowledge standard including both an actual knowledge standard and the ‘awareness of infringement’ standard has been defined, *inter alia*, as a decisive element in determining ISP copyright liability in the legislation of the United States of America, Germany and China. However, inconsistency exists between legislative provisions in respect to ISP knowledge requirement, which leads to the question as to whether a broad knowledge standard should be preserved in a Chinese ISP copyright liability system. The answer of the question will be given by evaluating whether the knowledge standard laid out in the law of other two jurisdictions and their interpretations in practice might lead to effects in China, and whether the existing interpretation of the knowledge standard in a Chinese ISP copyright liability system is appropriate.
2. When knowledge requirement is absent in a decentralised peer-to-peer file-sharing scenario, the tortious liability principle in particular the ‘intentional tort’ principle has been used to evaluate liability of peer-to-peer file-sharing providers. However, with the advance of the technology, the intent-based analysis created by case law has been subverted. As a result, the filtering mandate was proposed as the criterion for evaluating liability of peer-to-peer file-sharing providers. Can the filtering mandate be the criterion for peer-to-peer file-sharing liability assessment? If it were the solution, might China adopt the filtering mandate and how likely it can be adopted in a Chinese context in order to deal with peer-to-peer file-sharing liability?

The focus of this thesis is to fill up gaps in a Chinese ISP copyright liability system by answering the above research questions, therefore methodologies adopted for this research are: doctrinal research, critical and comparative studies. Quantitative research methodology is involved in this thesis as the research collects information

regarding an ISP copyright liability regime by selecting examples from other jurisdictions, particularly the United States of America and Germany which had influence on China's law making<sup>43</sup>. As references in this thesis are made to legislation and case law/precedents of the United States of America, Germany and China, the thesis also uses a critical comparative analysis of an ISP copyright liability regime. Critical and comparative studies adopted here allow the author to investigate the development of an ISP copyright liability regime in the context of other jurisdictions, to argue whether experience and lesson of other jurisdictions can be learned by China for the improvement of a Chinese ISP copyright liability regime. Conclusion and recommendation of the whole thesis will be drawn on the basis of such a comparative analysis.

## **1.2 Structure of the Thesis**

The thesis is structured in five chapters.

**Chapter 1** introduces the thesis, its aim, methodologies, structure and an introductory analysis of several relevant issues. Firstly, two frequently used terms – 'Internet Service Providers (ISPs)' and 'ISP copyright liability' - are defined, and the establishment of an ISP copyright liability in a copyright law context is examined. The selection of two countries – the United States of America and Germany – is elucidated in order to highlight the focus of the comparative analysis. A general framework of the law of tort underpins ISP copyright liability regime in both the common law system and civil law system is subsequently outlined so as to provide a clear idea of why ISP copyright liability has been established in a tort law context. At the end of the Chapter, the controversy over an ISP copyright liability regime is examined in order to highlight the need of a balanced ISP copyright liability regime in which interests of all the stakeholders are considered and ensured.

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<sup>43</sup> The reason of why the United States of America and Germany are chosen for analysis is explained in 1.5.

The portrait of the existing laws in relation to ISPs copyright liability in the United State of America, Germany and China is drawn in **Chapter 2**. In the context of the legislation of the United State of America, Section 512 of the U.S. Copyright Act is the main statute being examined. However, case laws prior to the DMCA also lay at the heart of the examination, in particular, those that have developed the ambit of secondary liability doctrine in a copyright context. With regard to ISP copyright liability in Germany, the provisions of the TDG (the later TMG) as the main statute is examined as well as its amendment both in 2001<sup>44</sup> and 2007<sup>45</sup> by which the Electronic Commerce Directive was implemented and scattered provisions regulating electronic information and communication services were united. The development of a knowledge standard in the TMG is highlighted as the key element of determining ISP liability. As for the law addressing ISP copyright liability in China, a thorough examination and critical analysis of a gradually established Chinese ISP copyright liability regime are conducted, including the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks, the Regulations on the Protection of the Right of Communication through the Information Networks and a relevant provision in the draft of the Tort Liability Act of the P.R.C.<sup>46</sup> By exploring the existing legislation with regard to ISP copyright liability in three different jurisdictions in details, this chapter intends to investigate the sufficiency and deficiency of those available laws and analyse their implications in practice. Findings finally suggest that to a certain degree the legal framework of ISP copyright liability is well established in both the United State of America and Germany and has contributed to effective copyright protection over the Internet, however, the problem in China is complicated because of, *inter alia*, the inconsistency of the ISP knowledge requirement. In order for the reader to have a better understanding of the aforementioned Chinese legislations, a brief introduction of a Chinese legal system is given at the outset of the discussion of a Chinese ISP copyright liability regime.

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<sup>44</sup> The TDG was revised in 2001 for implementing the Electronic Commerce Directive.

<sup>45</sup> The TDG was replaced along with the Teleservices Data Protection Act and the Media Services State Treaty by the German Telemedia Act 2007.

<sup>46</sup> The Tort Liability Act of the P.R.C (Second Draft) (2008, December 26). [WWW document]. URL <http://www.qinquan.info/179v9.html> (Chinese Version)

**Chapter 3** continues with the examination of the interpretation of the knowledge provisions in cases when such knowledge standard is deemed as, *inter alia*, a decisive element in determining ISP copyright liability in three jurisdictions. In the United States of American, the notice provisions in the DMCA were strictly interpreted by the courts in deciding ISPs' actual knowledge of infringement. Nevertheless, the evaluation criteria for ISPs' 'awareness of infringement' differed. The 'red flag' test and the constructive knowledge standard from the traditional contributory liability were employed by different courts, both of them, however, presented strengths and weaknesses. The German approach was less stringent and flexible when the detailed knowledge provisions were lacking. The 'know' and 'should know (have reason to know)' standard that rested on the law of torts therefore played a significant role in determining ISPs' actual knowledge or awareness of infringement. China developed an actual knowledge standard through the application of the Judicial Interpretation and adopted a similar rigorous approach to ISP actual knowledge evaluation, though there is still a need to clarify several unsolved issues as to evaluation of ISPs' actual knowledge of infringement through notices. The 'should know (have reason to know)' standard from the law of torts contributed to the evaluation of ISPs' 'awareness of infringement'. The outcome of the examination justifies that a broad knowledge standard for ISP copyright liability has now been widely adopted in court practice and is essential for effective online copyright protection.

**In Chapter 4**, a comprehensive examination of peer-to-peer file-sharing copyright liability is undertaken along with critical analysis of decentralised peer-to-peer file-sharing liability cases in a number of jurisdictions. The *Grokster* case as the benchmark case in the decentralised peer-to-peer file-sharing context and its implication is critically examined, followed with the discussion of the *KaZaa*, *Cybersky* and *the Pirate Bay* cases. In addition, legislative solutions to address peer-to-peer file-sharing liability, in particular, the 'three strikes' approach are discussed and the review of different attitudes towards such an approach in various countries is conducted. All in all, the objective of this chapter is to elaborate the potential of the filtering mandate formulated by the case law for evaluating the intent of peer-to-peer

file-sharing providers and to examine the need and possibility of mandatory use of filter in a Chinese context for effective online copyright protection.

After an in-depth comparative analysis of the interpretations of the ISP knowledge standard in the United States of America, Germany and China and the discussion of filtering mandate as a legislative solution in a decentralised peer-to-peer file-sharing liability context, **Chapter 5** concludes with two key recommendations. Recommendations are put forward as a result of critical comparative analysis of legislations and case law of other jurisdictions. Admittedly, the recommendations solely concern ISP knowledge standard and legislative solutions on peer-to-peer file-sharing copyright liability, whereas further research on other alternative measures for effective copyright protection is still needed, which however goes beyond the scope of this thesis.

### **1.3 Defining Internet Service Providers (ISPs)**

The Internet is one of the twentieth century's most important innovations and it refers to a 'global information system'<sup>47</sup>. Though the Internet consists of many different services<sup>48</sup> including the World Wide Web and email and has a rich range of useful features, capabilities, and functions. The basic function performed by the

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<sup>47</sup> The Internet timeline begins in 1962. It was the result of a research by people in the early 1960s that saw great potential value in allowing computers to share information on research and development in scientific and military fields, and it was firstly adopted by the American Department of Defense. However, there was no official definition of the Internet. On 24 October 1995, the Federal Networking Council of the United States of America unanimously passed a resolution defining the term Internet and agreed that the following language reflected definition of the term 'Internet': ' "Internet" refers to the global information system that -- (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.' See Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff. (2003, December) 'A Brief History of the Internet' [WWW document] URL <http://www.isoc.org/Internet/history/brief.shtml> (visited 2005, September 3)

<sup>48</sup> The Internet supports a variety of online services, and a number of tools are available to enable people to make good use of these, including Telnet, FTP, SMTP, Gopher, Wide Area Information Servers (WAIS), and the World Wide Web (WWW).

Internet is extremely simple; it transports any type of information<sup>49</sup> which can be translated to digital forms, such as text, numerical data, images, sounds and videos from one computer to another, and nothing more. The transport function of the Internet is performed by copying digital information from one computer to another until a copy reaches the receiving computer. Every Internet transaction requires the participation of multiple intermediaries, and may well involve in any transmission of information more than the two actors who are simply the sender and the receiver.

In the case of the Internet, a range of Internet Service Providers are involved in delivering contents to end users, including the traditional network providers, access providers,<sup>50</sup> host service providers, information location tool providers,<sup>51</sup> bulletin board operators, news groups and chat room operators and peer-to-peer file-sharing service providers,<sup>52</sup> and many new sorts of providers.<sup>53</sup> Each provider (site) offers a complete range of services, covering hosting, transmitting, or publishing materials, which might be engaged in copyright infringement, but not all of them are liable. Indeed, whether they are liable depends on their roles in the dissemination of the infringing content.<sup>54</sup> The finding in the cases<sup>55</sup> regarding ISP copyright liability is that, in the absence of peer-to-peer file-sharing technology, the most targeted ISPs are those who knowingly participate in the dissemination of unauthorised copyright contents with financial benefits.

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<sup>49</sup> Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff. (2003, December) 'A Brief History of the Internet' [WWW document] URL <http://www.isoc.org/Internet/history/brief.shtml> (visited 2005, September 3)

<sup>50</sup> Such as BT and Sky.

<sup>51</sup> Such as Google and Yahoo.

<sup>52</sup> The old models were Napster, Aimster, Grokster, and KaZaa, which were shut down owing to the violation of copyright. The current models are services such as the Pirate Bay, Rapidshare and Torrent Reactor, etc.

<sup>53</sup> Such as, the social networking websites Facebook and MySpace; the video sharing sites YouTube and the Internet telephony Skype and the virtual world website such as Second Life.

<sup>54</sup> According to the law addressing ISP copyright liability in most jurisdictions, for example, Section 512 (a) (b) and (c) of the U.S. Copyright Act and Article 12, 13 and 14 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), an ISP is only liable for hosting but not for caching or acting as a mere conduit.

<sup>55</sup> For example, the American cases of *Sega Enters. Ltd. v. MAPHIA* and *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, the Dutch case of *Scientology v. Karin Spaink & Xs4all*, and the Chinese cases of *Wang Meng, et al v. Beijing Cenpok Intercom Technology Co., Ltd* and *Liu Jingsheng v. Sohu Aitexin Information Technology Ltd.*

An 'ISP' is named differently in the legislations of different countries, such as, a 'service provider' in the DMCA of the United States of America and the Electronic Commerce Directive as well as the TDG of Germany, and a 'network service provider' in the Chinese Judicial Interpretation and the Regulations.

With the emergence of peer-to-peer file-sharing technology that allows 'computer network uses a series of ad hoc connections between participants in a network and the cumulative bandwidth of network participants',<sup>56</sup> the target has changed to those who distribute peer-to-peer file-sharing programs, namely peer-to-peer file-sharing service providers, such as Napster, Aimster, Grokster, KaZaa, eMule, POCO, the Pirate Bay, etc. Though the classification of peer-to-peer file-sharing technology varies,<sup>57</sup> in general, peer-to-peer technology has four different applications. The first application - centralised peer-to-peer file-sharing programs - provide a centralised index to all the files stored and available for uploading on the users' individual computers. Napster was the most typical centralised peer-to-peer file-sharing program model between 1999 and 2001.<sup>58</sup> The second application of peer-to-peer file-sharing programs was decentralised. In this application, a centralised index is no longer available, instead, each user who has downloaded a particular peer-to-peer software maintains an index only of those files stored on his/her own computer and makes them available for downloading. Gnutella, KaZaa, eMule and Grokster are the models of the decentralised peer-to-peer file-sharing application.<sup>59</sup> This decentralised

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<sup>56</sup> Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File - Sharing (BERR, UK: July 2008), p. 11

<sup>57</sup> Michael Nwogugu, 'Economics of Digital Content: New Digital Content Control and P2P Control Systems/Methods', *C.T.L.R.* Vol.14, No. 6, (2008), pp.140-149; Harry Yang, 'From P2P to BT, File-Sharing Software Upgrades with Lawsuits', *China Intellectual Property (Online Magazine)*, Issue 17, (April 2007); Danny Hughes, James Walkerdine, Kevin Lee, 'Monitoring Challenges and Approaches for P2P File-Sharing Systems', [WWW document] URL <http://www.kevin-lee.co.uk/work/research/tracing.pdf> (visited 2008, May 2); Stephanos Androutsellis-Theotokis And Diomidis Spinellis, 'A Survey of Peer-to-Peer Content Distribution Technologies', *ACM Computing Surveys*, Vol. 36, No. 4, (December 2004), pp. 335-371; Peer-to-Peer File-Sharing: the Legal Landscape (Australian Vice-Chancellors' Committee, The Council of Australia's University Presidents, November 2003); Sandvine Incorporated, (July 2002,), 'Peer-to-Peer File Sharing: The impact of file sharing on service provider networks (An Industry White Paper)', [WWW document] URL <http://downloads.lightreading.com/wplib/sandvine/P2P.pdf> (visited 2008, May 2)

<sup>58</sup> Napster was shut down after a series of legal actions taken by the Recording Industry Association of America (RIAA) and later purchased by Roxio. It is now an online music service offering a variety of purchased and subscription models.

<sup>59</sup> KaZaa is now running subscription-based service, which provides unlimited access to hundreds of thousands of CD-quality tracks for one low monthly fee. Grokster is no longer operative. Currently,

peer-to-peer file-sharing technology means peer-to-peer file-sharing operators no longer host any kind of infringing files themselves; instead, it enables users who have downloaded particular peer-to-peer software<sup>60</sup> to unlawfully exchange and share files which contain copyright works, therefore it has been much harder to control in terms of preventing copyright infringement by peer-to-peer file-sharing providers. The third generation of peer-to-peer technology such as BitTorrent and the Pirate Bay is those that have no decentralised server to search sharing files but can break a large file into many pieces and can connect uploaders to downloaders with tracking files which tells them from where they can download the pieces of files. Despite this technology requires online communities or online forums to exchange torrent files, it does not have the trouble of searching files across networks. It allows transfer between multiple peers, therefore, it solves the problem with the download queue and it is very efficient. With regard to copyright infringement, the striking point of this peer-to-peer technology is that the torrent files only provide information that which computer shares pieces of or the whole file, they themselves contain no copyright content. The fourth generation of peer-to-peer file-sharing is the services that send streams not files over a P2P network. A swarming technology is used in their designs and it allows users to hear radio and watch television without any *central* server involved and the data is confined to an Internet connection and a host page, instead of storing in the users' computer, examples include PPLive and Cybersky.

Though peer-to-peer file-sharing technology has been used for copyright infringement; it is still a neutral technology with both positive and negative applications, in other words, it is capable of both infringing and non-infringing uses. Therefore, among peer-to-peer file-sharing providers, those who simply make and

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there are still some peer-to-peer file-sharing applications utilising a decentralised peer-to-peer model, Limewire is the one among them. Limewire runs on the decentralised Gnutella Network and it is now one of the world's most popular peer-to-peer file-sharing applications.

<sup>60</sup> The decentralised peer-to-peer file-sharing software work in a way that they allow for a network that could scale to a much larger size by electing some higher-capacity nodes to be indexing nodes, with lower capacity nodes branching off from them. In addition, distributed hash tables included in their design help solve the scalability problem by electing various nodes to index certain hashes (which are used to identify files) and allowing for fast and efficient searching for any instances of a file on the network.



distribute peer-to-peer applications but have no intention to promote users to infringe others' copyrights should not be liable for users' infringements.<sup>61</sup>

All in all, in this thesis, ISPs that provide Internet access service, hosting service, search engine and linking services, etc. and the peer-to-peer file-sharing providers are all under *an umbrella term* of ISPs and they remain to be the main entity in this ISP copyright liability discussion.

#### **1.4 Defining ISP Copyright Liability**

Under a general tort law doctrine, the distinction between direct infringement and indirect infringement in a copyright context is accepted and their matching liability – direct liability and indirect liability – is therefore established. Being referred to the liability that a third party contributes or jointly infringes copyright of copyright owners, indirect copyright liability is defined differently in different countries. In the United States of America, despite the U.S. Copyright Act 'does not expressly impose liability on anyone other than direct infringers, courts have long recognised that in certain circumstances, vicarious or contributory liability will be imposed.'<sup>62</sup> Nevertheless, in the civil law countries, such as Germany and China, neither of their copyright law provide for an indirect copyright liability in an explicit manner, whereas in their Civil Codes, joint tort liability is used to describe liability of a party who jointly contributes to infringement with the direct infringer.<sup>63</sup>

This thesis intends to use an umbrella term - ISP copyright liability - to cover ISP related copyright liabilities, which are named differently in various jurisdictions,<sup>64</sup> in order to minimise any possible confusion. Nevertheless, it should be noted here that

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<sup>61</sup>*Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005). Grokster was held liable in this case, owing to that it had intent to infringe copyright by explicitly encouraging copyright infringement of its users.

<sup>62</sup>*Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996)

<sup>63</sup>E.g., Section 930 and 840 (1) of the German Civil Code and Article 130 of the General Principles of Civil Code of the P.R.C

<sup>64</sup>For example, ISP copyright liability is also called 'secondary copyright liability', 'third party copyright liability' in the United States of America, and in the civil law countries such as Germany and China, it is known as 'joint tort copyright liability'.

civil liability of ISPs for copyright infringement is the only concern in the discussion, criminal liability of ISPs for copyright infringement is far beyond the scope of this thesis. Before the discussion goes further, it is imperative to review the establishment of ISP liability in a copyright law context and three liability regimes proposed for ISP copyright liability.

#### **1.4.1 Why ISPs Are Being Targeted**

In a digital environment, although most Internet users use the Internet to spread lawful contents, there are also users who abuse the facilities and distribute unlawful materials. According to the copyright law, any acts of distributing and disseminating copyright work over the Internet without permission would constitute copyright infringement, and anyone who plays a part in the communication to the public of a copyright protected work (e.g. by publicly performing or displaying it, or by distributing it) may, in principle, violate the exclusive right of communicating a work to the public and be held liable. In addition, the act of reproducing a copyright work without permission is also covered by copyright law and unauthorised reproduction of copyright work is strictly prohibited over the Internet.<sup>65</sup> Apparently, Internet users who place such content on the Internet without permission (content providers) are the first liable party, and they could certainly be held liable under copyright law by owners or licencees of those contents. However, due to the nature of the Internet and the widespread transmission made possible by it, in practice, suing numerous individual infringers is a relatively big task for copyright owners and right holders. Meanwhile, individual lawsuits are fairly expensive and the likelihood of compensation from those individual users is low. Therefore, copyright owners and right holders have been reluctant to sue. For protecting their interests, an alternative path for enforcing their copyright is to target ISPs who facilitate and assist unauthorised transmission of copyright works. Over the Internet, ISPs function as communicators or web-hosts of online materials which may take the form of copyright material available on the Internet or digital files available for sharing on

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<sup>65</sup> Article 9 (the right to reproduce the work), Article 11 (the right to perform the work publicly) of the Berne Convention for the Protection of Literary and Artistic Works. See also Article 8 of the WIPO Copyright Treaty of 1996.

peer-to-peer file-sharing networks. In either case, if the materials transmitted via those ISPs are unauthorised, the issue regarding ISP liability for copyright infringement may arise. In certain circumstances, for example, with the knowledge of infringing contents and the control of direct copyright infringers, sometimes the benefit they gain from unlawful activities, ISPs can be easily held liable under relevant laws.<sup>66</sup> Besides, ISPs are easily identified targets; they have deep pockets to compensate and they control the gateways to the online environment. Therefore, ISPs are actually the best candidates for infringement prevention because they are the parties in the best 'position to know the identity and activities of their subscribers and to stop unlawful activities'.<sup>67</sup>

#### **1.4.2 Activities Make ISPs Liable**

Copyright law protects original copyright works with a set of exclusive rights given to copyright owners. These exclusive rights include the right to reproduce, distribute, perform, display, or license their works.<sup>68</sup> Copyright infringement occurs when someone other than the copyright owner or right holder engages in one or more of the exclusive activities without consent.<sup>69</sup>

The advance of the Internet and digital technology has a profound and disturbing impact on the scope and structure of copyright law, and for copyright owners, their exclusive rights, in particular the rights of reproduction and distribution have been the most affected in the new Internet surrounding. Yet, the conventional copyright law system has no clear provisions in relation to reproduction and distribution of copyright works on the Internet, and traditional copyright enforcement methods also

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<sup>66</sup> For example, Section 512 (c) of the U.S. Copyright Act and Article 22 & 23 of the Regulations on the Protection of the Right of Communication through the Information Networks of the P.R.C set forth the knowledge, the control and the financial benefit as the preconditions of ISP copyright liability, whereas the German TMG only requires an ISP's knowledge of infringement and the prompt removal of infringing content upon knowledge for liability.

<sup>67</sup> Intellectual Property and the National Information Infrastructure - Report of the Working Group on Intellectual Property Rights (Information Infrastructure Task Force, the U.S., 1995), p.117.

<sup>68</sup> For example, Articles 8, 9, 11, 11bis, 11ter and 12, 14 of the Berne Convention for the Protection of Literary and Artistic Works, Section 106 of the U.S. Copyright Act, Section 15 of the German Copyright Act 1998 (Urheberrechtsgesetz), and Article 10 of the Copyright Act of the P.R.C 1990.

<sup>69</sup> For example, Section 501 of the U.S. Copyright Act, Section 96 of the German Copyright Act (Urheberrechtsgesetz), and Article 45 & 46 of the Copyright Act of the P.R.C 1990.

seem ineffective in dealing with hundreds and thousands of direct copyright infringers emerging from the Internet.

To respond to the challenges to copyright laws imposed by digital technology and the Internet, at an international level, the WIPO diplomatic conference quickly adopted the WCT and the WPPT in December 1996. These two treaties grant authors, performers and phonogram producers an exclusive right to make a work available to public, e.g. to authorise or prohibit the dissemination of their works and other protected materials through interactive networks such as the Internet.<sup>70</sup> This exclusive right provides control over the act of ‘making available’ by all means of delivery - ‘by wire or wireless means’<sup>71</sup>- and whenever ‘members of the public may access the work or phonogram from a place and at a time individually chosen by them.’<sup>72</sup> By eliminating a remaining gap in copyright protection on the Internet and offering an explicit standard of copyright protection especially with regard to Internet - based delivery of copyright work, these two treaties constitute the international basis for legislation concerning copyright law in the information society. Since then, the ‘making available’ right alongside the reproduction right becomes a very attractive weapon for copyright owners to fight increasing copyright piracy over the Internet.

The WCT and the WPPT both came into force in 2002 and by far 36 countries implemented these two treaties to create a clear-cut legal environment to online copyright protection. For example, the United States of America implemented the WCT and WPPT through the DMCA. At the other side of the Atlantic, the Parliament of European Union passed Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (the Copyright Directive)<sup>73</sup> and clearly implemented the right of communication to the public in this Copyright Directive<sup>74</sup>.

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<sup>70</sup> Article 8 of the WCT and Article 10 and 14 of the WPPT.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> The European Parliament and the European Council. (2001, May 22). ‘the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects

Followed the trend, many more countries have signed on to both of the treaties and implemented them to address the new copyright issues emerging from the Internet. They include the ‘making available’ right within the sphere of the ‘communication to the public’ right, or the distribution right in order to regulate copyright infringement taking place on the Internet. For instance, in Germany, the German Copyright Act<sup>75</sup> was revised in order to implement the WCT as well as the WPPT.<sup>76</sup> The new amended Copyright Act 2003 extended copyright protection to the Internet. Section 19a of it provided copyright owners with the right of making available to the public which is the right to authorise or prohibit any making available to the public of their works in such a way that members of the public may access them from a place and a time individually chosen by them.

In the developing countries, such as in China, ‘the Right of Communication through the Information Networks’ was added into the amendment of its Copyright Act in 2001 and defined as ‘the right to communicate to the public a work, by wire or wireless means in such a way that member of the public may access these works from a place and at a time individually chosen by them’.<sup>77</sup> Pursuant to Article 10, paragraph 1, (12) of the Revised Copyright Act 2001, copyright owners enjoy the exclusive right to communicate their works through the information networks, which include the Internet, local area networks, fee-based television networks and telephone and mobile phone networks. Though China joined the two WIPO treaties

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of Copyright and Related Rights in the Information Society’ [WWW document] URL <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> (visited 2004, February 20)

<sup>74</sup> Article 3(2) of the Copyright Directive: Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chose by them: ... (b) for phonogram producers, of their phonograms. [WWW document] URL <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> (visited 2005, February 20)

<sup>75</sup> The German Copyright Act (Urheberrechtsgesetz), [WWW document] URL <http://www.iuscomp.org/gla/statutes/UrhG.htm> (visited 2007, January 20)

<sup>76</sup> The German Act on the Regulation of Copyright in the Information Society (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft), Federal Law Gazette Part I, No. 46, September 12, 2003, pp. 1774-1788.

<sup>77</sup> Article 10, paragraph 1, (12) of the Copyright Act of the People’s Republic of China.

on June 2007,<sup>78</sup> the first regulation concerning the protection of the right of communication through the information networks named the Regulations on the Protection of the Right of Communication through the Information Networks was issued one year earlier in July 2006.

With the passage of the WIPO Treaties and the amendments of domestic copyright laws, both at international and national level, copyright owners' rights of distribution and communication to the public over the Internet are clearly clarified.

### **1.4.3 ISP Liability Approaches**

Although it is explicitly stated in the copyright law that whoever violates legal rights of copyright owners on the Internet will be held liable under copyright law, what kind of liability can be imposed on ISPs is still not clear. While a number of countries have considered the issue of ISP copyright liability, in most jurisdictions, it has not been possible to accuse ISPs with direct copyright infringement, as they did not themselves violate the distribution and reproduction rights of copyright owners, although their users did. Therefore, even though the American courts had tried to apply direct liability to the ISP, the court ruling<sup>79</sup> was not able to set a precedent for the succeeding cases. In the meantime, no liability for ISPs has also been suggested, yet, its flaw lies in the fact that it is not able to provide adequate incentive to ISPs to discourage rampant copyright infringement committed by Internet users; it thereby cannot offer proper protection to the interests of copyright owners in the Internet environment. Owing to the drawbacks of imposing direct liability and no liability, neither is considered appropriate for ISP liability for copyright violation. Consequently, a limited liability regime has drawn the attention.

#### **1.4.3.1 Direct Liability**

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<sup>78</sup> China joined the WCT and the WPPT at June 9, 2007. [WWW document] URL <http://www.wipo.int/treaties/en/documents/pdf/wct.pdf> and (visited 2007, Nov 20) [WWW document]. URL <http://www.wipo.int/treaties/en/documents/pdf/wppt.pdf> (visited 2007, Nov 20)

<sup>79</sup>It refers to *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

In fact, 'direct liability' was proposed to regulate ISP copyright liability over the Internet before the enactment of the DMCA in the United States of America. In the first case regarding ISPs' liability - *Playboy Enters., Inc. v. Frena*<sup>80</sup>, the court held that a Bulletin Board System (BBS) operator was directly liable for distributing infringing photographs uploaded and downloaded by their users. The court ruling suggested that a direct liability for direct infringer under the Copyright Act of the U.S.<sup>81</sup> was initially imposed on the BBS operator in this case. However, 'direct liability' is a liability without fault. In the context of copyright infringement, direct infringer bears 'direct liability' because direct infringement does not require any intent. For ISP liability in the copyright cases, instead, intent or knowledge is required to make a finding of ISP's copyright infringement. Thus, in the scenario that an Internet user uploads a film to a BBS without the copyright owner's consent, direct liability should impose on the Internet user who is the direct infringer and who reproduced and initiated illegal distribution of the film without authorisation. If direct liability is imposed on the ISP who assisted such reproduction and distribution, it means that the ISP is liable no matter how much it knows (or has reason to know) about the infringement and no matter whether it can control the infringement or not.

At first view, 'direct liability' for ISPs appears as an effective instrument to tackle extensive online copyright infringement, however, consider the impact of a direct liability; it is not really an appropriate option. It is a great benefit to copyright owners though; its impact on the ISP industry is also significant. Since under a 'direct liability' approach, even though ISPs did not infringe copyright themselves and they had no knowledge of what was passing along their network at any given point and time, they are still found to be liable. Such a heavy liability burden could force ISPs to take any possible technical measures to monitor and identify all the materials flowing through their systems so as to make sure they can escape from liability; this could accordingly lead to overzealous censorship which would not only undermine

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<sup>80</sup>*Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

<sup>81</sup>Section 501 of the U.S. Copyright Act. The U.S. Copyright Act's direct liability rule probably derives from the notion of copyright as a property right. Under other proprietary torts, such as trespass and conversion, the defendant is similarly directly liable, i.e. it is sufficient that the defendant intended to commit an act that has the effect of interfering with another person's property. Intention to cause harm is not required. See England 1992, p.49; Emanuel 1991, p.30.

the growth of the Internet and the advance of digital technology, but would also violate users' privacy and stifle free speech.<sup>82</sup> As a rather unfair and excessive liability regime, 'direct liability' for ISPs for copyright infringement is finally rejected.

#### **1.4.3.2 No Liability**

'No liability' approach is welcomed by the ISP industry, as it tends to give ISPs total immunity from liability in respect of the content they carry. This approach has been supported for its strength of prompting free speech; however, the great weakness of it is the potential of ISPs ignoring legitimate demands without fear when copyright owners or right holders seek to take down infringing materials. For example, in the United States of America, Section 230 of the Communication Decency Act of 1996<sup>83</sup> offers immunity to providers and users of interactive computer services that make third party content available to others, but it has been argued that it had given ISPs unrestricted power to act at their own discretion and ignore legitimate demands of victims. Therefore, it was attacked by a series of courts case such as *Barrett v. Rosenthal*<sup>84</sup> and *Grace v. Ebay*<sup>85</sup>. Even though these are cases regarding defamation not copyright, they illustrate the point that a 'no liability' regime is an unhelpful regime. As a 'no liability' regime does not take copyright owners and right holders into account when their interests are extensively affected by the negligence of ISPs (if the law imposes a duty of care on ISPs). Moreover, the most possible consequence is that ISPs would not waste their time and money monitoring or cleaning up any unlawful content over the Internet when they would suffer no legal consequences from failing to do so.

A 'no liability' approach has been proved unhelpful, owing to that it is not capable of protecting the interests of the victims of copyright infringement and it leaves no hope of relief where the true infringers cannot be identified or are financially insolvent.

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<sup>82</sup> For example, overzealous ISPs may censor private e-mail messages or prevent a user from downloading material that is absolutely lawful but deemed unlawful by the ISPs. They may also censor online discussions by making ungrounded legal threat against services that host the discussions.

<sup>83</sup> Section 230 of the Communications Decency Act of 1996.

<sup>84</sup> *Barrett v. Rosenthal*, 40 Cal.4th 33, 146 P.3d 510, 51 Cal.Rptr.3d 55 (Cal. Sup. Ct., Nov. 20, 2006).

<sup>85</sup> *Grace v. Ebay*, 2004 WL 1632047 (Cal.App.2<sup>nd</sup> Dist. July 22).



### 1.4.3.3 ISP Limited Liability Based on, *inter alia*, Knowledge

ISPs have been accused of providing the facilities for direct infringers and assisting direct copyright infringement and have been brought to the courts by copyright owners or right holders as the best party to eliminate the risk of online copyright infringements. However, to what extent and on which scale ISPs should be liable are less clear. Faced with those equivocal questions, the legislatures in different jurisdictions started to work on a framework in which the scope of ISP copyright liability can be determined. The United States of America was the first country to issue a law regarding ISP liability for copyright infringement over the Internet.

As the first American copyright law regulating ISP copyright liability, Section 512 of the U.S. Copyright Act (Title II of the DMCA) recognised that liability should be imposed on ISPs, depending on their services. According to the Act, limitation of liability is given to those that acted as a 'passive conduits'<sup>86</sup> or those that complied with elaborate procedures, or those that provided system caching, hyper-linking or web hosting, and comply with a 'notice and take-down' procedure, and expeditiously removed infringing materials or blocked access to infringing materials upon copyright owners' notices.<sup>87</sup>

Prior to the United States of America enacted the DMCA, Germany enacted legislation - the MDSStV and the TDG - for all the Internet related contents liability. These two legislations divided ISPs into three different groups and distinguished their liability. However, the law regulated liability for all content not only copyright materials. The German legislation also inspired the Electronic Commerce Directive where a similar approach to German legislation was adapted<sup>88</sup>.

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<sup>86</sup> Section 512 (a) of the U.S. Copyright Act

<sup>87</sup> Section 512 (b) (c) (d) of the U.S. Copyright Act

<sup>88</sup> *Supra* note 28. The Electronic Commerce Directive is a Directive at European level, it was issued in 2002, and it has now been implemented in all the Member State countries. In the Directive, ISP liability varies depending on their roles. When acting as a mere conduit, the service provider is completely absolved from liability provided that it does not initiate the transmission, select the receiver of the transmission, or modify the information contained in it. There is also exemption for caching, provided that the information has not been modified, the cache is updated regularly, and the service provider has not obtained actual knowledge of the disabling of the original source or a court or

Having observed the models set by the United States of America and the Europe, many other countries have also followed with a similar knowledge - based copyright liability for ISPs. China is the one among them. China updated the Copyright Act in 2001 and issued the Regulations in which an American-style ISP copyright liability system is reflected, including separate liabilities for different groups of ISPs, a ‘notice and take-down’ procedure and detailed provisions regarding requirements of notices and counter-notices.

It suffices to conclude from the foregoing examination that a limited liability approach is adopted for ISP liability for copyright infringement in most jurisdictions. It is that ISPs should be sheltered from liability until the point where they, *inter alia*, gain actual knowledge or have awareness of the illegal content or activities, and they fail to exercise their control to remove or disable access to it upon such knowledge or awareness of the infringement. This limited liability approach is a fair approach that placed responsibility on the person who has knowingly assisted or facilitated copyright infringement. It therefore has been effective in tackling extensive copyright infringement over the Internet. However, such a knowledge standard is not be able to evaluate liability of some peer-to-peer file-sharing providers because knowledge is no longer relevant in several developed peer-to-peer file-sharing infrastructures including the second to fourth generation of the peer-to-peer file-sharing technology discussed in 1.3 of this Chapter.

#### **1.4.3.4 Peer-to-Peer File-Sharing Liability**

Peer-to-peer file-sharing is the process by which Internet users can exchange digital information. This model not only allows users to receive or download files, but also

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administrative authority order closing it down. For hosting, the service provider is exempt from liability provided that it has no actual knowledge of illegal activity or information. It is exempt from damage claims if it has no actual knowledge and a lack of awareness of facts from which the illegal activity is apparent. But a similar notice and take down regime is applied here which requests the service provider must act expeditiously to remove or disable access to information upon obtaining knowledge of copyright infringement. The Directive imposes no general obligation on providers to monitor content or investigate potentially illegal copyright activities. However, an ISP could still be required to disclose the identification of infringing users to copyright owners, and a court or administrative authority could require an ISP to terminate and prevent the infringement.

to store and upload files to other users. Peer-to-peer file-sharing system enables the exchange of any kind of digital file including files protected by copyright. Therefore, not surprisingly, unauthorised reproduction and distribution of copyright works, which infringe copyright of copyright owners, grow with the increasing use of peer-to-peer file-sharing programs. It was estimated that no less than 80 per cent of all Internet traffic comprised copyright infringing files on peer-to-peer file-sharing networks.<sup>89</sup> Only taking music content for example, around 95 per cent of music tracks were downloaded globally without payment to the copyright owners or right holders in 2008.<sup>90</sup>

For the first application of peer-to-peer file-sharing technology, court found no difficulty in establishing their liability; because there is a centralised server in such a system that controls all traffic among users, and lists of shared files of network users are stored in a central sever. Therefore, any query made by users to a central server for their desired files is known, and the central server has the knowledge of users' exchanging activities and has the control over their activities. Such knowledge and the ability to control would make the court to determine liability of the centralised peer-to-peer file-sharing providers easily.

Nevertheless, the subsequent generations of peer-to-peer file-sharing technology are greatly advanced with no central sever involved<sup>91</sup>, fast downloads and anonymity<sup>92</sup>, and more popular channels enhanced by increased bandwidth<sup>93</sup>. The structure of these advanced peer-to-peer file-sharing systems creates the problem of how to establish liability of those who do not have knowledge of infringement, retain no ability to control or prevent infringement of their users, and how to apply the existing liability principle on them.

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<sup>89</sup> IFPI. (2009, January). 'IFPI Digital Music Report 2009'. [WWW document]. URL <http://www.ifpi.org/content/library/DMR2009.pdf> (visited 2009, January 20)

<sup>90</sup> *Ibid.* (This estimation was based on International Federation of the Phonographic Industry's collating studies in 16 countries over a four year period)

<sup>91</sup> It refers to advantages of the second generation of peer-to-peer file-sharing technology.

<sup>92</sup> It refers to advantages of the third generation of peer-to-peer file-sharing technology.

<sup>93</sup> It refers to advantages of the fourth generation of peer-to-peer file-sharing technology, in particular, the strengths of those peer-to-peer file-sharing applications such as Zattoo, PPLive, and PPStream, which allow users to watch various TV channels that are not available in their own territories.

As peer-to-peer file-sharing technologies vary, it is very difficult to determine legitimacy of their system. Moreover, peer-to-peer file-sharing technologies develop side by side along with liability litigation; it makes the law even harder to keep pace with the advance of peer-to-peer file-sharing technologies. Up to date, countries that have adapted a limited knowledge based liability system for ISPs such as the United States of America and China do not currently have a legislation specifically addressing liability of peer-to-peer file-sharing, both the liability of peer-to-peer file sharers and providers. In German, although the newly amended Copyright Act<sup>94</sup> stipulated that private copying limitation does not apply if the copy is made from a suspicious source, by which the prohibition of private copying is extended to peer-to-peer file-sharing services and the liability for users' downloading from a suspicious source may trigger, liability of peer-to-peer file-sharing providers is still not defined.

When the existing legal framework in most jurisdictions is not completely adequate to regulate the evolving peer-to-peer file-sharing systems, their courts have attempted to use other tort law doctrines to analyse the facts they considered most important in peer-to-peer file-sharing liability cases. The typical example is an inducement liability<sup>95</sup> rule created by the *Grokster* Court in the United States of America. By applying the inducement liability rule in a peer-to-peer file-sharing context, the court found that the defendants had intent of promoting their software to infringe copyright of the plaintiffs and therefore liable, even though their acts did not meet the requirement of vicarious infringement and contributory infringement. Despite the inducement liability rule met many criticisms as it would not be possible to find intent in every peer-to-peer file-sharing cases, particularly when the technology is dynamic, the intent-based analysis created by the *Grokster* case is deemed as significant, as it set out an example for other courts to evaluate peer-to-peer file-sharing liability from a different angle.

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<sup>94</sup> The Second Act Governing Copyright in the Information Society (eines Zweiten Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschaft) (January 2008) [WWW document] URL <http://bundesrecht.juris.de/urhg/> (German Version) (visited 2008, October 2)

<sup>95</sup> The inducement liability rule was created by the court of *MGM v. Grokster*. It is a liability for 'one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement'.

## 1.5 The Selection of Two Countries

As this thesis compares and scrutinizes the law and cases associated with ISP copyright liability in the United States of America and Germany with those of China, and attempts to analyse implication of the comparison to be drawn for China, it is therefore necessary to elucidate my selection of two aforementioned countries and the ground of my selection.

### 1.5.1 The United States of America

Firstly, as ISP copyright liability this thesis concerned is a liability issue associated with Internet, which is a global phenomenon. The leading country, the United States of America is chosen in this thesis, in terms of both its Internet population<sup>96</sup> and its principle role in developing Internet related law. Naturally, the examination of ISP copyright liability starts with the examination of the American law and cases. The position of the United States of America is extraordinarily central on the Internet. Because that most of the literature and cases cited in relation to ISP copyright liability originate from the United States of America, such as the first Copyright Act specifically addressing limitations of ISP liability – Section 512 of the U.S. Copyright Act and several landmark cases – *A&M Records, Inc. v. Napster, Inc.*<sup>97</sup>, *In re Aimster Copyright Litigation*<sup>98</sup>, and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*<sup>99</sup> Therefore, the American legislation, case law and their implication for other countries including China are significant. In fact, China has been observing legal development of the United States of America, especially in the aspect of legislating ISP copyright liability. The model sets forth in Section 512 of the U.S. Copyright Act for limitation of ISP copyright liability has been followed by the

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<sup>96</sup> The United States of America is the world's second biggest nation behind China, which has 338 million Internet users by 30 June 2009, in terms of Internet population.

<sup>97</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)

<sup>98</sup> *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003)

<sup>99</sup> *Supra* note 21.

Regulations,<sup>100</sup> and relevant American legislation and case law in this regard and their implications in a Chinese ISP copyright liability have been carefully studied.<sup>101</sup>

The second reason of choosing the United States of America for comparison is that the United States of America has played a significant role in urging China to come to terms with the problem in protecting copyright in particular in an Internet context. On the one hand, the United States of America has actively engaged China on intellectual property law enforcement initiatives through various established channels, such as the Joint Commission on Commerce and Trade, the United States of America-China Strategic Economic Dialogue and the United States of America-China Joint Liaison Group for Law Enforcement Cooperation in order to jointly operate with China to combat intellectual property infringements associated with the American right holders.<sup>102</sup> On the other hand, the United States of America has pressed China to improve legislation and law enforcement, for example by filing two requests before the WTO Dispute Settlement Body and contending that several of China's enforcement measures with regard to aspects of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement)<sup>103</sup> were

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<sup>100</sup> In the Regulations on the Protection of the Right of Communication through the Information Networks, similar 'safe harbours' for mere conduit, caching, hosting, and linking are created and a 'notice and take down' procedure is established.

<sup>101</sup> Hong Xue, *Intellectual Property and Electronic Commerce* (Beijing: Law Press, 2003), pp. 335-345, pp. 362-368, pp.380-393; Zhiwen Liang, *Discussion on Digital Copyright – Centred on the Regulations on the Protection of the Right of Communication through the Information Networks*, (Beijing: Intellectual Property Press, 2007), pp. 249-273, pp.299-304, pp. 310-322; Lixin Yang, *The Law of Electronic Commerce Tort* (Beijing: Intellectual Property Press, 2005), pp. 236-238, pp.285-288, pp. 306-307; Xiangjuan Meng, *The Determination of Copyright Infringement* (Beijing: Law Press, 2001), pp. 209-219; Jiarui Liu, 'Discussion on Chinese "Safe Harbours" for ISPs', *Intellectual Property*, Vol.19, No. 110, (2009), pp.13-22; Guanbin Xie and Xueqin Shi, 'Fair Definition on Fault Liability of Internet Searching Service Provider', *Intellectual Property*, Vol. 1, (2008), pp. 34-37, p. 35; Qian Wang, 'Discussion on the Determination of Indirect Liability of the Information Location Tool Provider – and Compare the Decisions of the *Baidu* and *Yahoo! China* Cases', *Intellectual Property*, Vol. 4, (2007), pp. 3-8, Qian Wang, 'Twenty Years since the *Sony* Case – Review, Reflection and Inspiration', *Intellectual Property Research*, Vol. 4 (2004), pp.59-68.

<sup>102</sup> Information on the bilateral engagement efforts undertaken by the United States of America and China can be found in the United States of America Government reports such as the 2007 Trade Policy Agenda and 2006 Annual Report, the 2007 National Trade Estimate Report on Foreign Trade Barriers, the 2007 Special 301 Report, and the 2007 Report to Congress on China's WTO Compliance.

<sup>103</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) (1994, April 15) [WWW document]. URL [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm) (visited 2005, September 10)

being inadequately applied.<sup>104</sup> After all, China is currently the second largest export market for the United States of America,<sup>105</sup> trade and economic issues are central in the United States of America-China relations, in particular, inefficient copyright protection in China as one of critical economic issues that deteriorated two countries' trade and economic cooperation. Owing to copyright piracy in China, the United States of America lost more than 2 billion dollars (approximately 1.22 billion Pounds Sterling)<sup>106</sup> every year<sup>107</sup> with several industries such as music, motion pictures, business and entertainment software industry were badly affected.<sup>108</sup> The United States of America remained China as a key problem country in the 'Priority Watch List'<sup>109</sup> in the annual 'Special 301' Report<sup>110</sup> produced by the office of the United States of America Trade Representative.<sup>111</sup> Nevertheless, the United States of America has also obtained a great deal of trade interests from the exports of copyright products to China, owing to huge demand for copyright products of the United States of America in China<sup>112</sup>. Such interests motivated and will continue to

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<sup>104</sup> Report to the President and Congress on Coordination of Intellectual Property Enforcement and Protection (the National Intellectual Property Law Enforcement Coordination Council, January 2008) and WTO. (2009, January 26). 'WTO Issues Panel Report on US-China Dispute over Intellectual Property Rights' [WWW document] URL [http://www.wto.int/english/news\\_e/news09\\_e/362r\\_e.htm](http://www.wto.int/english/news_e/news09_e/362r_e.htm) (visited 2009, January 26)

<sup>105</sup> The Foreign Trade Statistic – Top Trading Partners (the United States of America Census Bureau, March 2009)

<sup>106</sup> According to the foreign currency exchange rate on 23 October 2009: British Pounds Sterling: US Dollar = 1: 1.64.

<sup>107</sup> For example, as reported by the 'Special 301' Reports that copyright losses of the United States of America due to piracy in China exceed \$2.3 billion (approximately 1.40 billion Pounds Sterling) in 1995, \$2.5 billion (approximately 1.52 billion Pounds Sterling) in 2004 and approximately \$3.5 billion (approximately 2.13 billion Pounds Sterling) for the music recording and business software industries alone in 2008. In the 2008 'Special 301' Report, it was reported that 85 percent to 95 percent of all of the United States of America copyright industries members' copyright works sold in China was pirated.

<sup>108</sup> The details are discussed in the 2007 – 2009 'Special 301' Reports produced by the office of the United States of America Trade Representative.

<sup>109</sup> 'Priority Watch List' is the list for placing countries which have the most onerous or egregious acts, policies or practices and which have the greatest adverse impact on relevant products of the United States of America but those do not result in immediate trade sanctions after an ensuing investigation.

<sup>110</sup> *Supra* note 42 and accompanying text.

<sup>111</sup> The status of China in the 'Special 301' Reports see the 2007 – 2009 'Special 301' Reports produced by the office of the United States of America Trade Representative (these reports are available at the website of the United States of America Trade Representative) and the country submissions between 2001-2009 filed by the International Intellectual Property Alliance (IIPA) which is a coalition of seven trade associations representing the United States of America copyright-based industries in bilateral and multilateral efforts to open up foreign markets closed by piracy and other market access barriers. (these submissions are available at the website of the International Intellectual Property Alliance).

<sup>112</sup> The Submission regarding China WTO Compliance: Written Comments Regarding Copyright Protection and Services/Market Access in China in response to the Request for Comments and Notice

motivate government of the United States of America to work closely with its Chinese counterpart so that the United States of America can get more market access to China for their copyright products and China's copyright protection can be pushed towards an effective and deterrent level. Therefore, it may be argued that the United States of America is a country totally different with China, in terms of legal systems, states of economic development and social and cultural traditions, and the American law cannot be followed by China which is a country within a civil law legal system and is in a different state of economic development with the existence of many differences in social and cultural traditions. The special relations particularly in the aspect of intellectual property right between two countries should nevertheless be perceived and such a special relations should have laid a fertile ground for such comparison.

Most importantly, as ISP copyright liability is a liability regime particularly in relation to online copyright infringement, it is appropriate to say that, owing to the nature of the Internet, the infringement taking place on a borderless Internet platform in every country should have common features, and thus the solution towards copyright infringement in one country may be implicated in another country, and any solution to this massive problem may need greater cooperation and coordination among countries. Although China cannot simply follow the practice of its American counterpart, it is apprehensible that China can learn lesson and experience from the United States of America in order to improve their copyright law system and copyright law enforcement.

### **1.5.2 Germany**

The ground of choosing Germany as the point of the comparison is mostly owing to that Germany and China has shared the same legal tradition for many years and German law especially German Civil Law has had great impact on that of China.

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of Public Hearing Concerning China's Compliance with WTO Commitments (72 Fed. Reg. 40905, the International Intellectual Property Alliance, July 2007)



As a country that has a very strong civil law legal tradition, Germany has had the greatest influence on China and other Asian civil law countries, for example, Japan and South Korea. Since the influence of the German law on many other civil law countries is strong particularly in the field of the civil law; those countries therefore patterned their legal systems on the German model.<sup>113</sup> Taking China as an example, since the Qin Dynasty, Chinese law has been greatly influenced by the Romanist tradition.<sup>114</sup> Following the 1911 Revolution, the Republic of China<sup>115</sup> adopted a great deal of Western-style legal code from the German-influenced civil law tradition. The People's Republic of China established in 1949 has inherited those traditions and now its law to a great degree still shares the characteristics of the civil law system rather than those of the common law and reflects a structural similarity to countries within the Romano-Germanic family, in particular the German.<sup>116</sup> For instance, the GPCC as a very typical German-style code has a 'General Part'<sup>117</sup>, which is existed in the German Civil Code<sup>118</sup> and is designed to provide 'structure, coherence, and consistency to the various special parts of civil law'. In addition, the GPCC contains some abstract concepts appeared in the BGB, such as 'civil acts' as the equivalent of '*Rechtsgeschaeft*' and "“abstract notion” of agency' as the equivalent of '*Abstraktheit der Vollmacht*'.<sup>119</sup> The recent German influence in law of China can be found in the course of drafting the Property Rights Act of the P.R.C<sup>120</sup>, which started in 1998<sup>121</sup>

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<sup>113</sup> Herbert Bernstein, 'The P.R.C General Principles from A German Perspective', *Law & Contemporary Problems*, Vol. 52, No. 2, (1989), p.118

<sup>114</sup> Wei Luo and Joan Liu. (2003, January 15). 'Features - A Complete Research Guide to the Laws of the People's Republic of China (PRC)' [WWW document]. URL <http://www.llrx.com/features/prc.htm> (visited 2007, July 7). See also Liming Wang, (2007, November 22) 'The Impact of the German Law on the Formation of Chinese Contemporary Legal System at the End of Qin Dynasty' [WWW document] URL <http://www.lunwentianxia.com/product.free.4517600.1/> (Chinese Version) (visited 2008, April 23)

<sup>115</sup> The Republic of China was ruled by the National People's Party from 1928 to 1947. It was forced from the mainland China and remained in power in Taiwan.

<sup>116</sup> Liming Wang, (2007, November 22) 'The Impact of the German Law on the Formation of Chinese Contemporary Legal System at the End of Qin Dynasty' [WWW document] URL <http://www.lunwentianxia.com/product.free.4517600.1/> (Chinese Version) (visited 2008, April 23)

<sup>117</sup> The 'General Part' in the General Principles of Civil Code of the P.R.C is designed to provide rules applicable to all subject matters in the other parts of the Code.

<sup>118</sup> The German Civil Code (des Bürgerlichen Gesetzbuches - BGB). (1896, August 18). [WWW document] URL [http://www.gesetze-im-Internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-Internet.de/englisch_bgb/index.html) (English Version) (visited 2008, May 20)

<sup>119</sup> *Supra* note 113, p.127.

<sup>120</sup> The National People's Congress (2007, March 16). 'The Property Rights Act of the P.R.C.' [WWW document] URL <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html> (English Version). See

and enacted in 1 October 2007. The basic structure and many individual provisions of this Property Rights Act is said to have resembled those of the German Law.<sup>122</sup>

With the structural similarity in both Germany and China's legislation, it is sufficient to say that the ISP copyright liability provisions in German Law could again have influence over those of its Chinese counterpart; especially when Germany has been at the forefront of adapting its laws to respond to the new liability challenge over the Internet.

It is undeniable that substantial transformation is undergone in the process of adapting law of one country to another country, which has a different social, political, economical, and cultural environment. However, in terms of legislation associated with the Internet, it is appropriate to say that solution in one country may have the potential to be learned or transplanted by another country, and a solution towards a problem which has similar features in various countries may need all countries' cooperation and coordination. In fact, online copyright piracy is a new problem every country confronts, and many countries have worked very hard to find the solution in particular when copyright of one country's right holders are infringed in the territory of another country. It is reported<sup>123</sup> that the model provided by the DMCA and the Electronic Commerce Directive in terms of ISP copyright liability and online copyright protection has greatly influenced that of many other countries in both the

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also [WWW document] URL [http://www.gov.cn/flfg/2007-03/19/content\\_554452.htm](http://www.gov.cn/flfg/2007-03/19/content_554452.htm)  
(Chinese Version)

<sup>121</sup> The People's Daily. (2007, March 8). 'Tracking 'the New Benchmark' of Chinese Legislation - the 'Eighth Review' of the Draft of the Property Rights Act of the P.R.C on March 8'. [WWW document] URL [http://news.xinhuanet.com/legal/2008-12/24/content\\_10551466.htm](http://news.xinhuanet.com/legal/2008-12/24/content_10551466.htm) (visited 2009, February 2)

<sup>122</sup> Rehm, Gebhard Marc and Julius, Hinrich. (2008, May 11) 'The New Chinese Property Rights Act: An Evaluation from a Continental European Perspective'. [WWW document] URL <http://ssrn.com/abstract=1132343> (visited 2008, July 10), pp.17, 27, 54, 57; Lei Chen, 'The New Chinese Property Code: A Giant Step Forward?', *Electronic Journal of Comparative Law*, Vol. 11.2 (September 2007), p. 23.

<sup>123</sup> Limitations of ISP liability and a 'notice and take down' procedure provided by the DMCA and the Electronic Commerce Directive are reflected in the legislation of the civil law countries such as, the 2008 Amendment to the Copyright Act in Taiwan, Bill Related to Limitation on Liability for Damages of Specific Telecommunications Service Providers, and Disclosure of Sender Information in Japan, the TDG in German. Such limitations and procedure are also mirrored by the law of the common law countries, for instance, the Indian Information Technology Act 2000, the Singapore Copyright Act 2004, and the Singapore Copyright (Amendment) Bill 2005.

common law and the civil law legal systems. Legislative solution to liability of peer-to-peer file-sharing, such as ‘three strikes law’<sup>124</sup> proposed by the French Government has inspired many countries within two legal systems.<sup>125</sup> Such an approach has already been adopted in two civil law countries, South Korea, Taiwan, and one common law country, New Zealand.<sup>126</sup> New Zealand has initially adopted such an approach in its new amendment of the Copyright Act<sup>127</sup> but has later decided to reexamine it, owing to enormous criticisms from ISPs and Internet users<sup>128</sup>. It is certain that similar approaches are adopted in different countries in terms of online copyright protection is because that international instruments such as two WIPO Internet Treaties, the WCT and the WPPT, have made the requirements that rights of copyright owners shall be protected on the Internet and appropriate measures are needed to ensure such a protection. However, it should be noted here that similar approaches to Internet copyright protection and ISP copyright liability have been adopted in these countries, even though they are within different legal systems. The model set by one country’s legislation is also reflected in that of other countries. Hence, it is apprehensible that, when copyright infringement takes place on a no-boundary Internet, every country faces similar challenges. While similar challenges and problems often lead to similar solutions, learning lessons and transferring experiences from one country to another becomes inevitable.

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<sup>124</sup> ‘Three strikes law’ is also known ‘graduated response’ process. It was proposed by the French government in the ‘Hadopi’ Law and it intends to establish a graduated response system by which ISPs will educate and warn persistent copyright infringers and finally disconnect their Internet access.

<sup>125</sup> IFPI. (2009). ‘Digital Music Report 2008’ [WWW document] URL <http://www.ifpi.org/content/library/DMR2009.pdf> (visited 2009, January 29), pp.24-25 (the report mentioned that ‘three strikes law’ was discussed in the UK, Australia, New Zealand, Japan, Hong Kong, and South Korea.)

<sup>126</sup> For news reporting the adoption of ‘three strikes law’ in South Korea see Kim Tong-hyung. (2009, May 4). ‘New Copyright Law Causes Uproar among Bloggers, Internet Companies’. [WWW document] URL [http://www.koreatimes.co.kr/www/news/tech/2009/04/133\\_42594.html](http://www.koreatimes.co.kr/www/news/tech/2009/04/133_42594.html) (visited 2009, May 5). For news reporting the adoption of ‘three strikes law’ in Taiwan, see also MEPO Humanity Technology Inc.. (2009, April 28). ‘ISP Liability Bill Completed Third Reading at the Legislative Yuan on April 21’. [WWW document] URL <http://www.nsc.gov.tw/csdr/ct.asp?xItem=0980426002&ctNode=865&lang=E> (visited 2009, May 1). For news reporting the adoption of ‘three strikes law’ in New Zealand, see Juha Saarinen. (2009, February 5). ‘New copyright act to hit NZ ISPs’. [WWW document] URL <http://www.zdnet.com.au/news/business/soa/New-copyright-act-to-hit-NZ-ISPs/0,139023166,339294778,00.htm> (visited 2009, February 6)

<sup>127</sup> The Copyright (New Technologies) Amendment Act 2008 of New Zealand (2009, February 28) [WWW document] URL <http://www.legislation.govt.nz/act/public/2008/0027/latest/DLM1122643.html> (visited 2009, March 2)

<sup>128</sup> Simon Power (2009, March 23). ‘Government to Amend Section 92A’. [WWW document] URL <http://www.beehive.govt.nz/release/government+amend+section+92a> (visited 2009, April 1)

It is understood that we cannot simply transplant wholesale the law from the United States of America or Germany to China, which has a different social, political, economical, and cultural background and it is not the intention of this thesis to do so. However, by making comparison between these two countries and China, their experiences and lessons can contribute to the improvement of a Chinese ISP copyright liability regime. Therefore, this thesis selected the United States of America or Germany that to a certain degree influenced China's law making for comparison to see whether anything can be learned for China in the development of an ISP copyright liability system.

### **1.6 Tort Liability Principles: An Introductory Analysis of the Application of Tort Law to ISP Copyright Liability**

Tort is a word that derives from the French for 'wrong'. A tort, general speaking, is a civil wrong which occurs when one party 'destroys another party's initial entitlement by imposing a negative externality on him'<sup>129</sup>. And the law of tort is therefore 'the law of civil liability for wrongfully-inflicted injury, or at least a very large part of it (breach of contract and breach of trust are perhaps the other two most important civil wrongs)'.<sup>130</sup>

Liability for harm done to others or the interests of others is generally governed by the law of tort. But there are many different types of activities can lead to liability under the law of tort, including damage to a human body, other's reputation or academic record, etc. Copyright infringement is a tort – an act that violates copyright law which is designed to protect creative works. Therefore, liability for copyright infringement is regulated by the law of tort. In the context of ISP copyright liability, ISPs assist copyright infringement of the Internet users and their indirect liability for harm done to copyright owners is concurrently governed by the law of tort.

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<sup>129</sup> Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* (Boston: Harcourt Brace Jovanovich, Publishers, 1988), p. 165

<sup>130</sup> Mark Lunney, Ken Oliphant, *Tort Law: Text and Materials* (Oxford: Oxford University Press, 2008), p.1

The rule of tort law provides a paramount framework for shaping and managing ISP copyright liability in an online copyright infringement context in many jurisdictions. However, the approach to tort law varies from one legal system to another, one country to another. Before we go further to discuss the role of the law of tort in an ISP copyright liability context, a brief introduction to the law of tort both in the common law and the civil law system is given. In addition, several key principles of the law of tort and varied liability applications in an ISP copyright liability context are analysed in the context of two legal systems. The economic efficiency of tort law in the context of an ISP copyright liability regime is also examined, as it highlights the strength of an ISP copyright liability system in effectively preventing Internet copyright piracy.

### **1.6.1 The Law of Tort in the Common Law and the Civil Law Systems**

As a law ‘regulates the circumstances in which people can either recover compensation for, or prevent an infringement of, their rights,’<sup>131</sup> the law of tort performs similar functions both in the common law and the civil law systems. However, dividing approaches to tort law in two legal systems result in their conceptual differences and differences in elements by which a concept is established. In addition, sources of the law of tort in two systems differ, case law created the common law of tort (although some areas are covered by statutes) whereas the civil law of tort is mainly contained in a country’s Civil Code.<sup>132</sup>

Taking conceptual differences as an example, this thesis is submitting that ISP copyright liability is established when an ISP fails to stop copyright infringement of their users upon knowledge of such infringement or an ISP fails to take necessary preventative measures to prevent potential infringement, an approach which has been

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<sup>131</sup> Raymond Youngs, *English, French & German Comparative Law* (Abingdon: Routledge-Cavendish, 2007), p.336

<sup>132</sup> *Ibid*, p.337

adopted by the law or judiciary in many countries.<sup>133</sup> Hence, liability of an ISP is based on the infringement committed negligently or intentionally by the ISP.

In the common law legal system, torts of negligence or intentional torts of an ISP discussed later are two key elements to establish fault. Therefore, fault determines liability of one person to another through his infringement. By demonstrating fault of an infringer; the affected person is entitled to ask for compensation for harm done to him. Nevertheless, in the civil law legal system, a comparable concept to fault in the common law of tort is unlawfulness. Unlawfulness is the element to establish liability under the civil law of tort; it refers to that the act of an infringer must be unlawful to trigger liability. Unlike in the common law of tort, unlawfulness in the civil law of tort may be determined on the basis of a breach of the duty of care<sup>134</sup> or lack of reasonable care.<sup>135</sup> For instance according to the German Civil Code, unlawfulness will be established when the act of the infringer violates one of the legally protected rights without justification such as consent or self-defence. The interpretation of unlawfulness has latterly established that an established duty needs to be breached to establish unlawfulness. Apart from the general duty imposed by Section 276 to exercise ordinary care, the German courts and the German statute has increasingly established the duty required to be shown, for example in the road traffic and product liability acts.<sup>136</sup> With these differences in mind, answers to the question as to what constitutes an ISP's fault may become clearer by analysing the following elements that establish fault.

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<sup>133</sup> See the discussion in 1.4.3.3 and 1.4.3.4 of the thesis and Section 512 (b) (c) (d) of the U.S. Copyright Act and *Metro-Goldwyn-Mayer Studios Inc, et al. v. Grokster Ltd., et al.* Section 10 & 11 of the TDG of Germany and cases of '*Premiere*' v. *TC Unterhaltungselektronik AG (TCU)* and *German Copyright Society (GEMA) v. Rapidshare*. Article 18 & 19 of the Electronic Commerce (EC Directive) Regulations 2002 of the United Kingdom. Article 22 & 23 of the Regulations in China. *SCRL Societe Belge des Auteurs, Compositeurs et Editeurs (Belgian Society of Authors, Composers and Publishers) v. SA Scarlet* in Belgium and *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd* in Australia.

<sup>134</sup> Kamiel J. Koelman, 'Online Intermediary Liability', in *Copyright And Electronic Commerce: Legal Aspects of Electronic Copyright Management*, (London: Kluwer Law International, 2000), pp.7-57, p.10

<sup>135</sup> *Ibid.*

<sup>136</sup> Nigel Foster and Satish Sule, *German Legal System and Laws* (Third edition, New York: Oxford University Press, 2002), p.434

## 1.6.2 Torts of Negligence

In most online copyright infringement cases, ISPs are not the party that intend to cause copyright infringement yet act with the purpose of prompting the infringement or knowing with substantial certainty that the infringement will occur. Consequently, liability of an ISP is an indirect copyright liability which is based on negligence when it has the reason to know the infringement as a professional body in the industry but fails to take necessary measures to prevent or stop the infringement.

Torts of negligence, as one of the mental elements required to determine fault of a defendant, differs from other category of torts, such as intentional torts, strict liability. It is a tort, which relies on the existence of a breach of duty of care by one person to another, and the duty of care is usually defined as ‘an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others.’<sup>137</sup> The ambit of the duty depends on the circumstances. Negligent tort rule draws a line between strict liability and immunity by identifying a level of due care and verifying if the relevant party adopted that level of due care; therefore, it involves a failure to exercise the care of an ordinary sensible person.<sup>138</sup> For example, negligence is defined in Section 276<sup>139</sup> of the German Civil Code as failure to exercise the duty of care of an ordinary sensible person, which might result in an unintended injury/damage to another party.<sup>140</sup> To apply torts of negligence rule into an ISP copyright liability context, the liability of an ISP is that the ISP fails to stop the infringements that have come to their knowledge. Therefore, unless ISPs act positively to stop copyright infringements committed by the Internet users, they will otherwise be held liable for the failure of fulfilling their duties to prevent infringements.<sup>141</sup>

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<sup>137</sup> John G Fleming, *The Law of Torts* (Sydney: LBC Information Services, 1998), p.149.

<sup>138</sup> *Ibid.*

<sup>139</sup> Section 276, Paragraph 2 of the German Civil Code states that: ‘a person acts negligently if he does not have regard to the care necessary in human affairs.’

<sup>140</sup> Nigel Foster and Satish Sule, *German Legal System and Laws* (Third edition, New York: Oxford University Press, 2002), p.435

<sup>141</sup> Section 512 (c) (1) (C) and (d) (3) of the U.S. Copyright Act sets forth ISPs’ duty to stop copyright infringement. In the German TMG 2007, Section 10 states that, if the service providers have actual knowledge of illegal activities or information, they have to remove or disable the access to the information expeditiously, or else they will be held liable. In China, such a duty of removing or

In the legislations of both the common law and the civil law jurisdictions, ISPs' duty of care to copyright owners or right holders has been set forth so as to provide a prerequisite for their negligence copyright liability. In the common law countries, negligent tort was considered as the primary theory of ISP copyright liability, as it offered a better framework for balancing the pros and cons of ISP copyright liability.<sup>142</sup> Negligence copyright liability also prevailed when the courts in the civil law countries considered ISP liability for copyright infringement and it swept up most online copyright infringement cases where the ISPs did not act intentionally but was still at fault for violating copyright.<sup>143</sup>

### 1.6.3 Intentional Torts

In tort law, intentional torts refers to any deliberate interference with an interest recognised by law, such as the rights to physical integrity violated by the intentional torts of assault, or control over property violated by the intentional torts of trespass. As a civil wrong resulting from an intentional act on the part of the tortfeasor, intentional torts differs from a negligence tort that simply results from the failure of the tortfeasor to take sufficient care in fulfilling a duty owed. The intent element of intentional torts is satisfied when the tortfeasor acts with the purpose to bring about harmful consequences or the tortfeasor has knowledge with substantial certainty that an act would result in liability.

In the common law system, case law created intentional torts; and intentional torts has a variety of subcategories, such as, intentional torts of assault, battery and slander and libel. In the civil law system, intentional torts are set out by the law of tort. For instance, Section 823 paragraph 1 of the German Civil Code states that 'a person who intentionally or negligently injures the life, body, health, freedom, property or other right of another unlawfully is obliged to compensate the other from the harm

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disabling access to infringing copyright materials is also imposed on ISPs by Article 4 of the Judicial Interpretation and Article 22 and 23 of the Regulations.

<sup>142</sup> Alfred C. Yen, 'Third Party Copyright Liability after *Grokster*', *Information & Communications Technology Law*, Vol. 16, Issue 3, (October 2007), pp. 233 – 272, p. 251.

<sup>143</sup> To name but a few, for example, the German case of *Hit Bit Software GmbH v AOL Bertelsmann Online GmbH & Co KG*, and the Chinese case of *EMI Group Hong Kong Ltd v. Yahoo China!*, *Shanghai Busheng Music and Culture Dissemination Ltd. v. Baidu Network Information Technology Ltd.*, *Xinchuan Online (Beijing) Information Technology Ltd v. Shanghai Full Potato Network Technology Ltd.*, and *Wangle Hulian (Beijing) Technology Ltd v. Shanghai Full Potato Network Technology Ltd.*



arising from this.’<sup>144</sup> Such a provision indicates that persons are both liable for intention and negligence under the German law. In France, the French concept of fault under the general principles of liability set out in Articles 1382 and 1383 of the *Code Civil* includes intention as well as negligence and recklessness.

Though negligence theory is the dominant in the ISP copyright liability context, intentional torts theory has not been excluded in online copyright infringement cases. In the United States of America, the American court in *Metro-Goldwyn-Mayer Studios Inc, et al. v. Grokster Ltd., et al.*<sup>145</sup> applied an alternate formulation of intent<sup>146</sup> from tort law to the peer-to-peer file-sharing provider Grokster, which was that intent existed if the defendant merely ‘knew with substantial certainty that his conduct would cause such harmful or offensive contact’.<sup>147</sup> The ruling of the court suggested a broad application of an inducement liability rule in the ISP copyright liability system. However, the court has also made clear that ‘mere knowledge of infringing potential or of actual infringing uses’ or ordinary acts incident to product distribution, such as offering customers technical support or product updates’<sup>148</sup> would not be sufficient to subject a peer-to-peer file-sharing distributor to liability. The court further clarified that the inducement liability rule ‘premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.’<sup>149</sup> In other common law jurisdictions for example in Australia, although there was an argument on whether the nature and extent of the defendant’s knowledge sufficed to support an inference about their intention in *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd*<sup>150</sup>, and the court did not explicitly state that liability of the defendant was based on such intention; the court ruling however implied that if the defendant did not incorporate effective filters into their system in an effort to reduce

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<sup>144</sup> Section 823 paragraph 1 of the German Civil Code

<sup>145</sup> *Metro-Goldwyn-Mayer Studios Inc, et al. v. Grokster Ltd., et al.*, 125 S.Ct. 2764 (2005).

<sup>146</sup> Alferd C. Yen, ‘Third Party Copyright Liability after Grokster’, *Minnesota Law Review* 91, (2006), pp.184-240, p.222 (‘in tort, courts define intent in two ways. A defendant accused of battery has intent if he acts with the express purpose of causing harmful or offensive contact on the plaintiff’s body. Alternatively, intent exists if the defendant merely “knows with substantial certainty” that his conduct will cause such harmful or offensive contact.’)

<sup>147</sup> *Ibid.*

<sup>148</sup> *Supra* note 145, 2780

<sup>149</sup> *Ibid.*

<sup>150</sup> *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd*, [2005] FCA 1242.

or prevent copyright infringement, it could be held liable for copyright infringement with intention, as the defendant should have had the awareness of infringement and should have known exactly what they could do to incorporate ‘keyword filtering’ and ‘gold file flood filtering’ into their system as those measures were discussed with evidence in the trial. Similarly, the approach was adopted in the civil law countries, for instance, in the Belgian case of *SCRL Societe Belge des Auteurs, Compositeurs et Editeurs (Belgian Society of Authors, Composers and Publishers) v. SA Scarlet*<sup>151</sup> and the German case of ‘*Premiere*’ v. *TC Unterhaltungselektronik AG (TCU)*<sup>152</sup>.

#### 1.6.4 Liability Principles Applied to ISPs

As discussed earlier in the thesis that in a copyright context, there are two kinds of infringements namely direct copyright infringement and indirect copyright infringement. Direct copyright infringement results in direct liability, indirect copyright liability results indirect liability based on either intentional torts or torts of negligence.

In the common law system for example, there are two main strands of liability. The first originates from liability of the superior for the acts of their subordinate<sup>153</sup>, termed vicarious liability. Vicarious liability exists in both of the common law and the civil law jurisdictions<sup>154</sup>. In some common law countries, for example, in the UK<sup>155</sup> and Australia,<sup>156</sup> it is not actually called vicarious liability, but can be likened to authorising infringement in their laws. The second strand of liability in the common law system requires the defendant’s knowledge of infringement and its

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<sup>151</sup> *SCRL Societe Belge des Auteurs, Compositeurs et Editeurs (Belgian Society of Authors, Composers and Publishers) v. SA Scarlet*, [2007] E.C.D.R. 19.

<sup>152</sup> ‘*Premiere*’ v. *TC Unterhaltungselektronik AG (TCU)*. the Hamburg District Court, Judgment of 26 April 2005, 2005 MMR 547; the Hamburg Court of Appeal, Judgment of 8 February 2006, 2006 MMR 398 (Case No. 5 U 78/05); the Federal Court of Appeal, Judgment of 15 January 2009, (Case No. I ZR 57/07).

<sup>153</sup> *Fonovisa*, 76 F.3d at 261-62 (noting connection between vicarious copyright liability and respondeat superior). See also *PRS v. Caryl Theatrical Syndicate, Ltd* [1924]1 K.B.1 and *PRS v Mitchell & Booker* [1924]1 K.B. 762.

<sup>154</sup> For example, in Chinese law, vicarious liability of the guardian for the infringement of a person without legal capacity or with restricted legal capacity is stipulated in Article 133 of General Principles of Civil Code of PRC. A similar provision regarding parental liability can be found in Section 823 of the German Civil Code as well.

<sup>155</sup> Section 16 (2) of the CDPA 1988 of the UK

<sup>156</sup> Section 36 (1) of the Australian Copyright Act 1968

material contribution, known as contributory liability. Contributory liability stems from the tort theory of *enterprise* liability and it is established by fault of a defendant who has knowledge of the infringement and makes material contributions to the infringement. In American case law,<sup>157</sup> the concept of contributory infringement stems from the notion that one who directly contributes to another's infringement should be held liable. Nevertheless, in the UK and Australia, contributory liability can be established from authorisation of the infringement<sup>158</sup> which refers to sanctioning, countenancing or approving, or alternatively, to granting or purporting to grant to a third person the right to do an act complained of.<sup>159</sup> In the common law countries, both vicarious liability and contributory liability (and its equivalence – liability for authorisation of the infringement) have been two dominant liability applications in the ISP copyright context.<sup>160</sup>

In 2005, the second strand of contributory liability also led the *Grokster* court to create a new inducement liability and applied it in a peer-to-peer file-sharing provider copyright liability context. The inducement liability rule requires proof of intent - the reprehensive state of mind which is one of the forms constitutes fault. The inducement liability rule has a substantial body of authority in support of its general applicability throughout other areas of law, for example, the Patent Act.<sup>161</sup>

In civil law jurisdictions, joint tort liability is applied to ISPs for their indirect copyright liability. Basically, joint tort liability means that two or more individuals are jointly liable for the same injury to the same person or his property caused by their tortious actions.<sup>162</sup> To be considered as joint tortfeasors, the parties must act together in committing the wrong, or their acts, if independent of each other, must

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<sup>157</sup> *Sony Corporation of America v. Universal City Studios Inc.*, 104 S. Ct. 774.

<sup>158</sup> Section 16 (2) of the CDPA 1988 of the UK and ss. 36(1) and 101(1) of the Australian Copyright Act 1968.

<sup>159</sup> *Falcon v. Famous Players* [1926] 2 KB 474, 491 and *CBS Songs Ltd v. Amstrad Consumer Electronics* [1988] AC 1013.

<sup>160</sup> For example, vicarious liability and contributory liability were applied to ISPs in the cases, such as *Sega Enters. Ltd. v. MAPHIA*, *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, *A&M Records, Inc. v. Napster, Inc.* and *In re Aimster Copyright Litigation*. In addition, liability for authorisation of infringement was applied in *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd* in Australia.

<sup>161</sup> Section 271(b) of Title 35 of the U.S. Codes (the Patent Act)

<sup>162</sup> Section 830 of the German Civil Code and Article 130 of the GPCC of the P.R.C

join in causing a single injury. All who actively participate in committing a civil wrong are joint tortfeasors. Persons responsible for separate acts of negligence that combine in causing an injury are joint tortfeasors.

The strength of joint tort liability principle is that it has a wide ambit so that it can be interpreted and applied in a broader way to fit into liabilities in a wide range of circumstances, in particular in a changing technology environment. However, the problem of joint tort liability principle is that it is relatively abstract; it does not have the detailed elements as existed in vicarious and contributory liability in a common law of tort, such as the ability to control and financial benefit requirements for vicarious liability and knowledge of infringement and material contribution requirements for contributory liability. Thus, in a civil law country, if there is no specific provisions that address prerequisites of an ISP copyright liability in an online environment, it may easily cause application problems when joint tort liability is applied in an ISP copyright liability context, for example, joint tort liability does not have a knowledge standard, if in the meantime, no specific provisions addressing what constitutes ISP knowledge of infringement, the courts dealing with relevant cases would have difficulty in determining an ISP's knowledge of infringement and further deciding liability of the ISP. Hence, it seems vital that in the civil law countries, a more detailed legislation addressing ISP copyright liability is needed so that the courts can take the legislation as guidance with supplement of the joint tort liability principle; this is of particular importance when the courts in the civil law jurisdictions have no legal obligation to follow precedents.

The law of tort in both the common law and the civil law systems undergirds an ISP copyright liability through two tort principles: torts of negligence and intentional torts. No matter the infringement is committed by ISPs intentionally or negligently, as long as ISPs are in breach of the obligation fixed by the law in the copyright context, they are considered to have fault and their liabilities in tort would arise. Tort law principles make ISP copyright liability enforceable against extensive copyright infringement emerging from the Internet, thus effectively protects copyright owners

and right holders whose interests are greatly threatened by the Internet and developing technology.

Apart from the discussion of the enforceability of liability doctrines in an ISP copyright liability context, economic approach to tort law further attributes a particular goal to such an indirect copyright liability regime. Economic approach to tort law, namely, efficiency is understood as optimal cost reduction in this liability regime by creating adequate incentives to induce ISPs to invest appropriately in determining what the optimal precautions they should take to avoid liability. In the following, efficiency element of the law of tort in an ISP copyright liability context is examined.

### 1.6.5 The Efficiency of ISP Copyright Liability

Apart from the primary function of tort law – compensation,<sup>163</sup> the system of tort law has long been claimed to have a function in minimising accident costs and the costs of avoiding them<sup>164</sup> so as to maximise wealth. This welfare-maximising tort system ordinarily relies upon a cost-minimising liability rule<sup>165</sup>, which promotes individual welfare while increasing individual (and social) wealth. This liability principle is grounded in the concept that the loss of the victim is avoidable by a third party's caution and preventative measures so as to eliminate social costs<sup>166</sup> and maximise social welfare<sup>167</sup>, it also constructs an understanding of reasonableness in which

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<sup>163</sup> Simon Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008), p.52

<sup>164</sup> Richard A. Posner, *The Economics Analysis of Law* (Boston: Little Brown & Co, 1986); Richard A. Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981); William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass: Harvard University Press, 1987).

<sup>165</sup> Mark A. Geistfeld. (2006, March) 'Efficiency and Fairness in Tort Law' [WWW document] URL <http://ssrn.com/abstract=893061> (visited 2006, October 19)

<sup>166</sup> SJ Grant, *Introductory Economics* (Singapore, Longman 2003) at pp. 192-193 defines 'social cost' as 'the total cost to the society of an economic activity.' It is 'private costs ('the costs incurred by those who buy products and by those who produce products') plus negative externalities which are the costs imposed on third parties by the economic activity of others'.

<sup>167</sup> *Ibid.*, pp. 192-193 defines 'social welfare' is also called 'social benefit' which is 'the total benefit to society from an economic activity. It consists of private benefits ('the benefits received by those who buy products and by those who produce products') plus positive externalities which are the benefits to third parties from the consumption and production of others'.

actors behave reasonably when they take sensible care to avoid infringements that should be avoided, because the costs of avoidance are smaller than the benefits.<sup>168</sup>

Indirect liability in tort law creates efficiency by motivating a third party by penalties in order to greatly reduce the risk of the injury (infringement) and avoid the expected costs of all the relevant parties. In an online copyright infringement context, allocative efficiency of an indirect liability principle is exhibited when pursuing numerous individual direct infringers is not practicable. As discussed earlier that, when Internet users upload and download a book which is the copyright work of another person and keep redistributing it, the copyright owner of this book needs to be compensated for such unauthorised reproduction and distribution. However, the problem arises when many individuals are involved in the infringement. In this scenario, copyright infringement of those individuals are facilitated by a wide range of ISPs who are often in a good position to discourage copyright infringement either by monitoring direct infringers or redesigning technology to make infringement more difficult, thus, shifting liability to a third party who is in wrong and also who has the ability to compensate could be a solution<sup>169</sup>. It is appropriate to say from the example that tort law provides rules to give ISPs appropriate incentives to act in this situation, because they are uniquely empowered to help minimising infringement in an Internet environment where they performs a unique and lucrative function for the Internet. This set of loss (cost) allocation between direct copyright infringers and ISPs in tort liability sets an efficient incentive for ISPs to take precautions to avoid a potential infringement and to reduce their own costs in responding litigations and also the costs of the copyright owners. Unless the expected gain from the destruction offset at a minimum the anticipated required compensation, ISPs are likely to follow the incentive, as the compensation creates a deterrent to their wrongdoings.

The efficiency of tort law is paramount in evaluating the merit of a liability rule; it is also significant in the ISP copyright liability context when it has the potential of

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<sup>168</sup> Richard A. Posner, 'A Theory of Negligence', *Journal of Legal Study*, Vol. 1, (1972), pp. 32-34, p.29.

<sup>169</sup> William M. Landes and Douglas Lichtman, 'Indirect Liability for Copyright Infringement: An Economic Perspective', *Journal of Economic Perspectives*, Vol.17, No.2, (Spring 2003), pp.113-124, p.114.

enhancing efficient allocation of society's resources. As a preferred liability system in most jurisdictions, ISP copyright liability attempts to satisfy the grievances of copyright owners by shifting the costs from impecunious individual infringers to ISPs who have the ability to compensate the loss of copyright owners, when detecting and pursuing hundreds and thousands individual copyright infringers over the Internet is not practicable. The efficiency of an ISP copyright liability regime is not only justified by the examination of the welfare-maximising nature of the tort law system, but such a conclusion that ISP copyright liability is efficient can also be drawn by the fact that many countries are now considering further co-operation between the copyright industry and ISPs.

Although the strength of ISP copyright liability are revealed in the aforementioned study as well as in many other publications<sup>170</sup>, ISP copyright liability regime is still among the most controversial issues, in particular, the concerns over its impact on privacy of Internet users, public access to information and the development of technology and ISP industry. Next, I will move on to the questions raised on whether the enforcement of an ISP copyright liability regime can be in harmony with other rights protected by other laws. By seeking answers for the questions, the part emphasise a need of a balanced ISP copyright liability regime that does not invade other rights of Internet users in an online copyright context.

### **1.7 A Balanced ISP Copyright Liability Regime**

As a substantially different medium, the Internet has changed the world in so many ways that we could not begin to list them all; it has also challenged a number of legal rights governed by a variety of laws and the balance between them. With widespread copyright infringement emerging from the Internet, many jurisdictions are now recruiting an ISP copyright liability regime to press ISPs to prevent copyright violation over the Internet; however, this liability regime has also been blamed of

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<sup>170</sup> To name but a few, see Peter S. Menell and David Nimmer, 'Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and *Sony's* de facto Demise', *UCLA L. REV.*, Vol. 55, Issue. 1, (2007), pp. 143-204; Alfred C. Yen, 'Sony, Tort Doctrines, and the Puzzle of Peer-To-Peer', *Case Western Reserve Law Review* 55, No.4, (2005), pp. 815-865.

having negative impacts on other aspects of the society. Among them, the privacy right of Internet users, public access to information and the development of technology are the main concerns.

Before exploring approaches to ISP copyright liability, this part examines the impact of ISP copyright liability on other aspects of life in society and contemplates whether those conflicts of right are inevitable and how the law should be modified to ensure a proper balance between different interests. The discussion of this part does not attempt to offer a solution for the clashes of rights, but suggests that effective copyright enforcement over the Internet need not come at the expense of Internet users' privacy and denial of public access to information, nor result in a retreat of technology. A better balance needs to be struck among all stakeholders by employing legislative means to ensure copyright works and other rights of the public can be simultaneously protected over the Internet. Finally, it concludes that, even though a developing ISP copyright liability system may in the short term, bring negative effects to certain parts of the society, if we make the efforts to advance this liability system, the whole of society would be the eventual beneficiary.

### **1.7.1 ISP Copyright Liability and Internet Users' Privacy**

Privacy as a fundamental human right underpins human dignity and other values such as freedom of association and freedom of speech.<sup>171</sup> Interest in the right of privacy increased with the advent of information technology, in particular in relation to personal data of Internet users. Copyright, as a right for all the people is granted by law that gives the creators of literary, dramatic, musical or artistic works the ability to control the ways their works are used and to earn a fair reward for those uses. With the emergence of the Internet, conflicts between these two rights come to the fore<sup>172</sup> with some arguing that protecting copyright endangers people's

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<sup>171</sup> Privacy is defined as a fundamental human right and is protected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in many other international and regional human rights treaties.

<sup>172</sup> The Internet provides a platform for unauthorised reproduction and redistribution of copyright work. When such copyright infringement comes to the attention of the copyright owner, he would always attempt to find out the identity of the infringer through ISPs in order to take further action.



privacy.<sup>173</sup> Those arguments have been echoed recently in an ISP copyright liability scenario<sup>174</sup> in which it was questioned whether ISPs should expose the identities of Internet users to copyright owners based on the owners' allegations of copyright infringement. This raises important privacy concerns. Some have argued that the right granted by laws such as Section 512 of the U.S. Copyright Act, which allows copyright owners or their agents to discover the name, address and telephone number of any Internet user without having to file a lawsuit or making any substantive showing at all to a judge; without requiring any notice to an end user that his or her

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However, whether an ISP exposes its users' personal information to copyright owner invades the privacy right of the user has been on debate. (Okechukwu Benjamin Vincents, 'When rights clash online: the tracking of P2P copyright infringements vs. the EC Personal Data Directive', *International Journal of Law & Information Technology*, Vol.16, Issue 3, (2008), pp. 270-296 )

<sup>173</sup> Julie Cohen, 'Overcoming Property: Does Copyright Trump Privacy', *University of Illinois Journal of Law & Technology Policy*. Vol. 2003, (2003), pp.101-108, p.101 (The author claimed in the article that 'online copyright enforcement represents one of the greatest current threats to online privacy.'). Sonia K. Katyal, 'Privacy vs. Piracy', *Yale Journal of Law & Technology*, Vol. 7, (2004), pp. 222-345, p.7, 335 & p.345 (The author pointed out that the DMCA created an entirely disparate and hierarchical regime favoring the expansion of property rights (copyright) at the expense of consumer privacy in cyberspace, rather than resolving the conflict between them.) See also Nic Suzor, 'Privacy v Intellectual Property litigation: preliminary third party discovery on the Internet', *Australian Bar Review*, Vol. 228, Issue. 25, (2004), pp. 227-267 (This author discussed that the balance between privacy and intellectual property enforcement has been shifted in favour of intellectual property owners and proposed the way to achieve a delicate balance between them and some safeguard for user's privacy needed to be considered.) and Tim Wright, Alessandro Liotta, Dominic Hodgkinson. 'E-Privacy and Copyright in Online Content Distribution: a European Overview,' *World Communication .Regulation .Report*, Vol.3, Issue 6, (2008), pp. 33-35. Most recent discussion on this issue can be found in the debate about 'three strikes Law' which was proposed by the French Government however was ruled being unconstitutional by the Constitutional Council of France, as two Articles of the law will affect the public's free access to online communication service which is a human right that cannot be withheld without the intervention of a judge. Also, the method of policing the Internet adopted by the law infringes people's privacy. See for example, Lilian Edwards. 'Should ISP's be Compelled to Become Copyright Cops?' *Computers & Law*, Vol.19, Issue 6, (2009), pp.29-31 and Catherine Saez (2009, June 11). 'French Revolution Meets Information Revolution in Setback for HADOPI Law'. [WWW document] URL <http://www.ip-watch.org/weblog/2009/06/11/french-revolution-meets-information-revolution-in-setback-for-hadopi-law/> (visited 2009, June 11)

<sup>174</sup> Jonathan Krim. (2002, September 5) 'A Story of Piracy and Privacy'. [WWW document]<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A38034-2002Sep4> (visited 2006, July 3) (The author discussed *RIAA v. Verison Internet Services*. in which the defendant refused to honour RIAA's subpoena and argued that such a subpoena without a court order would violate the constitutional right to privacy of its clients.) See also Sonia K. Katyal, 'Privacy vs. Piracy', *Yale Journal of Law & Technology*, Vol. 7, (2004), pp. 222-345, p.256, 275, 293 & 316. (The author discussed the conflicts between copyright protection and privacy in an ISP copyright liability context). And see also Okechukwu Benjamin Vincents, 'When Rights Clash Online: the Tracking of P2P Copyright Infringements vs. the EC Personal Data Directive', *International Journal of Law & Information Technology*, Vol.16, Issue.3, (2008), pp. 270-296 (The author identified two points of clash between privacy and copyright protection in a P2P file-sharing context and analysed relevant legislation in the European level and in Sweden with the development in the United States of America. The author finally proposed a possible solution regarding the clash.)

identity had been unmasked, and without extensive legal review or judicial oversight as to the likely truth of the allegations, is an invasion of the privacy of Internet users. With the acknowledgement of the importance of fighting massive copyright infringement online, these advocates contend that personal identifying data of users should not be revealed without the individuals' knowledge to avoid misuse, abuse, or mistake, casting a 'chill' on their privacy.<sup>175</sup> It is argued that copyright owners should not be allowed to trample upon users' privacy rights, and Internet users' privacy rights should be balanced against the tools of fighting online piracy in the meantime.<sup>176</sup>

However, the dilemma facing copyright protection over the Internet relating to copyright infringements committed on the Internet is that the identity of online copyright infringers is often unknown to copyright owners, and is difficult for copyright owners to track them down without co-operation of ISPs. This is why, at present, copyright owners are mostly relying on seeking court orders to demand disclosure from ISPs, because this is the only practicable way of obtaining infringers' information. However, privacy concerns have really been a barrier for copyright owners pursuing such information. In the United States of America, the right of requiring identification of alleged infringers from ISPs through court order is expressly stipulated in Section 512(h) of the U.S Copyright Act: 'a copyright owner or a person authorised to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer. Section 512 also contains a provision to ensure that service providers are not placed in the position of choosing between limitations on liability on the one hand and preserving the privacy of their subscribers, on the other.'<sup>177</sup> Copyright owners do not seem to have many difficulties in seeking the identity of a subscriber.<sup>178</sup> However, in the EU, the picture is confusing. At one extreme, the

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<sup>175</sup> Sonia K. Katyal, 'Privacy vs. Piracy', *Yale Journal of Law & Technology*, Vol. 7, (2004), pp. 222-345, p. 340.

<sup>176</sup> *Ibid.*, p. 337

<sup>177</sup> Section 512 (m) of the U.S Copyright Act.

<sup>178</sup> Gwen Hinze. (2008, January 30). 'EU Law Does Not Require ISP to Hand Over Customers' Identity Data in Alleged File-sharing Case' [WWW document] URL <http://www.eff.org/deeplinks/2008/01/eu-law-does-not-require> (visited 2008, May 3) (Gwen Hinze referred to more than 20,000 lawsuits initiated by the music industry against individual file sharers

Electronic Commerce Directive requires Member States to ‘establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.’<sup>179</sup> However, at another extreme, the European Court of Justice (‘ECJ’) has decided that privacy law may prevent right holders from obtaining this data unless it is for security or crime related purposes.<sup>180</sup> In this ruling, the European Court of Justice responded to the Spanish Court<sup>181</sup> that the Directives<sup>182</sup> ‘do not require member states to lay down...an obligation to disclose personal data in civil proceedings’. This ruling implies that whether an obligation to disclose connection and traffic data in a civil case is imposed, is entirely up to national legislators of the Member States. Therefore, in the EU, there is a room for Member States to adopt different approaches on whether or not they place privacy rights of individuals at a higher level than intellectual property rights of others. As a result, inconsistency exists between the Member States with regard to personal data disclosure for civil law enforcement purpose.<sup>183</sup>

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and demonstrated that in the United States of America, privacy issue in relation to the disclosure of personal data in the civil law cases was not indeed a problem that impeded copyright owners to request a subpoena for identification of an alleged infringer.) See also, Mercury News Staff and Wire Reports (2008, July 3). ‘Judge Orders Youtube to Turn Over User Data’ [WWW Document]. URL [http://www.siliconvalley.com/news/ci\\_9778339?nclick\\_check=1](http://www.siliconvalley.com/news/ci_9778339?nclick_check=1) (visited 2008, July 7) and Electronic Frontier Foundation.(2008 September). ‘RIAA v. The People: Four Years Later’. [WWW document] URL [http://w2.eff.org/IP/P2P/riaa\\_at\\_four.pdf](http://w2.eff.org/IP/P2P/riaa_at_four.pdf) (visited 2008, December 2)

<sup>179</sup> Article 15 (2) of the Electronic Commerce Directive.

<sup>180</sup> *Productores de Música de España (Promusicae) v. Telefonica de España SAU*, [2008] E.C.D.R. 10. This decision is in line with the requirements in the ‘Directive 2006/24/EC of The European Parliament and of The Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC’ in which service providers throughout Europe are obliged to store dynamic IP addresses for prevention, investigation, detection and prosecution of criminal offences.

<sup>181</sup> *Ibid.* (The Spanish court in *Productores de Música de España (Promusicae) v. Telefónica de España SAU* (C-275/06) [2007] E.C.D.R. CN1 was seeking a preliminary ruling from the European Court of Justice on whether European community laws require EU Member States that are implementing this suite of EU directives to impose an obligation on ISPs to reveal their customers’ personal data to copyright owners in a civil copyright lawsuit)

<sup>182</sup> Here it refers to the Charter of Fundamental Rights, Directive 2000/31 on Electronic Commerce in the Internal Market, Directive 2001/29 on Copyright and Related Rights in the Information Society, Directive 2004/48 on the Enforcement of Intellectual Property Rights and also Directive 2002/58 on the Protection of Personal Data and Privacy in Electronic Communications.

<sup>183</sup> According to *Ashworth Hospital Authority v. MGN Ltd*, [2002] 4 All ER 193, an ISP in the UK could well be compelled by a court to disclose the name of a particular user who has infringed a

It is undeniable that the privacy right is a right everyone should have for preserving access to his/her personal information, in particular in the Internet environment where personal data can be so easily invaded. However, balance with this, those who have made every effort to create copyright content, copyright is also significant as a fundamental right to property. Copyright protects the interests of the creators and those who invest in creativity such as producers. Without appropriate legal copyright protection, copyright owners would feel very insecure and lack the incentive to go on being creative and make a living from their work. Likewise, anyone who finances reproduction and redistribution or other exploitation of creative works would have less security and confidence in their return of investment.<sup>184</sup> The easier it becomes to access creative works, the more vital it is that we respect copyright law so that people continue to produce creative works which add value to our lives. Furthermore, through protection of creative works and the creative industry, Member States will benefit from copyright contribution to economy. Looking at the arguments of both sides, neither the right to privacy, nor copyright, is an absolute right. And in cases of a clash between these two rights, it would not be fair or appropriate to prioritise the

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particular copyright. In the absence of a court order, though, if an ISP were to disclose the identity of a user to a third party this would almost certainly be a breach of the Data Protection Act 1998 as well as of its contract with that user. In *Totalise Plc v. Motley Fool Ltd* [2001] EWCA Civ 1897, the Court of Appeal held that website operators should disclose the identity of wrongdoers who posted defamatory material to a website operator's discussion board). In Germany, the Local Court (AG) in Offenburg refused to order ISPs to hand over user details to the music industry in its ruling issued on 20<sup>th</sup> July 2007. Similarly, the public prosecutor's office in Celle and in Berlin denied complaints filed by several law firms on behalf their clients asking for personal data that match the IP addresses of alleged P2P network users. Because the requests were suspected to be asked for initiating civil proceedings against alleged individual users, the clients of these law firms were not genuinely interested in initiating criminal proceedings. See Heise Online (2007, February 8). 'Public Prosecutors Refuse to Collect IP Address-Related Information from Providers' [WWW document] URL <http://www.heise.de/english/newsticker/news/93759> (visited 2008, June 20). However, in Italy, the Court of Rome issued two different orders that one was to ask ISP to provide a German music label Peppermint Jam Records GmbH with the complete personal details of its clients but another was to reject the requests of Peppermint and Techland for disclosure of personal data about their client, because the data Peppermint and Techland collected was unlawful without the subject's consent. See Laura Liguori (2007, August 16). 'Copyright Claim Highlights ISPs' Data Protection Responsibilities' [WWW document] URL <http://www.internationallawoffice.com/newsletters/detail.aspx?g=eb2298f4-8767-4963-b68e-bad529f094e2> (visited 2007, October 20)

<sup>184</sup> Ruth Towse, *Creativity, Incentive, and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Northampton: Edward Elgar, 2001). See also William M. Landes and Richard A. Posner, 'An Economic Analysis of Copyright Law', in *Economic Analysis of the Law: Selected Readings*, (Oxford: Blackwell Publishing, 2002), pp.83-96, p.87.

privacy right and disregard copyright, as both rights deserve respect and have their economic and individual importance.

Acknowledging that protecting the value of creativity is as paramount as protecting privacy in a digital environment where all rights should be equally preserved, what the legislature should do to minimise the conflict is to conduct comprehensive research on the intersection of the right to privacy and copyright law over the Internet in order to thoroughly resolve the clash of these two interests through law and regulation. Just as Sonia K. Katyal pointed out that ‘the great irony of this situation is not the intractability of the conflict between privacy and intellectual property in cyberspace, but the inability of legislators to fashion a solution that squares with other constitutional values of property, personhood, and autonomy under the DMCA.’<sup>185</sup> Therefore, to eliminate the impact of ISP copyright liability on the issue of privacy, it is vital to set up rules in copyright law enforcement for preventing violation of users’ privacy. For example, ISPs should be required to provide Internet users with notice when their identities are exposed, otherwise, ISPs could be sanctioned for the misuse or inappropriate release of users’ personal information. In the meantime, a restriction on copyright owners should also be put in place so that they must compensate a user if the owner obtains details to identify users whom they suspect of infringement which turns out to be improper, without sufficient evidence, and the release of such information under their request leads to harmful consequences for the user. To ensure enforcement, courts’ supervision could go a long way toward preventing any breach of these provisions. All in all, if we attach great importance to both the privacy right and copyright by restricting the use of personal information in a copyright infringement investigation, an appropriate balance between these two competing interests would be sustained, significantly assuring the value of both rights.

### **1.7.2 ISP Copyright Liability and Public Access to Information**

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<sup>185</sup> Sonia K. Katyal, ‘Privacy vs. Piracy’, *Yale Journal of Law & Technology*, Vol. 7, (2004), pp. 222-345, p. 336.

With the emergence of ISP copyright liability, concerns have been voiced for public access to information, which is a right of the public to access works that have been published, distributed and placed in publicly accessible collections, e.g. libraries, Internet or through other public channels.

For the past two centuries, copyright law has promoted extensive public access to a wide range of informational works and to the ideas, information, or expression in those works by various means, e.g., fair use (dealing), as the ultimate purpose of copyright law is public benefit. However, changes brought by the Internet and the need for copyright protection in a digital environment are again challenging the existing set of copyright laws and copyright practices for public access to information. In a new Internet environment, digital technology triggers great danger for the rights of copyright owners and requires copyright to be more advanced and more subtle in order to fit into the new technological environment. However, in the meantime, the protection of the exclusive rights of copyright owners has been argued as a hindrance to the public's interests in which public access to information is one such argument.

In fact, the conflict between copyright protection and public access to information is not a new challenge, as copyright has been argued to have been a barrier to the access of the information for years.<sup>186</sup> Therefore, it is no surprise that criticism

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<sup>186</sup> For example, Consumers International found from their study into the copyright laws of eleven Asian countries that, the Berne Convention does not prohibit the utilisation of the whole of a work for the purpose of teaching, so long as it is justified by the purpose and is compatible with fair practice. However, only Indonesia, Malaysia and the Philippines allow such a possibility. The Berne Convention does not restrict the number of copies of publications or sound or visual recordings that can be made for the purpose of illustrations for teaching. However, China, India and Indonesia expressly restrict the number of copies of these materials for teaching purposes. The Berne Convention also does not place any limitation on the purpose for which quotations can be made. Nevertheless, China, India, Indonesia, Kazakhstan and Mongolia permit quotations to be made for only certain purposes. See Consumers International. (2006, February 20) 'Provisional Committee on Proposals Related to A WIPO Development Agenda' [WWW document] URL [http://www.idrc.ca/uploads/user-S/11412439401Copyright\\_-\\_CI\\_Statement\\_at\\_WIPO.doc](http://www.idrc.ca/uploads/user-S/11412439401Copyright_-_CI_Statement_at_WIPO.doc) (visited 2007, October 2). Same opinions were also voiced in the context of copyright protection and library use of copyright works. In August 2005, over three hundred librarians from developed and developing countries attended the World Library Congress expressed their concerns on copyright as a barrier to libraries and education, in particular, the use of digitised copyright works, for instance the lack of exception for long term preservation for digitised materials, limitation on the use of audio-visual format. See Teresa Hackett. (2005, November 21). 'Learning with Libraries and Copyright Issues'. [WWW document] URL

emerges again when copyright law becomes more sophisticated in a digital environment. However, we should keep in mind that public access to information has a much broader sphere. The right of public access to information is not limited to information on the Internet, but extends to information offline, and only includes the information in public domain or copyright owners' authorised works, not information from unlawful sources. What is more, public access to information in achieving the greatest possible access to information must be balanced against its own long term interest in stimulating creations. If the ultimate goal of copyright is the need for public access to such copyright information, this need should not only be the reason for granting protection to copyright works but also the reason for limiting it. This is why the exclusive rights of copyright owners have always been given in association with various limitations and exclusions, which are to ensure public access to such information.<sup>187</sup> Without the creative labour of authors and copyright holders, those works would not have been made available for public access in the first place. Therefore, no matter whether in a traditional or an Internet environment, copyright and the public's interest in access to such information both deserve protection and limitation. We cannot disregard copyright, merely because of the side effect of protecting copyright infringement to the public access to information.

In the context of ISP copyright liability, ISPs' monitoring and blocking responsibility upon the requests of copyright owners is the main reason being argued for the public denied access to information, in particular, to those works, which are mistakenly alleged by copyright owners to be infringing or unlawful and are taken down by ISPs. It is true that if innocent users' works are being taken down by mistake, public access to those works would be denied. Even though ISPs' take down procedure to some extent denies public access to a certain amount of information, it does not mean that ISPs' supervision should be banned. This is because, first, supervision by ISPs would

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[http://www.wipo.int/edocs/mdocs/copyright/en/educ\\_cr\\_im\\_05/educ\\_cr\\_im\\_05\\_www\\_53634.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/educ_cr_im_05/educ_cr_im_05_www_53634.pdf)  
(visited 2008, October 2)

<sup>187</sup> For example, the Berne Convention for the Protection of Literary and Artistic Works as well as the WCT, the WPPT and the TRIPs Agreement demands the members of the Union to create exception so that the public are able to utilise works without payment. In the copyright law of individual countries, for instance in the United States of America and the United Kingdom, fair use (dealing) are seen as the limitations to copyright owners' monopoly to their works. Exceptions are also given by Section VI of the German Copyright Act and Section 4 of Chapter 2 of the Copyright Act of the P.R.C.

only restrict access to mostly unauthorised copyright works and not works in the public domain. Secondly, the information the public seeks is not only available online. In fact, most copyright works are still available in non-electronic forms and from other sources, e.g. newspapers, magazines and books. Therefore, access of the public to information affected is certainly not a substantial part, but rather only a certain part of it. Last but not the least, for the long-term benefit of the public, the strength of ISP copyright liability is that copyright protection provided by ISPs' supervision, in another way, can help creativity and provide free access to information in the end.

A balanced relationship between right holders and users is a fundamental element of any copyright regime, particularly as new technology continues to change the way people exchange ideas and information. For this reason, efforts to strike a balance between copyright protection and public access to information have always been central to the copyright debate at international and national level, and have been built into copyright-related legislation at both levels.<sup>188</sup>

Therefore, to disregard copyright that offers incentives to disseminate knowledge is not a solution, even in the name of free access to information. Rather, in view of these considerations, we should confront the dilemma between copyright protection and public access to information, adapting copyright laws to a level more acceptable to all parties to ensure public access to information in an information society. In the scenario of ISP copyright liability, we can improve ISPs take down procedure and

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<sup>188</sup> In order to keep the balance between copyright protection and public access to information, international instruments in the field of copyright demand domestic copyright law to create exceptions to the use of copyright works in the meantime set forth limitations to monopoly rights of copyright owners. And copyright laws in most countries reflect combination of these various limitations and exceptions to the exclusive rights granted to copyright owners. Further discussion see Gillian Davies, *Copyright and the Public Interest*, (second edition, London: Sweet & Maxwell, 2002), pp. 311-313 (examining limitations and exceptions under the WIPO Internet treaties); pp.53-70 (examining the public interest and limitations on copyright in legislation of the United Kingdom); pp.99-119 (examining the public interest and limitations on copyright in legislation of the United States of America); pp.159-160, pp.165-169 (examining the public interest and limitations on copyright in legislation of France); pp.199-210, pp.224-229 (examining the public interest and limitations on copyright in legislation of Germany). Robert Burrell, Allison Coleman, *Copyright Exception: the Digital Impact*, (Cambridge: Cambridge University Press, 2005), pp.330-386, and Maskus, Keith; Reichman, Jerome H., *International Public Goods and Transfer of Technology: under a Globalised Intellectual Property Regime*, (Cambridge: Cambridge University Press in 2005), pp147-156.



establish a compensation system for ISP liability of wrongly removing or blocking those actually lawful information with inappropriate discretion. It is certain that, by so doing, the public would eventually be able to enjoy a wider range of legitimate information provided by the Internet, and the negative impact of extensive online infringement on incentives for copyright owners would be eliminated to the ultimate benefit of the public.

### **1.7.3 Long Term Benefit to the Development of the Technology and Short Term Effect of ISP Copyright Liability to ISPs Industry**

As a system contributing to the promotion of the progress of science and the useful arts, copyright law is seen as a means of advancing public interest and increasing social welfare by rewarding creators and innovators for their works and motivating them to further creative activities. It encourages copyright owners to produce and disseminate their creative work via a competitive market, and in return, they are offered exclusive rights to distribute and exploit what they create and can ask the courts to issue injunctions against infringers who violate their legal rights and compensate them. Copyright and its effective enforcement, both in the physical and digital environment, is the most essential ingredient to increase social welfare of the whole society.<sup>189</sup> But, just as the foregoing discussion indicates, if we cannot maintain a proper balance between copyright protection and the other interests of society, an overbearing copyright protection system would have the opposite effect, particularly on the public and the development of the ISP industry.

Since the *Sony* case<sup>190</sup>, the effect of third party copyright liability on the development of technology has become problematic. From the *Sony* case, we can see clearly that the American courts were attempting to keep the balance by adopting the ‘staple article of commerce’ doctrine from U.S. patent law in holding that where a product is ‘capable of substantial non-infringing use’ the manufacturer of that product cannot be held liable for infringement, even if they have constructive knowledge that users

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<sup>189</sup> Here it refers to the contribution of copyright industry to the country’s economy. Further information see WIPO. (2003) Guide on Surveying the Economic Contribution of the Copyright-Based Industries. [WWW document] URL [http://www.wipo.int/copyright/en/publications/pdf/copyright\\_pub\\_893.pdf](http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf) (visited 2008, June 3)

<sup>190</sup> *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984).

of the equipment might use it to make unauthorised copies of copyright work. However, this technology-friendly *Sony Betamax* ruling was too much in favour of technology development rather than copyright, therefore it was not able to strike a proper balance between technology development and copyright protection. The *Sony Betamax* ruling might fit that epoch in which the 'Video Cassette Recorders (VCRs) exists in the world of atoms, not the world of bits',<sup>191</sup> as the scale of VCRs reproduction was still modest at that time. But with the rapid evolvement of Internet technology, today's peer-to-peer software is totally unlike VCRs in the *Sony* case. Peer-to-peer technology is powerful. It has advantages in providing free distribution and is good for the development of legitimate digital contents markets; however, it is also dangerous if it is used primarily to promote copyright infringement on a massive scale, though the technology itself should not be attacked. Therefore, applicability of the liability approach in *Sony* may be argued in a new peer-to-peer technology phenomenon.

In fact, while every significant technological progress has altered the balance between copyright and the public, the advent of the Internet and the development of new technology do so on a different scale.<sup>192</sup> With the emergence of the Internet and the use of digital technology, the interests of copyright owners have been greatly affected and the balance between copyright owners and the public has been dramatically shifted in this decade. This circumstance calls for a new legal calibration and imposing liability on any third party who indirectly contributes to infringements is therefore becoming urgent in this Internet environment. In the case of *Metro-Goldwyn-Mayer Studios Inc, et al. v. Grokster Ltd., et al.*, the Supreme Court of the United States of America reversed the decision of the Ninth Circuit Court of Appeals in which they thought too much attention had been paid to the development of the technology and the public, while the interests of copyright

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<sup>191</sup> Paul Ganley, 'Surviving *Grokster*: Innovation and the Future of Peer-to-Peer', *E.I.P.R.*, Vol. 15, Issue 25, (2006), pp15-25, p.22

<sup>192</sup> For example, creative works of copyright owners would be more easily accessed than ever before with the assistance of the Internet, and with digital technology, the public can effectively make further contribution to those original works. On the contrary, the exclusive rights of copyright owners are more affected on the Internet, in particular, the rights of reproduction, redistribution and make a work available to public. In addition, to protect their own interests, copyright owners may adopt technical measures such as DRM to limit the public's access to their works.

owners were ignored. The Supreme Court finally set forth an inducement liability, which is now a significant part of an ISP copyright liability regime for a party distributing a product with clear intent that third parties will use it to engage in direct infringement. This inducement liability rule is not attempting to ‘chill’ legitimate innovation and deny public access to the information, but it sensibly limits liability to culpable conduct of the inducer in order to strike a proper balance between protecting intellectual property to promote creative activities and the importance of not impeding creative and innovative conduct. As a result, this inducement liability rule, with two other applications of liability, vicarious liability and contributory liability, are becoming the main elements of ISP copyright liability and the most popular means of balancing the interests of creative work, development of digital technology and the public.

Apparently, not imposing liability on ISPs may be good for the ISP industry, the carrier and performer of new technology in the short term. However, in the long run, the damaged motivation for creativity would mean fewer resources would be available for distribution, and in that event, ISPs industry would also suffer.<sup>193</sup> After all, ISP industry profits mostly from the display of content and their re-distribution. It should also be noted here that imposing liability on ISPs does not mean that new technology such as peer-to-peer file-sharing software would be entirely banned, just as Judge Wilson concluded in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>194</sup> that ‘StreamCast will be required to use the most effective means available to reduce the infringing capabilities of the Morpheus System and Software, while preserving its non-infringing uses as feasible’<sup>195</sup>. This means that StreamCast would be allowed to distribute Morpheus so long as it undertook sufficient measures to mitigate end-user capacity for infringement. So the court did not go as far as the MGM wished in the *Metro-Goldwyn-Mayer Studios Inc, et al. v. Grokster Ltd., et al.*,

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<sup>193</sup> IFPI. (2008). ‘Digital Music Report 2008’ [WWW document] URL <http://www.ifpi.org/content/library/DMR2008.pdf> (visited 2008, January 29), p.18 (Digital Music Report 2008 quoted Peter Mandelson who was the EU Trade Commissioner and now is the Business Secretary of the United Kingdom: ‘ “the fact is that in a commercial culture that doesn’t protect intellectual property, today’s violator is tomorrow’s victim. There are no long-term winners from growing intellectual property theft.” ’

<sup>194</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 518 F.Supp.2d 1197 (C.D. Cal. 2007).

<sup>195</sup> *Ibid.*, 1241

and space is left for new technology developers and distributors to preserve their non-infringing functionality and develop their business. So far, no evidence shows that the evolvement of Internet technology has been impeded as a result of ISP copyright liability system. Rather, legal peer-to-peer file-sharing services that allow music fans to download songs for free are blooming. In the meantime, advertising revenues which free legal peer-to-peer file-sharing services can share with copyright owners enable them to offer more free music works for unlimited download with those advertising support. *Qtrax*<sup>196</sup> and *SpiralFrog*<sup>197</sup> are the best examples among those legal peer-to-peer file-sharing services as well as those were unauthorised services but have migrated to legitimacy such as KaZaa,<sup>198</sup> iMesh,<sup>199</sup> Soribada<sup>200</sup>. Therefore, from the long-term point of view, ISP copyright liability regime would not only effectively protect the interests of copyright owners; it would also greatly promote sound development of legitimate digital technology businesses.

The Internet has stimulated much controversy and rhetoric on all sides of the debate. Copyright is but one of them. Copyright law is designed to allocate a particular bundle of rights to the authors of works, but it also reserves the balance of rights to the public, so it is a two-sided system, which protects the interests of authors, investors and also users (the public). The Internet and digital technology raise challenges to copyright law in particular, leading to the conflicts between copyright protection and the issue of users' privacy and public access to information. Meanwhile, the effect of online copyright protection on the advance of technology is also a controversial issue in the debate, just as the balance copyright is trying to strike suggests that copyright imposes responsibilities as well as rights upon both copyright owners and other members of society. Since rights and responsibilities apply equally to both sides, it may not be fair that one side takes all the benefits but

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<sup>196</sup> Qtrax (<http://www.qtrax.com/>)

<sup>197</sup> Spirafrog (<http://www.spiralfrog.com/membership/membership.aspx?control=signin>)

<sup>198</sup> KaZaa (<http://www.kazaa.com/>) (Kazaa is now running subscription-based service which provides unlimited access to hundreds of thousands of CD-quality tracks for one low monthly fee.)

<sup>199</sup> iMesh (<http://www.imesh.com/>) (iMesh was a popular peer-to-peer file-sharing service found in 1999 until it was sued by RIAA in 2003. it became the first legal peer-to-peer file-sharing service in 2004)

<sup>200</sup> Soribada (<http://www.soribada.com/#/>) (Soribada (소리마다) is the first Korean peer-to-peer file-sharing system. It was closed in 2002 by a court order and is now a legitimate online licensed down store.)

does not accept any responsibilities, and it may not be fair either that the balance is shifted in the direction of copyright or the public or the technology alone. For maintaining the balance between various interests concerned in an Internet environment, what we need to do is to make our commitment to establishing a dedicated copyright protection system on the Internet as a result of which the interests of copyright owners could be well accommodated and the values of other aspects of society could also be guaranteed.

## CHAPTER 2:

# ANALYSIS OF ISP COPYRIGHT LIABILITY IN THE UNITED STATES OF AMERICA, GERMANY, AND CHINA

### 2.1 Introduction

As introduced in Chapter 1, the United States of America was the first country that had to deal with ISP copyright liability cases. *Playboy Enterprises, Inc. v. Frena*<sup>201</sup> raised the question of what kind of liability should be imposed on a BBS operator for distributing infringing photographs uploaded and downloaded by its users. The court finally ruled a direct copyright liability for the defendant. However, the ruling was opposed by several subsequent cases<sup>202</sup> in which two liability principles stemming from the common law of tort were adopted in determining liability of ISPs. Faced with confusion and diversity caused by contradictory outcomes of ISP liability case; the American legislature has been responsive by updating its Copyright Act to address the issue. In 1998, the DMCA was issued so that two WIPO Internet treaties were implemented in the United States of America and liability of ISP for online copyright infringement was clarified. In Section 512 of the U.S. Copyright Act (Title II of the DMCA), a vertical approach was adopted and limitations of liability are given to four categories of conducts of ISPs for copyright infringement only. Among other requirements, knowledge of infringement is the most important element in determining ISP copyright liability.

At the other side of the Atlantic, limitations of liability for ISPs are given by an overall legislation for all Internet related contents in Germany. Two laws - the TDG and the MDSStV were issued in 1997 at both Federal and State level in addressing ISP liability on the Internet. The German law has taken a horizontal approach - that means the law is applicable to any type of Internet content-related infringement,

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<sup>201</sup> *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)

<sup>202</sup> For example, *Sega Enterprises v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994) and *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)

whether it is copyright, defamation, or privacy rights. The knowledge of infringement was considered as a critical factor in deciding ISP liability, though the provisions in the legislation were relatively less detailed. As the most frequently cited legislation in the court cases, the TDG 1997 was revised once in 2001 to implement the Electronic Commerce Directive in which the initial knowledge requirement is further clarified and expanded. However, the provisions in relation to ISP liability in the TDG 2001 were transposed into the TMG in 2007. To reinforce ISP liability provisions in the TMG 2007, a joint tort liability principle codified in the German Civil Code and several copyright law provisions<sup>203</sup> are applied as such.

While the United States of America and Germany have been actively engaged in regulating ISP liability over the Internet, the legislature in China, however, has hesitated to do so. The hesitation is shown in the course of the adoption of various levels of legislation to address copyright liability for ISPs. When the Chinese court took up the first Chinese Internet case against an ISP in 1999<sup>204</sup> and several other cases<sup>205</sup> were pending for decision, the Supreme People's Court of P.R.C made a first small attempt to issue the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks in 22<sup>nd</sup> November 2000. However, the Judicial Interpretation was not sufficient to clarify ISP copyright liability in order to effectively protect copyright over the Internet and significantly decrease copyright piracy. To reinforce copyright enforcement on the Internet, China amended the Copyright Act in 2001<sup>206</sup> and incorporated 'the right of communication through an information network'<sup>207</sup> into the amendment. The Judicial

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<sup>203</sup> The provisions refer to Section 16 (1) of the German Copyright Act that addresses the right of reproduction; Section 17 (1) of the German Copyright Act that addresses the right of redistribution; Article 19a of the revised German Copyright Act 2003 that addresses the right of making available to the public and Article 97 of the Copyright Act that provides remedy for copyright infringement.

<sup>204</sup> *Meng Wang, et al v. Beijing Cenpok Intercom Technology Co., Ltd (Wang Meng, et al v. Beijing Cenpok Intercom Technology Co., Ltd, No. 57 (the Beijing Haidian District People's Court, 1999), No. 185 (the Beijing First Intermediate People's Court, 1999)*

<sup>205</sup> For example, *University Students Magazine v. Beijing JingXun Public Tehcnology Ltd (Capital Online) and Xiang Li (2000)*; *Jingsheng Liu v. Sohu Aitexin Information Technology Ltd (2000)*

<sup>206</sup> The National People' Congress. (1990, September 7). 'The Copyright Act of the P. R. C.'. [WWW document]. URL <http://www.chinaconsulatesf.org/eng/kj/wjfg/t43948.htm> (English Version). Also available at <http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/detail.jsp?articleid=9391&boardpid=175&boardid=11501010111602> (Chinese Version)

<sup>207</sup> Article 10, paragraph one, (12) of the Copyright Act of the P.R.C 2001

Interpretation has also made corresponding changes to be in line with the Copyright Act. Nevertheless, online copyright infringement was still widespread. By making its second attempt, China issued the Measures for the Administrative Protection of Copyright on the Internet<sup>208</sup> in May 2005, detailed discussion of which are beyond the scope of the thesis that focuses on merely civil liability of ISPs. Although the Measures were intended to curb copyright infringement by means of imposing administrative liability on ISPs who assisted infringements of Internet users, it was challenged by continuous expansion of copyright infringement, as non-deterrent administrative measures including low administrative fines<sup>209</sup> are rather too weak to deter prevalent infringement. Under tremendous pressure, internationally and domestically, to crack down on copyright piracy on the Internet, the Chinese legislature finally made their third attempt to issue a law that is at a high level of legal hierarchy - the Regulations on the Protection of the Right of Communication through the Information Networks. The Regulations were issued by the State Council of the P.R.C. and have more detailed provisions addressing ISP copyright liability depending on their differentiated functions. The Regulations supersede the Judicial Interpretation and the Administrative Measures, in terms of the source of the Chinese law. In all these three pieces of legislation, a knowledge requirement, *inter alia*, is being made the most critical issue for establishing ISP copyright liability. However, the inconsistent ambit of the knowledge standard in the Judicial Interpretation and the Regulations has led to confusion in practice. When the draft of the Tort Liability Law of the P.R.C was opened for consultation, it was hoped that this law would be able to solve the inconsistency and clarify the ambit of the ISP knowledge standard.

In the light of these developments, this chapter makes an analysis of the existing laws in relation to ISP copyright liability in the United States of America, Germany, and China in order to examine how the ISP copyright liability provisions have been

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<sup>208</sup> The National Copyright Administration and Ministry of Information Industry of the P.R.C. (2005, May 30). 'The Measures for the Administrative Protection of Copyright on the Internet' [WWW document] URL <http://www.chinaeclaw.com/english/readArticle.asp?id=3608> (English Version). Also available at URL <http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/detail.jsp?articleid=9437&boardpid=176&boardid=11501010111602> (Chinese Version)

<sup>209</sup> International Intellectual Property Alliance (IIPA), '2005 Special 301 Report People's Republic of China'. [WWW document]. URL <http://www.iipa.com/rbc/2005/2005SPEC301PRCrev.pdf> (visited 2008, May 21)



constructed in the written law and whether the ISP knowledge standard has been made, *inter alia*, a predominant element for determining ISP copyright liability.

## 2.2 The Law in the United States of America

Being the leading country in the development of an ISP copyright liability regime, the examination of American case law that precipitated the enactment of the DMCA is inevitably positioned at the beginning of this chapter. Provisions regarding ISP copyright liability in Section 512 of the U.S. Copyright Act, in particular a knowledge standard, are subsequently discussed.

### 2.2.1 Case Law

As mentioned earlier, in the first American ISP liability case, *Playboy Enterprises, Inc. v. Frena*<sup>210</sup>, the court suggested that direct liability for a primary infringer under the Copyright Act of the U.S.<sup>211</sup> should be imposed on the BBS operator for distributing infringing photographs uploaded and downloaded by users.<sup>212</sup> As a liability offence, a direct liability generally applies to a primary copyright infringer when he violates any of the exclusive rights<sup>213</sup> of a copyright owner and incurs primary infringement. Imposing a direct liability on a BBS operator thus does not seem to be appropriate in a scenario where the BBS operator does not itself distribute infringing material and simply provides a platform for such distribution. It, though, might be argued that a direct liability is a practical tactic to quickly fix copyright infringement problem on the Internet. The elements establishing a direct liability for a primary infringer, nevertheless as a matter of fact, do not fit the activities of a BBS operator. For instance, a direct liability does not require an infringer to know that he

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<sup>210</sup> *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)

<sup>211</sup> Section 501 of the U.S. Copyright Act. The U.S. Copyright Act's strict liability rule probably derives from the notion of copyright as a property right. Under other proprietary torts, such as trespass and conversion, the defendant is similarly strictly liable, i.e. it is sufficient that he intended to commit an act that has the effect of interfering with another person's property. Intention to cause harm is not required. See Englard 1992, p. 49; Emanuel 1991, p. 30

<sup>212</sup> *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), at 1560–61.

<sup>213</sup> The exclusive rights of copyright owners are enumerated at Section 106 of the U.S. Copyright Act – to reproduce, to prepare derivative works, to distribute copies, to display and to perform in public – are infringed under Section 501 of the U.S. Copyright Act if any of these rights are exercised without a licence.

or she is infringing. Hence, even if he infringes copyright of others without any knowledge, he would still be liable. Nevertheless, it may not be fair to ask a BBS operator to bear the same liability while it does not commit copyright infringement himself. It would be more inappropriate to impose liability on a BBS operator when it does not have any knowledge of infringement and does not know what is passing through its network.

In a dilemma, secondary liability was proposed in an ISP copyright liability context by *Sega Enterprises v. MAPHIA*<sup>214</sup> and *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*<sup>215</sup>, which will be discussed at length following the brief review of earlier precedents in relation to vicarious liability and contributory liability below. Nevertheless, secondary liability is not stipulated in the U.S. Copyright Act<sup>216</sup>; instead, it was created by courts in interpreting the Copyright Act and it generally takes place when a third party assists a direct infringement committed by a primary infringer.

### **2.2.1.1 Vicarious Liability**

The first limb of secondary liability – vicarious liability - stems from tort law doctrine of agency - *respondeat superior* - the responsibility of the superior for the acts of their subordinate.<sup>217</sup> Under the doctrine of vicarious liability, liability is initially imposed on an employer for the torts of his employees. However, the Second Circuit in the appeal of *Shapiro, Bernstein & Co. v. H.L. Green Co.*<sup>218</sup> widened the scope of vicarious liability. The court noted two facts, the first fact was that there was no employer-employee relationship between two defendants, and the second fact

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<sup>214</sup> *Sega Enterprises v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994)

<sup>215</sup> *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)

<sup>216</sup> The U.S. Copyright Act of 1976. (1976, October 19). [WWW document]. URL <http://www.copyright.gov/title17/92appa.pdf> (visited 2006, February 10)

<sup>217</sup> For a general survey of law of vicarious liability, see William Lloyd Prosser & W. Keeton, et. al, editors, *Prosser and Keeton on Torts*, (Fifth edition, Saint Paul: West Group Publishing, 1984), pp.499-501. See also the American cases *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, (2d Cir. 1963) and *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), pp.261-62 (noting connection between vicarious copyright liability and respondeat superior) and the British case *PRS v. Cyril Theatrical Syndicate, Ltd* [1924]1 K.B.1 and *PRS v. Mitchell & Booker* [1924]1 K.B. 762, in which vicarious liability was applied in the copyright context.

<sup>218</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, (2d Cir. 1963).

was that the second defendant, the H.L.Green Company neither actively participated in the sales of bootleg records nor knew of those unauthorised reproduction and distribution manufactured and sold by the first defendant, Jalen Amusement Company. The second defendant, as a licensed concessionaire of the first defendant, however had the right to fire the employees of the first defendant and that they profited by taking a percentage of the first defendant's receipts from the sale of those bootleg records. Thus the second defendant should be vicariously liable for copyright infringement. To that the court stated:

Many of the elements, which have given rise to the doctrine of *respondeat superior*, may also be evident in factual settings other than that of a technical employer-employee relationship. When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials – even in the absence of actual knowledge that the copyright monopoly is being impaired – the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.<sup>219</sup>

In this case, the *Shapiro* court expanded the scope of vicarious liability and went beyond the limits suggested by tort law in which the application of tort doctrine of *respondeat superior* only applies to the relationship between the defendant and an underlying tortfeasor. Two critical elements were established for vicarious liability: the right and ability to control and financial interest.

*Polygram Intern. Pub., Inc. v. Nevada/TIG, Inc.*<sup>220</sup> and *Fonovisa, Inc. v. Cherry Auction, Inc.*<sup>221</sup> followed suit and further developed vicarious liability, in particular in respect of what would be sufficient to establish necessary control of the

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<sup>219</sup> *Ibid.*, at 307 (citations omitted).

<sup>220</sup> *Polygram Intern. Pub., Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314 (D. Mass. 1994) (In this case, the court found that the defendant had the ability to control the infringement by setting the terms in the agreement between itself and primary infringer in order to authorise inspection of copyright infringement. With regard to the requirement of a direct financial interest, the court clarified that 'commercial gain from the overall operation and either a direct or indirect financial benefit from the infringement itself' would support liability.)

<sup>221</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (In this case, the court further affirmed that the defendant Cherry Auction had the necessary control of the infringement as it could terminate vendors for selling counterfeit records and had the ability to police the premises on which the swap meet took place. Meanwhile, the defendant had the requisite financial interest from admission, parking and concession stand revenues paid by those who attended the swap met to buy counterfeit records. )

infringement and what should be considered as financial benefit. In *Polygram Intern. Pub., Inc. v. Nevada/TIG, Inc.*, the court held that the ability of the defendant to prohibit the use of music by a primary infringer would be sufficient to establish necessary control for liability.<sup>222</sup> As for requirement of ‘an obvious and direct financial interest’<sup>223</sup> in the infringement, the court went on to permit that vicarious liability could be imposed on a showing of ‘direct or indirect financial benefit’<sup>224</sup>. Thus, commercial gain from the operation of the trade show and indirect financial interests achieved from many people’s attendances attracted by the performance of music would also support the argument that the defendant had necessary control and indirect financial benefit from the infringement. It is suggested by the *Polygram* case that the establishment of vicarious liability would no longer be based on control over ‘the manner and means of performance’<sup>225</sup> and ‘an obvious and direct financial benefit’;<sup>226</sup> it could be established on a showing of an ability to ban the use of music and an indirect financial interest. With similar facts to the *Polygram* case, the court in *Fonovisa* followed the interpretation of vicarious liability in the *Polygram* case, and held that the defendant was liable for vicarious liability, based on the facts that it had the ability to stop vendors from selling counterfeit records and could police the premises on which the infringements took place. In the meantime, it had the requisite financial interest from admission, parking and concession stand revenues paid by those who attended the swap meet to buy counterfeit records.

It can be perceived from cases discussed above that a handful of case laws have developed vicarious liability to embrace complex situations. Before case laws advanced vicarious liability, the courts would have only been able to apply vicarious liability to a secondary infringer when he is in a supervisory relationship to a primary infringer and receives some financial benefit from the infringement. With the development of a modern definition of vicarious liability in case laws, the scope of vicarious liability has been enlarged to a dimension in which liability could be imposed on a third party even when he has no relationship with a primary tortfeasor

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<sup>222</sup> *Polygram*, 855 F.Supp at 1326 (D. Mass.1994)

<sup>223</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, (2d Cir. 1963), at 307.

<sup>224</sup> *Polygram*, 855 F.Supp at 1326 (D. Mass.1994)

<sup>225</sup> *Ibid.*

<sup>226</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, (2d Cir. 1963), at 307.

but only has control of the infringement, or benefits from the infringement. It is hoped that, with the expansion of vicarious liability, the courts may again construct an effective solution to the copyright puzzle on the Internet.

### **2.2.1.2 Contributory Liability**

The second milestone in the development of secondary liability under the American law was marked by cases that expanded the reach of contributory liability. Similar to vicarious liability, contributory infringement has deep roots in the tort theory of *enterprise* liability, which is characterised by the fault of a third party and framed by elements of knowledge of infringement and material contribution to infringement. In Section 876 of the *Restatement (Second) of Torts*, the tort theory of *enterprise* liability is found which requires the contributing tortfeasor '[to know] that the other's conduct [constitutes] a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.'<sup>227</sup> Nevertheless, American case laws have restructured the application of contributory liability in a copyright context and stretched the ambit of two determining elements that establish contributory liability.

In *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*<sup>228</sup>, the court issued a decision that rested the idea on that it was wrong to provide significant assistance with knowledge that such assistance would facilitate copyright infringement. In this case, four music publishers sued Mark Fi Records, Inc., a company that made and sold bootleg records with very low prices along with other three defendants that did business with Mark Fi for copyright infringement. The plaintiffs argued that the first defendant Mark Fi was liable for making and selling records that violated the plaintiffs' copyright, and that other three defendants<sup>229</sup> that had business with the first defendant were also liable for copyright infringement. The plaintiff laid their liability on their knowledge of the infringing nature of the records sold by Mark Fi

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<sup>227</sup> The Restatement (Second) of Torts, Section 876B (1979).

<sup>228</sup> *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*, 256 F.Supp. 399 (S.D.N.Y.1966)

<sup>229</sup> *Ibid.*, at 401-02. (They were an advertising agency that purchased airtime for the broadcast of commercials for the infringing album; the owner of the radio stations that played the commercials; and a company that packaged and mailed the infringing albums to people who has already ordered and paid for the albums through Mark Fi.)

and their assistance of the infringement. To defend themselves, three defendants argued that they did not actually participate in those infringements and they did not have any control or any financial benefit from those infringements, therefore they should not be liable for copyright infringement. However, the plaintiffs disagreed with that and submitted that the defendants, as a matter of fact, knew or should have known about Mark Fi's infringement from Mark Fi's records' suspicious prices (far below market value), and the infringing nature of Mark Fi's operation. The court had the opinion in favour of the plaintiffs, based on 'the basic common law doctrine that one who knowingly participate in or further an act is jointly and severally liable with the prime tortfeasor.'<sup>230</sup> The court held that these three defendants could be held liable for contributory copyright infringement 'if it were shown to have had knowledge, or reason to know, of the infringing nature of the records.'<sup>231</sup> In other words, they could be liable if they should have known of the infringement based on indications such as a product prices far below market value, and still promoted and assisted the infringement. Even though the court ruling did not explicitly address a constructive knowledge standard, it implied that 'have reason to know/should have known' would suffice to establish the defendant's knowledge for contributory liability.

Similar view was shared by the court of *Gershwin Publishing Corp. v. Columbia Artists Management, Inc*<sup>232</sup>. In their judgment, the court held that a defendant would be culpably liable for contributory infringement, if it knows that a specific person will commit a particular act of infringement and it yet decides to provide direct assistance to the infringement. It did not really matter what kind of knowledge the defendant had and what kind of assistance it provided in the view of the court. The defendant contended that it was not responsible for the infringements whereas the plaintiff argued that the defendant had caused copyright infringement by organising, supervising, and controlling an unincorporated local community concert association that helped the expansion of the concerts' audiences. The court, however, noted that liability of the defendant was found in both its close relations with this local

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<sup>230</sup> *Ibid.*, at 403.

<sup>231</sup> *Ibid.*, at 404-405.

<sup>232</sup> *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir.1971).

association and its participation in planning and printing programmes for the concerts. In addition, it was known by the court that the defendant knew that the local association did not pay licence fees to the plaintiffs, the right holder, nor paid royalties to copyright owners for copyright music performed publicly at community concerts and it yet continuously promoted those concerts. In their decision, the court ruled that the defendant was liable because it had knowingly participated in the infringement, in terms of the standard created by previous cases<sup>233</sup>, which states that ‘one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another’ may be held liable as a ‘contributory’ infringer. The significance of this case is that it further acknowledged a constructive knowledge implied in the ruling of *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.* that merely know a third party performed works protected by the law would satisfy knowledge element of contributory infringement.<sup>234</sup>

In *Fonovisa, Inc. v. Cherry Auction, Inc.*<sup>235</sup>, another notable case that usually being cited when determining contributory liability, the Ninth Circuit once again endorsed the expansion of a contributory liability in a copyright context and held that ‘wilful blindness’ sufficed to establish constructive knowledge. In addition, it allowed a mere facilitation of infringement to satisfy second element of material contribution to support the claim of contributory copyright liability. In this case, the Ninth Circuit found that the defendant Cherry Auction, the operator of a swap meet had supplied parking, conducted advertising and retained the right to exclude any vendor for any reason at any time. The defendant knew that some of its vendors were selling infringing recordings that infringed copyright of the plaintiff, but turned ‘a blind eye’ to the infringement and provided services to those vendors in exchange for the daily rental fees after the county sheriff had raided their premises and seized 38,000 counterfeit recordings the previous year. Moreover, the defendant failed to comply with a lawful request by the local sheriff that it gathered and shared basic identifying

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<sup>233</sup> *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*, 256 F.Supp. 399 (S.D.N.Y.1966) and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396-397, 88 S.Ct. 2084, 2088, 20 L.Ed.2d 1176 (1968)

<sup>234</sup> *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir.1971), 1163.

<sup>235</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)

information about its vendors.<sup>236</sup> The court adopted the view set forth in *Columbia Pictures Industries, Inc. v. Aveco, Inc.*<sup>237</sup> that ‘providing the site and facilities for known infringing activity was sufficient to establish contributory liability’,<sup>238</sup> and held that Cherry Auction ‘materially contributed’ to the infringement through its provision of services including ‘provision of space, utilities, parking, advertising, plumbing and customers’,<sup>239</sup>.

Analysis of the cases indicates that contributory liability is established when somebody knows of or should have known others’ direct infringement and materially contributes to that infringement by inducing, causing or merely facilitating the infringing conduct. ‘Know’ herein signifies actual knowledge of the infringement and ‘have reason to know/should have known’ signifies constructive knowledge of the infringement. Nevertheless, a landmark case *Sony Corporation of America v. Universal City Studios Inc.* marked a significant structural change of the contributory liability standard. The *Sony* case was in fact a case about a third party provided a product, which had enabled another to infringe copyright. Since there was a weaker connection between the third party and the direct infringer in this case, knowledge of the underlying act of infringement was difficult to prove. Moreover, another issue that the court concerned was that the product provided by the defendant could be used for non-infringing purpose. In this case, the plaintiffs were companies that owned copyrights on a range of works being broadcasted as ordinary television programs. They argued that the defendant Sony was liable for copyright infringement by selling VCRs to the public who had used the VCRs to copy the plaintiffs’ works for later viewing<sup>240</sup>. When they brought the case to the court, the District Court dismissed the claim by stating that the situation in the case was different to that of the *Screen Gems* and *Gershwin* cases, and that non-commercial home use recording of material broadcast over the public airwaves was a fair use of copyright works and hence did not constitute copyright infringement. The court further stated that, even if the home use of a VCR was infringing use, the defendants were not contributorily

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<sup>236</sup> *Ibid.*, at 261.

<sup>237</sup> *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3rd Cir. 1986)

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*, at 264.

<sup>240</sup> *Ibid.*, at 419.



liable because they had neither actual knowledge nor constructive knowledge of their customers' infringements, and they did not by any means promote and encourage those infringements.

In the appeal, the Ninth Circuit overturned the decision of the District Court and held that the defendants were in fact liable for contributory infringement in that they knew that the VCRs would be used to reproduce copyright materials and they induced, caused, or materially contributed to the infringing conduct. The case was appealed again to the Supreme Court. On the issue of contributory infringement, the Supreme Court found that Sony had constructive knowledge of its customers' potential infringements, as Sony knew that some customers would use the VCRs to infringe copyright.<sup>241</sup> Moreover, Sony materially contributed to the infringements of its customers, because infringement of the customers would not be possible without the assistance of the VCRs.<sup>242</sup> But, the Supreme Court yet rejected imposing liability on Sony with those findings because of the consideration of a broader social consequence of the liability. The Supreme Court borrowed a concept from patent law, which provided that the sale of a 'staple article or commodity of commerce suitable for substantial non-infringing use'<sup>243</sup> could not constitute contributory infringement. The Supreme Court held that Sony was not liable because 'the sale of copyright equipment, like the sale of other articles of commerce, did not constitute contributory infringement if the product was widely used for legitimate unobjectionable purposes. Indeed, it needed merely be capable of substantial non-infringing uses.'<sup>244</sup>

The Supreme Court in the *Sony* case changed definition of contributory liability that was gradually established in the foregoing cases and excluded contributory liability of Sony based on the non-infringing feature of its product, regardless of its

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<sup>241</sup> *Sony Corporation of America v. Universal City Studios Inc.*, 659 F.2d 963, 975 (9<sup>th</sup> Cir. 1981) ('The corporate appellant "know" that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product. That use is intended, expected, encouraged, and the source of the product's consumer appeal. The record establishes that appellant knew and expected that Betamax's major use would be to record copyrighted programs off-the-air.')

<sup>242</sup> *Ibid.* ('There is no doubt that appellant have met the other requirements for contributory infringement - inducing, causing, or materially contributing to the infringing conduct of another.')

<sup>243</sup> Section 271 (c) of the Patent Act.

<sup>244</sup> *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984), 442.

constructive knowledge of its customers' potential infringement and its material contribution to the infringements. This change was principally due to the court's concern to balance the benefits of contributory liability and its cost. Because, according to the court, imposing contributory liability would have the benefit of reducing infringement, but in the meantime society would also lose the benefit associated with non-infringing use of VCRs, or, in other words, the full benefit of new technologies, and possibly, future development of any new technologies. Apparently, the *Sony* court has set a precedent for future courts that they should avoid contributory liability for technology providers if the technology in question could have significant non-infringing uses. According to the court, actual knowledge of the infringement, *inter alia*, must be presented for establishment of contributory liability when the technology or service can be used for non-infringing purpose. The *Sony Betamax* ruling is heavily cited in the subsequent cases in relation to ISP copyright liability, though it has also been under constant legal attack in cases associated with peer-to-peer file sharing technology.

Examination of the cases involving vicarious and contributory liability reveals that a secondary copyright liability regime is developed through substantial case laws in the United States of America. Despite the fact that secondary copyright liability lacks an explicit statute basis in the Copyright Act and two tort law principles that were applied in cases do not necessarily have binding effect, it may be quoted to support the establishment of ISP copyright liability in an Internet environment. *Sega Enterprises v. MAPHIA*<sup>245</sup> and *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*<sup>246</sup>, which focus upon the concept of contributory infringement, may be the illustration of the value of the precedents towards the development of an online ISP copyright liability regime.

In 1994, the court of *Sega Enterprises v. MAPHIA*<sup>247</sup> reached a conclusion that refused to find a BBS operator liable for direct infringement because the BBS operator did not upload or download the infringing files themselves and did not

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<sup>245</sup> *Sega Enterprises v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994)

<sup>246</sup> *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)

<sup>247</sup> *Sega Enterprises v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994)

directly cause the copying of the alleged copyright materials. Nevertheless, the court ruled that the defendant was liable for video game distributed by their subscribers, based on specific findings of contributory infringement. The court held that the defendant caused and contributed to the infringing activity by actively soliciting users to upload unauthorised games, and by providing a road map on their BBS for easy identification of Sega games available for downloading.<sup>248</sup> In addition, the defendant's 'role in the copying, including provision of facilities, direction, knowledge and encouragement, amounted to contributory copyright infringement'<sup>249</sup>. In this case, the court accepted that a conflating knowledge requirement with material contribution requirement suffices to establish contributory liability of the defendant, although the defendant did not know exactly when infringing video games were uploaded to or downloaded from bulletin board.

A year later, the court of *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*<sup>250</sup> further suggested the application of contributory liability in the context of ISP copyright liability. The court found that there was an issue of fact as to Netcom's knowledge of the infringement and its failure to act that might constitute substantial participation. In its conclusion, the court held that, if Netcom knew or should have known that infringing material was passing through its servers and failed to take action to prevent the dissemination of that material, it could be liable as a contributory infringer. When it was not clear in the existing law as to the degree of evidence necessary to create constructive knowledge on the part of

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<sup>248</sup> *Ibid.*, at 687

<sup>249</sup> *Ibid.*, at 687.

<sup>250</sup> *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (In this case, the plaintiffs, who owned copyrights in works by L. Ron Hubbard, the founder of the Church of Scientology sued three defendants for copyright infringement. They are, Dennis Erlich, who had allegedly infringed the copyright works by posting them on the Internet, a Bulletin Board Service (BBS) through which Erlich gained his Internet access, and Netcom, which provided the BBS its Internet access. In the findings of the court, a former member of the Church, the first defendant Erlich who had contracted with the BBS operator for the right to post messages on the BBS, posted messages to a BBS that contained excerpts of the copyright works. When Erlich transmitted a message to the first defendant, the BBS operator, the operator's computer temporarily stored the message. In the meantime, Erlich's message was automatically copied onto the second defendant, Netcom's computer through Netcom's software. His message was stored for three days on the BBS operator's computer and for eleven days on Netcom's computer so that others could access it. Since the messages Erlich posted contained excerpts of the copyright works without authorisation of copyright owners, the plaintiffs argued that the act of Erlich constituted copyright infringement. In addition, the plaintiffs argued for Netcom's contributory and vicarious liability. )

ISPs that do not actually know of users' infringement, the *Netcom* court framed the knowledge requirement as 'knew or should have known' in the context of ISP copyright liability, which implies that constructive knowledge is equally acceptable for establishment of contributory liability.

The prevailing view in the United States of America shown by the substantial body of case law was that, ISPs might be secondarily liable for copyright infringement of their users. Contributory liability might be established, when an ISP is found to have knowledge of infringement (the court do not require actual knowledge, rather, contributory copyright liability incurs when the ISP has reason to know or should have known the users' direct infringement.) and makes material contribution to the infringement. Nevertheless, with the division of the courts, it was hoped that explicit statutory provisions could be given to clarify ISPs' legal status and put the debate on what kind of liability ISPs should undertake to an end.

### **2.2.2 Section 512 of the U.S. Copyright Act**

Having considered the substantial case law<sup>251</sup> in relation to ISP copyright liability and the application of two common law tort contributory and vicarious liability standards in the cases<sup>252</sup>, Section 512 of the U.S. Copyright Act provides qualifying ISPs 'safe harbours' from all monetary relief for direct, vicarious, and contributory infringement. There are generally four categories of conduct eligible for such limitations, including transitory communications<sup>253</sup>; system caching<sup>254</sup>; storage of

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<sup>251</sup> For example, *Playboy Enterprises v. Frena* (*Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994), and *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>252</sup> However, the Congressional Committee Reports on the DMCA also stated that, 'the current criteria for finding contributory infringement or vicarious liability are made clearer and somewhat more difficult to satisfy'. Therefore, elements of the traditional contributory infringement or vicarious liability were only part of the provisions in Section 512 of the U.S. Copyright Act, which means even if the criteria for finding contributory infringement or vicarious liability are satisfied; the ISP may still be entitled for exemption.

<sup>253</sup> Section 512 (a) of the U.S. Copyright Act. (Section 512(a) provides immunity for 'infringement of copyright by reason of the [ISP's] transmitting, routing or providing connections for' the information as well as the intermediate and transient copies that are made automatically in the operation of a network. The immunity therefore is given to a service provider that 'merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else' request.' Only if the transmission is initiated and directed by an Internet user are the conditions met. The

information on systems or networks at direction of users<sup>255</sup> and information location tools<sup>256</sup>. Apart from a lower liability threshold for ISPs who conduct transitory communications, a higher liability threshold is provided for ISPs who conduct system caching, storage of information on systems or networks at direction of users and information location tools, which is only if they, *inter alia*, have actual knowledge or ‘awareness of infringement’, may they be held liable.

According to Section 512 (c) (1) (A)<sup>257</sup> of the U.S. Copyright Act, an ISP shall not be liable ‘for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider’, if the ISP, *inter alia*, ‘does not have actual

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injunctive relief against such kind of service provider copyright owners can ask from the court is an order to disable access to an infringing subscriber or a specific, identified offshore location.)

<sup>254</sup> Section 512 (b) of the U.S. Copyright Act. (Section 512 (b) sets forth three conditions to be met for the liability exemption available to ISPs that provide ‘intermediate or temporary storage of infringing materials,’ (i) the ISP caches materials made available by a third party and transmits such materials to other parties automatically and without modification; (ii) the ISP complies with generally accepted industry standard data communications protocol for the system or network through which that person makes the material available; (iii) the ISP responds expeditiously to a notice and takedown request if alleged infringing material has been removed by the original provider.)

<sup>255</sup> Section 512 (c) of the U.S. Copyright Act. (Section 512 (c) makes it clear that there are two prerequisites for exemption of ‘infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.’ Firstly, an ISP is not liable if (i) it does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, it is unaware of facts or circumstances from which infringing activity is apparent; (iii) upon obtaining such knowledge or awareness, it acts expeditiously to remove or deny access to the material that is allegedly infringing. Secondly, an ISP is not liable if it receives no financial benefit from the infringement directly attributable to the infringing activity when it has the right and ability to control such activity and responding expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity upon notification of claimed infringement.)

<sup>256</sup> Section 512 (d) of the U.S. Copyright Act. (Limitation of liability for hyperlinks, online directories, search engines and the like if similar conditions set forth for information residing on systems or networks in Section 512 (c) are met, including no knowledge of infringement; no financial benefit directly attributable to the activity when an ISP has the right and ability to control the infringing activity; and expeditious removal or access disablement to the material upon receiving a notification of claimed infringement.)

<sup>257</sup> Section 512 (c) Information Residing on Systems or Networks at Direction of Users. - (1) In general. - A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider - (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; ...

knowledge that the material or an activity using the material on the system or network is infringing’, or, ‘in the absence of such actual knowledge, it is unaware of facts or circumstances from which infringing activity is apparent’. Similarly, by virtue of Section 512 (d) (1)<sup>258</sup> of the U.S. Copyright Act, an ISP shall not be liable for same reliefs by reason of ‘referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link’, if the ISP, *inter alia*, does not have actual knowledge of the infringement or ‘awareness of facts or circumstances from which infringing activity is apparent’.

For the evaluation of ISP actual knowledge or awareness of infringement, Section 512 (c) (3) (B) (i) of the U.S. Copyright Act explicitly states that a notification that fails to comply substantially with the requirements laid out by the statute would result in the notification not being considered in deciding the requisite level of knowledge by the ISP. Therefore, notification is of critical importance for justification of ISPs’ actual knowledge or awareness of the infringement. In order for the notice to be qualified as evidence of ISP actual knowledge or awareness of infringement, right holders must ensure that six elements set forth by Section 512(c) (3) (A) of the U.S. Copyright Act are met:

- (A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
  - (i) A physical or electronic signature of a person authorised to act on behalf of the owner of an exclusive right that is allegedly infringed.
  - (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
  - (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or

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<sup>258</sup> Section 512 (d) Information Location Tools. - A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider - (1) (A) does not have actual knowledge that the material or activity is infringing; (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; ...

access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

In addition, Section 512 (c) (3) (B) (ii)<sup>259</sup> of the U.S. Copyright Act accentuated that, an ISP will not be deemed to have notice of infringement when a notice that fails to comply substantially with all the provisions of Section 512(c) (3) (A) but substantially complies with clauses (ii), (iii), and (iv) of Section 512(c) (3) (A) if ‘the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A)’. This clause was intended to require an ISP to assist copyright holders in issuing an effective notice and to discourage the ignorance of faulty notices. However, the provision does not explicitly state whether a notice that substantially complies with clauses (ii), (iii), and (iv) of Section 512(c) (3) (A) but is not under oath, does not attest to a good faith belief of the alleged infringements, and does not attest to the accuracy of the allegations will be considered valid to establish knowledge necessary to establish liability for infringement if the ISP fails to respond to the inadequate notice and explain the requirements for substantial compliance.

### **2.2.2.1 The Actual Knowledge of Infringement**

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<sup>259</sup> Section 512 (c) (3) (B) (ii): [I]n a case in which the notification that is provided to the service provider’s designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

Section 512 of the U.S. Copyright Act does not provide definition as to what constitutes an actual knowledge of infringement. However, Section 512 (c) (3) (B) (i) states that for the purposes of determining whether an ISP has the requisite level of knowledge of infringement a court should consider whether notice was provided to the ISP and the extent to which the notice includes the required documents and information. Therefore, if an ISP has been put on notice, then the ISP will be deemed as having the requisite actual knowledge of infringement claimed and will have the duty to act expeditiously to remove, or disable access to, the infringing material. Nevertheless, this does not necessarily mean that the standard of notice is the only criterion for establishing ISP actual knowledge of infringement. A specified set of circumstances considered by the previous courts where the ISP was deemed to have actual knowledge of the service being used to infringe copyright should also be of assistance in determining what constitutes ISP actual knowledge of infringement. For example, it could include internal documents of the ISP or statements of the ISP's employees indicating that the ISP knew the existence of infringing content or infringing activities, or in a BBS scenario, an explicit comment in a BBS signifying that the content is taken from a source protected by copyright such as, 'click here to download this bootleg album'.

#### **2.2.2.2 The 'Awareness of Infringement'**

Section 512 of the U.S. Copyright Act does not provide definition or examples of what constitute 'facts or circumstances' that might result in an awareness of 'red flags' from which infringing activity is apparent. However, the legislative history<sup>260</sup> of the DMCA suggests that the 'awareness of infringement' in Section 512 (c) (1) (A) (ii) and Section 512 (d) (1) (B) can be best described as a 'red flag' test<sup>261</sup>, which is

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<sup>260</sup> It refers to mainly the Senate Judiciary Report, S. Rep. No. 105-190 (5/11/98), the House Judiciary Report, H.R. Rep. No.105-551, Part 1 (5/22/98), the House Commerce Report, H.R. Rep. No.105-551, Part 2 (7/22/98).

<sup>261</sup> The 'red flag' test originates from the language in Section 512 of the U.S. Copyright Act that requires that an ISP not be 'aware of facts or circumstances from which infringing activity is apparent.' Further discussion on this, see the House Commerce Report (Rept. 105-551, Part 2: July 1998), pp.44-45 and Jonathan Band and Matthew Schruers. 'Safe Harbors against the Liability Hurricane: the Communications Decency Act and the Digital Millennium Copyright Act'. [WWW document] URL <http://www.policybandwidth.com/doc/JBand-CDAvDMCA.pdf> (visited 2008, October 20), pp. 13-15.



different from the mere constructive knowledge – ‘have reason to know’ standard in the contributory liability cases<sup>262</sup>. Two elements, objectively and subjectively, are included in the ‘red flag’ test, which means that,

[I]n determining whether the service provider was aware of a ‘red flag’, the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a ‘red flag’ – in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.<sup>263</sup>

Therefore, only if both the subjective and objective elements are met, in other words, only if the ISP becomes aware of a ‘red flag’ - ‘information of any kind that a reasonable person would rely upon’<sup>264</sup> - from which infringement is apparent and does not take action, will it be disqualified from exemption of liability. In other words, an ISP would not qualify for ‘safe harbour’ if it had ‘turned a blind eye’ to ‘red flags’ of obvious infringement. In addition, the legislative history interpreted the safe harbour for information location tools in a key passage, which is worth to cite here:

[F]or instance, the copyright owner could show that the provider was aware of facts from which infringing activity was apparent if the copyright owner could prove that the location was clearly, at the time the directory provider viewed it, a ‘pirate’ site of the type described below, where sound recordings, software, movies, or books were available for unauthorized downloading, public performance, or public display. Absent such ‘red flags’ or actual knowledge, a directory provider would not be similarly aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.

The intended objective of this standard is to exclude from the safe harbor sophisticated ‘pirate’ directories—which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted. Such pirate directories

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<sup>262</sup> The House Commerce Report (H.R. Rep. No. 105-551, Part 2: July 1998), p. 44

<sup>263</sup> The House Commerce Report (H.R. Rep. No. 105-551, Part 2: July 1998), pp. 44-55

<sup>264</sup> The House Judiciary Report ( H.R. Rep. No.105-551, Part 1: May 1998), p. 22

refer Internet users to sites that are obviously infringing because they typically use words such as ‘pirate,’ ‘bootleg,’ or slang terms in their URL and header information to make their illegal purpose obvious, in the first place, to the pirate directories as well as other Internet users. Because the infringing nature of such sites would be apparent from even a brief and casual viewing, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate. Pirate directories do not follow the routine business practices of legitimate service providers preparing directories, and thus evidence that they have viewed the infringing site may be all that is available for copyright owners to rebut their claim to a safe harbor.<sup>265</sup>

Therefore, as to the ‘awareness of infringement’, the indication given by the legislative history is that, 1) ‘awareness of facts or circumstances from which infringing activity is apparent’ should not be simply connected to a constructive knowledge standard for the traditional contributory liability; 2) to establish ISPs’ ‘awareness of infringement’ by a ‘red flag’ test, the ‘red flag’ must be flagrant and blatant enough so that the ISP can be full aware of it without being notified by copyright owners or right holders. By the terms given, the ‘red flag’ test put forward by the legislative history requires a high level of proof to establish ISPs’ awareness than the traditional constructive knowledge (‘have reason to know’) standard. The ‘red flag’ standard is ‘not what a reasonable person would have deduced given all the circumstances; it is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.’<sup>266</sup>

### **2.3 The Law in Germany**

The law in Germany follows a civil law legal tradition. It therefore contrasts, at least in theory and in basic principles, with the legal system of the common law countries.<sup>267</sup> The German laws are contained in codifications and in statutory form

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<sup>265</sup> The House Commerce Report (H.R. Rep. No.105-551, Part 2: July 1998), pp. 47-48

<sup>266</sup> David Nimmer, *Copyright: Scared Text, Technology, and the DMCA* (New York: Kluwer Law International, 2003), p. 358

<sup>267</sup> Nigel Foster and Satish Sule, *German Legal System and Laws* (Third edition, New York: Oxford University Press, 2002), p.3. See also, Werner. F. Edke and Matthew W..Finkin, editors, *Introduction to German Law*, (The Hague: Kluwer Law International, 1996) and Freckmann and T.Wegerich, *The German Legal System*, (London: Sweet & Maxwell, 1999).

originally distinguished from the legal system of a common law country such as the United States of America with its predominant base in case law.<sup>268</sup> In the comprehensive German legislative Codes, general and abstract principles that apply to all of the specific circumstances are often employed and they can be interpreted in the light of various problems and be applied to achieve a result in particular with regard to new legal issues.<sup>269</sup> In theory, the courts and precedents play no part as a formal source of law; and the judges are free to make decisions on its merits of every case without being hindered by previous decisions. In practice, previous decisions, in particular those of higher courts, are observed and considered. In addition, the courts play a distinct role in interpreting and developing the law.<sup>270</sup> The Constitution (Grundgesetz - GG) is the supreme source of German law and the main source of law is all other enacted and written rules of law termed Gesetz, including 'the comprehensive legislative Codes and amending or additional single enactments from both the Federal and *Länder* (State) legislatures and their executives endowed with law making powers.'<sup>271</sup> Since there is a division between the Federation and the *Länder* (State),<sup>272</sup> Article 31 of the Constitution (*Grundgesetz - GG*) thus states that, within Germany's federal system, federal laws prevail over laws of the *Länder* (*State*). It should be noted here that apart from those features, international law and European Community law also have impact on the German laws, while Germany is the member of those international instruments and the Member States country of the European Union.

What regards to civil liability for copyright infringement over the Internet, several laws are applicable in Germany. There are special laws which were created for this

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<sup>268</sup> Nigel Foster and Satish Sule, *German Legal System and Laws* (Third edition, New York: Oxford University Press, 2002), p.5.

<sup>269</sup> *Ibid.*, p.5

<sup>270</sup> *Ibid.*, p. 39

<sup>271</sup> *Ibid.*, p.37

<sup>272</sup> Article 79 III of the Constitution (Grundgesetz-GG) guarantees the federal state form and thus the division between the Federation and the *Länder*. Further discussion see Nigel Foster and Satish Sule, *German Legal System and Laws* (Third edition, New York: Oxford University Press, 2002), p.48. (legislative competence is 'divided into areas of exclusive competence of the Federation, with the *Bundestag* (the Lower House of the German Parliament) and thus the German government in the leading role (Article 71 and 73 GG), concurrent competence with the *Länder* who are represented within the *Bundestag* (The Bundesrat is the Upper House of the German Parliament, it represents the interests of the *Länder* in the Parliament) in Parliament (Article 72 and 74 GG) and a residual area of competence exclusive to the *Länder* (Article 70 and 30 GG).')

purpose, such as the Federal Teleservices Act 1997 (Teledienstegesetz-TDG) and the Media Services State Treaty 1997 (Mediendienstestaatsvertrag-MDStV) and their amendments, the Telemedia Act (TMG) 2007 and European Community Law such as the Electronic Commerce Directive, as well as general German laws including the German Copyright Act and its amendments<sup>273</sup> and the German Civil Code.

### 2.3.1 The Copyright Act of Germany

On the Internet, copyright infringement occurs when someone reproduces, distributes or makes available to the public unauthorised copies of copyright works. Thus, rights of reproduction<sup>274</sup>, redistribution<sup>275</sup> and ‘making available to the public’ are of paramount consideration. Among them, the right of ‘making available to the public’ is a new right provided by the two WIPO Internet treaties<sup>276</sup>. In Germany, such a right is given by the 2003 amendment of the German Copyright Act<sup>277</sup>. The German Copyright Act was amended to implement the two WIPO Internet treaties and the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (the EU Copyright Directive)<sup>278</sup>. Article 19a of the 2003 amendment of the German Copyright Act provides that copyright owners have the right to ‘authorise or prohibit any making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and

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<sup>273</sup> The German Copyright Act (Urheberrechtsgesetz). (1998, May 8) [WWW document] URL <http://www.iuscomp.org/gla/statutes/UrhG.htm> (English Version) (visited 2007, January 20) (the German Copyright Act was published on 9<sup>th</sup> September 1965 and was first amended on 8th May 1998. The Second amendment was in 2003 as the German Act on the Regulation of Copyright in the Information Society (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft), and the third amendment in 2007 was known as the Second Act Governing Copyright in the Information Society (eines Zweiten Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschaft).

<sup>274</sup> Section 16 (1) of the German Copyright Act.

<sup>275</sup> Section 17 (1) of the German Copyright Act.

<sup>276</sup> Here they refer to the WCT and the WPPT.

<sup>277</sup> The German Act on the Regulation of Copyright in the Information Society (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft), Federal Law Gazette Part I, No. 46, September 12, 2003, pp. 1774-1788.

<sup>278</sup> The European Parliament and the European Council. (2001, May 22). ‘the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’ [WWW document] URL <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> (visited 2004, February 20)

at a time individually chosen by them'<sup>279</sup>. Literally, it corresponds to Article 3.1 of the EU Directive on Copyright in the Information Society (2001/29/EC) as well as Article 10 and 14 of the WPPT.

As for remedies for copyright infringement, Article 97 of the Copyright Act provides that, 'the injured party may bring an action for injunctive relief requiring the wrongdoer to cease and desist if there is a danger of repetition of the acts of infringement, as well as an action for damages if the infringement was intentional or the result of negligence.'<sup>280</sup> Though this Article does not provide for a third party's indirect copyright liability in an explicit manner; under the broad tort doctrine of the civil law, the division between direct and indirect infringement of rights is generally accepted. Liability for such indirect infringement is deemed as a joint tort liability stipulated in the German Civil Code<sup>281</sup>, which will be discussed below. Therefore, to pursue liability for an indirect copyright infringement, a copyright owner may apply Article 97 of the Copyright Act for both the claim for compensation and action for a cease and desist order.

### **2.3.2 Joint Tort Liability in the German Civil Code**

A great deal of general principles that apply to all of the specific circumstances are set forth in the German Civil Code. Provisions regarding liability for all torts<sup>282</sup> therefore cover all sorts of liability arising from tortious activities including tortious copyright infringement.

The existence of a direct copyright infringement is one of prerequisites to an indirect copyright liability and such a direct copyright liability is determined by virtue of provisions of the Copyright Act as well as Section 823 (1) of the German Civil

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<sup>279</sup> Article 3(2) of the EU Copyright Directive

<sup>280</sup> Article 97 of the German Copyright Act.

<sup>281</sup> The German Civil Code (Bürgerlichen Gesetzbuches - BGB). (1896, August 18). [WWW document] URL <http://www.gesetze-im-internet.de/bgb/BJNR001950896.html> (German Version) & [http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html) (English Version) (visited 2008, May 20)

<sup>282</sup> Such as torts arising from harm to someone's life, body, health and freedom. Further discussion on the matter see BGH (Federal Court of Justice) *NJW(New Legal Weekly)* 1969, 2136 cited by Raymond Youngs in his book, *English, French & German Comparative Law* (New York: Routledge Cavendish, 2007), at p.438.

Code<sup>283</sup>. As for an indirect copyright liability of a third party who contributes to direct copyright infringement, the courts often refer to Section 830 of the German Civil Code which reads in its first paragraph: '[I]f more than one person has caused damage by a jointly committed tort, then each of them is responsible for the damage. The same applies if it cannot be established which of several persons involved caused the damage by his act.'<sup>284</sup> Second paragraph of Section 830 is applied too, as it provides that 'instigators and accessories are equivalent to joint tortfeasors.'<sup>285</sup> To establish a joint tort liability for the purpose of Section 830 of the Civil Code, violation of others' subjective rights must be proved as well as fault on the part of the defendant and a casual connection between the act and the damage to the protected interest. The element of fault can be fulfilled by intention as well as negligence. Intention is easily to be understood as knowing and desiring the consequence that may be in breach of the law or the relevant duty in the case of special relationships.<sup>286</sup> Negligence is however measured on the basis such as what a reasonable individual could and should have done based on a duty of care he has as the member of the society. Someone who violates others' rights by his omissions is also considered as negligent.

It shall be noted here that although a joint tort liability is clearly codified in the German Civil Code, a broad indirect infringement concept reflected in a joint tort liability doctrine is nevertheless developed by the German courts in intellectual property law as well as other fields of law. For instance, in a copyright context, German case law established a formulation where anyone who has willingly provided cause for copyright infringement on the part of others can be held jointly responsible, no matter what kind of participation he has in the infringement.<sup>287</sup> As for liability of the organiser or prompter of a public performance of copyright works or

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<sup>283</sup> Section 823 (1) of the German Civil Code reads, 'a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party from the damage arising from this.'

<sup>284</sup> Section 830, paragraph one, of the German Civil Code.

<sup>285</sup> Section 830, paragraph two, of the German Civil Code.

<sup>286</sup> Raymond Youngs, *English, French & German Comparative Law* (New York: Routledge · Cavendish, 2007), p.363.

<sup>287</sup> Gerald Spindler & Matthias Leistner, 'Secondary Copyright Infringement - New Perspectives in Germany and Europe', *International Review of Intellectual Property and Competition Law*, Vol. 37, (2006), pp.788-822, p.796.

the proprietor of a dance hall or restaurant who hires a dance band and makes profits from unauthorised performance, the German Federal Supreme Court repeatedly held that they might be subject to claims of damage or cease and desist orders under German copyright law.<sup>288</sup> In *Musicbox-Aufsteller*,<sup>289</sup> the Berlin Court of Appeal held that the owner of jukeboxes installed in a restaurant from which he had withdrawn coins inserted by guests of the restaurant was liable because of his financial gain from the performance of the music protected by copyright law. So if a general principle from this case law can be applied, a third party may be considered as a joint infringer when he either actively operates or supervises the operation of the place wherein the performance occurs, or has the control of the infringing performance and financially benefits, either directly or indirectly, from the operation or performance.<sup>290</sup> Furthermore, the German Federal Supreme Court held in its *video licensing agreement* decision<sup>291</sup> that, a distributor of motion pictures who had granted the defendant a license to manufacture and sell video recordings of various movies could claim damages from its licensee who had unlawfully authorised video libraries to rent these videotapes to consumers. The indication given by this decision is that the author of a copyright work may claim damages from a third party that did not directly infringe copyright work, but adequately caused the infringement of someone else. Such a decision may also imply that copyright owners could pursue an infringer that facilitates direct copyright infringement by technical means.

The abovementioned cases reveal that, in the context of copyright, duties of supervision, control or inspection are found appropriate as prerequisites to a joint tort

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<sup>288</sup> Dennis Campbell and Susan Cotter, editors, *Copyright Infringement*, (Salzburg: Kluwer Law International, 1998), at p. 162, footnote 141, the author cited RGSt (Decisions of the Supreme Court of the German Reich in Criminal cases) 12/34 and RGZ (Decisions of the Supreme Court of the German Reich in Civil cases) 78, 84 and 86; BGHZ (Decisions of the Federal Court of Justice in Civil cases) 42, 118, 127 – *Tonbandgerätehersteller* (Tape manufacturers).

<sup>289</sup> *Musicbox-Aufsteller*, the Berlin Court of Appeal, GRUR (Intellectual Property and Copyright Law), 1959, 150, 151.

<sup>290</sup> Dennis Campbell and Susan Cotter, editors, *Copyright Infringement*, (Salzburg: Kluwer Law International, 1998), at p. 163, footnote 143, the author cited BGH (Federal Court of Justice) GRUR (Intellectual Property and Copyright Law) 1956, 515, 516 – *Tanzkurse* (Dance); OLG (Regional Appeal Court ) München GRUR 1979, 152 – *Transvestiten-Show*. He also pointed out that *Warner Brothers Inc. v. O'Keefe*, 468 F. Supp. 16 (S.D. Iowa 1977) presented application of the same principles in the United States copyright law.

<sup>291</sup> The German Federal Supreme Court, GRUR (Intellectual Property and Copyright Law) 1987, 37, 39.

liability for indirect copyright infringement. They can be prerequisites to a joint tort liability, in particular where the defendant has engaged in activities such as promoting a concert at which copyright works are performed without authority, operating a restaurant or dance hall where music is performed by live bands or jukebox, or manufacturing or selling copying equipment if the equipment lacks any substantial non-infringing use. Knowledge of the infringement is not discussed in the above context, though as an element to decide a joint tort liability, it should have applied within the context because a joint tort liability can be imposed only if the infringer has assisted a direct infringement or induced others to infringe with fault.

Analysis of the cases also suggests that in Germany, although the ambit of a joint tort liability is developed so that it can be applied in the context of ISP copyright liability, the imposition of a joint tort liability yet depends on a specific area of law and underlying facts of a variety of cases. Thus, the establishment of a violation of a specific duty of care for ISPs is of critical importance for the application and interpretation of a joint tort liability in an ISP copyright liability context. As discussed in the following context, the German TMG 2007 has established several necessary requirements for ISP copyright liability such as, *inter alia*, actual knowledge of an ISP or 'awareness of infringement'. It is hoped that the framework created by the statute can effectively solve the problem of liability emerging from the Internet or maybe an even more sophisticated technological environment.

### **2.3.3 The Federal Teleservices Act and Its Amendments**

The Media Services State Treaty 1997 (Mediendienstestaatsvertrag-MDStV) and the Federal Teleservices Act 1997 (Teledienstegesetz-TDG) are statutes specifically addressing liability of service providers on the Internet. Because Section 5 of the TDG mirrored Section 1 of the MDStV, provisions with regard to limitation of liability for ISPs are identical in these two statutes. In practice, the court mainly refers ISP liability limitations to Section 5 of the TDG 1997, which has authority over the MDStV; the TDG 1997 hence is the most cited statute in a German context of ISP copyright liability. However, it shall be noted here that this Act is not copyright-specific but regulates liability horizontally. The provisions of the statute



apply to a full range of liabilities resulting both from civil and criminal law, and cover any kind of liability for content on the Internet as laid down in the German Civil Code, for example, liability for copyright content, defamation content, abuse or other indecent contents.

Section 3 of the TDG 1997 distinguishes three types of service providers: information providers, access providers and hosting service providers. Section 5 of the TDG 1997 then provides limitation of liability for those service providers<sup>292</sup> and their duty to block the use of illegal content<sup>293</sup>. Limitations are applicable to all kinds of ISPs as long as their function is content-related. Their liability, however, differs depending on their specific function on the Internet. As an earlier attempt to address content liability over the Internet, the TDG is not elaborate and thus not rich in details.

As mentioned earlier in the beginning of the German law discussion, European Community law is one of the influencing factors on the German law. As for ISP liability for copyright infringement, reference shall be made to the Electronic Commerce Directive that provides limitations of liability for ISPs. The Electronic Commerce Directive was adopted in June 2000 and it imposed a requirement on Member States to implement it into national law by 17 January 2002; and thus the passage of the TDG 2001<sup>294</sup> in Germany. It may be argued that the Electronic Commerce Directive in particular Article 12 to 15 is modelled upon the German

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<sup>292</sup> Section 5 of the TDG 1997: (1) Service providers are responsible under the general laws for their own content which they make available for use. (2) Service providers are only responsible for third-party content which they make available for use if they have knowledge of such content and blocking its use is both technically possible and can be reasonably expected. (3) Service providers are not responsible for third-party content to which they merely provide access for use. The automatic and temporary storage of third-party content because of a user access constitutes the provision of access.

<sup>293</sup> Section 5 (4) of the TDG 1997: Any duties to block the use of illegal content according to the general laws remains unaffected, insofar as the service provider gains knowledge of such content while complying with the obligation of telecommunications secrecy under Section 85 of the Telecommunications Law, and blocking is both technically possible and can be reasonably expected.

<sup>294</sup> Germany implemented the Electronic Commerce Directive into its national law (Gesetz zum elektronischen Geschäftsverkehr-EGG) on 21 December 2001 and the provisions in the TDG 1997 were modified accordingly. The revised TDG was in effect on 1 January 2002. For further discussion on the matter, see Oliver Köster & Uwe Jürgens, 'Liability for Links in Germany. Liability of Information Location Tools under German Law after the Implementation of the European Directive on E-Commerce', Hamburg: Verlag Hans-Bredow-Institut, Working Papers of the Hans Bredow Institute No. 14, (July 2003), pp.1-14, p. 5.

TDG 1997<sup>295</sup>. Several important issues that the German TDG 1997 did not touch or failed to clarify were, however, addressed in the Directive. The 2001 revision of the TDG strongly reflected the Electronic Commerce Directive and took over many aspects of the Electronic Commerce Directive, in particular, it faithfully implemented liability limitation of the Directive for ISP's activities as a mere conduit, caching and hosting. In 2007, provisions of the 2001 revision were transposed into the German Telemedia Act (Telemediengesetz-TMG) in an effort to unify regulations embedded respectively in three statutes.<sup>296</sup>

Although limitations of liability for ISPs are stipulated in three statutes: the TDG 1997, the TDG 2001 and the TMG 2007, limitation of direct liability for information providers that are 'responsible in accordance with general laws for their own content, which they make available for use'<sup>297</sup> remains unchanged. Changes were made only to limitations of liability for service providers who act as access providers and hosting providers in the 2001 amendment of the TDG by which the Electronic Commerce Directive was implemented. In the TDG 2001, Article 13 (liability for caching)<sup>298</sup> and 14 (liability for hosting)<sup>299</sup> of the Electronic Commerce Directive

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<sup>295</sup> P. Bernet Hugenholtz, Kamiel Koelman. (1999, September 30). Digital Intellectual Property Rights Economic Report, Legal Report (Final) – Copyright Aspects of Caching. [WWW document] URL <http://www.ivir.nl/publications/hughholtz/PBH-DIPPER.doc> (visited 2005, July 3), p. 33; Qian Wang and Lucie Guibault. (2008, January). 'The Regulation and Protection of Online Copyright in the EU and China'. [WWW document] URL [http://www.eu-china-info.org/UserFiles/File/008%20Online%20Copyright\\_report\\_Jan\\_2008\\_final%20CB%20.pdf](http://www.eu-china-info.org/UserFiles/File/008%20Online%20Copyright_report_Jan_2008_final%20CB%20.pdf) (visited 2008, May 2), p.51 & footnote 122.

<sup>296</sup> Here it refers to the Federal Teleservices Act 1997 (Teledienstegesetz-TDG), the Teleservices Data Protection Act 1997 (Gesetz über den Datenschutz bei Telediensten) and the Media Services State Treaty 1997 ((Mediendienstestaatsvertrag-MDStV)).

<sup>297</sup> Section 5 (1) of the TDG 1997: Service providers are responsible under the general laws for their own content which they make available for use.

<sup>298</sup> Article 13, paragraph one, of the Electronic Commerce Directive: Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

were faithfully implemented and a service provider's knowledge of the infringement, *inter alia*, was set forth as a key factor while deciding its liability. Those provisions in the TDG 2001 were transposed into the TMG in 2007 where the content of limitations of liability for ISPs was not changed<sup>300</sup>. Since this thesis is constrained to indirect copyright liability of ISPs, discussion on direct liability for information provider in the German context falls beyond the scope of the thesis, and limitations of liability for access providers and that of hosting service providers will lie at the heart of the following examination.

### **2.3.3.1 Limitation of Liability for Access Providers**

According to the former Section 5 (3) of the TDG 1997, access providers are exempted from liability for 'any third party content to which they only provide access'<sup>301</sup> and 'the automatic and temporary storage of third party content due to user request shall be considered as providing access.' However, the duty of blocking the use of illegal content under the former Section 5 (4) of the TDG 1997 has complicated the application of the former Section 5 (3) of the TDG 1997 to access provider's liability.

In the judgment of *CompuServe*<sup>302</sup> regarding liability of Mr. Somm, the managing director of CompuServe Information Services GmbH (CompuServe Germany) for distribution of child pornography and other illegal materials, the Local Court of Munich firstly refused to acknowledge that CompuServe Germany was an access

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<sup>299</sup> Article 14, paragraph one, of the Electronic Commerce Directive: Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or circumstance is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable the access to the information.

<sup>300</sup> Limitations for liability was in Section 8 to 11 of the TDG 2001 and they are now in Section 7 to 10 of the TMG where limitation of liability for content providers is given by Section 7 (1) of the TMG, limitation for liability of access providers is given by Section 8 & 9 of the TMG and limitation of liability for hosting service providers is regulated by Section 10 of the TMG,

<sup>301</sup> Section 5 (3) of the TDG 1997: Providers shall not be responsible for any third party content to which they only provide access. The automatic and temporary storage of third party content due to user request shall be considered as providing access.

<sup>302</sup> *CompuServe Information Services GmbH, AG München (Local Court [Amtsgericht] Munich)*, NJW (New Legal Weekly) 1998, 2836.

provider and to apply the former Section 5 (3) of the TDG 1997 to them. To that, the court stated that:

An access provider provides his customers with direct access to computer networks, in particular the Internet. CompuServe Germany, however, neither has own customers nor provides access to the network. Access to the network is provided only by the parent company, which also makes third party content available for use. CompuServe Germany is only responsible for connecting the customers of CompuServe USA in Germany via a local dial-in node and a dedicated line with the parent company. This dedicated line between parent company and subsidiary does not make the subsidiary into an access provider.<sup>303</sup>

Further, the court went on to say that Mr. Somm had knowledge of the violent, child, or animal pornographic content made available for use on the news server of its parent company, CompuServe USA because '[K]nowledge means knowing the circumstances which make up the statutorily-required constituent elements (citation omitted).'<sup>304</sup> The court also emphasised that '[K]nowledge, however, does not mean that the accused had to know the individual contents of the respective violent, child, or animal pornographic articles.'<sup>305</sup> In addition, the court held that it was technically possible, and reasonably expected, for CompuServe Germany to block the access to illegal materials when the question of technical ability or reasonable expectancy should have been based 'on the organization as a whole'<sup>306</sup>, but not 'on the subsidiary as an isolated part of the organization of CompuServe USA'<sup>307</sup>. Due to the failure of CompuServe Germany on all these matters, two years imprisonment was given to Mr. Somm because he had jointly assisted the dissemination of child pornography and other illegal materials that could have been accessed via CompuServe's Internet access and its proprietary service. The *CompuServe* case was argued to have worrying implications on cases in relation to liability of access providers and the judgment of the Local Court of Munich was criticised as misinterpreting the legislature's intention in releasing access providers from

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<sup>303</sup> *Ibid*, at IV. 1, B, 1

<sup>304</sup> *Ibid*, at IV.1, B, 2, b)

<sup>305</sup> *Ibid*.

<sup>306</sup> *Ibid*, at IV.1, B, 2, c), aa).

<sup>307</sup> *Ibid*.

liability.<sup>308</sup> In the appeal<sup>309</sup> of the case, the judgment was overturned by the Regional Court of Munich and the managing director of CompuServe Germany was acquitted.

Therefore, the position of access providers was not clear under the provisions of the TDG 1997. Limitation of liability for access providers was clarified only when the TDG 2001 was issued to implement Article 12 (1) and (2) and 13 (1) of the Electronic Commerce Directive<sup>310</sup>. According to Section 9 (1) of the TDG 2001 that corresponded to Article 12 (1) of the Electronic Commerce Directive, service providers are not liable for contents for which they only offer access to under certain requirements: 1) the service provider does not initiate the transmission; 2) the service provider does not select the addressee of the transmitted information; 3) the service provider does not select or alter the transmitted information. In addition, Section 9 (2) of the TDG 2001, which implemented Article 12 (2) of the Electronic Commerce Directive, states that the transfer of information is considered to be equivalent to the automatic, short-term intermediate information storage if it is merely for facilitating transmission within the communications network and the information is not stored any longer than normally required for transmission purposes. Further stipulated in the revision, Section 10, which corresponded to Article 13 (1) of the Electronic Commerce Directive, provides that liability for the automatic, intermediate, and temporary storage of information for the mere purpose of making the information transmission more efficient to the users is restricted; if several requirements are fulfilled. Firstly, the service provider must not modify the information; Secondly, the service provider must comply with conditions on access to the information and rules regarding the updating of the information specified in a manner widely recognised and used by industry; Thirdly, the service provider must not interfere with the lawful use of technology widely recognised and used by industry to obtain data on the use of the information; Lastly, the service provider acts expeditiously to remove or to disable access to the information it has stored, upon obtaining actual knowledge of

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<sup>308</sup> Christopher Kuner, 'Comments on Judgment of the Munich Court in the "CompuServe Case" (Felix Somm Case)'. [WWW document] URL <http://www.kuner.com/data/reg/somm.html> (visited 2008, May 3). See also, Ulrich Sieber. 'Commentary on the Conclusion of Proceedings in the "CompuServe Case" (Acquittal of Felix Somm)'. [www document] URL <http://www.digital-law.net/somm/commentary.html> (visited 2008, May 3)

<sup>309</sup> *LG (Regional Court) München*, Multimedia und Recht-MMR (Multimedia and Legal) 2000, 171.

<sup>310</sup> *Supra* note 28.

the fact that, the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement. Among other issues, ‘actual knowledge’ was required so that the access provider can act promptly to remove or to disable access to suspicious information. However, the statute did not address what constitutes ‘actual knowledge’, though notices being sent by copyright owners or right holders to ISPs may imply such knowledge.

Limitation of liability of access providers becomes clear where several conditions are set out in details in the TDG 2001. The indication given by the provisions is that actual knowledge is a key element in the application of limitation of liability for access providers as well as their reaction upon knowledge of the changing status of alleged information. Sections 9 & 10 of the TDG 2001 have now replaced by Sections 8 & 9 of the TMG 2007 though no change has been made to the actual content of the provisions.

### **2.3.3.2 Limitations of Liability for Hosting Service Providers**

By virtue of the former Section 5 (2) of the TDG 1997, hosting service providers that make any third party content available for use were only liable if ‘they [had] knowledge of such content and [were] technically able and [could] reasonably be expected to block the use of such content.’<sup>311</sup> However, it was not clear whether ‘content’ was viewed as the content itself only or the illegitimacy of such content as the statute failed to indicate what was meant by content at the basic definitional level. In addition, the term of ‘knowledge’ was not defined anywhere in the statute. This made the application and interpretation of the former Section 5 (2) being controversial.

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<sup>311</sup> Section 5 (2) of the TDG 1997: Providers shall not be responsible for any third party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content.

Firstly, there were arguments about whether the TDG was relevant in the context of copyright infringement due to the undefined term ‘content’. In a controversial decision of the Regional Court of Munich (*Oberlandesgericht München; OLG München*), the application of Section 5 (2) of the TDG 1997 was disputed because content in a copyright context is usually not the object of copyright infringement (such as a book) but the rights related to the content such as copyright of the contents of a book.<sup>312</sup> However, based on the general tort law principle, copyright infringement is a tort. The former Section 5 of the TDG that covered all sorts of tort law claims should therefore regulate liability for copyright infringement. Yet, without clarification on this, whether reference should be made to the content itself or the right attached to the content was the centered question of the argument.

Secondly, it was arguable whether reference should be made to the content itself or to the illegal status of the content. In fact, according to the wording of the TDG 1997, reference is only made to the content itself and not the legitimacy of such content. However, the indication given by the official legislative reasons with regard to the former Section 5 of the TDG 1997 was that the legislature ‘[wanted] to constitute liability of the service provider only in the event that it [made] the contents available on request conscious of the relevant circumstances.’<sup>313</sup> Such intention is contained in the language of the former Section 5 (2) of the TDG 1997 that liability exemption is only denied if there is illegal intent. Similar opinion<sup>314</sup> was also there that liability is limited to intentional behaviours and the ‘obligation [of the ISP] shall be only valid if the ISP was making available the illegal third party contents intentionally.’

Thirdly, although the former Sections 5 (2) and (4) of the TDG 1997 explicitly stated that ISP liability was imposed only when, among other things, an ISP had knowledge of third party’s content, what constituted ‘knowledge’ was not clearly expressed in the TDG 1997. If only ‘actual knowledge’ of the content suffices to establish liability,

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<sup>312</sup> Detlef Kröger, Marc A. Gimmy, *Handbuch zum internetrecht (Guide to Internet Law)*, (Hamburg: Springer, 2002), p.551.

<sup>313</sup> *Hit Bit Software GmbH v. AOL Bertelsmann Online GmbH & Co KG*, [2001] E.C.D.R. 18, paragraph. 62 B.

<sup>314</sup> Andreas Leupold, ‘Push und Narrowcasting im Lichte des Medien- und Urheberrechts (Push and Narrowcasting in the Light of Media Law and Copyright)’ *Z.U.M.*, Issue 2, (1998), pp. 99-112, p. 102.

then the host service provider would be liable if it intentionally infringes copyright of another by failing to block the use of such content while it is technically possible to do so. Nevertheless, in *Hit Bit Software GmbH v AOL Bertelsmann Online GmbH & Co KG*<sup>315</sup>, the Higher Regional Court of Munich ruled that AOL was liable because it had been grossly negligent even if actual intent to infringe copyright was not present. The negligence is presented in AOL's conduct that it had set up the forum for MIDI files, which made acts of copyright infringement by anonymous Internet users inevitable. Criticisms hence arose surrounding this decision as to whether the threshold for finding negligence with respect to knowledge about the unlawfulness was relatively low for ISPs' liability.<sup>316</sup> In addition, it was argued that if the interpretation of the illegality of negligence is widely adopted, the exemption available to ISPs would then be constrained which may contradict with the intention of the legislature to impose liability on ISPs only when they intentionally make alleged content available.

With those issues in relation to liability of hosting service providers, it was hoped that the provisions of the TDG 1997 could be refined by the implementation of the Electronic Commerce Directive. In Article 14 of the Electronic Commerce Directive,<sup>317</sup> a more subtle language was adopted than that of the former Section 5 (2) of the TDG 1997 to offer limitation to liability of those that store 'information provided by a recipient of the service'. It reads that, a host provider will be exempt from liability as long as it

does not have actual knowledge of illegal activity or information and, as regards of claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or upon obtaining such knowledge or awareness, acts expeditiously to remove it or disable the access to the information.<sup>318</sup>

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<sup>315</sup> *Hit Bit Software GmbH v. AOL Bertelsmann Online GmbH & Co KG*, [2001] E.C.D.R. 18, [2001] E.C.D.R. 27; [2002] E.C.C. 15

<sup>316</sup> Kai Burmeister and Claus Kohler, 'Copyright liability on the Internet Today in Europe (Germany, France, Italy and the E.U.)', *EIPR*, 1999, 21(10), pp. 485-499, p. 492

<sup>317</sup> Article 14 of the Electronic Commerce Directive. (The liability of hosting is defined in Article 14 of the Electronic Commerce Directive as 'storage of information provided by a recipient of the service.' Article 14 provides that a host provider will be exempt from liability as long as it does not have actual knowledge of illegal activity and information and, upon obtaining such knowledge, act expeditiously to remove it or disable the access to the information.)

<sup>318</sup> *Ibid.*



By simply following the wording of Article 14 of the Electronic Commerce Directive, Section 11 re-addressed limitation of liability for hosting service providers in its 2001 amendment. This provision was later transposed into Section 10 of the TMG 2007 without any change and it reads:

[P]roviders shall not be responsible for third party information that they store for a user if,

1. they have no actual knowledge of illegal activity or information and, as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent, or
2. act expeditiously to remove or to disable access to the information as soon as they become aware of such circumstances. Sentence 1 shall not be applied if the user is subordinate to or supervised by the provider.

Notably, two changes were made in the provision. The first change was that the term of ‘content’ is clarified with ‘illegal activities or information’. In a copyright context, illegal information can be understood as unauthorised copyright works and illegal activities can be interpreted such as unauthorised reproduction, distribution of copyright works or making available of copyright works to the public. The second change was about knowledge requirement of the infringement. In the TMG 2007, knowledge requirement is defined to include both ‘actual knowledge illegal activities or information’ required for hosting service providers’ liability and awareness of ‘facts or circumstances from which the illegal activity or information is apparent’ needed for damages claims against them.

By conditioning liability exemptions for ISPs on their level of fault and/or negligence, the TMG 2007 rules out fault and breach of duty of care for the conduct of a mere conduit. In addition, it sets out a high liability threshold for access providers and hosting service providers that if they have knowledge or ‘awareness of the alleged information or activity’ and fail to take action, may they be held liable. However, the TMG 2007 does not provide definition of what constitutes an ‘actual knowledge of infringement’ or ‘awareness of infringement’. In addition, a ‘notice and take down’ procedure is lacking in the Electronic Commerce Directive and the

German ISP liability regime. Therefore, it remains unclear as to the effect of a notice in determining an ISP's knowledge or awareness of the infringement. It is very likely the absence of those critical criteria would render the German courts to apply the 'know' or 'should know (have reason to know)' standard to evaluate ISPs' actual knowledge of infringement and their awareness of 'facts or circumstances from which the illegal activity or information is apparent'.

## **2.4 The Law in China**

Laws in relation to ISP copyright liability are more complex in a Chinese context, partly because of a distinct Chinese legal system. Hence, a brief introduction to the Chinese legal system is essential in order to provide a better understanding of legal framework in relation to ISP copyright liability in China. As for legislation applied to ISP copyright liability for online copyright infringement, the Judicial Interpretation, the Regulations and the Draft Tort Liability Act of the P.R.C are the main statutes being examined and discussed in this chapter. Moreover, provisions in the Copyright Act and the GPCC are also of particular relevance, as they address copyright infringements and civil liability for those infringements. However, these alone will not suffice without associated cases to be analysed.

### **2.4.1 The Legal System in China**

Like its German counterpart, China follows the civil law tradition<sup>319</sup> and the sources of law in China are written.<sup>320</sup> The Constitution of the P.R.C<sup>321</sup> is the highest source

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<sup>319</sup> The civil law tradition, in particular Continental Europe legal systems, has had a dominant influence on Chinese law since the Qing dynasty to 1940's. It re-emerges as a significant force in modern China. However, the common law is also finding its way into Chinese law, especially in the field of commercial law and procedural law. The Confucian philosophy, which requires social control, also has a significant impact on Chinese legal system. Therefore, at present, Chinese law has been a complex mix of traditional Chinese approaches and Western influences. Multiple legal jurisdictions exist in China in particular after the return of Hong Kong and Macau in 1997 and 1999. So far, Hong Kong retains the common law system inherited as a former British colony, and Macau has a legal system based on that of Portuguese civil law. Hong Kong and Macau are outside the legal jurisdiction of China, except on constitutional issues. They have their own courts of final appeal and extradition policies. Further discussion see, Jianfu Chen, *Chinese Law: Towards an Understanding of Chinese Law, its Nature, and Development* (Melbourne: Kluwer Law International, 1999), pp.31-55.

of law and its provisions prevail over any other written law that is inconsistent with the Constitution. Basic Laws issued by the National People's Congress and its Standing Committee<sup>322</sup> are of the second tier, such as the GPCC and the Copyright Act of the P.R.C. The third tier comprises Administrative Regulations issued by the State Council<sup>323</sup> - the highest administrative organ of the central government, such as the Regulations for the Implementation of the Copyright Act of the P.R.C<sup>324</sup> and the Regulations on the Protection of the Right of Communication through the Information Networks. The State Council has several ministries, commissions, and other directly affiliated organs. Pursuant to Article 90 of the Constitution, '[T]he ministries and commissions issue orders, directives, and regulations within the jurisdiction of their respective departments and in accordance with the law and the administrative rules and regulations, decisions, and orders issued by the State Council.' For instance, the Measures for the Administrative Protection of Copyright

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<sup>320</sup> It is not written in the Constitution of the P.R.C though; China has long been a country with written laws. For general discussion on this, see Guodong Xu, *The Construction on the Basic Principles of Civil Law: the Overcoming of Drawbacks of Written Law* (Beijing: Publishing House of China University of Political Sciences and Law, 1992), pp. 57-73; Ralph Haughwout Folsom and John H. Minan, editors, *Law in the People's Republic of China: Commentary, Readings, and Materials* (Hong Kong: Martinus Nijhoff Publishers, 1988), p. 11; Keyuan Zou, *China's Legal Reform: towards the Rule of Law* (Boston: Martinus Nijhoff Publishers, 2006), p18; Chenguang Wang and Xianchu Zhang, *Introduction to Chinese Law* (Hong Kong: Sweet & Maxwell Asia, 1997), p. 25

<sup>321</sup> The National People's Congress. (1982, December 4). 'The Constitution of the P.R.C.'. [WWW document] URL [http://www.npc.gov.cn/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm) (English Version). Also available at [http://www.npc.gov.cn/npc/xinwen/node\\_505.htm](http://www.npc.gov.cn/npc/xinwen/node_505.htm) (Chinese Version) (The Constitution of the P.R.C. was adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982. It has four amendments. The First Amendment of Constitution was approved on April 12, 1988. The Second Amendment was approved on March 29, 1993. The Third Amendment was approved on March 15, 1999 and the Fourth Amendment was approved on March 14, 2004)

<sup>322</sup> According to Section 1, Chapter 3 of the Constitution of the P.R.C, the National People's Congress of the P.R.C is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress. The National People's Congress and its Standing Committee exercise the legislative power of the state, including amending the Constitution, supervising the enforcement of the Constitution, enacting and amending basic laws governing criminal offenses, civil affairs, the state organs and other matters, etc.

<sup>323</sup> According to the Constitution of the P.R.C, the State Council is the Central People's Government of the P.R.C and the executive body of the highest organ of state power. It is the highest organ of state administration. The main function and power the State Council exercise in terms of law making is to adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders in accordance with the Constitution and the law. The State Council also has the power to change or cancel any unsuitable decisions and orders made by its subsidiary departments or by local government.

<sup>324</sup> The State Council of the P.R.C. (2002, August 2). 'The Regulations for the Implementation of the Copyright Act of the P.R.C.'. [WWW document] URL [http://china.org.cn/business/laws\\_regulations/2007-06/22/content\\_1214795.htm](http://china.org.cn/business/laws_regulations/2007-06/22/content_1214795.htm) (English Version). See also [WWW document] URL [http://www.gov.cn/banshi/2005-08/21/content\\_25099.htm](http://www.gov.cn/banshi/2005-08/21/content_25099.htm) (Chinese Version)

on the Internet issued by the National Copyright Administration and Ministry of Information Industry of the P.R.C.. Local legislations made by the local People's Congress and local councils are more specific to the local situation for effective law enforcement. As for international treaties, if they are signed by China and then they will be automatically incorporated into the Chinese law, whereas China reserves the right to make reservations with regard to provisions of a treaty.

A four level court system is set up in China with the Supreme People's Court of the P.R.C at the top and then the High People' Court, the Intermediate People' Court and the District (County) People' Court follow in each province, city and district (county). Several special Courts are also set up in China, mainly for cases in relation to military, maritime and railway issues. Intellectual Property divisions or courts are established within many High People' Courts and Intermediate People' Courts as well as some District (County) People' Courts for civil disputes in relation to intellectual property rights.<sup>325</sup> In China, case law does not have the binding status and there is no principle of *stare decisis*. The Supreme People's Court, however, does issue judicial interpretations of the law and it is the common practice that the Supreme People's Court may issue judicial interpretation to deal with new issues emerging where no provision in the existing law might be applied.<sup>326</sup> Therefore, the interpretation of the Supreme People's Court is usually followed by the judges of the Lower People' Courts in practice. In addition, the Supreme People's Court may also issue their opinions on the implementation of a specific law for effective enforcement, for example, the Opinions (For Trial Use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of the

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<sup>325</sup> The People's Net. (2009, March 9). 'An Interview with Junxiang Kong, the Director of Intellectual Property Division of the Supreme Court of the P.R.C on Current Situation of the Judicial Protection of Intellectual Property in China'. [WWW document] URL [http://www.chinacourt.org/public/detail.php?id=347616&k\\_title=知识产权庭&k\\_content=知识产权庭&k\\_author=](http://www.chinacourt.org/public/detail.php?id=347616&k_title=知识产权庭&k_content=知识产权庭&k_author=) (visited 2009, April 3)

<sup>326</sup> The Supreme People's Court of the P.R.C (2000, November 22). 'The Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks' [WWW document] URL <http://www.chinaeclaw.com/english/readArticle.asp?id=2372> (English Version). Also available at URL [http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/list\\_column.jsp?BoardID=175&boardid=11501010111602](http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/list_column.jsp?BoardID=175&boardid=11501010111602) (Chinese Version, including 2000, 2003 and 2006 versions)

Civil Code of the P.R.C.<sup>327</sup>. Furthermore, replies of the Supreme People's Court to the local people' courts on the application of law of specific cases are also of references.<sup>328</sup> According to the Chinese legal system, the Constitution, basic laws, and administrative regulations issued by the State Council could bind the court. However, orders, directives, and regulations issued by ministries, commissions, and other directly affiliated organs of the State Council could not bind the courts though the courts can still make reference to them where appropriate. In addition, unlike the courts of the common law countries, the Chinese courts follow a civil law tradition and they usually provide relatively brief decisions that merely explain basic facts of the cases and refer to the statutes used without giving opinions of the individual judges as well as dissenting opinions.

#### **2.4.2 Copyright Liability and Joint Tort Liability**

Like its German counterpart, China maintains a liability system in which national Civil Code contains general provisions of civil liability arising from tortious acts. Therefore, in tort, no matter the form of liability or the field of the liability involved, all forms of liability are generally based upon same provisions of the GPCC, and copyright is no exception. In Section 3 of Chapter 5 of the GPCC, intellectual property rights are particularly implicated in Articles 94-97. In reference to copyright, Article 94 says that the law entitles citizens and legal persons to sign their names as authors, issue their works and receive remuneration.<sup>329</sup> Article 106 then lays

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<sup>327</sup> The Supreme People's Court of the P.R.C (1988, January 26). 'Opinions (For Trial Use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of the Civil Code of the P.R.C.', translated by Whitmore Gray & Henry Ruiheng Zheng (52 *Law & Contemporary Problems*, 88 (1989)). Also available at URL <http://www.court.gov.cn/lawdata/explain/civil/200304010167.htm> (Chinese Version)

<sup>328</sup> For example, in an ISP copyright liability context, 'The Reply of the Supreme People's Court to the Shangdong Province High People' Court for the Request on How to Determine Whether the Linking Activity of Jining Zhi Chuang Information Ltd. Infringed the Right of Communication through the Information Networks of the Sound Recording and How to Calculate the Amount of Compensation'. The reply stated that, 'copyright infringement of network service providers in the course of providing linking service should be determined by applying provisions of the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks. Network service provider knows copyright infringement, or continues to provide links (to infringing files) after receiving a substantiated warning from copyright owners, (the court) may apply Article 4 of the Judicial Interpretation to decide their liability, According to the specific circumstances of the case.'(emphasis added) It is said that this reply of the Supreme People's Court implied a 'no notice, no actual knowledge and thus no liability' principle.'

<sup>329</sup> Article 94 of the General Principles of Civil Code of the P.R.C.

foundation for civil liability of fault, stating that ‘where a citizen or legal person through fault interferes with and causes damage to state or collective property, or to the property or person of another, he must bear civil liability.’<sup>330</sup> With regard to liability for copyright infringement, Article 118 stipulates that, where the rights of a citizen or legal person to authorship (copyright) is infringed by such [acts] as plagiarising, there is a right to demand that infringement be ceased, its effects be eliminated, and any loss be compensated.<sup>331</sup> If copyright infringement is caused by the activities of more than one person, then Article 130 can be applied to impose a ‘joint tort liability’ which is usually associated with an indirect infringement of a joint tortfeasor. It reads that, ‘where two or more persons jointly infringe a right and cause loss to another, they must bear joint tort liability.’<sup>332</sup> For a comprehensive description of joint tort liability, Article 87 of the GPCC<sup>333</sup> further provides that,

[W]here there are on one side two or more obligees or obligors, each obligee may, in accordance with provisions of law or the agreement of the parties, demand that obligor perform the duty. Each obligor with a joint duty is obliged to satisfy the entire duty under the obligation; the person who performs the duty has a right to demand that any other joint obligor reimburse him in the amount of the share for which [such joint obligor] was obligated.

However, these two Articles still do not complete what constitutes a joint tort. To supplement the provisions on joint tort liability in the GPCC, Article 148 of the Opinions (For Trial Use) of the Supreme People’s Court on Questions Concerning the Implementation of the General Principles of the Civil Code of the P.R.C.<sup>334</sup> stipulates that: ‘those who aid and abet others in committing infringing acts are joint tortfeasors, and should bear joint liability.’<sup>335</sup> This article has clarified by which means a third party contributes to the infringement, and ‘aid’ and ‘abet’ are used to exemplify the means. In terms of the explanation of the Contemporary Chinese

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<sup>330</sup> Article 106 of the General Principles of Civil Code of the P.R.C. This article stipulates the civil liability of fault, but this fault liability has in fact been adopted in judicial practice long before the enactment of the General Principles of Civil Code of the P.R.C.

<sup>331</sup> Article 118 of the General Principles of Civil Code of the P.R.C.

<sup>332</sup> Article 130 of the General Principles of Civil Code of the P.R.C.

<sup>333</sup> Article 87 of the General Principles of Civil Code of the P.R.C.

<sup>334</sup> *Supra* note 327.

<sup>335</sup> Article 148 of the Opinion on the Implementation of the GPCC.

Dictionary,<sup>336</sup> the meaning of ‘aid’ is to provide others with the money, equipment or services they need to help and assist them. This word is akin to the English words of ‘assist’ or ‘encourage’. Likewise, as explained in the same dictionary, the word ‘abet’ in this article is understood as helping or encouraging others to do something wrong, which has the same meaning as the same word in English. It is interesting to note here that the clarification of joint tort liability in Article 148 of the Opinion on the Implementation of the GPCC matches the criteria of contributory liability<sup>337</sup> in the United States of America though knowledge or the state of the mind of the joint tortfeasor is not explicitly stipulated in the Article.

According to the above provisions in law and court practice, to establish a joint tort liability, the following requirements must be satisfied. Firstly, there is a copyright infringement committed by a direct infringer. The direct infringer must have committed activities that infringe others’ copyright such as reproducing or distributing copyright works without the authorisation. In other words, it can be described as one in which the liability of a third party would not have occurred but for the copyright infringement of the direct infringer. Secondly, the third party must have assisted and induced direct copyright infringement. According to the interpretation of Article 130 of the GPCC and Article 148 of Opinion on the Implementation of the GPCC, a third party’s act of encouraging, supporting or assisting infringement of a direct infringer will suffice to establish causal relationship between the direct infringer and the third party. Thirdly, facilitation and inducement of a third party to the infringement must be accompanied by the third party’s knowledge of infringement. The relevant provisions do not provide whether both ‘know’ and ‘have reason to know/should have known’ [infringement] are required or only ‘know’ will suffice. However, from the meaning of Article 106 of the GPCC that lays civil liability on fault, fault should include both intention and negligence. Hence, a third party should be liable when his conduct is intentional that he knew

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<sup>336</sup> Contemporary Chinese Dictionary (Beijing: Foreign Language Teaching & Research Press, 2002) p.987

<sup>337</sup> Under a common law legal concept known as contributory infringement, parties can be held responsible for aiding an infringer, even if they do not actively infringe themselves. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (‘one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another’)

that his facilitation and inducement might cause infringement and he either expected infringement or took a reckless attitude towards the occurrence of the infringement. He should be liable as such when he is negligent, if he ought to have anticipated the infringement that may be in breach of law or in breach of a duty of care because of his facilitation and inducement, or, although he did foresee the consequence he naively believed that his conduct would not lead to copyright infringement. Lastly, a third party's conduct invades copyright of others and is thus in violation of copyright law. The requirement of illegality is an essential element of a tortious conduct. In this context, it means that the act of a third party is in violation of copyright law and it is unlawful. There is no joint tort liability for a third party if his conduct is lawful.

Since Chinese legislation does not use terms 'direct infringement' and 'indirect infringement', and only has the concept of 'liability for infringement' and 'joint tort liability'. In an ISP copyright liability context, the analogy the courts can draw is therefore relying on Article 130 of the GPCC, a provision with regard to a joint tort liability and the requirements outlined above.

#### **2.4.3 The Early Call for an ISP Copyright Liability Regime**

Despite there was no provision in the existing law addressing copyright protection over the Internet and ISP copyright liability, the Chinese courts had had opportunities to decide ISP copyright liability.<sup>338</sup> However, that was only until the decision in *Jingsheng Liu v. Sohu Aitexin Information Technology Ltd* where for the first time the court held that an ISP should be liable with knowledge of the infringement of their users. In this case, the defendant provided users with search engines, one of which linked to a website that contained copyright work of the plaintiff - a Chinese version of the well-known Spanish novel 'Don Quixote'. Though the infringing material was not saved in the server of the defendant, the court held that the defendant who provided technical services and facilities should be held liable if it had knowledge of the infringing materials on the linked website and had not stopped the linking. The court established fault of the defendant on its failure to comply with

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<sup>338</sup> WIPO Standing Committee on Copyright and Related Rights, Seventh Session, Geneva. (2002, April 22). 'The Economic Impact of the Protection of Database in China'. [WWW document] URL [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_7/sccr\\_7\\_6.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_7/sccr_7_6.doc) (visited 2008, July 2), p.20.



the plaintiff's request to discontinue the links. In this case, the decision of the court raised the point that knowledge of the infringement and reaction upon such knowledge should be seen as the prerequisites of ISP copyright liability. The court held that, due to the nature of the Internet, it might not be fair to require an ISP to bear liability when it did not have control over others' infringement. However, it was reasonable to oblige an ISP to exercise its control once knowledge of the infringement came to attention. As for an ISP who provided linking or search engine services, it might not be possible for them to control the content on the linked websites but it could have controlled whether to or not to make a link to the websites that contained infringing materials so as to prevent further infringement.

When no provision in the law was available to answer the questions at the time, the Chinese courts ruled on many occasions that copyright works should be protected on the Internet. In addition, the courts accentuated that ISP copyright liability should be based on their knowledge of infringement and their reaction upon such knowledge though the courts did not make it clear what constituted such a knowledge. As a result, a formulation was established through the rulings that anyone who infringed copyright on the Internet may be held liable; a joint tort liability may be applied to an ISP who indirectly but knowingly assisted or facilitated copyright infringement of others. The formulation created in cases may provide guidance to the courts in subsequent cases. It, however, does not have binding effect, as case law is not recognised as a source of the law in the Chinese legal system. Hence, the need to provide copyright owners associated rights to protect their works on the Internet and to address relevant copyright liability issues in a written law was raised.

#### **2.4.4 The Establishment of an ISP Copyright Liability Regime**

To address ISP copyright liability issue emerging from the cases, China has attempted to issue laws at different levels. In 22<sup>nd</sup> November 2000, the Supreme People's Court issued the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks. This Judicial Interpretation was amended twice, in 2003 and 2006 respectively, following the enactment of the Copyright Act 2001 and the Regulations on the Protection of the

Right of Communication through the Information Networks. To be consistent with the TRIPS Agreement<sup>339</sup> and to answer questions posed by cases regarding copyright protection over the Internet, China amended the Copyright Act in 2001 and provided ‘the right of communication through the information networks’<sup>340</sup> to copyright owners so that they can protect copyright of their works on the Internet. In May 2005, the National Copyright Administration and Ministry of Information Industry issued the Measures for the Administrative Protection of Copyright on the Internet in order for administrative penalty to be applied to those individual copyright infringers or ISPs. Most recently in 2006, the State Council of the P.R.C issued the Regulations on the Protection of the Right of Communication through the Information Networks. Through all the legislation, China has gradually established an ISP copyright liability regime. Although further discussion on the Measures for the Administrative Protection of Copyright on the Internet is beyond the scope of this thesis, it is mentioned here to show China’s commitment to the establishment of an ISP copyright liability system.

#### **2.4.4.1 Limitations of Liability for ISPs in the Judicial Interpretation**

As just mentioned, the first piece of legislation addressing civil liability of ISPs for copyright infringement was the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks in which Article 3 and Article 4 are of particular importance to ISP copyright liability.

In the newest version of Judicial Interpretation (2006), Article 3 (the former Article 4 in the 2001 and 2003 version) that applies generally to liabilities of all network service providers regardless of their roles on the Internet explicitly provides,

[I]n the event that a network service provider, by means of its network, participates in, induces, or assists copyright infringement

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<sup>339</sup> China joined the World Trade Organisation in December 2001, and agreed that it would fully implement its TRIPs obligations from that date.

<sup>340</sup> Article 10, paragraph one, (12) of the amended Copyright Act 2001 defines the right of communication through the information networks as ‘the right to communicate to the public a work, by wire or wireless means in such a way that member of the public may access these works from a place and at a time individually chosen by them.’

committed by others, the People's Courts shall pursue a joint liability for infringement of the network service provider with others involved or the person who directly committed the infringement, pursuant to Article 130 of the General Principles of the Civil Code.

Despite that ISP joint tort liability in this Article is akin to the American contributory liability as submitted at page 104 of this Chapter, Article 3 does not have the requirement that ISP joint tort liability should be imposed on the basis of their knowledge of infringement. Hence, an ISP's participation in copyright infringement, inducement, and assistance to infringement are the determining factors for its joint tort copyright liability. As an umbrella provision directed at securing ISP copyright liability, Article 3 of the Juridical Interpretation therefore might cover circumstances that the Juridical Interpretation did not anticipate however could give rise to liability, such as, ISP copyright liability for unlawful peer-to-peer file-sharing.

In Article 4 (the former Article 5 in the 2001 and 2003 version)<sup>341</sup>, liability of ISPs that provide content services on the Internet was given that,

[A] network service provider that provides content service knows that network users use its network to infringe copyright of others, or after receiving a substantiated warning from copyright owners but fails to take measures such as removing the infringing content to eliminate consequence of the infringement, the People's Courts shall pursue joint liability of the network service provider for infringement with network users, pursuant to Article 130 of the General Principles of Civil Code.

From the plain reading of the Article, there are two prerequisites for liability of ISPs that provide content services: firstly, the right holder has to prove that the ISP fails to take action to prevent dissemination of the infringing content upon receipts of notices by copyright holders. Secondly, even if the right holder did not issue any warning letters or notices to the ISP, as long as the right holder can prove that the ISP had actual knowledge of infringement, liability might occur. However, the problem is how the right holder can prove that an ISP has actual knowledge of infringement in the absence of notices. Unless the ISP admits that it had such knowledge, the court

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<sup>341</sup> The content of this Article has not been changed although this Judicial Interpretation has been revised twice in 2003 and 2006, only the sequence of the Article is different. It is Article 5 in the 2003 revision and Article 4 in the 2006 revision.

might need to use the ‘should know (have reason to know)’ standard to evaluate whether an ISP has actual knowledge of the infringement.<sup>342</sup>

Hence, despite the Judicial Interpretation provided a general guidance for ISP copyright liability, the simplicity of its language and a single actual knowledge standard made the application problematic in court practice.

#### **2.4.4.2 Limitations of Liability for ISPs in the Regulations**

Limitations of liability for ISPs are addressed in details in the Regulations and liability of ISPs is divided depending on their varied functions. It shall be noted here that since the Regulations were issued nearly ten years after the enactment of Section 512 of the U.S. Copyright Act and the TDG 1997 of Germany, and six years later following the issuance of the Electronic Commerce Directive, many aspects of the above mentioned laws in relation to limitations of liability for ISPs are in fact reflected in the Regulations.<sup>343</sup> It is therefore not surprising that limitation of liability for an ISP who acts as mere conduit<sup>344</sup> in the Regulations is almost identical with that of Section 512 (b) of the U.S. Copyright Act and Section 8 of the TMG 2007 of Germany. Limitation of liability for damages claim given to system caching by

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<sup>342</sup> In fact, the Chinese courts had occasionally considered to decide an ISP’s actual knowledge of the infringement by checking whether a network service provider should have known the infringement. See, Procuratorial Daily. (2009, March 24). ‘How should the Tort Liability Act Regulate Infringement on the Internet?’ [WWW document] URL [http://newspaper.jcrb.com/html/2009-03/23/content\\_14116.htm](http://newspaper.jcrb.com/html/2009-03/23/content_14116.htm) (Chinese Version) (visited 2009, May 3).

<sup>343</sup> Lixin Yang, *The Law of Electronic Commerce Tort* (Beijing: Intellectual Property Press, 2005), pp. 236-239; Jiarui Liu, ‘Discussion on Chinese “Safe Harbours” for ISPs’, *Intellectual Property*, Issue 2, (2009), pp.13-22; Xueqin Shi & Yong Wang, ‘Safe Harbours or Cape of Storms’, *Intellectual Property*, Issue 2, (2009), pp. 23-29; Guanbin Xie & Xueqin Shi, ‘Fair Definition on Fault Liability of Network Service Providers’, *Intellectual Property*, Issue 1, (2008), pp. 81-86; Qian Wang and Lucie Guibault. (2008, January). ‘The Regulation and Protection of Online Copyright in the EU and China’. [WWW document] URL [http://www.eu-china-info.org/UserFiles/File/008%20Online%20Copyright\\_report\\_Jan\\_2008\\_final%20CB%20.pdf](http://www.eu-china-info.org/UserFiles/File/008%20Online%20Copyright_report_Jan_2008_final%20CB%20.pdf) (visited 2008, May 2)

<sup>344</sup> Article 20 of the Regulations on the Protection of the Right of Communication through the Information Networks provides: ‘[A] network service provider that provides network automatic access service at the direction of its subscribers, or provides service for automatic transmission of works, performances, sound recordings or video recordings provided by its subscribers, and meets the following conditions shall not be liable for damages: (1) the network service provider neither chooses nor alters the transmitted works, performances, sound recordings or video recordings; and (2) the network service provider makes the works, performances, sound recordings or video recordings available to the designated recipients, and prevents those other than the designated recipients from receiving them.’

Article 21 of the Regulations<sup>345</sup> is also the same as that of the law of the United States of America and Germany, which is that an ISP is not liable if it, *inter alia*, responds expeditiously to alter, remove, or disable the access to alleged infringing materials when the original source of those materials has been altered, removed, or disabled.

As for limitation of liability for ISPs who provide users storage space in which users may upload files and make them available to the public over the Internet, Article 22 of the Regulations provides that,

[A] network service provider that provides its subscribers with network storage space for them to make works, performances, sound recordings or video recordings available to the public, and meets the following conditions shall not be liable for damages:

- (1) it clearly indicates that the network storage space is provided to its subscribers and discloses the name, person to contact, and network address of the network service provider;
- (2) it does not alter the works, performances, sound recordings or video recordings provided by its subscribers;
- (3) it does not know or has no reasonable grounds to know that the works, performances, sound recordings or video recordings provided by its subscribers infringe any other person's rights;
- (4) it does not seek financial benefits directly from the works, performances, sound recordings or video recordings provided by its subscribers;
- (5) it promptly removes, according to these Regulations, the works, performances, sound recordings or video recordings alleged of infringement by the right owner upon receipt of notification.

It is worth noting that the requirements in this Article have similarities and differences with that of the laws of the United States of America and Germany.

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<sup>345</sup> Article 21 of the Regulations on the Protection of the Right of Communication through the Information Networks provides: '[A] network service provider that provides network automatic storage for works, performances, sound recordings or video recordings obtained from another network service provider in order to improve the efficiency of network transmission, and automatically provides them to its subscribers according to the technological arrangement, and meets the following conditions shall not be liable for damages: (1) it does not alter the automatically stored works, performances, sound recordings or video recordings; (2) such storage does not affect the access of the initial network service provider that provides the works, performances, sound recordings or video recordings to the information about the subscribers' access to the works, performances, sound recordings or video recordings; (3) it alters, removes or disables the access to, the works, performances, sound recordings or video recordings according to the technological arrangement when the initial network service provider alters, removes or disables the access to them.

Unlike Germany, but similar to the United States of America, this Article establishes ISP copyright liability for hosting on, *inter alia*, three important conditions. The first condition is an ISP's knowledge of the nature of infringement; and the second is reaction of the ISP upon knowledge of infringement. These two elements, interestingly, match the requirements codified in Section (c) (1) (A) of the U.S. Copyright Act underpinned by the contributory liability principle. The third condition is the financial benefits received directly from the infringement by ISPs, one of the elements required by the so-called 'vicarious liability' in the United States of America and codified in Section 512 (c) (1) (B) of the U.S. Copyright Act. Apparently, the existing similarity is the result of the Regulations mirroring the provisions of the American legislation. However, the imitation is argued as problematic because those principles were created and developed in the United States of America by case law, which have no root in the Chinese law and Chinese judicial practice.<sup>346</sup> Unlike the United States of America, the language of Article 22 is simple, which is similar to the provisions of the German law. Article 22 of the Regulations gives less detail to questions such as how notification can be received and whether a notification that fails to comply with substantially with relevant provisions shall be considered in determining an ISP's knowledge of infringement. Therefore, further clarification may be needed by means of the court's interpretation on the matters.

Despite the differences, one thing in common in the statutes of three countries is that they all set forth knowledge requirements, including both actual knowledge and 'awareness of infringement', as the prerequisite of limitation of liability for hosting service providers. However, the terms used by the Regulations such as 'know' and 'should know (have reason to know)' as the equivalent of 'actual knowledge' and 'awareness of infringement' have to be understood in a Chinese context so that the underlying meaning can be interpreted. Both the terms and their similarity with 'actual knowledge' and 'awareness of infringement' will be discussed in 2.4.4.4.

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<sup>346</sup> Qian Wang and Lucie Guibault. (2008, January). 'The Regulation and Protection of Online Copyright in the EU and China'. [WWW document] URL [http://www.eu-china-info.org/UserFiles/File/008%20Online%20Copyright\\_report\\_Jan\\_2008\\_final%20CB%20.pdf](http://www.eu-china-info.org/UserFiles/File/008%20Online%20Copyright_report_Jan_2008_final%20CB%20.pdf) (visited 2008, May 2), p.41

Similarity exists as such between provisions in relation to limitation of liability for ISPs who provide search engine or linking services in the U.S. Copyright Act and the Chinese Regulations<sup>347</sup>. A network service provider that provides search engine or linking services to its subscribers shall be jointly liable for the infringement, when it knows or has reasonable grounds to know that the linked works, performances, sound recordings or video recordings infringe another person's rights and fails to disconnect them. Nevertheless, financial benefit from the infringement is not required for liability of search engine or linking service providers. To this effect, Article 23 states that,

[W]here a network service provider that provides searching and linking services to its subscribers disconnects the linked infringing works, performances, sound recordings or video recordings upon receipt of the right owner's notification, it shall not be liable for damages, according to the Regulations. However, where it knows or has reasonable grounds to know the linked works, performances, sound recordings or video recordings infringing another person's rights, it shall be jointly liable for the infringement.

#### **2.4.4.3 Limitations of Liability for ISPs in the Draft of the Tort Liability Act**

Apart from the provisions in the Judicial Interpretation and the Regulations addressing limitation of liability for ISPs, another law that has to be mentioned here is the Tort Liability Act of the P.R.C. The draft of the Tort Liability Act has been opened to public consultation since 2007. At least two comprehensive drafts of the Act are now provided on the Internet, and the third draft is expected to be completed by the end of 2009.<sup>348</sup> The Act is said to be patterned on the German Civil Code, but

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<sup>347</sup> There is no explicit provision with regard to liability for search engine or linking service in the law of Germany. For detailed discussion on the matter, see Thomas Hoeren, 'Liability for Online Services in Germany', *German Law Journal*, Vol. 10, No. 05, (2009), pp.561-584, pp.568-576; Wolfgang Schulz, Thorsten Held and Arne Laudien, 'Search Engines as Gatekeepers of Public Communication: Analysis of the German Framework Applicable to Internet Search Engines including Media Law and Anti trust Law', *German Law Journal*, Vol. 06, No. 10, (2005), pp. 1419-1432; Oliver Köster / Uwe Jürgens, 'Liability for Links in Germany: Liability of Information Location Tools under German law after the Implementation of the European Directive on E-Commerce', *Working Papers of the Hans Bredow Institute*, No. 14, (2003).

<sup>348</sup> Liming Wang. (2009, May 30). 'Several Important and Complicated Issues in the Second Draft of the Tort Liability Act – Keynote Speech on the 2009 Annual Conference of the Chinese Law Association', [WWW document] URL <http://www.civillaw.com.cn/article/default.asp?id=44860> (Chinese Version) (visited 2009, June 2).

has also resorted to the common law principles.<sup>349</sup> Apart from liabilities such as, product liability, motor vehicle accident liability, environmental pollution liability, etc, Article 34 of the Act addresses specifically the liability of ISPs where a horizontal approach was adopted to address liability for all types of Internet contents such as copyright content, defamatory content or obscene content, rather than merely focusing on a single area. In the second draft of the Act, Article 34 reads,

[N]etwork service providers shall be jointly liable with users, in the event that they know that users commit torts via networks and fail to take necessary measures.

The infringed party is entitled to notify network service providers to delete, block infringing content while users commit infringement through networks. Network service providers shall be jointly liable with users for further damages, in the event that they fail to take necessary measures upon receipt of notices.

Paragraph one of Article 34 states that the actual knowledge of users' infringement and the failure to take necessary measure to prevent infringements are the foundation of a network service provider's liability. However, no details are given as to what constitutes 'an actual knowledge'. Paragraph two of the Article provides copyright owners or right holders an entitlement to send notice to network service providers so that infringement can be expeditiously terminated. In addition, liability of network service providers for further damages is given when they fail to take measures to stop infringement upon receipt of right holders' notices. In fact, this Article reiterates what has been provided in the Judicial Interpretation and the Regulations regarding ISP copyright liability and it maintains the simplicity in its language.

It is apprehensible that the Tort Liability Act tries to provide a general principle for all kinds of content related liability for ISPs. However, the single actual knowledge

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<sup>349</sup> In his article 'the Draft of the Civil Code of China - A Suggested Alternative and Discussion' published by China Legal System Publishers in 2004, Professor Liming Wang, the Dean of the Law School of the People's University revealed that, China has learned from common law countries to treat tort liability law as a distinct field. The Tort Liability Act of the P.R.C has general logical principles of the civil law system as well as flexible, highly developed and detailed categories of the common law system.



standard adopted by the draft of the Act has been criticised by legal professions for its inadequacy in evaluating ISPs' awareness of infringing activities.<sup>350</sup>

#### **2.4.4.4 The 'Know' and 'Should Know (Have Reason to Know)' Standard**

Having outlined the main provisions in a Chinese ISP copyright liability framework that provide limitation of liability for ISPs, it suffices to say that a knowledge requirement, *inter alia*, has been defined as a key element of ISP copyright liability, in particular with regard to liability for hosting service providers and search engine or linking service providers. According to the Oxford Dictionary, knowledge can be explained as (1) information and skills acquired through experience or education. (2) the sum of what is known. (3) awareness or familiarity gained by experience of a fact or situation. In the legal sense, 'knowledge' is therefore divided into two types: actual knowledge and 'awareness of infringement'. In the Chinese Regulations, the knowledge requirements are not defined as 'actual knowledge' and 'awareness of infringement' and the terms 'know' and 'should know (have reason to know)' used by the Regulations are not defined anywhere in the Chinese law. However, the terms 'know' and 'should know (have reason to know)' can be found from the traditional theory of the tort law as factors that establish fault. Taking copyright infringement as an example, if a person knows that his act may infringe copyright of others, or, in other words, he has actual knowledge that his act may be in breach of copyright, and he still decides to carry on or take a reckless attitude towards the occurrence of the infringement, then he is intentionally liable. However, if he does not actually know or has no actual knowledge that his act may infringe, but as a reasonable person, he should have expected the infringement or he did anticipate the consequence he naively believed that his conduct would not result in a copyright infringement, he would be liable for his negligence. Thus, in a Chinese context, 'know' in fact

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<sup>350</sup> The School of Law of the People's University of the P.R.C. (2009, March 17). 'Transcript of the Seminar on Network Infringement and the Enactment of the Tort Liability Act', [WWW document] URL <http://www.law.ruc.edu.cn/Article/ShowArticle.asp?ArticleID=15231> (Chinese Version) (visited 2009, May 2); Liming Wang. (2009, May 30). 'Several Important and Complicated Issues in the Second Draft of the Tort Liability Act – Keynote Speech on the 2009 Annual Conference of the Chinese Law Association', [WWW document] URL <http://www.civillaw.com.cn/article/default.asp?id=44860> (Chinese Version) (visited 2009, June 2); Lixin Yang. (2008, May 13). 'Draft Note – The Civil Code of the P.R.C · The Tort Liability Act', [WWW document] URL <http://www.yanglx.com/disnews.asp?id=621> (Chinese Version) (visited 2009, February 2).

indicates ‘actual knowledge’ and ‘should know (have reason to know)’ indicates ‘awareness of infringement’.

As such, the ‘know’ and ‘should know (have reason to know)’ standard can be used to evaluate whether an ISP has actual knowledge of infringement or awareness of infringement. As for the evaluation of an actual knowledge of infringement, Article 22 (5) and Article 23 of the Regulations could be of assistance, as both Articles require the duty to delete or disconnect infringing contents upon notices by right holders. Hence, notices complied with the requirements of Article 14 of the Regulations can be deemed as evidence of ISPs’ actual knowledge of infringement.<sup>351</sup> By virtue of Article 14, paragraph one, of the Regulations, a valid notice should include the following information:

1. the name, contact information and address of the right owner;
2. the description and URL address of the infringing work, performance and audio or video products that are required to be deleted or disconnected;
3. the prima facie evidential materials that prove the infringement

In addition, a standard format<sup>352</sup> of the notification for requesting deletion or disconnection of the infringing contents along with the associated instruction<sup>353</sup> are provided on the official website of the National Copyright Administration of the P.R.C so that the right holder can follow it to make a valid notice. The form requires all the contact information of the ISP, the right holder and his designated agent if applicable, information of the infringing website including the name, domain name, IP address of the infringing website and its email, fax and telephone. In addition, the

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<sup>351</sup> Despite the Regulations do not elucidate the relation between notice and actual knowledge, Section 5, Article 24 of the Guidance on Issues Regarding the Hearing of Copyright Disputes Involving Audio and Video Copyright Infringement issued by the Supreme People’s Court of Guangdong Province clarified the standard of notice as actual knowledge. See, The Supreme People’s Court of Guangdong Province (2009, March 2), ‘The Guidance on Issues Regarding the Hearing of Copyright Disputes Involving Audio and Video Copyright Infringement’, [WWW document] URL [http://www.gdcourts.gov.cn/gzzdyj/t20090423\\_23269.html](http://www.gdcourts.gov.cn/gzzdyj/t20090423_23269.html) (Chinese Version)

<sup>352</sup> ‘Notification for Requesting Deletion or Disconnection of the Infringing Contents (Standard Format)’ [WWW document] URL <http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/detail.jsp?articleid=11110&boardpid=63&boardid=1150101011160107> (Chinese Version)

<sup>353</sup> ‘Instruction for Notification for Requesting Deletion or Disconnection of the Infringing Contents’ [WWW document] URL <http://www.ncac.gov.cn/GalaxyPortal/inner/bqj/include/detail.jsp?articleid=11109&boardpid=63&boardid=1150101011160107> (Chinese Version)

infringing contents, the URL addresses of the infringing contents, and the facts and proofs of the infringing contents are required as well as the detailed request (deletion or disconnection), and a statement that the information in the notification is accurate and that the complaining party is liable for authenticity and accuracy of the notification.

As the thesis submitted earlier that no criterion has been given to evaluate ISPs' awareness of infringement in the Regulations, the Guidance of the Supreme People's Court of Guangdong Province on Issues Regarding the Hearing of Copyright Disputes Involving Audio and Video Copyright Infringement<sup>354</sup>, however, addressed this issue. By virtue of Section 5, Article 23 (4) of the Guidance, whether an ISP (a peer-to-peer file-sharing provider in this Guidance) should have known of infringement shall be determined by conducting a 'reasonable person' test whereas the 'reasonable person' test in this context is elevated to a standard of whether the ISP acted how a 'rational, prudent ISP with network expertise' would have and not 'an ordinary person without such network expertise' would have. In fact, several Chinese courts that dealt with ISP copyright liability cases<sup>355</sup> have conducted this 'rational, prudent ISP with network expertise' test prior to the issuance of this Guidance. However, this is the first time that the local Supreme People's Court has elaborated the 'should know (have reason to know)' standard in a judicial document that would have influence over the decisions of the lower courts at least in Guangdong Province in this context. According to this, the 'reasonable person' test

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<sup>354</sup> The Supreme People's Court of Guangdong Province (2009, March 2), 'The Guidance of the Supreme People's Court of Guangdong Province on Issues Regarding the Hearing of Copyright Disputes Involving Audio and Video Copyright Infringement', [WWW document] URL [http://www.gdcourts.gov.cn/gzzdyj/t20090423\\_23269.html](http://www.gdcourts.gov.cn/gzzdyj/t20090423_23269.html) (Chinese Version)

<sup>355</sup> To name but a few, for example, *Xinchuan Online (Beijing) Information Technology Ltd v. Shanghai Full Potato Network Technology Ltd*, No. 129 (the Shanghai First Intermediate People's Court, 2007); *Shanghai Full Potato Network Technology Ltd v. Xinchuan Online (Beijing) Information Technology Ltd*, No. 62 (The Shanghai Higher People's Court, 2008); *Wangle Hulian (Beijing) Technology Ltd v. Shanghai Full Potato Network Technology Ltd*, No. 438 (the Shanghai PuDong New District People's Court, 2008); *Shanghai Full Potato Network Technology Ltd v. Wangle Hulian (Beijing) Technology Ltd*, No. 16 (the Shanghai First Intermediate People's Court, 2009); *Beijing GuangDian Weiye Film and Television Cultural Centre v. Ku Liu Net (Beijing) Information Technology Ltd*, No. 14025 (the Beijing Haidian District People's Court, 2008); *Shanghai Jidong Telecommunication Ltd v. Ku Liu Net (Beijing) Information Technology Ltd*, No. 24750 (the Beijing Haidian District People's Court, 2008); *Ninbo Success Mutli-Media Telecom Ltd v Beijing Alibaba Information Technology Ltd*, No. 4679 (the Beijing Chaoyang District People's Court, 2008); No. 19082 (the Beijing Second Intermediate People's Court, 2008).

in the context of ISP copyright liability is hence more than an objective test under the tort law theory. The analysis of a ‘rational, prudent ISP with network expertise’ test would focus primarily on: how a professional ISP would have acted; how skeptical the ISP should be according to its industry expertise; how much duty of care the ISP should take when it suspects infringement.

#### **2.4.4.5 The Inconsistency of the Knowledge Standard**

Having established that in the Chinese context the ‘know’ and ‘should know (have reason to know)’ standard is employed to evaluate ISP knowledge of the infringement, it has yet to be explored, the inconsistency of the knowledge standard in a Chinese ISP copyright liability regime and its implication.

The inconsistency of the ISP knowledge standard exists between the two enacted legislation: the Judicial Interpretation and the Regulations. In the Judicial Interpretation, Article 4 states that, a content service provider is liable only when it, *inter alia*, has actual knowledge of the infringement before receipt of notice from copyright owner or right holder. Therefore, by virtue of the Judicial Interpretation, only a subjective knowledge (an actual knowledge) is, *inter alia*, required to establish an ISP’s joint tort liability for copyright infringement. Nevertheless in the Regulations, Article 22 and 23 set forth a broad knowledge standard for liability of ISPs that provide hosting and search engine or linking services, which includes both actual knowledge of infringement and awareness of facts and/or circumstances that would indicate the likelihood of infringement to a reasonable person. Hence, the Regulations consider both subjective knowledge (actual knowledge) and objective knowledge (awareness) for evaluating ISP joint tort liability.

The inconsistency should have been resolved when the Judicial Interpretation was revised after the enactment of the Regulations in 2006. Nevertheless, a single actual knowledge requirement remained in the revision, no change was made to expand the ISP knowledge requirement, and no explanation was provided on why the change has not been made even though the purpose of the revision was to be consistent with the Regulations. The only possible reason might be, as Jinchuan Chen, the chief judge of

the Intellectual Property Court of the Beijing Higher People' Court pointed out<sup>356</sup> that, the courts had used the 'reasonable person' test to decide whether an ISP should have known of infringement when actual knowledge of infringement was not found in the cases. In addition, while the Regulations have embraced such a knowledge standard in the provisions, it may be unnecessary to reiterate it in the Judicial Interpretation; the courts can simply follow provisions of the Regulations instead of applying Article 4 of the Judicial Interpretation. Nevertheless, without clarification on the matter, the position in relation to ISP knowledge requirement would be that, on the one hand the courts might apply provisions of the Regulations and condition liability of an ISP on an actual knowledge requirement or the 'awareness of infringement'. On the other hand, the Judicial Interpretation would only allow the courts to impose ISP liability when actual knowledge of the infringement is established. Certainly, this would cause confusion.<sup>357</sup>

Some may argue that the simplest way to solve the inconsistency between the Judicial Interpretation and the Regulations would be to follow the hierarchy of the source of laws outlined in 2.4.1 to invalidate the Judicial Interpretation. In China, a Judicial Interpretation is usually enacted before the issuance of a specific law in order to provide courts a general guidance on a particular legal issue that is not addressed by the existing law. Most of the time, a Judicial Interpretation will be invalidated once a specific law is issued on the same subject matter to avoid confusion and conflict. In this context, the Regulations have been issued and have covered almost all the issues (except the issue with regard to the jurisdiction of ISP liability cases) addressed by the Judicial Interpretation. Hence, the abolition of the Judicial Interpretation could be possible. In addition, the Regulations as the second level of the sources of law issued by the State Council have authority over Judicial Interpretation while Juridical Interpretation is not technically primary sources of the

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<sup>356</sup> The School of Law of the People's University of the P.R.C. (2009, March 17). 'Transcript of the Seminar on Network Infringement and the Tort Liability Act', [WWW document] URL <http://article.lawtv.com.cn/portal/2009/0319/7390.html> (Chinese Version) (visited 2009, May 2)

<sup>357</sup> The confusion can be seen from the comparison of the outcomes of the *Baidu* and *Yahoo!China* cases. See discussion on these two cases at pp. 139-140, pp.141-142 and pp.157-161 of Chapter 3.

Chinese law and thus it should not have legal binding authority<sup>358</sup>. Indeed, this should be the simplest means to solve the inconsistency. However, in reality, such an approach does not seem to be that easy to follow. The reason, as Professor Zhiwen Liang pointed out<sup>359</sup> is that, in China, although the inconsistency of the laws is *prima facie* due to that the laws lagging behind technological development, it actually reflects the conflicts of interests between the laws and the lawmakers.<sup>360</sup> In the context of ISP copyright liability, the Judicial Interpretation is the result of the Supreme People's Court's attempt to participate in policy making by exercising its judicial power. The Measures for the Administrative Protection of Copyright on the Internet, however, are the outcome of establishing administrative jurisdictions and the Regulations are the fruit of power exercise of the National Copyright Administration authorised by the National State Council.<sup>361</sup> Thus, it is in fact difficult to solve the conflict between the laws by simply following the legal hierarchy in China, unless it is submitted to the National People's Congress for determination.

While the ISP knowledge standard in both the Judicial Interpretation and the Regulations remains inconsistent, it was hoped that the Tort Liability Act could solve the problem. Nevertheless, it was discovered<sup>362</sup> that a great deal of provisions of the judicial interpretations including the ISP knowledge standard were copied by the draft of the Civil Code of the P.R.C in 2002 as well as the draft of the Tort Liability Act in 2008, without appropriate examination of strengths and weaknesses of the judicial interpretations in practice. Many legal scholars and experts<sup>363</sup> criticised the

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<sup>358</sup> Further discussion on the matter, see HongKong Lawyer (1997, November). 'The Role of Judicial Interpretation in China'. *HongKong Lawyer*, Nov 1997, pp.38-40 ; Grace Li, 'The Contract Law of the P.R.C and Its Unique Notion of Subrogation', *Journal of International Commercial Law and Technology*, Vol. 4, Issue 1, (2009), pp.12-21, p. 20.

<sup>359</sup> Zhiwen Liang, *Discussion on Digital Copyright – Centred on the Regulations on the Protection of the Right of Communication through the Information Networks*, (Beijing: Intellectual Property Press, 2007)

<sup>360</sup> *Ibid.*, at p.269

<sup>361</sup> *Ibid.*, at p.270

<sup>362</sup> Xinbao Zhang (2009, April 23). 'The Amendment of the Second Draft of the Tort Liability Act'. [WWW document] URL <http://www.civillaw.com.cn/qqf/weizhang.asp?id=44545> (Chinese Version) (visited 2009, May 2) (Xinbao Zhang, Professor of the Law School of the People's University of the P.R.C (Beijing) who commented on the second draft of the Tort Liability Act, disputed the negative effect of duplicating provisions of judicial interpretations into the draft of the Tort Liability Act.)

<sup>363</sup> *Supra* note 350.

inadequacy of a single actual knowledge standard in the second draft of the Tort Liability Act for ISP liability for online contents. They pointed out that the Internet environment is so sophisticated while the technology advances, and ISP knowledge of infringement would be more undetectable in such a developing technology surrounding. If the Tort Liability Act gives a less detailed standard for ISPs' knowledge of the infringement, it would further complicate the situation where there is an inconsistency between the Judicial Interpretation and the Regulations in respect of the ambit of ISP knowledge standard. Several judges from the intellectual property courts also indicated<sup>364</sup> the difficulties they had faced in practice, in particular in relation to the determination of ISP actual knowledge of the infringement. As the knowledge standard is fatal to the imposition of copyright liability on ISPs, they all advocated for a prudent consideration on ISPs' knowledge standard of the infringement.

## 2.5 Conclusion

Examination of legislation and case law in relation to ISP copyright liability in three countries shows that substantive criteria has been established to regulate ISP copyright liability on the Internet. A balance approach has been adopted in particular in terms of the knowledge standard with which, *inter alia*, copyright owner can pursue ISP copyright liability and ISPs can claim for exemption if they do not have knowledge of the infringement or have no awareness of the infringement.

In the United States of America, Section 512 of the U.S. Copyright Act opts for a vertical legislative approach in which only copyright liability of ISP is applied. Aside to other requirements such as financial benefits and the right and ability to control drawn from vicarious liability and the duty to take down, a broad knowledge

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<sup>364</sup>The School of Law of the People's University of the P.R.C. (2009, March 17). 'Transcript of the Seminar on Network Infringement and the Enactment of the Tort Liability Act', [WWW document] URL <http://www.law.ruc.edu.cn/Article/ShowArticle.asp?ArticleID=15231> (Chinese Version) (visited 2009, May 2); Jun Yi & Zuo Wang, 'The Application of the "Safe Harbours" Principle in Judicial Practice', *China Intellectual Property (Online Magazine)*, Vol. 30, Issue. 6, (2009); Bei Lun, 'The Determining Standard of ISPs' Awareness of Infringement', [WWW document] URL [http://www.nbblfy.gov.cn/news/E\\_ReadNews.asp?NewsID=2500](http://www.nbblfy.gov.cn/news/E_ReadNews.asp?NewsID=2500) (visited 2009, February 2)

standard is affirmatively included as, *inter alia*, the prerequisite to ISP copyright liability. As for an actual knowledge standard, the provisions of the statute and the legislative history clarify that, *inter alia*, notification by right holders and their designated body is the means to determine whether an ISP has gained the requisite level of knowledge of infringing activity. The elements of a valid notification are also given by Section 512 (c) (3) (A) of the U.S. Copyright Act. On the other hand, the interpretation of ISPs 'awareness of infringement' is supported by legislative history with a 'red flag' test, with which an ISP's copyright liability is determined if the ISP becomes aware of a 'red flag' from which infringing activity is apparent and takes no action. Owing to that the knowledge standard is initially one of the elements of the traditional contributory liability; previous case law that involved contributory liability may also have value in interpreting such knowledge standard in an ISP copyright liability context.

In Germany, there is a horizontal regulation of service provider liability since 1997. This regulation is laid down in the German TMG 2007 that followed the European Electronic Commerce Directive closely. The Act sets out exemptions from liability for ISPs where they play a passive role as mere conduits of information from third parties. It limits ISPs' liability for other activities such as the storage of information provided by recipients of the service and at their request, if the ISP, *inter alia*, does not have actual knowledge of the illegal activities or information, or is not aware of 'facts and circumstances from which illegal activity is apparent', and acts expeditiously to remove or disable access upon such knowledge or awareness. Despite the 'actual knowledge' standard and the awareness of 'of facts or circumstances from which infringing activity is apparent' standard are not clarified in detail in the TMG 2007 as that of its American counterpart, the horizontal approach of ISP liability suggests that the interpretation of the knowledge standard in other field of law could provide insight to the courts that deal with copyright liability of ISPs.

China has established an ISP copyright liability regime by issuing laws at different levels but in a vertical way. Apart from the Measures for the Administrative



Protection of Copyright on the Internet that addresses administrative liability of ISPs, the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks and the Regulations on the Protection of the Right of Communication through the Information Networks address civil liability for ISPs.

The latest Regulations adopted a similar approach that has been adopted by both the statutes of the United State of America and Germany and exempt ISPs from similar limitations of liability as the laws of the United State of America and Germany set out. ISPs are not liable for activity such as mere conduit as well as caching so long as they alter, remove or disable the access to the works when the initial network service provider alters, removes or disables the access to them. Limitations of liability for hosting providers apply where they know or should know (have reason to know) the infringement, promptly remove the infringing works upon receipt of notification and do not receive any financial benefit directly from the infringing works. Similar exemption applies to search engine or linking service providers where they disconnect the links to the infringing works upon receipt of the copyright owner's notification. The knowledge of infringement standard is laid out in the Regulations and it has two limbs: the 'know' standard and the 'should know (have reason to know)' standard. However, such knowledge standard is undefined and it co-exists with a narrower knowledge standard adopted by the Judicial Interpretation. Consequently, the knowledge standard is debatable and remains a disputed matter.

The foregoing examinations of the ISP copyright liability legislation provided the answer to the question posed at the beginning of this Chapter and shows that the legislation of both the United State of America and Germany provided insight to the establishment of a broad knowledge standard in the Chinese Regulations. As a result, a broad knowledge standard, among other things, has been defined as a predominant element for determining ISP copyright liability in the Chinese Regulations while its importance has been previously stressed in a wide range of cases prior to the Chinese ISP liability legislation. However, when the inconsistency exists between the Judicial Interpretation and the Regulations with regard to the ISP knowledge standard, the ultimate question emerged from the debate is whether a single actual knowledge

standard is sufficient in a Chinese context or a broad knowledge standard is needed. If a broad knowledge standard is essential to an effective online copyright protection, whether the existing interpretation of the knowledge standard is appropriate, in terms of its effect on the Internet, in particular its efficiency in deterring copyright infringement and prompting a long-term legitimate development of Internet industry. With these being examined in Chapter 3, the first research question will be answered and the basis for recommendation given in the final Chapter of this thesis will be formed.

## **CHAPTER 3:**

### **THE INTERPRETATIONS OF THE KNOWLEDGE STANDARD**

#### **3.1 Introduction**

The knowledge standard is considered to be of critical importance for the evaluation of ISP copyright liability, according to the statutes of the United States of America, Germany, and China. Both in the United States of America and in Germany, the relevant laws explicitly state that such knowledge can be actual knowledge or ‘awareness of infringement’ indicating infringing activity. It means that an ISP may be held liable for copyright infringement when it has actual knowledge or it has ‘awareness of facts or circumstances from which the infringing activity is apparent’. Nevertheless, in China there is a debate as to whether the broad knowledge standard adopted by the Regulations should be narrowed down to the single actual knowledge standard adopted by the Judicial Interpretation and should be retained in the proposed draft of the Tort Liability Act. Hence, the question has been posed as to which knowledge standard, a single actual knowledge standard or a broad knowledge standard, is desirable for a Chinese ISP copyright liability regime. To answer the question, it is imperative to examine whether the knowledge provisions in existing law offer useful guidance to courts in interpreting ISPs’ knowledge of infringement, their strengths and weaknesses. Apart from the enforceability of the knowledge standard in practice, another question that needs to be answered is, if a broad knowledge standard were to be preserved, whether the existing interpretation of such a knowledge standard is appropriate for a Chinese ISP copyright liability regime?

To answer these questions, this Chapter attempts to examine how the knowledge provisions in the statutes have been interpreted in cases that have similar fact patterns in each country in determining ISP knowledge of infringement, and whether the interpretations of the knowledge standard in both the United States of America and Germany provide real insights into how it might be employed in a Chinese ISP copyright liability context. The conclusion drawn from the analysis is that a broad knowledge standard is desired to cater for the needs of an enforceable and effective

online copyright protection in China while Internet technology advances and online copyright piracy are prevalent. Although it has been suggested that, as for the interpretation of the ‘awareness of infringement’, the American ‘red flag’ test might be of assistance to a refined Chinese ISP copyright liability system, the analysis however reveals the opposite. In addition, the analysis accentuates a stringent interpretation of the broad knowledge standard needed to maintain a proper balance between copyright protection and the development of ISP industry, and to minimise other potential adverse effects such as a general obligation imposed on ISPs to monitor and a denial of public access to information.

### **3.2 The Actual Knowledge Standard**

The plain definition of ‘actual knowledge’ is understood as the specific information actually possessed by an individual, or, in other words, subjective knowledge of an individual. In a copyright liability context, the actual knowledge of infringement therefore can be understood as an individual possessing specific information about actual infringement. As discussed earlier in Chapter 2, no definition is given to what constitutes an ‘actual knowledge of infringement’ in Section 512 of the U.S. Copyright Act and the German TMG, whereas the term ‘know’ as the equivalence of an actual knowledge standard is also undefined in the Chinese legislation. When courts take into account all matters which appear to them in the particular circumstances to be relevant to determine ISPs’ actual knowledge of infringement, first thing to come to mind is probably whether the ISP has received a notice from the right holder through a means of contact made available in accordance with the law.<sup>365</sup>

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<sup>365</sup> This does not necessarily mean that other factors such as the defendant’s own statements or conduct will not be taken into account when the court determines ISPs’ actual knowledge of infringement. For example, in the *Napster* case, the court argued that other documents that were not communication between the copyright owners and the ISP might also be used to evaluate the ISPs’ actual knowledge. And in the judgment of the district court, a document authored by Napster co-founder Sean Parker was taken as evidence that Napster had actual knowledge of infringement when the document mentioned ‘the need to remain ignorant of users’ real names and IP addresses “since they are exchanging pirated music.” And what Napster executives admitted that ‘facilitating the unauthorised exchange of copyrighted music was a central part of Napster, Inc.’s business strategy from the inception’ was also taken as evidence showing that Napster had actual knowledge of its users’ infringements.

### 3.2.1 The American Interpretation of the Standard of Notice as Actual Knowledge

In the United States of America, evidence of an actual knowledge of specific acts of infringement is required in an online context so that an ISP can be held liable.<sup>366</sup> To determine that, the court often examines whether a right holder has sent a notice to the ISP and whether the notice complied with the requirements of the law, by virtue of Section 512 (c)(3)(B)(i)<sup>367</sup> of the U. S. Copyright Act. In the *Napster*<sup>368</sup> case, for instance, notices sent to Napster of the infringement were taken as evidence that Napster had actual knowledge of the infringement.<sup>369</sup> In *Corbin v. Amazon*<sup>370</sup>, the court explicitly stated that when a copyright holder notified an ISP of copyright infringement, this notice was evidence of the ISP's actual knowledge.<sup>371</sup>

When the court acknowledged the effect of notice as actual knowledge, subsequent argument was related to the 'substantial compliance' of a notice.<sup>372</sup> By virtue of Section 512 (c)(3) as discussed earlier in 2.2.2 of Chapter 2, a valid notice must be a written communication that contains substantially six elements, including (i) a physical or electronic signature of the complainant; (ii) identification of the copyright work or a representative list of multiple works; (iii) identification of the infringing material and information that reasonably allows the ISP to locate the infringing material; (iv) the complainant's contact information; (v) a statement of good faith that the use of the material is not authorised; and (vi) a statement under penalty of perjury that the notice is accurate. In addition, as long as the notice substantially

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<sup>366</sup> Section 512 (c) (1) (A) (i) and Section 512 (d) (1) ( A) of the U.S. Copyright Act

<sup>367</sup> Section 512(c)(3)(B)(i): [S]ubject to clause (ii), a notification from a copyright owner or from a person authorised to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

<sup>368</sup> *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. Aug. 10, 2000), 918; 239 F.3d 1004 (9th Cir. 2001)

<sup>369</sup> *Ibid.*, at 1021.

<sup>370</sup> *Corbin v. Amazon*, 351 F. Supp. 2d 1090 (W. D. Wa. 2004)

<sup>371</sup> *Ibid.*, at 1107

<sup>372</sup> Jennifer M. Urban & Laura Quilter, (2006, May 23), 'Efficient Process or "Chilling Effects"?' Take Down Notices under Section 512 of the Digital Millennium Copyright Act', [WWW document] URL <http://lquilter.net/pubs/UrbanQuilter-2006-DMCA512.pdf> (visited 2009, July 24), pp.621-693, p. 625 and footnote 12.

complies with the requirements of (ii), (iii) and (iv), the ISP must contact the complainant and work with the complainant to bring the notice into full compliance and then follow the take down procedure. Although all six elements are equally important in terms of forming an effective notice, (ii) identification of the work claimed to have been infringed and (iii) identification of the material that is claimed to be infringing are of particular significance as they are the key information for an ISP to decide whether take down procedure should proceed and how (where) to take down the allegedly infringing material. These two elements have been the central arguments in the cases and hence deserve detailed discussion in this chapter.

### **3.2.1.1 Identification of the Copyright Protected Works**

Under Section 512 (c)(3)(A)(ii) of the U.S. Copyright Act, the notice is required to identify the works under copyright protection, and if multiple copyright works at a single online site are infringed, a representative list of such works at that site or linked to from that site may be provided in a single notification so that the ISP can identify the copyright works claimed to have been infringed and take down the works specifically identified in the notice or those within the category of which the right holder provided a representative list.

In an information location tool scenario, the court in *Arista Records, Inc. v. MP3Board, Inc.*<sup>373</sup> held that information to identify the copyright works claimed to have been infringed should include the names of the artists and a representative list of the song titles. In this case, the plaintiff initially provided the defendant two notices containing the names of artists whose work claimed to have been infringed and asked for the removal of all infringing links. Since these two notices did not identify the copyright protected works, the court ruled that they did not substantially comply with the requirements of the law. Only until the plaintiff provided the names of the artists and 22 song titles that were representative lists of their works being infringed in the third notice, the court determined its effectiveness in deciding the defendant's knowledge of infringement.

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<sup>373</sup> *Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist, LEXIS, 16165 (S.D.N.Y. Aug 28, 2002); 2003, U.S. Dist, LEXIS, 11392 (S.D.N.Y. July 3, 2003)

This interpretation of a representative list of works was adopted in *UMG Recordings, Inc., et al. v. VEOH Networks, Inc., et al.*<sup>374</sup> where the court held that ‘simply searching for a name would not necessarily unearth only unauthorised material’<sup>375</sup>. The names of the artists provided by the plaintiff in a notice to the defendant were neither quite the same as a ‘representative list of works’ nor were they ‘reasonably sufficient to permit the service provider to locate the material.’ However, the court did not provide further clarification as to when a ‘representative list’ of works will suffice in this video-sharing liability case.

In the case of notices regarding a hosting service, the court in *Perfect 10, Inc. v. CCBill LLC*<sup>376</sup> emphasised the importance of detailed information to identify the work claimed to have been infringed. The court noted that in the email received by two of the defendants, CCBILL and CWIE, the plaintiff only identified websites that contained images of celebrities but failed to provide websites that contained their own copyright protected images. Therefore, the court held that the plaintiff’s notice was non-compliant when a clear ‘identification of the copyrighted work claimed to have been infringed’ was lacking.

Nevertheless, in *ALS Scan, Inc. v. RemarQ Communities, Inc.*<sup>377</sup>, the U.S. Court of Appeals Fourth Circuit had a different interpretation with regard to the sufficiency of identification of the works claimed to have been infringed while all copies of that work offered on a site were likely to be infringing. The court found that the plaintiff had provided information, including (1) two sites – ‘alt.als’ and

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<sup>374</sup> *UMG Recordings, Inc., et al. v. VEOH Networks, Inc., et al.*, United States District Court, Central District of California, CV 07-5744 (AHM) (C.D.C.A. September 11, 2009) (The Court granted Veoh’s motion for summary judgment that it is entitled to the section 512(c) safe harbour. The Court ordered the parties to meet and confer as to whether there are any issues remaining in this case that truly require judicial resolution. The parties must file a joint status report by not later than 9/23/2009.)

<sup>375</sup> *Ibid.*, at page 16.

<sup>376</sup> *Perfect 10, Inc. v. CCBill LLC*, 340. F. Supp. 2d 1077, 1100-01 (C.D. Cal. 2004); 488 F3d 1102, (9th Cir, 2007)

<sup>377</sup> *ALS Scan v. RemarQ Communities, Inc.*, 239 F. 3d 619 (4th Cir. 2001) (ALS Scan, Inc., a Maryland corporation engaged in the business of creating and marketing ‘adult’ photographs sued RemarQ Communities, Inc., an ISP for violations of copyright of the photographs it owned. The district court ruled that the plaintiff failed to provide notices with sufficient details to trigger take down procedure. The Fourth Circuit however, denied summary judgment to both parties and remanded for the district court to determine facts that would be relevant to whether the defendant had committed contributory or vicarious infringement.)

'alt.binaries.pictures.erotica.als' – created for the sole purpose of publishing the plaintiff's copyright works; (2) almost all the images at the two sites were copyright material of the plaintiff; and (3) two web addresses where the defendant could find pictures of the plaintiff's models and obtain copyright information of the plaintiff (the plaintiff's name and/or copyright symbol). These information were sufficient for the defendant to identify the plaintiff's copyright works and 'when a letter provide[s] notice equivalent to a list of representative works that can be easily identified by the service provider, the notice substantially complie[s] with the notification requirements'.<sup>378</sup> The court therefore reversed the ruling of the district court and remanded this case for further proceedings. The ruling of the Fourth Circuit in this case was said<sup>379</sup> to have relaxed the specificity requirement laid down by the statute and have shifted the burden of identifying infringing materials to the ISPs, which contravened the intent<sup>380</sup> of Congress reflected in the legislative history. However, two district courts<sup>381</sup> in California adopted a similar approach when all copies of the plaintiff's work were likely to be infringing on a site. In these two cases, the plaintiff was the same person, a filmmaker named Robert Hendrickson. According to the plaintiff, he had never authorised recording of his film to DVD. However, he discovered that DVD copies of his film were offered on eBay and Amazon for sale. He initiated lawsuits against two sites for copyright infringement and asked the removal of all the infringing DVD copies. Considering the fact at hand, the courts decided that reference to a work by title was sufficient for the defendants to identify the copyright work claimed to have been infringed, if all copies of that work offered on a site were likely to be infringing. Additionally, the *Amazon* court further amplified that a 'take down' notice was only valid for notifying the infringing activities taking place at the time notification was provided and it did not create an obligation to remove later infringement.<sup>382</sup> If a right holder wanted to complain for

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<sup>378</sup> *Ibid.*, at 625

<sup>379</sup> Jonathan Bick, 'New ISP Liability', *New Jersey Law Journal*, (July 2001); Stealing Porn, 'ALS Scan v. RemarQ Communities', [WWW document] URL <http://www.benedict.com/Digital/Internet/ALS/ALS.aspx> (visited 2009, August 2)

<sup>380</sup> 'The purpose behind the notice requirement under the DMCA is to provide the Internet service provider with adequate information to find and examine the allegedly infringing material expeditiously.' *Hendrickson v. Amazon.com, Inc.*, 298 F.Supp. 2d 914, (C.D. CAL. 2003), 917

<sup>381</sup> *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001); *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003)

<sup>382</sup> *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003), 916-17.



later infringement, he/she should issue a new notice identifying and providing location information for new infringement as subsequently posted infringing material may be posted in different manners and at different locations.

Close analysis of the case law reveals that whether identification of the works claimed to have been infringed is sufficient depending on the circumstances in particular cases. While all copies of a work offered on a site are likely to be infringing, reference to a work by title would be adequate. Nevertheless, if multiple copyright works at a single online site are infringed, a representative list of such works at that site or linked to from that site are needed, which should at least include the names of the right holders and further identification of specific copyright works such as the titles of songs and videos.

### **3.2.1.2 Identification of the Infringing Material**

Identification of the material that is claimed to be infringing or to be the subject of infringing activity stipulated in Section 512 (c)(3)(A)(iii) is regarded as important because it is the information that enables the ISP to identify and locate the infringing material and then subsequently remove or disable access to the infringing material. Therefore, Section 512 (c)(3)(A)(iii) accentuated that such identification must ‘reasonably sufficient to permit the service provider to locate the material.’

In the views of many courts, the specific location of each infringing copy of a work should be provided in order to satisfy the sufficiency. For example, in *Hendrickson v. eBay, Inc.*<sup>383</sup>, the court held that proper identification under Section 512(c)(3)(A)(iii) should include the specific item numbers of the listings that were allegedly offering pirated copies of ‘Manson’ for sale. The court noted that despite the plaintiff had informed eBay the existence of infringement in writing, the plaintiff did not explain what distinguishes an authorised copy of ‘Manson’ from an unauthorised one, and failed to provide eBay the specific item numbers of the listings that were allegedly

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<sup>383</sup> *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082 (C.D. Cal. 2001) (Robert Hendrickson, a movie producer sued eBay based on the fact that infringing copies of his movie were auctioned through the auction site. The court found that the notice sent by the Hendrickson did not satisfy the requirements set forth by the DMCA, and therefore eBay was not obliged to take down those infringing copies.)

offering pirated copies of ‘Manson’ for sale. The court considered that these eBay item numbers were necessary for the defendant to identify the alleged problematic listings even if the plaintiff had notified eBay of the existence of infringing activity. The plaintiff’s notice did not comply substantially with the requirements of Section 512(c)(3) (A) because the plaintiff refused to provide the eBay item numbers of ‘Manson’ and other information required. As a result, the eBay should not be deemed as having had actual knowledge or awareness of infringement and had the duty to remove, or disable access to the infringing copies of ‘Manson’ alleged.

In the case of notices regarding information location tools, a clear identification of the infringing materials with sufficient specificity was also required by the courts. In *Arista Records, Inc. v. MP3Board, Inc.*<sup>384</sup>, the court found that the first two notices by the plaintiff contained no information that enabled the defendant to locate the allegedly infringing links. Only the third notice contained the printouts of MP3Board screen shots on which the plaintiff identified 662 links to infringing material satisfied the requirement of Section 512 (c)(3)(A)(iii) as they identified the allegedly infringing material with enough specificity to permit MP3Board to locate the links.

In *Perfect 10, Inc. v. CCBill LLC*<sup>385</sup>, the interpretation of Section 512 (c)(3)(A)(iii) was even stringent. The court not only negated the effectiveness of the notice that contained no URLs of the allegedly infringing images, but also invalidated the notice that provided the URLs of the infringing images, which were not accessible by non-members. The court found that, in a letter received by two of the defendants, CCBILL and CWIE, the plaintiff identified the websites that contained the allegedly infringing materials; however, the notice did not identify the URLs of the images nor did it identify which of the plaintiff’s images were being infringed.<sup>386</sup> The court held that the notification by the plaintiff did not constitute proper notification under Section 512 (c)(3)(A) because ‘these websites may contain more than one hundred images at different URLs; it is Perfect 10’s responsibility, under the DMCA, to

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<sup>384</sup> *Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist. LEXIS, 16165 (S.D.N.Y. Aug 28, 2002); 2003, U.S. Dist. LEXIS, 11392 (S.D.N.Y. July 3, 2003)

<sup>385</sup> *Perfect 10, Inc. v. CCBill LLC*, 340. F. Supp. 2d 1077, 1100-01 (C.D. Cal. 2004); 488 F3d 1102, (9th Cir, 2007)

<sup>386</sup> *Perfect 10, Inc. v. CCBill LLC*, 340. F. Supp. 2d 1077, 1100-01 (C.D. Cal. 2004), at p. 34.

provide these defendants with enough information to allow them to locate the infringing material.<sup>387</sup> In addition, the court rejected that an email received by the defendant, which contained the URLs of the infringing images was the type of notification contemplated by Section 512 (c)(3)(A) because the court noted that ‘most of the URLs provided referred to the “members only” areas of the website.’ This means that the defendant as a non-member of the website would not be able to access and locate the specific images even if the URLs of those infringing images were provided.

Nevertheless, the U.S. Court of Appeals Fourth Circuit in *ALS Scan v. RemarQ Communities, Inc.*<sup>388</sup> adopted a lenient interpretation with regard to identification of the infringing material and held that ‘only location information is required for substantial compliance with the terms of § 512(c)(3)’<sup>389</sup>. However, it shall be noted here that circumstances in this particular case were different where all infringing copies of a copyright work were in fact offered on two particular sites. Therefore, it may not be necessary for the plaintiff to identify the specific location of the infringing material when these two sites were created for the sole purpose of publishing and exchanging the plaintiff’s copyright works and nearly all the images at the two sites were the infringing materials.

Despite the Fourth Circuit in *ALS Scan v. RemarQ Communities, Inc.* held that ‘absolute compliance is not required’<sup>390</sup> in a circumstance where all the infringing copies of a copyright work were offered in two specific sites, the succeeding cases, for instance *Arista Records, Inc. v. MP3Board, Inc.* and *Perfect 10, Inc. v. CCBill LLC* adopted a stringent interpretation of the notice provision with regard to infringement involving multiple copyright works. It was argued<sup>391</sup> that *ALS Scan v. RemarQ Communities, Inc.* might not represent the typical copyright infringement

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<sup>387</sup> *Ibid.*

<sup>388</sup> *ALS Scan v. RemarQ Communities, Inc.*, 239 F. 3d 619 (4th Cir. 2001)

<sup>389</sup> *Ibid.*, at 625.

<sup>390</sup> *Ibid.*

<sup>391</sup> Lee A. Hollaar, *Legal Protection of Digital Information*, (New York: BNA Books, 2002), pp.171-176; David Johnson, (2009, June 26), ‘DMCA Take-Down Notices with Little Detail on the Identity and Location of Infringing Material Are Often Found to Be Insufficient’, [WWW document] URL [http://www.digitalmedialawyerblog.com/2009/06/dmca\\_takedown\\_notices\\_with\\_lit\\_1.html](http://www.digitalmedialawyerblog.com/2009/06/dmca_takedown_notices_with_lit_1.html) (visited 2009, July 20)

scenario on the Internet because of the particular circumstances of the alleged infringement in the case. It would not be the case and the substantial specific identification of the allegedly infringing works would have to be given, if the allegedly infringing works contain no copyright symbol/notice, or if the allegedly infringing material is in a more general newsgroup or is scattered throughout hundreds of thousands of files over the Internet.

All in all, the case law<sup>392</sup> indicates that there is increasingly a view taken by the courts that the copyright owner should provide as sufficient information as possible in an effective ‘take-down’ notice so that the ISP can locate the content to be taken down without undue burden and without taking down substantially more than is alleged to infringe. ‘[G]eneral or vague allegations of copyright infringements are not sufficient to place Internet service providers on “notice” of potential copyright infringements.’<sup>393</sup> Apart from other four requirements, identifications required by Section (c)(3)(A)(ii) and (iii) are proven particular significant. For these two clauses to be satisfied, identification of the work claimed to have been infringed and identification of the material that is claimed to be infringing should include at least the named particular artists, specific song titles, and specific location of each infringing copy of a copyright work. Merely the names of the copyright owners/holders without further identification of specific materials and specific location would not suffice. For a notice to be substantially compliant with the statute, ‘all of § 512(c)(3)’s clauses, not just some of them’<sup>394</sup> should be satisfied, which means that all the six elements required must be presented in a single written communication.

### **3.2.1.3 Appraisal**

Although the above discussed cases such as, *Hendrickson v. eBay, Inc.*, *Arista Records, Inc. v. MP3Board, Inc.*, and *Perfect 10, Inc. v. CCBill LLC.*, are admittedly too limited to be representative, they nevertheless exhibited a prevailing view on the

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<sup>392</sup> For example *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082 (C.D. Cal. 2001), *Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist. LEXIS, 16165 (S.D.N.Y. Aug 28, 2002); 2003, U.S. Dist. LEXIS, 11392 (S.D.N.Y. July 3, 2003), and *Perfect 10, Inc. v. CCBill LLC*, 488 F3d 1102, (9th Cir, 2007)

<sup>393</sup> *Perfect 10, Inc. v. CCBill LLC*, 340. F. Supp. 2d 1077 (C.D. Cal. 2004), 1100-01

<sup>394</sup> *Perfect 10, Inc. v. CCBill LLC*, 488 F3d 1102, (9th Cir, 2007), 1112, footnote 3.

standard of notice as actual knowledge and articulated the importance of sufficient information to constitute an effective notice in order to establish actual knowledge necessary to establish ISP liability for copyright infringement. Such stringent interpretation of the standard of notice as ISP actual knowledge appears to be practical, in particular, when the following factors are considered.

Firstly, they cater for the sheer practicalities of enforcement in practice. The stringent interpretation of the notice provision as actual knowledge is able to ensure the proper balance between copyright protection and the development of electronic commerce and technologies that support electronic commerce. As they put reasonably proportional burdens on ISPs and copyright holders,<sup>395</sup> both parties remain motivated to take responsibilities to their own conduct. Namely, copyright owners are still the dominating party to look after their works and ISPs are obliged to take action against infringement once substantially compliant notifications comes into their hands.

Secondly, a stringent application of the notice provisions protects public access to information. The Internet accommodates millions of users and provides access to information for the public. Any abuse of notices and mistaken copyright allegations are therefore likely to result in erroneous ‘take down’ decisions and denial of access to information for many Internet users. A compliant notice and the subsequent ‘take down’ would significantly minimise such a danger. In particular, while it may too troublesome for the ISP refer to a court for a ‘take down’ decision, to follow a strict application of the ‘notice and take down’ procedure would ensure that defective notices are rejected and the risk of imprudent deletion and disconnection is diminished so that the access to information of third party is preserved.

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<sup>395</sup> *Herdrickson v. Amazon.com. Inc.*, 298 F.Supp. 2d 914, (C.D. CAL. 2003), 916-917. (‘Congress’s intent was that both the copyright owner and the [Internet service provider] cooperate with each other to detect and deal with copyright infringement that takes place on the Internet’). Information Infrastructure Task Force Working Group on Intellectual Property Rights, Intellectual Property Rights and the National Information Infrastructure [WWW document] URL <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>, pp. 122-123 (visited 2006, July 3) (recognising that service providers provide a variety of services under a variety of circumstances and ‘[n]o one rule may be appropriate’)

As well as the above-mentioned benefits, a rigid interpretation of the notice provisions as an actual knowledge standard may also contribute efficiency to a joint ‘notice and take down’ process. The legislatures of the United States of America<sup>396</sup> emphasised that a ‘notice and take down’ procedure was a cooperative process that has been employed to deal efficiently with network-based copyright infringement, therefore the ‘notice and take down’ procedure would be an efficient mechanism for removing infringing content. Since the purpose behind the notice requirement is to provide the ISP with adequate information to find and examine the alleged infringing content expeditiously,<sup>397</sup> a rigid application of the notice provisions would hence ensure the copyright holder who is most able to recognise their own works provided sufficient and accurate information to ISPs. As a result, ISPs who have the control to prevent unauthorised dissemination can do their part of job to quickly delete or disconnect infringing content.

### **3.2.2 The German Interpretation of the Actual Knowledge Standard**

The German interpretation of an actual knowledge standard is far clearer from that of the American courts, even though such a knowledge standard is deemed more important than that in the American law. By virtue of the American Copyright Act, an ISP would not necessarily be held liable even if it was proved to have knowledge of infringement, as financial benefits from the infringement and the right and ability to control the infringing activity are other factors to be considered. However, according to Article 11 of the German TMG 2007, actual knowledge of infringement and reaction upon such knowledge are the only two preconditions of ISP liability (the ‘awareness of infringement’ standard is considered for damages claims only). This indicates that the prerequisites for ISP liability in the German law differ to that of its American counterpart. The German law thus provides for the paramount importance of an actual knowledge standard in determining ISP copyright liability.

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<sup>396</sup> H.R. Report, II, at 45.

<sup>397</sup> *Herdrickson v. Amazon.com. Inc.*, 298 F.Supp. 2d 914, (C.D. CAL. 2003), 917

Apart from Article 11 of the TMG 2007 that briefly defines the ambit of the knowledge standard, nowhere does the Act explain what constitutes ‘actual knowledge’. In addition, a ‘notice and take down’ procedure is not provided in the German Act, thus, no connection between notice and the knowledge standard. The Act in fact provides little by way of practical advice to copyright owners on how to send a notice to inform the ISP of infringement, or to ISPs on how to make decisions on requests for take down. Legal commentators have suggested<sup>398</sup> that the notification must be substantial enough that the ISP can easily find the infringing content and take action, and they are of the opinion that in a copyright setting concrete information should be provided in the notification; otherwise, it should not trigger the knowledge requirement. Nevertheless, these views remain merely of academic importance now that the courts are bound to clarify these issues and provide useful guidance.

In determining ISPs’ liability, the German courts associated ISPs’ actual knowledge with notices, even though the law does not explicitly state such a relation.<sup>399</sup> For example, in *AG Winse v. Luhe*<sup>400</sup>, the plaintiff sent an email to an Internet forum operator, requesting the removal of a picture of a criminal on which his head was mounted within 24 hours and 17 minutes. The court accepted that the email demanding a third party’s defamatory photographs to be deleted was deemed as evidence of establishing a forum operator’s actual knowledge of defamation, and upon the email the defendant had the duty to remove such content within the time the plaintiff requested. In another prominent trademark case - *Rolex v. eBay*<sup>401</sup>, the court also found that eBay had actual knowledge of infringement of specific infringing items upon the receipt of notice from Rolex, and eBay was thus under the duty to

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<sup>398</sup> Sabine Sobola & Kathrin Kohl, ‘Haftung von Providern für fremde Inhalte - Haftungsprivilegierung nach § 11 TDG - Grundsatzanalyse und Tendenzen der Rechtsprechung (Liability for Third Party Content Providers - Liability Privileges under § 11 TDG - Principle and Analysis of Trends in Case Law)’, CR 2005, pp. 443-450, pp. 446-447; Markus Stephanbolme, ‘Internet Provider Liability for Copyright Infringement Under German and European Law’, Copyright Bulletin, Vol. XXXV, No. 2, (2001), pp.7-36, p.23.

<sup>399</sup> Markus Stephanbolme, ‘Internet Provider Liability for Copyright Infringement Under German and European Law’, Copyright Bulletin, Vol. XXXV, No. 2, (2001), pp.7-36, p.23.

<sup>400</sup> *AG Winse v. Luhe*, MMR 2005, 722; MIR 2005, Dok. 003, Rz. 1-7

<sup>401</sup> *Rolex v. eBay*, BGH (2007) Az. I ZR 35/04; BGH (2004) Az. I ZR 304/01; OLG München (2006) Az. 29 U 2119/06; LG München (2006) Az. 21 O 2793/05; LG Hamburg (2005) Az. 312 O 753/04.

implement reasonable technical means to prevent recurrent infringement in the future. In a copyright case<sup>402</sup>, the court also held that because the illegality of the content was not clarified by the notification the defendant should not have been deemed to have actual knowledge of infringement that the content was in fact infringing and therefore illegal. Nevertheless, in a copyright liability case decided earlier 2009 in relation to Usenet<sup>403</sup> access providers<sup>404</sup>, the Higher Regional Court of Hamburg held that a company which provided access to illegal Usenet content was liable after exchange of the unlawful contents was notified by the plaintiff by letters from the solicitor's office.

Therefore, as a matter of fact, a formulation<sup>405</sup> has been gradually established by the German courts with regard to the standard of notice as actual knowledge of infringement, and the horizontal approach the TMG has adopted made it possible that the interpretation of an actual knowledge standard in one liability case might be borrowed by other courts dealing with other Internet content-related liability issues. According to the formulation, a notification has to contain specific information in order to establish an ISP's actual knowledge of infringement and request them take action against infringement, such specific information should include the nature of the infringement, the specific location of the infringement and the identification of the complaining party. Notification vaguely referring to the general appearance of illegal content on a website is not acceptable and notification from an anonymous correspondent is void.

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<sup>402</sup> OLG München (2006) Az. 6U 675/06

<sup>403</sup> The Usenet is an abbreviation of 'Users Network'. It is a one of the computer network communication systems that connect organisations or individuals (peers) to each other and exchange messages. See definition by Wikipedia at <http://en.wikipedia.org/wiki/Usenet> and *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (C.D. Ca, 2002) at 1053.

<sup>404</sup> OLG Hamburg, judgment of January 14, 2009 - 5 U 113/07, ZUM-RD 2009, 246 = MMR 2009, 631. Further discussion on this case, see Daniel Kaboth, (2009, August 27), 'Hamburg Court Rules on Liability of Usenet Access Providers', [WWW document] URL <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=dd8bf97e-e9ca-488d-95df-8df795ba5722> (visited 2009, August 27).

<sup>405</sup> Thomas Hoeren, 'The European Liability and Responsibility of Providers of Online-Platforms Such As "Second Life"', *Journal of Information, Law & Technology*, 2009(1), pp.1-20, p.11; Sabine Sobola & Kathrin Kohl, 'Haftung von Providern für fremde Inhalte - Haftungsprivilegierung nach § 11 TDG - Grundsatzanalyse und Tendenzen der Rechtsprechung (Liability for Third Party Content Providers - Liability Privileges under § 11 TDG - Principle and Analysis of Trends in Case Law)', CR 2005, pp. 443-450, pp. 446-447; Markus Stephanbolme, 'Internet Provider Liability for Copyright Infringement Under German and European Law', *Copyright Bulletin*, Vol. XXXV, No. 2, (2001), pp.7-36, p.23.



Although, to some extent, the courts have clarified that ISPs do not have to take any action upon ambiguous notices, uncertainty is left as to whether a notice can be merely an email or must be any other written communication. In addition, it is still unclear who can be the person to send such a notice or whether a notice from any user of the Internet will be accepted. Furthermore, it remains unclear that, if multiple copyright works are claimed to have been infringed at a single site, whether the copyright owner must provide a full list of such works or a representative list of such works would be sufficient. All in all, neither a unified standard nor consistent requirements regarding the actual knowledge standard for ISPs' liability has been established in a German ISP liability context. The German case law has contributed to nothing but a paramount need to have the actual knowledge standard elucidated in the legislation so that ISP liability can be appropriately determined while in the meantime copyright interests can be protected.

### **3.2.3 The Interpretation of the Actual Knowledge Standard in China**

Having explored the American Interpretation of an actual knowledge standard and the German practice in this respect, it is needful to examine how the Chinese courts have interpreted the actual knowledge standard – the 'know' standard in the ISP copyright liability cases.

As discussed earlier in Chapter 2, the Chinese courts recognised the importance of an actual knowledge standard at the very beginning when they issued the Judicial Interpretation in which an actual knowledge was deemed the only way to hold an ISP liable. When the Regulations were issued, the knowledge standard was set forth among other factors such as financial benefit as one of prerequisites for ISP copyright liability because of the influence of the American and German law. Though the relation between actual knowledge and a notice is not explicitly stated by the law as it is in its American counterpart, a link between these two can be found in Article 23, paragraph one, of the Regulations that addresses liability of search engine or linking providers, which states that '[W]here a network service provider that

provides searching and linking service to its subscribers disconnects the linked infringing works, performances, sound recordings or video recordings upon receipt of the right owner's notification, it shall not be liable for damages, according to these Regulations.' In the Regulations, a detailed 'notice and take down' procedure is in place<sup>406</sup> explaining the entitlement of a right holder to send a notice to inform copyright infringement and make a request for deletion and disconnection as well as setting out how an ISP should respond. As for the requirements of an effective notice, not only Article 14 of the Regulations provides guidance, the National Copyright Administration of the P.R.C also offered standard forms as templates.

In practice, the Chinese courts considered that notices whereby copyright owners provided information to ISPs were the predominant evidence that proved an actual knowledge of ISPs. The *Baidu*<sup>407</sup> case was the typical example that illustrated the importance of a notice to actual knowledge of infringement. In this case, the courts took a stringent interpretive approach to notice as the basis of the actual knowledge standard and suggested a principle in a search engine liability context - 'no notice, no actual knowledge of infringement and thus no liability'<sup>408</sup>. When Baidu was brought to court by seven international record companies for copyright violation, the Regulations had not been issued and the only piece of legislation addressing ISP copyright liability was the Judicial Interpretation in which only the 'know' (an actual knowledge standard) standard was laid down *inter alia* as the precondition for ISP copyright liability. In the judgments of both the first instance and the appeal court, lack of an actual knowledge of infringement was held as one of the reasons that exempted Baidu from liability. The court accentuated in their decisions that in order

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<sup>406</sup> Article 14 (5) of the Regulations sets forth requirements for notice and it states that the notice issued by the copyright owner should include: the name, contact information and address of the right owner, the description and URL address of the infringing works and the preliminary evidential materials that prove the infringement. In Article 22 and 23, the duty to 'take down' is applied to host service providers and search engine or linking service providers.

<sup>407</sup> *Gold Label. et al. v. Baidu Network Information Technology Ltd*, No. 7965, 7978, 8474, 8478, 8488, 8995 and 10170 (the Beijing First Intermediate People's Court, 2005); *Baidu Network Information Technology Ltd v. Gold Label. et al*, No. 597 to 603 (the Beijing Higher People's Court, 2007)

<sup>408</sup> This principle was consistent with 'The Reply of the Supreme People's Court to the Shandong Province High People' Court for the Request on How to Determine Whether the Linking Activity of Jining Zhi Chuang Information Ltd. Infringed the Right of Communication through the Information Networks of the Sound Recording and How to Calculate the Amount of Compensation' dated on 8 January 2005. For further details on the Reply, see *supra* note 328 and accompanying text.

for Baidu to take action against infringement, the plaintiffs must have sent notice to Baidu in order for Baidu to obtain actual knowledge of infringement and take action. The failure to provide such notice resulted in the record companies losing their cases. Although the outcome of the *Baidu* case illustrates how important the notice was for the court's decision that actual knowledge had to occur in order to establish an ISP's liability, it provided no further clarity as to what was needed for a compliant notice that would enable the ISP to identify and locate the infringing materials.

Despite the Regulations were issued and guidance on what constituted a compliant notice was provided in this legislation before the court determined the appeal raised by Baidu Network Information Technology Ltd. The Regulations failed to address the sufficiency criteria of identification of the infringing works in a notice and clarify whether the right holder should provide all the descriptions and URL addresses of 'the infringing work, performance and audio or video products that are required to be deleted or disconnected,' or, a representative list of such works would be sufficient. While it is common that a number of the allegedly infringing works are offered in a single site, clarification in this regard is needed. Two cases addressed this issue with diverging outcomes.

The Beijing Higher People's Court in *Zhejiang Pan-Asia Electronic Commerce Ltd v. Baidu Network Information Technology Ltd.*<sup>409</sup> dismissed the plaintiff's claim that Baidu should be liable for all the infringing links while only the lyrics of the twenty-six songs were provided in the notice. The court did not accept that a representative list of the works claimed to have been infringed were sufficient without sufficient information to enable the defendant to identify and locate all the infringing links. Pursuant to Article 14 of the Regulations, the court held that Baidu was merely liable for unauthorised reproduction and distribution of the lyrics of the twenty-six songs claimed. Baidu nevertheless had no responsibility to remove or block all other infringing links while specific URL addresses of those links were not given in the plaintiff's solicitor's letter. In reaching the conclusion, the court went on to say that:

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<sup>409</sup> *Zhejiang Pan-Asia Electronic Commerce Ltd v. Baidu Network Information Technology Ltd.*, No. 1201 (the Beijing Higher People's Court, 2007)

even if the plaintiff provided nine official notices that contained a list of the infringing links accompanied with titles of the songs, lyrics and melodies, names of the authors and specific URL addresses, the solicitor letter by the plaintiff did not contain specified information required by the Regulations with regard to all other links, therefore, Baidu was not deemed to have known of those links that were claimed to be infringing and had no duty to remove those unspecified links. Although the defendant was expected to search those links so as to find their specific URL addresses by the search of ‘audio file content’, existing technology however has not reached that level. Additionally, the plaintiff had already authorised some other websites or organisations disseminating the songs claimed, Baidu thereby could not simply remove or block links associated with the songs claimed by the means of ‘keywords’ or ‘titles of the songs’ searching, as it might infringe rights of those licensed websites.<sup>410</sup>

However, the courts in *EMI Group Hong Kong Ltd, et al. v. Yahoo! China*.<sup>411</sup> had different opinion on this issue. The court of the first instance determined that Yahoo! China was held liable for copyright violation where it failed to delete all the linked sound recording files that contained names of artists and titles of songs the plaintiffs had claimed, after receiving two notices by the plaintiffs that included a list of names of their artists, titles of their songs and a representative lists of the songs being infringed as well as screen shots of the alleged infringing links. Yahoo!China appealed and argued that notices dated April 10 2006 and July 4<sup>th</sup> 2006 were non-compliant since URL addresses of all the other infringing songs were not provided aside from the URL addresses of twenty-four songs specified in the notices. They contended that they had not been able to locate and disable the links claimed because of the lack of sufficient detail in relation to all other infringing songs. When Yahoo!China raised the argument, the appeal court was in fact invited to deal with this issue, which is significant to search engine or linking providers’ liability but was not addressed by the Regulations, however, there was nothing in the judgment of the appeal court that indicated its clarification upon this matter. Instead, the court went

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<sup>410</sup> *Ibid.*

<sup>411</sup> *EMI Group Hong Kong Ltd, et al. v. Yahoo! China.*, No. 02621 to No. 02631 (the Beijing Second Intermediate People’s Court, 2007); *Yahoo! China. v. EMI Group Hong Kong Ltd, et al.*, No. 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1239 (the Beijing Higher People’s Court, 2007)

on to apply Article 23, paragraph two, of the Regulations<sup>412</sup> and decided liability of Yahoo! China was based on their objective fault under the ‘should know (have reason to know)’ standard. To that, the court ruled that by notices Yahoo!China should have known all the sound recording files that contained those names and titles linked to were infringing and should have taken necessary measures to prevent further infringement, and they were liable for failing to do so.

Analysis of case law shows that despite the relatively detailed notice provisions given in the Regulations by which ISPs’ actual knowledge of infringement is determined, and a stringent interpretation of those provisions adopted by the courts, several related issues were not clarified by both the legislation and the court interpretation. For example, whether separate notices could be put together to form an effective notice, and whether the copyright owner or right holder should provide all of the infringing links in a notice when multiple works were infringed in a search engine website or whether a representative list of the links would be sufficient for an effective notice. The lack of clarification on these unsettled issues could impose practical problems. On the one hand, if the above-mentioned problems remain unsolved, a high burden might be placed on right holders of multiple copyrights who face extensive infringement of their works and would make their claims more difficult. Nevertheless, on the other hand, it could be a problem for ISPs to locate the infringing content if reasonably sufficient information is not available in such a notice. Clarification is therefore desired on these issues so as to strike the balance between protecting copyright and limiting ISP liability.

The comparison of the interpretations of an actual knowledge standard among the United States of America, Germany and China shows that although in China the Regulations provided a ‘notice and take down’ procedure that mirrored the American model and the National Copyright Administration issued two standard forms

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<sup>412</sup> Article 23 of the Regulations on the Protection of the Right of Communication through the Information Networks reads, ‘[W]here a network service provider that provides searching and linking service to its subscribers disconnects the linked infringing works, performances, sound recordings or video recordings upon receipt of the right owner’s notification, it shall not be liable for damages, according to these Regulations. However, where it knows or has reasonable grounds to know the linked works, performances, sound recordings or video recordings infringe another person’s rights, it shall be jointly liable for the infringement.’

designed especially for the notice and counter-notice process, several problems remained as to evaluation of ISPs' actual knowledge of infringement through notices. In this regard, the German interpretation of an actual knowledge standard is less textually grounded to warrant it as a starting point for providing insight into the refinement of an actual knowledge standard in a Chinese ISP copyright liability system, as it lacked a 'notice and take down' procedure in its legislation. Nevertheless, the American experience suggests that a dedicated 'notice and take down' provision in particular the 'substantial compliance' rule in Section 512 (c)(3) and the stringent American interpretation of the notice provisions in several cases such as *Hendrickson v. eBay, Inc.*, *Arista Records, Inc. v. MP3Board, Inc.*, and *Perfect 10, Inc. v. CCBill LLC*. would add value to the improvement of an actual knowledge standard.

Notwithstanding an actual knowledge standard underpinned by the improved notice provisions could be of great assistance in examining ISPs' subjective knowledge of infringement, a single actual knowledge standard is not sufficient in an extensive online copyright piracy environment. The subjective knowledge standard has a high threshold and is thus very difficult to prove, in particular in the absent of relevant evidences, such as notice or other documents that may demonstrate a genuine issue of material fact as to whether the ISP possessed subjective knowledge of infringement. In addition, the actual knowledge standard does not 'reach an ISP's conduct of wilfully (or wantonly) ignoring blatant indications of infringement'<sup>413</sup> that the ISP could escape from liability. While there is a need to address liability of the ISP who buried its head in the sand like an ostrich in order to avoid obtaining the knowledge of copyright infringement, an objective knowledge standard is needful as an additional basis for ISPs' potential liability.

### **3.3 The 'Awareness of Infringement' Standard**

By virtue of the ISP liability legislation of all three countries, the 'awareness of infringement' standard is the second criterion in the knowledge standard to establish

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<sup>413</sup> David Nimmer, *Copyright: Scared Text, Technology, and the DMCA* (New York: Kluwer Law International, 2003), p. 358

ISP copyright liability. Unlike an actual knowledge standard that provides subjective evidence through notices, the ‘awareness of infringement’ is demonstrated through objective evidence. To provide criteria for assessing ISPs’ ‘awareness of infringement’, the America legislature introduced a ‘red flag’ test<sup>414</sup>, which is, as discussed earlier in 2.2.2.2 of Chapter 2, a two part test with both objective and subjective elements. This ‘red flag’ test differs with a traditional constructive knowledge – ‘should know (have reason to know)’ standard in the contributory liability cases. In Germany and China, the criterion for assessing ISPs’ ‘awareness of infringement’ is, however, based on the traditional ‘should know (have reason to know)’ standard.

### **3.3.1 The Interpretation of the Standard of ‘Awareness of Infringement’ in the American Case Law**

As discussed earlier in this Chapter, for striking a balance between copyright protection and development of electronic commerce and preserving incentive for ISPs to cooperate with copyright holders, the American legislature introduced a ‘red flag’ test that has both subjective and objective elements to determine ISPs’ ‘awareness of infringement’. They differentiated the traditional constructive knowledge standard that has a broad ambit to this test. The legislative intention of applying a ‘red flag’ test for evaluation of ISPs’ ‘awareness of infringement’ was to release ISPs from liability for less apparent infringement and capture the ISPs who deliberately adopted their services to avoid knowledge or otherwise turned ‘a blind eye’ to ‘red flags’ of apparent infringement.<sup>415</sup> Apart from the ‘red flag’ test, Section (c) (3) (B) (i) of the U.S. Copyright Act also stated that a notification from a copyright owner or from a person authorised to act on behalf of the copyright owner should also be considered while determining ISPs’ ‘awareness of infringement’. In addition, the Congress elaborated in their reports that ‘awareness of infringement’ includes ‘information of any kind that a reasonable person would rely upon’<sup>416</sup> which may, ‘in appropriate circumstances include the absence of customary indicia of

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<sup>414</sup> H.R. Rep., II, p. 44-45, 48

<sup>415</sup> *Ibid.*, at 47

<sup>416</sup> H.R. Rep., I, p. 22

ownership or authorisation, such as a standard and accepted digital watermark or other copyright management information.’<sup>417</sup>

### 3.3.1.1 The Application of a ‘Red Flag’ Test

As to what might constitute a ‘red flag’, the legislative history offered some guidance<sup>418</sup>. For example, the committee reports referred the sites that ‘use words such as “pirate”, “bootleg”, or slang terms in their URL and header information to make their illegal purpose obvious, in the first place, to the pirate directories as well as other Internet users’<sup>419</sup> as examples which would raise ‘red flags’ as ‘the infringing nature of such sites would be apparent from even a brief and casual viewing.’<sup>420</sup> However, it shall be noted here that the foregoing references were to interpret the safe harbour for information location tools; therefore, whether they can be used to interpret the safe harbour for hosting service provider may be arguable.

Nevertheless, several courts have deduced from the legislative history’s interpretation of the information location tools safe harbour that in a hosting service context, the name of the sites that used words such as ‘pirate’, ‘bootleg’, or slang terms in their URL and header information was not sufficient to raise ‘red flags’. The disclaimer and the absence of copyright labels on the material also had no effect of raising a ‘red flag’.

*Corbis Corp. v. Amazon.com, Inc.*<sup>421</sup> is one of the examples where the American court closely followed the ‘red flag’ test in order to examine a host service provider’s ‘awareness of infringement’. In this case, Corbis Corp. initiated proceeding against Amazon.com, Inc for unauthorised use of over 230 copyright images on third party websites hosted by Amazon under its ‘zShops’ service, as well as on the Internet Movie Database (IMDb) owned by Amazon.<sup>422</sup> Although Corbis Corp. did not send a notice to Amazon informing item of copyright violation, they argued that Amazon

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<sup>417</sup> *Ibid.*

<sup>418</sup> H.R. Rep., II, pp. 47- 48. (cited at page 82-83 in 2.2.2.2 of Chapter 2)

<sup>419</sup> *Ibid.*

<sup>420</sup> *Ibid.*

<sup>421</sup> *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp.2d 1090 (W.D. Wash. 2004)

<sup>422</sup> *Ibid.*, at 1096-97.



had knowledge of a 'red flag' based on 10 total notices Amazon received from other senders between June 2002 to February 2003 against two different vendors - Famed & Framed and Posternow - on Amazon's 'zShops' sites. The court cited the Congressional Committee Reports and accentuated a 'blatant' or 'obvious' infringement should be clear 'from even a brief and casual viewing'<sup>423</sup>. However, in this case, the court elucidated,

[T]here is no evidence suggesting that Amazon would have been able to tell, merely by looking at the Famed & Framed and Posternow listings, that the posters and photos being sold infringed another's copyrights. Without some evidence from the site raising a 'red flag', Amazon would not know enough about the photograph, the copyright owner, or the user to make a determination that the vendor was engaging in blatant copyright infringement. See S. Rep. No. 105-190, p.30 (merely being aware of 'one or more well known photographs of a celebrity at a site' does not provide a service provider with knowledge of possible infringement).

In applying the interpretation in the legislative history, the court explicated on when infringement may be conspicuous and obvious in the context of hosting service providers' liability.

In *Perfect 10, Inc. v. CCBill LLC*<sup>424</sup>, the court continued the application of the 'red flag' test. This case was brought by an adult magazine *Perfect 10* against CWIE, a webhosting service, and CCBill, an online payment service, for providing services to third-party websites that had infringing photos of *Perfect 10*. In reaching their conclusion, the court further elaborated what suffices for establishing an ISP's 'awareness of infringement'. Using the 'red flag' test, the court determined that the claims of the plaintiff were insufficient to establish the defendants' 'awareness of infringement'. The court found that the names of 'illegal.net' and 'stolencebritypics.com' for which two defendants provided services were not 'red flags' of the infringement based on the argument that there might be reasons such as 'an attempt to increase their salacious appeal'<sup>425</sup> in the names other than announcing the infringement. The names of the sites alone did not signal apparent infringement.

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<sup>423</sup> *Ibid.*, at 1107-08 (quoting H.R. Rep. No. 105-551, Part 2: July 1998, at 57)

<sup>424</sup> *Perfect 10, Inc. v. CCBill LLC*, 340 F. Supp. 2d 1077, 1100-01 (C.D. Cal. 2004); 488 F3d 1102, (9th Cir, 2007)

<sup>425</sup> *Ibid.*, at 1119.

The court stated that ‘[W]e do not place the burden of determining whether photographs are actually illegal on a service provider.’<sup>426</sup> In addition, the court negated that the disclaimers posted on illegal.net were ‘red flags’ of the infringement. They argued that the disclaimer in question (illegal.net) simply stated that the webmaster had the right to post the files and thus it was not sufficient to raise a ‘red flag’ of copyright infringement. In terms of the password-hacking websites hosted by CWIE, the court held that the sites themselves were not *per se* ‘red flags’ of infringement as there was no evidence that the sites had instructed and enabled users to infringe another’s copyright. In addition, it was not possible for the defendants to conclude that ‘the passwords enabled infringement without trying the passwords and verifying that they enabled illegal access to copyrighted material’ when ‘[T]he website could be a hoax, or out of date. The owner of the protected content may have supplied the passwords as a short-term promotion, or as an attempt to collect information from unsuspecting users. The passwords might be provided to help users maintain anonymity without infringing on copyright.’ The court cited the *Napster*<sup>427</sup> case and held that ‘in order for a website to qualify as a “red flag” of infringement it would need to be apparent that the website instructed and enabled users to infringe another’s copyright’<sup>428</sup>. Since the plaintiff, *inter alia*, did not raise a genuine issue of material fact that the defendants were aware of infringement on their clients’ websites, the court finally held that the defendants were not liable.

The approach of *Corbis Corp. v. Amazon.com, Inc* and *Perfect 10, Inc. v. CCBill LLC* were further followed by *Io Group, Inc. v. Veoh Networks, Inc.*<sup>429</sup> in a decision which looked for what constitutes a ‘red flag’ of infringement and whether the defendant was aware of the ‘red flag’. The court firstly quoted the judgment of *Corbis Corp. v. Amazon.com, Inc.*, which stated that an ISP’s ‘awareness of infringement’ was determined by asking question of ‘whether the service provider deliberately proceeded in the face of blatant factors of which it was aware’<sup>430</sup>, but not

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<sup>426</sup> *Ibid.*, at 1114.

<sup>427</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001).

<sup>428</sup> *Ibid.*, at 1121.

<sup>429</sup> *Io Group, Inc. v. Veoh Networks, Inc.*, 2008 WL 4065872, 25 ILR (P&F) 586 (ND Cal, 8/27/08)

<sup>430</sup> *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp.2d 1090, at 1108 (quoting 3 Nimmer on Copyright, § 12B.04[A][1], at 12B-49)

the question as to ‘what a reasonable person would have deduced given all the circumstances.’<sup>431</sup> In other words, the question should be whether there was evidence, which substantiated a conclusion that a service provider had ‘turned a blind eye’ to ‘red flags’ of obvious infringement. The court held that the absence of labels on the material was not a ‘red flag’ that the uploading user did not have authority to submit the content as the plaintiff claimed, because none of the allegedly infringing video files uploaded by users contained the plaintiff’s copyright notices. Nor did the professionally created nature of the submitted content constitute a ‘red flag’ of infringement *per se*, as it was not sufficient to impute the requisite level of knowledge or awareness to the defendant, when it was difficult to distinguish between professional and amateur production nowadays when video equipment is widely available to the general public. As to whether the absence of labels on the sexually explicit nature of the works was a ‘red flag’ of apparent copyright infringement, the court held that the defendant was not supposed to know that no legitimate producer of sexually explicit material would have omitted the requisite labels on the video clips in question. They quoted the judgment of *Perfect 10, Inc. v. CCBill LLC*<sup>432</sup> to support their decision.

Although it has been a decade since the Congress introduced the ‘red flag’ test, these are the only cases<sup>433</sup> that have considered the ‘red flag’ test as yet.<sup>434</sup> Unfortunately, the courts’ decisions were criticised as problematic and said to have provided a disincentive for ISPs to take technologically feasible measures to prevent infringing content from being made available.<sup>435</sup> For example, it was argued that in *Perfect 10, Inc. v. CCBill LLC* notices sent by Perfect 10 might have played a role in providing the defendants with ‘awareness of infringement’, although they were non-compliant

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<sup>431</sup> *Ibid.*

<sup>432</sup> *Perfect 10, Inc. v. CCBill LLC*, 488 F3d 1102, at 1114 (‘even “[w]hen a website traffics in pictures that are titillating by nature” and describes them as “illegal” or “stolen,” “[w]e do not place the burden of determining whether photographs are actually illegal on a service provider.”’)

<sup>433</sup> For example, *Corbis Corp. v. Amazon.com, Inc., CoStar Group, Inc. v. Loopnet, Inc.*, 164 F.Supp. 2d 688, *Perfect 10, Inc. v. CCBill LLC* and *Io Group, Inc. v. Veoh Networks, Inc.*

<sup>434</sup> The decisions of the courts that adopted a ‘red flag’ test do not bind other courts except the decision of U.S. Court of Appeals Ninth Circuit is binding in the Ninth Circuit, such as California, Arizona, Nevada, Idaho, Montana, Hawaii, Idaho, etc.

<sup>435</sup> Frank P. Scibilia & Vanessa G. Lan, ‘Whatever Happened to the “Red Flag” Test?: Knowledge of Infringing Activity on-and the Burden to Police-User-Generated Content Sites After *CCBill*, *Visa*, *Io* and *eBay*’, *Entertainment, Arts and Sports Law Journal*, Vol. 19, No.4, (Fall/Winter, 2008), pp.23-28

to constitute actual knowledge of infringement. As a matter of fact, Perfect 10 provided the defendants with plentiful notices, containing 22,185 pages of screen shots of infringing activities, cross-referenced by name of the adult model of the Perfect 10 in each photograph.<sup>436</sup> In addition, Thomas Fisher, the Executive Vice President of two defendants, who was also the designated agent to receive notices of infringement for two defendants, admitted during the deposition that information provided in the notices were sufficient to enable them to act.<sup>437</sup> If none of this evidence was sufficient to provide a reasonable person awareness of the ongoing infringing activities, it is hard to imagine what kind of evidence would qualify to do so. It seems that the *Perfect 10* court ignored the objective element of the ‘red flag’ test, i.e., whether all of the notices would have made infringing activity blatant so that a reasonable person in a similar situation to the defendants would have recognised that. Moreover, it is debatable that the immunity the court gave to the defendants by saying that the words ‘illegal’ or ‘stolen’ ‘may be an attempt to increase [the] salacious appeal’ of the content on these sites<sup>438</sup> would have a far-reaching effect. As Professor David Nimmer noted, ‘[w]ith the eponymously named “illegal” ruled inadequate to raise a red flag of illegality, it is difficult to imagine just how crimson one would have to be in order to qualify.’<sup>439</sup>

### 3.3.1.2 The Application of a Constructive Knowledge Standard

In contrast, other courts have considered ISPs’ ‘awareness of infringement’ under the traditional constructive knowledge standard when they were invited to decide ISPs’ ‘awareness of infringement’. The most frequently cited case is *A&M Records v. Napster, Inc.*<sup>440</sup> in which the District Court assumed that ‘reason to know’ was the equivalence of ‘awareness of facts and circumstances’ in its decision for preliminary injunction. To elaborate how the objective test for constructive knowledge was satisfied, the court listed certain conduct by Napster executives, including the Napster executives had recording industry experience, that they enforced intellectual

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<sup>436</sup> *Perfect 10, Inc. v. CCBill LLC*, 340 F. Supp. 2d 1077 (C. D. Cal. 2004), at 1112

<sup>437</sup> *Ibid.*, footnote 20.

<sup>438</sup> *Ibid.*, at 1114

<sup>439</sup> David Nimmer, §12B. 05[C][1] in *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (New York: M. Bender, 2002)

<sup>440</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)

property rights in other instances and also downloaded copyrighted songs from the system and they had promoted the site with ‘screen shots listing infringing files’.<sup>441</sup> Based on the findings, they held that the defendant had reason to know about the infringement of their users. Consequently, copyright liability existed while Napster was aware of the infringing activities through their executives’ conduct and failed to search the index and block all files that contained that particular work notified by the plaintiffs.

A similar approach was adopted in *ALS Scan v. RemarQ Communities, Inc.*<sup>442</sup> when the U.S. Court of Appeals Fourth Circuit read ‘awareness of infringement’ in Section 512 (c) (1) (A) (ii) as the description of a ‘should have known’ standard. The Fourth Circuit stated that the immunity provided by Section 512 of the U.S. Copyright Act was ‘not presumptive, but granted only to “innocent” service providers who can prove they do not have actual or constructive knowledge of the infringement, as defined under any of the three prongs of 17 U.S.C. § 512(c)(1).’<sup>443</sup> However, the defendant was not innocent when the notices by the plaintiff reached them and they became aware that a third party was using its system to infringe others’ copyright. The court accentuated in this decision that a right holder needed not specifically identify all particular instances of infringing copyright works at the site of the defendant when a number of copyright works were allegedly infringed. Section 512(c) (3) (A) (ii) of the U.S. Copyright Act only requires a notice that substantially but not perfectly complies with the prescribed format, therefore a notice by the right holder that provides representative list of infringed work on the site would suffice. To explain that, the court stated that,

‘[T]his subsection (Section 512(c) (3)(A)(ii)) specifying the requirements of a notification does not seek to burden copyright holders with the responsibility of identifying every infringing work — or even most of them — when multiple copyrights are involved. Instead, the requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works. Thus, when a letter provides notice equivalent to a list of representative works that can be easily identified by the service

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<sup>441</sup> *Ibid.*, at 1020.

<sup>442</sup> *ALS Scan v. RemarQ Communities, Inc.*, 239 F. 3d 619 (4th Cir. 2001)

<sup>443</sup> *Ibid.*, at 625.

provider, the notice substantially complies with the notification requirements.’<sup>444</sup>

Allowing a constructive knowledge of infringement to interpret ‘awareness of infringement’, the court concluded the defendant’s liability for failing to remove or block access to photos the plaintiff claimed.

Similarly, the District Court of *Hendrickson v. eBay, Inc.*<sup>445</sup> referred to ‘awareness of infringement’ stipulated in Section 512(c)(1)(A)(ii) as ‘constructive knowledge’ several times in its decision. As to whether the defendant had knowledge of the infringement, the court stated that ‘the limited information that the plaintiff provided to eBay cannot, as a matter of law, establish actual or constructive knowledge that particular listings were involved in infringing activity.’<sup>446</sup>

### **3.3.1.2 Appraisal of the American Approaches**

The foregoing examination of case law thus shows a confusing picture with the ‘awareness of infringement’ standard interpreted in different ways by the American courts. On the one hand, several courts applied the ‘red flag’ test provided by the legislative history and exempted ISPs from damage claim. On the other hand, other courts determined ISPs ‘awareness of infringement’ based on a constructive knowledge standard; though they do not necessarily need to follow the decision of the courts that adopted a ‘red flag’ test, in consideration of the authority of those court decisions. Both of the approaches have doctrinal grounds but each has its problem.

The application of the ‘red flag’ test does not require an ISP to seek out red flags<sup>447</sup> as it is technically impossible for an ISP to filter or monitor each of their millions of pages or other transactions conducted via its server for possible infringement. In

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<sup>444</sup> *Ibid.*, at 625

<sup>445</sup> *Hendrickson v. eBay, Inc.*, 2001 U.S. Dist. LEXIS 14420 (C.D. Cal. Sept. 4, 2001) (Hendrickson, a movie producer sued eBay based on the fact that infringing copies of his movie were auctioned through the auction site. The court found that the notice sent by the Hendrickson did not satisfy the requirements set forth by the DMCA, and therefore eBay was not obliged to take down those infringing copies. )

<sup>446</sup> *Ibid.*, at 1094.

<sup>447</sup> *Ibid.*

addition, such application excludes ISPs from ‘make[ing] discriminating judgments about potential copyright infringement’<sup>448</sup>. Thus, ISPs do not need to decide ‘whether all the elements of infringement are present - from proper ownership and standing to lack of licence (express or implied) to satisfaction of notice formalities (unless excused by national origin or otherwise), to the perennially murky issue of fair use, and beyond’<sup>449</sup>. Nevertheless, when the ‘red flag’ test has the benefit of excluding ISPs from monitoring and detecting potential infringement, it may create a ‘high bar’ for copyright holders to prove ISPs’ ‘awareness of infringement’. Additionally, there are many practical problems when applying this test into individual cases. For example, it is still arguable whether the passage addressed the safe harbour for information location tools cited at page 82-83 in 2.2.2.2 of Chapter 2 is equally applicable to the safe harbour for hosting service providers.<sup>450</sup> In addition, how to judge the flag is ‘red’. In fact, one person says that it is a ‘red flag’, which does not mean another person would agree. Moreover, content providers who offer unlawful contents may take advantage of the law and turn their ‘red flags’ into ‘pink flags’ or ‘orange flags’. Under such circumstance, even if ISPs are suspicious about the ‘flags’, they may have no incentive to take action as the ‘red flag’ test would always exclude them from liability. For ISPs who themselves are content providers, they may also take advantage of the law and may intentionally make the ‘flag’ (infringement) less red (blatant) to be noticed. For example, ISPs who have used obvious advertisements to attract users to visit their sites for downloading unauthorised copies of movies or music may change their advertising tactics so that their advertisements would be less likely to be qualified as ‘red flags’ and thus enable them to avoid awareness and liability.

The constructive knowledge standard is an essential element of the traditional contributory liability test, it has long been provided to copyright holders through case law in which both specific instances of infringement and generalised expectations of

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<sup>448</sup> H.R. Rep., II, p. 48

<sup>449</sup> David Nimmer, § 12B.04 [A] [2] [b] in *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (New York: M. Bender, 2002), at 12B-04[A] [2] [a].

<sup>450</sup> David Nimmer, *Copyright: Scared Text, Technology, and the DMCA* (New York: Kluwer Law International, 2003), pp. 362-363.

infringement are permitted to satisfy the knowledge standard. Therefore, it provides more scope for the courts to decide the state of mind of ISPs. The constructive knowledge standard requires courts to assess, firstly, whether an ISP has perceived facts or circumstances that were suspicious or from which the infringement was evident and secondly, whether the ISP has conducted a reasonable third person' test to investigate the existence of the infringement. Therefore, it has a lower threshold than that of the 'red flag' test. However, the weakness of the constructive knowledge standard is that finding constructive knowledge of an ISP may imply that an advanced monitoring program is needed to detect infringing activity. This accordingly raised a problem against the provision of Section 512 (m) of the U.S. Copyright Act in which the statute explicitly states that an ISP is not obliged to 'monitor[ing] its service or affirmatively seek[ing] facts indicating infringing activity'.

While both approaches have their benefits and weaknesses, it is difficult for the court to decide whether they should follow the interpretations of the legislative history or the standard developed through case law. The diverging outcome of the case law and the separating views of the courts however raise a question as to whether the 'red flag' test has indeed been the practical approach while copyright piracy is widespread with the support of more tactical equipment and Internet technologies.

### **3.3.2 The German Interpretation of the 'Awareness of Infringement' Standard**

Unlike its American counterpart, Germany has neither provided clarification as to what constitutes 'awareness of infringement' in its parliamentary materials<sup>451</sup>, nor has Germany had a contributory liability concept in its tort law system that can be referred to explicate the 'awareness of infringement' standard. Although recital 40 of the Electronic Commerce Directive<sup>452</sup> was of assistance, the evaluation of the ISPs'

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<sup>451</sup> For example, A Draft Law Regulating the Framework of Information and Communications (Information and Communication Services Act - IuKDG) (BT-Drucksache 13/7385, 1997), available at: <http://drucksachen.bundestag.de/drucksachen/index.php>

<sup>452</sup> Recital 40 of the Electronic Commerce Directive reads, '[B]oth existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have



‘awareness of infringement’ standard depended on the interpretation of the courts that dealt with ISP liability cases.

So far, the German courts have not established a unified requirement for ‘awareness of infringement’. However, in cases involving various liability issues from trade mark, copyright to defamation, the same common sense result reached by courts is that a generalised knowledge of infringement would satisfy the knowledge arm of ‘awareness of infringement’.

For instance, in two leading trademark cases, the German courts affirmed that specific knowledge of individual instances of infringement is not needed to establish ISPs’ ‘awareness of infringement’. Instead, if the infringement is serious and widespread, it is more likely that the ISP knows about the infringement. In *Rolex v. Ricardo*<sup>453</sup>, Rolex initiated proceedings against Ricardo for trade mark infringement by auction listings of counterfeited goods posted on its website. The court held that as the goods were explicitly designated as ‘noble repliqua’, this was indication that counterfeit products being offered on the site of the defendant. In addition, a press release issued by Rolex in 1999 regarding counterfeit branded watch Relox should also be deemed as evidence that the defendant had the awareness that trademark infringement had occurred on its site of ‘ricardo.de’. With such awareness, the defendant was obliged not only to block the specific offer that was explicitly labelled as ‘imitations’ by one of its users, but also to take necessary measures to prevent further blatant infringement so that similar infringing offers would not appear again on its site.

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a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.’

<sup>453</sup> *Rolex S.A. v. Ricardo*, I ZR 304/01 (BGHZ, 2004, November 3) (BGHZ 158, 236 = GRUR 2004, 860 = NJW 2004, 3102; reported in English at [2005] IIC 573); 1 ZR 73/05 (German Federal Supreme Court, 2008, April 30).

Another case initiated also by Rolex against eBay<sup>454</sup> for trademark infringement has again highlighted the question as to how the ‘awareness of infringement’ can be determined for liability of an Internet auction platform. The court endorsed the principle as applicable by the case of *Rolex v. Ricardo.de*, and held that counterfeiting and infringement on eBay was so pervasive that it would sufficient to come to eBay’s attention and establish their ‘awareness’ of widespread infringements. An injunction could be granted to the plaintiff against eBay to stop the infringement because not only there had already been an infringement, but also there was an imminent threat of infringement.<sup>455</sup> Although the German Supreme Court did not hold eBay liable for trademark infringement committed by the third parties offering counterfeit products through their auction website, they, however, confirmed that eBay as an auction website operator had a duty to prevent such infringement from happening in the future. In terms of the ‘awareness of infringement’ standard, the court appears to have adopted an approach which is similar to the constructive knowledge standard of contributory liability in the United States of America as they did not require eBay’s specific knowledge of infringement in order to take action to prevent future infringement.

Similar conclusions were reached by the courts in several copyright liability cases. For example, the Regional Court of Berlin (*LG Berlin*)<sup>456</sup> approved liability of the operator of a Meta - search engine - on the basis that the illegal entries displayed in its search results had already been subject to warnings, hence they should have had the awareness that linking to those unlawful entries might result in further infringement. Although the Superior Court of Justice of Berlin (*Kammergericht Berlin; KG Berlin*)<sup>457</sup> overturned the injunction of the Regional Court and held that liability of a Meta search engine - should be only based on its actual knowledge of the unlawful act when they were only the equivalent of a primary navigation aid, the court did not negate that the defendant had awareness of unlawful activity.

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<sup>454</sup> *Rolex S.A. v. eBay. GmbH*, 1 ZR 35/04 (German Federal Supreme Court, 2007, April 19) (reported in English at [2007] European Trade Mark Report 70)

<sup>455</sup> *Ibid.*, [2007] ETMR 70 at 41

<sup>456</sup> *LG Berlin*, CR 2005, 530 = MMR 2005, 324.

<sup>457</sup> *KG Berlin*, MMR 2006, 393.

Notably, the German courts in the foregoing cases undertook a lower threshold - the 'should know (have reason to know)' standard - to assess the defendants' 'awareness of infringement' when the law did not define how much knowledge is required to establish 'awareness of infringement'. In the view of the courts, the following factors should be considered in order to make the evaluation: notices, goods designated as 'noble repliqua' or any similar name, experience of the defendant as a professional dealer and the defendant's knowledge gained from previous instances of infringement. All these elements would be sufficient to constitute information about the general volume of infringement on the defendant's site and to establish the defendant's 'awareness of infringement' - the occurrence of infringing activities on site. The German interpretation of 'awareness of infringement' based on the 'should know (have reason to know)' standard provided courts more flexibility to decide whether an ISP had awareness of infringement from different point of views.

Unlike the American 'red flag' test, the application of the 'should know (have reason to know)' standard is very likely to hold an ISP liable even if infringing activity is not apparent to them. Under the 'should know (have reason to know)' standard, the court only needs to assess the ISP's subjective judgment on the infringing activity, instead of assessing whether the infringing activity ('red flag') has been blatant in the face of an ISP. Hence, for ISPs who want to escape from such liability, it would imply that they must take preventive measures when they are expected to have a reasonable duty to review the existence of any potential infringement of the same kind that was previously noticeable. Such an implied duty to review may have two major implications. The first implication concerns that a general obligation may impose on ISPs to monitor Internet content even if ISPs are prohibited to monitor any potential infringing content by Article 15 of the ECD and the TMG. It is likely that ISPs will be motivated to implement measures to monitor content so that they can escape from liability based on such implementation. However, for the majority of small ISPs, who have limited funds to invest on monitoring system, this may imply an enormous threat of potential liability upon them.

In addition, ISPs' monitoring may also result in ISPs' overzealous censorship. When ISPs are increasingly become targets of copyright lawsuits and held liable for copyright violation, they may be motivated to limit their services and if necessary, they may censor the linked results or their contents. Such a 'chilling' effect may lead to the denial of public access to information and fair use of copyright works.

### **3.3.3 The Chinese Interpretation of the 'Awareness of Infringement' Standard**

Although the 'awareness of infringement' standard is termed differently in the Chinese law, the standard applied to evaluate such awareness - the 'should know (have reason to know)' standard - is similar to that of the German courts. After several years' judicial practice, the 'should know (have reason to know)' standard has now been widely accepted by the courts and it has played a role in deterring copyright infringement.<sup>458</sup>

#### **3.3.3.1 The Interpretation of 'Awareness of Infringement' in a Search Engine or Linking Services Liability Context**

The landmark case, interpreted the 'should know (have reason to know)' standard in the context of search engine or linking service liability, is *EMI Group Hong Kong Ltd, et al. v. Yahoo! China*. With claims that had very similar fact patterns, the recording companies lost their cases in the previous *Baidu* case. Therefore, they hailed the *Yahoo! China* ruling as a turning point that provided an explicit legal basis for the court to require Chinese music search engines to remove infringing links from the services.<sup>459</sup>

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<sup>458</sup> Jinchuan Chen, the chief judge of the Intellectual Property Court of the Beijing Higher People's Court pointed out in his speech at the Seminar on 'Network Infringement and the Enactment of the Tort Liability Act' that, the 'should know (have reason to know)' standard has helped the court to determine ISPs' knowledge of infringement. In the absence of such standard, many cases would be overturned because it was so difficult to determine ISPs' actual knowledge of infringement.

<sup>459</sup> IFPI (2007, December 20), 'Beijing Court Confirms Yahoo China's Music Service Violates Copyright' [WWW document] URL [http://www.ifpi.org/content/section\\_news/20071220.html](http://www.ifpi.org/content/section_news/20071220.html) (visited 2008, July 18); Steve McClure, (2007, December 20), 'China Court Rejects Yahoo China's "Deep Linking" Appeal', [WWW document] URL [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i3ed206b8d3c0733b23120a461b4581f2](http://www.billboard.biz/bbbiz/content_display/industry/e3i3ed206b8d3c0733b23120a461b4581f2) (visited 2008, July 18); Andrew Orłowski, (2008, January 3), 'Music Industry Hails China Deep-

In the *Yahoo! China* case, the Beijing Second Intermediate People's Court overturned the formula formed in the *Baidu* case that ISP copyright liability is established only when, *inter alia*, an actual knowledge requirement is satisfied. Based on Article 23<sup>460</sup> of the Regulations, the *Yahoo! China* court held that,

[U]pon receipt of the notice, the defendant should have obtained relevant information regarding copyright ownerships of the plaintiffs to the audio works and the information regarding the infringing songs. And the defendant should also have known that result of search engine and linking provided by its music search engine service contained the content that infringed the sound recording right of the plaintiffs. However, the defendant only removed three URL addresses provided by the plaintiffs and failed to fulfill its duty to remove other infringing hyperlinks that were connected to the same songs, and hence allowed further infringement to those songs. Given that the defendant was at fault and assisted infringement of others on the Internet, the defendant should be held liable.<sup>461</sup>

Contrary to the *Baidu* case, the *Yahoo! China* court took the position that the 'should know (have reason to know)' standard would suffice to establish a search engine provider's liability for copyright infringement. The court adopted a broad interpretation as to what constitute the 'should know (have reason to know)' standard and explicated that a notice accompanied with all required information<sup>462</sup> would constitute an ISP's actual knowledge of the specific infringing activities. Additionally, the court held that such a notice would also impute 'awareness of infringement' to an ISP that the ISP should have known other relevant infringing facts and upon such awareness, the ISP had a duty to make a further check. Having specified the requirement of the 'should know (have reason to know)' standard, the court extended the search engine provider's duty from deletion of the hyperlinks

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linking Victory', [WWW document] URL  
[http://www.theregister.co.uk/2008/01/03/china\\_mp3\\_copyright/](http://www.theregister.co.uk/2008/01/03/china_mp3_copyright/) (visited 2008, July 18).

<sup>460</sup> Article 23 of the Regulations on the Protection of the Right of Communication through the Information Networks reads: '[W]here a network service provider that provides search engine or linking service to its subscribers, disconnects the links to the infringing works, performances, sound recordings or video recordings upon receipt of the right owner's notification according to these Regulations, it shall not be liable for damages; where it knows or has reasonable ground to know that the linked works, performances, sound recordings or video recordings infringe another person's rights, it shall be jointly liable for the infringement.'

<sup>461</sup> *EMI Group Hong Kong Ltd, v. Yahoo! China.*, No. 02631 (the Beijing Second Intermediate People's Court, 2007)

<sup>462</sup> Article 14 of the Regulations on the Protection of the Right of Communication through the Information Networks

specified in a notice of the right holder to deletion of all the hyperlinks that connected to unauthorised works. Hence, the interpretation of the 'should know (have reason to know)' standard in this case is that the search engine provider should have known of widespread infringement through notices by right holders and therefore take measures to eliminate them. When a search engine provider should have known the infringing nature of the links and still decided to maintain the infringing links, they should be considered as having subjective fault and be held liable.

In fact, the *Yahoo! China* case was very similar to the *Baidu* case. In both cases, Baidu and Yahoo!China provided MP3 search and indexing services, one of which was a highly specified MP3 search service. When an Internet user searched the titles of popular music with the keywords, the MP3 search service displayed a list of links to those music files that had the same or similar titles, the description of the artist, size, format (MP3, WMA or RM). The connection speed of the linked files were also provided on the same page. When the user clicked on the link, music files then could be downloaded to the computer of the user from the website where the music files were stored. In addition, Baidu and Yahoo!China organised a catalogue of the popular artists and music charts and provided links pointing to these music files. The user could enter any chart and find a list of music files. If the user clicked the name of a popular artist in the catalogue, music files arranged in alphabetical order by song titles would be displayed. To activate the downloading of a particular song, the user simply needed to click the title of the song. By offering the afore-mentioned services, Baidu and Yahoo!China were both sued by recording labels.

In the lawsuit against Baidu, the court sided with Baidu and ruled that Baidu was not liable for providing and keeping the links that were infringing, owing to that the plaintiffs failed to establish Baidu's knowledge of infringement by presenting a detailed written notice which should have clearly stated the URL addresses of the infringing websites and other required information. It may not be surprising to learn the outcome, if we compare this case with the *Yahoo!China* case, as they made the decision on a different legal basis. However, relying on the same Judicial

Interpretation, the courts in China have been inconsistent in their interpretation with respect to the requirements of search engine provider's liability. In a similar case against Baidu<sup>463</sup> decided earlier, another court had made an opposite decision in which Baidu was held liable for infringing the plaintiff's copyright on forty-six songs recordings. The diverging judgments were criticised as the result of vagueness and ambiguity of the Judicial Interpretation.<sup>464</sup>

In the *Yahoo! China* case, the identical facts were that, prior to the lawsuit; the plaintiffs - eleven recording giants - had also sent a list of names of their artists and titles of their copyright protected songs to Yahoo! China and requested the removal of all the links to sound recording files which contained those names as well as titles. However, Yahoo! China had only removed those links with specific URL addresses and refused to remove other links that had no specific URL addresses. Applying Article 23 of the Regulations, the *Yahoo! China* court reached a different conclusion and held Yahoo! China liable for copyright infringement by providing 'deep links' to a total of two hundred and twenty-nine unauthorised copyright protected songs on third party websites. The *Yahoo! China* decision was commented to be a remarkable ruling,<sup>465</sup> in particular when China hosted 'some very large unlicensed music delivery services that deep link to unauthorised song files and derive advertising

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<sup>463</sup> *Shanghai Busheng Music and Culture Dissemination Ltd. v. Baidu Network Information Technology Ltd.*, No. 14665 (the Beijing Haidian District People's Court, 2005); *Baidu Network Information Technology Ltd. v. Shanghai Busheng Music and Culture Dissemination Ltd.*, No. 2491 (the Beijing First Intermediate People's Court, 2006)

<sup>464</sup> Zhiwen Liang, *Discussion on Digital Copyright – Centred on the Regulations on the Protection of the Right of Communication through the Information Networks*, (Beijing: Intellectual Property Press, 2007), p. 251; Shaoping Chen, 'Liability of MP3 Search Engine Service Provider – Analysis of the Decisions of the Appealing Courts in the *Baidu* and *Yahoo! China* Cases', *Electronics Intellectual Property*, Vol. 8, (2008), pp. 28- 31, p. 30; Wushuang Huang, 'Discussion on the Tort Liability of a Search Engine Service Provider', *Intellectual Property*, Vol. 17, No. 5, (2007), pp. 9-14, p.12; Xin Liang, 'The Network Service Provider's Duty to Review', *People's Jurisdictions – Cases*, Vol. 14, (2007), pp. 23-25, p. 24.

<sup>465</sup> Shaoping Chen, 'Liability of MP3 Search Engine Service Provider – Analysis of the Decisions of the Appealing Courts in the *Baidu* and *Yahoo! China* Cases', *Electronics Intellectual Property*, Vol. 8, (2008), pp. 28- 31, p. 30; Guanbin Xie and Xueqin Shi, 'Fair Definition on Fault Liability of Internet Searching Service Provider', *Intellectual Property*, Vol. 1, (2008), pp. 34-37, p.36; Qian Wang, 'Discussion on the Determination of Indirect Liability of the Information Location Tool Provider – and Compare the Decisions of the *Baidu* and *Yahoo! China* Cases', *Intellectual Property*, Vol. 4, (2007), pp. 3-8, p. 6; August Zhang and Landy Jiang, 'Beijing Court Rules Yahoo! China's Music Service Liable for Copyright Infringement', *Journal of Intellectual Property Law & Practice*, (2008), pp.1-2, p. 2.

revenue<sup>466</sup> where Baidu and Yahoo! China are two largest companies offering such services that are available throughout the world and particularly popular in Asia. The *Yahoo! China* ruling has tremendously encouraged both the domestic and international copyright industry.<sup>467</sup> As a result, a Chinese music industry group lodged complaint against Baidu over alleged copyright violation in January 2008.<sup>468</sup> Several major international record labels also moved into a second round of legal action against Chinese search engine services - Baidu and Sohu - in February, 2008.<sup>469</sup>

### 3.3.3.2 The Interpretation of ‘Awareness of Infringement’ in a Host Services Liability Context

Apart from cases in relation to liability of search engine or linking service providers, a number of host service liability cases have also applied the ‘should know (have reason to know)’ standard in deciding ISPs’ ‘awareness of infringement’. These

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<sup>466</sup> IFPI. (2008). ‘Digital Music Report 2008’ [WWW document] URL <http://www.ifpi.org/content/library/DMR2008.pdf> (visited 2008, May 20), p18.

<sup>467</sup> Fang Wang, (2008, February 26), ‘Baidu Being Sued Again’, [WWW document] URL [http://www.legaldaily.com.cn/2007fycj/2008-02/26/content\\_803908.htm](http://www.legaldaily.com.cn/2007fycj/2008-02/26/content_803908.htm) (Chinese Version) (visited 2008, May 3); Graham Webster, (2008, March 2), ‘Chinese Music Industry Group Sues Baidu over Infringement’, [WWW document] URL [http://news.cnet.com/8301-13908\\_3-9883910-59.html](http://news.cnet.com/8301-13908_3-9883910-59.html) (visited 2008, October 24); Ming Chang (2008, April 10), ‘Four Recording Giants Sued Baidu, Sohu, Claiming More Than One Hundred Million RMB’, [WWW document] URL <http://bjgy.chinacourt.org/public/detail.php?id=63475> (Chinese Version) (visited 2009, February 24)

<sup>468</sup> The Music Copyright Society of China initiated proceeding against Baidu in the Beijing Haidian People’s Court in January 2008, accusing Baidu.com of using 50 songs illegally on its website and demanding compensation. The case is now pending for further investigation after the first court hearing in November 13 2008. Further discussion on this see, the Music Copyright Society of China, ‘The Case of *the Music Copyright Society of China v. Baidu* was Heard by Court Days Before’, [WWW document] URL <http://www.mscs.com.cn/html/news/news.htm> (Chinese Version) (visited 2009, February 24)

<sup>469</sup> Universal Music Ltd, Sony BMG Music Entertainment Hong Kong Ltd and Warner Music Hong Kong Ltd brought an action against Baidu for copyright violation and asked the court to order Baidu to remove all links to copyright infringing tracks to which they hold the rights. Sony BMG Music Entertainment Hong Kong Ltd, Warner Music Hong Kong Ltd, Gold Label Entertainment Ltd and Universal Music Ltd. also filed their claims against Sogou, the Chinese music delivery service operated by Sohu Inc, for participating in mass copyright infringement. The Beijing First Intermediate People’s Court agreed to hear these two damages claim cases. At the time of writing this thesis, there is no update regarding the status of these two cases. Further discussion on this see, Duncan Riley, (2008, February 6), ‘Record Companies Try Suing Baidu Again’, [WWW document] URL <http://www.techcrunch.com/2008/02/06/record-companies-try-suing-baidu-again/> (visited 2008, October 24); Sophie Taylor, (2008, February 5), ‘Warner, Universal Take Action against Baidu’, [WWW document] URL <http://www.reuters.com/article/technologyNews/idUSSHA21536420080205> (visited 2008, May 3); Ming Chang (2008, April 10), ‘Four Recording Giants Sued Baidu, Sohu, Claiming More Than One Hundred Million RMB’, [WWW document] URL <http://bjgy.chinacourt.org/public/detail.php?id=63475> (Chinese Version) (visited 2009, February 24)



cases further exhibited the strength of the ‘should know (have reason to know)’ standard.

For instance, in *Xinchuan Online (Beijing) Information Technology Ltd. v. Shanghai Full Potato Network Technology Ltd* (‘*Todou.com*’)<sup>470</sup>, the court imposed liability of the ‘*Tudou.com*’ on its ‘wilful blindness’ of the unauthorised contents, not on notice of the right holder. In the first instance, the Shanghai First Intermediate People’s Court noted that the defendant, ‘*Todou.com*’ as a leading video-sharing website<sup>471</sup> that hosted movies, music and other entertaining products, had a duty of care to ensure that copyright protected materials uploaded by users were not being distributed via its platform. In addition, the defendant had the responsibility to prevent the dissemination of the works when it had reason to know that those uploads were infringing. In determining whether the ‘should know (have reason to know)’ standard was met, the Shanghai First Intermediate People’s Court considered the following facts:

- 1) The defendant not only allowed users to upload content on virtual storage space and make them publicly available, but also provided catalogue of ‘original works’, ‘entertainment’, ‘music’, ‘movie and television’, ‘game’, etc. Although the purpose of the arrangement as the defendant argued was for performing easy-uploading, easy-searching and easy-checking the contents, it however facilitated the dissemination of the infringing content.
- 2) The defendant divided ‘original works’ and ‘movie and television’ into different sections, which indicated that the defendant was aware that copyright infringement might occur when users uploaded unauthorised popular movies and television programs to its site.

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<sup>470</sup> *Xinchuan Online (Beijing) Information Technology Ltd v. Shanghai Full Potato Network Technology Ltd*, No. 129 (the Shanghai First Intermediate People’s Court, 2007); *Shanghai Full Potato Network Technology Ltd v. Xinchuan Online (Beijing) Information Technology Ltd*, No. 62 (The Shanghai Higher People’s Court, 2008).

<sup>471</sup> IResearch (2009, July 2), ‘IResearch iUser Tracker: May 2009 Data Launch for Industry of Video Sharing Sites’, [WWW document] URL <http://news.iresearch.cn/viewpoints/96871.shtml> (visited 2009, July 30); Freedom House (2008), ‘Special Report Section: Freedom on the Net: A Global Assessment of Internet and Digital Media - China’, [WWW document] URL [http://www.freedomhouse.org/printer\\_friendly.cfm?page=384&key=197&parent=19&report=79#\\_ftn13](http://www.freedomhouse.org/printer_friendly.cfm?page=384&key=197&parent=19&report=79#_ftn13) (visited 2008, December 20).

- 3) The defendant as a professional video-sharing service provider, particularly for movie and television program sharing, should have the common sense that right holder of a copyright work would not make an recently released movie or album/single available for free downloading.
- 4) According to the defendant, they had a panel to conduct prior review for all those uploads so that only legitimate content would be allowed to distribute. By so doing, the defendant should have known that the movie 'Crazy Stone' the plaintiff claimed was a box-office hit and the upload of the movie on its site might be unauthorised.

Applying Article 22 of the Regulations, the court concluded that it was obvious that the defendant as a host service provider for video sharing had reason to know that the movie claimed was an infringing work, and then had the duty to investigate whether the suspicious content was in fact infringing others' copyright. The defendant however failed to take measures to eliminate the infringement and 'turned a blind eye' to the infringing content. The court therefore ruled that the defendant was at fault and should be held liable. Significantly, the court raised a crucial point as to the irrelevance of notice by right holders in establishing a host service provider's knowledge of the infringement. To that, the court held that

[N]otice was not relevant in this case, as only when the ISP did not know or had no reason to know that the materials provided by its users were infringing, the right holder needed to submit a written notice to the ISP so that the ISP could be alarmed and could take action to remove the infringing content.

It is indicated in this case that the court has expanded the interpretation of the 'should know (have reason to know)' standard in the context of search engine or linking service liability to a point that host service providers should pay more attention on their duty to review the content as the probability of the infringement would be high on their platform and therefore the infringing content are more noticeable.

In a later case - *Wangle Hulian (Beijing) Technology Ltd v. Shanghai Full Potato Network Technology Ltd ('Todou.com')*<sup>472</sup> - where 'Tudou.com' was again sued based on the very similar facts, the court shared the same view and again held that 'Tudou.com' 'turned a blind eye' to the movie 'Brotherhood Alliance of Life and Death' the plaintiff claimed because they should have known that the movie which had several super stars participated could be an unlicensed upload since it had been uploaded to its site only three days later after the official release of the movie. As such, *Beijing GuangDian Weiye Film and Television Cultural Centre v. Ku Liu Net (Beijing) Information Technology Ltd. (Ku6.com)*<sup>473</sup> , *Shanghai Jidong Telecommunication Ltd. v. Ku Liu Net (Beijing) Information Technology Ltd. (Ku6.com)*<sup>474</sup> reached similar conclusions, as both *Ku6.com* and *Tudou.com* are top Chinese video sharing sites and copyright infringement on both site are having similar features. Furthermore, in the decision of the appellate court in *Ninbo Success Mutli-Media Telecom Ltd. v Beijing Alibaba Information Technology Ltd. (Yahoo! China)*<sup>475</sup> , the Beijing Second Intermediate People's Court adopted the same interpretation of the 'should know (have reason to know)' standard and reversed the decision of the lower court. By putting the focus on 'whether the defendant did not know or had no reason to know that the claimed TV Series uploaded by its users were infringing'<sup>476</sup>, the precise type of constructive knowledge that the court of the first instance found irrelevant was considered as probative by the Beijing Second Intermediate People's Court. They noted that the exemption of liability for Yahoo! China given by the lower court was based on two findings: 1) the defendant had only provided information storage services that only stored the reference video coding of the TV Series 'The Struggle' and not the video itself. 2) the defendant had promptly

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<sup>472</sup> *Wangle Hulian (Beijing) Technology Ltd v. Shanghai Full Potato Network Technology Ltd*, No. 438 (the Shanghai PuDong New District People's Court, 2008); *Shanghai Full Potato Network Technology Ltd v. Wangle Hulian (Beijing) Technology Ltd*, No. 16 (the Shanghai First Intermediate People's Court, 2009)

<sup>473</sup> *Beijing GuangDian Weiye Film and Television Cultural Centre v. Ku Liu Net (Beijing) Information Technology Ltd*, No. 14025 (the Beijing Haidian District People's Court, 2008)

<sup>474</sup> *Shanghai Jidong Telecommunication Ltd v. Ku Liu Net (Beijing) Information Technology Ltd*, No. 24750 (the Beijing Haidian District People's Court, 2008)

<sup>475</sup> *Ninbo Success Mutli-Media Telecom Ltd v. Beijing Alibaba Information Technology Ltd*, No. 4679 (the Beijing Chaoyang District People's Court, 2008); No. 19082 (the Beijing Second Intermediate People's Court, 2008)

<sup>476</sup> *Ninbo Success Mutli-Media Telecom Ltd v. Beijing Alibaba Information Technology Ltd*, No. 19082 (the Beijing Second Intermediate People's Court, 2008)

deleted the reference video coding after being notified by the plaintiff. The Beijing Second Intermediate People's Court accentuated that the lower court, however, overlooked the fact that the time when the defendant provided storage for Episode 1 to 15 of the TV Series 'The Struggle' was exactly the same time as the TV Series premiered in Beijing. This meant that the defendant should have known that this TV Series was a recent release and it would be impossible for the right holder to allow the TV Series being viewed freely on the Internet as the same time as it was being played on a licensed TV channel. In addition, the lower court failed to identify that the defendant had also publicised and promoted the distribution of the TV Series 'The Struggle' on its front page apart from having provided storage for the unauthorised TV Series. Differed with the lower court, the Beijing Second Intermediate People's Court ruled that the findings sufficed to establish the defendant's 'awareness of infringement' and trigger copyright liability of the defendant under the reading of Article 22 of the Regulations.

From the above case analysis, it suffices to say that there are sufficient instances where the 'should know (have reason to know)' standard set forth in the Regulations is well accepted as a basis for the imposition of ISP copyright liability, in particular for liability of host service providers and search engine or linking service providers. While the law of tort provided a solid foundation for the 'should know (have reason to know)' standard, the Chinese courts have further developed the interpretation in a different liability context. The formulation established in the context of liability of hosting service, search engine or linking service providers is that the 'should know (have reason to know)' standard may be satisfied when an ISP receives a notice that contains basic information regarding infringement without explicating URL addresses of the infringing contents. Whereas under certain circumstances, an ISP's 'awareness of infringement' may be inferred through observation of facts and circumstances which would lead a reasonable person, through the exercise of reasonable care, to know about objectively high risk or existence of infringement. Upon such knowledge, the ISP is required to review infringing content provided in notices, but is also required to take necessary measure to eliminate future infringement of a similar kind. The courts accentuated that such a duty may be

decided on a case-by-case basis. Nevertheless, acknowledgment on the practicability of the ‘should know (have reason to know)’ standard does not necessarily exclude the possibility of further improving such a standard in practice. In fact, the courts could establish a refined knowledge standard by considering other elements such as the extent of ISPs’ involvement in their users’ acts, the level of their control over their users’ infringement and financial interests ISPs obtain from their users’ infringement. By so doing, the judiciary would be able to create a balanced environment.

### **3.3.3.3 Several Relevant Issues**

While a number of cases have provided substantial evidence of the far-reaching effect of the ‘should know (have reason to know)’ standard in a Chinese ISP copyright liability context, several related issues are yet to be examined to further ascertain that such standard is, *inter alia*, an essential and practical means to decide ISP copyright liability.

#### **3.3.3.3.1 The High Level of Internet Piracy in China**

It is submitted that the ‘should know (have reason to know)’ standard has enabled the Chinese courts to assess ISPs’ ‘awareness of infringement’ when their actual knowledge were not justified. As copyright piracy still remains the single greatest threat to copyright industry in the Chinese Internet territory, such a standard is even more important. According to the annual statistics of the China Internet Network Information Centre,<sup>477</sup> China has now overtaken the United States of America as the world number one nation in Internet users. The increase of the Internet population and the penetration of broadband establish the potential for a prosperous legitimate digital music market. Nevertheless, online copyright piracy is also booming in China.

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<sup>477</sup> China Internet Network Information Centre. (2009, January 13) ‘The 23rd Statistical Survey Report on the Internet Development in China’. [WWW document] URL <http://www.cnnic.cn/uploadfiles/pdf/2009/1/13/92458.pdf> (visited 2009, February 1) (According to the statistics of the China Internet Network Information Centre (CNNIC), the number of Internet users in China has raised to 298 million by the end of June, 2009.)

Taking Internet music as an example, according to the 2009-2010 China's Digital Music Industry Report<sup>478</sup> released by IRsearch that China's online music market grew 8.2% in 2009, reaching 140 million RMB (approximately 12.5 million Pound Sterling)<sup>479</sup>. 90% of the Chinese Internet users opted for obtaining music from the Internet rather than buying CDs, Tapes from shops or through other means. Nevertheless, the research also shows that 94.1% of the Chinese Internet users did not pay for music content they downloaded from the Internet in 2008 and the habit of paying for Internet music content has not been developed. This suggests that there might be a huge Internet market in China where the users can find unauthorised, free music content. In addition, according to the IFPI Digital Music Report<sup>480</sup>, 99% of the music downloaded in China violates copyrights. Baidu, Yahoo!China, Sohu-Sogou are among those that provided specialised 'deep link' services to massive infringing copyright music content. As a result, a potential huge music market in China has been strangled at the hands of online music piracy.<sup>481</sup> Although the Chinese government has made a number of commitments to improve legislation to crack down on rampant copyright infringement over the Internet,<sup>482</sup> the piracy level in China remains unprecedentedly high. To regulate online music content, China's Ministry of Culture issued a new online music policy<sup>483</sup> on 3 September 2009 that requires all online music business services must have an 'Online Cultural Business' license and obtain approval for disseminating music products which have been audited by the Ministry of Culture and given subsequent approval. This new policy is expected to reduce the level of music piracy and the implication of this policy in

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<sup>478</sup> The 2009-2010 China's Digital Music Industry Report (IRsearch, China: 2009)

<sup>479</sup> The calculation is based on the foreign currency exchange rate on 23 October 2009: British Pounds Sterling: Chinese RMB = 1: 11.18

<sup>480</sup> IFPI. (2008). 'Digital Music Report 2008' [WWW document] URL <http://www.ifpi.org/content/library/DMR2008.pdf> (visited 2008, April 29), p.18.

<sup>481</sup> Sean Mok, 'Slowing China's Internet Piracy', China Brief, (2009, July/August), pp. 15-17, p. 17;

<sup>481</sup> IFPI. (2008). 'Digital Music Report 2008' [WWW document] URL <http://www.ifpi.org/content/library/DMR2008.pdf> (visited 2008, April 29), p.18; IIPA. (2009, April 30). 'IIPA 2009 "Special 301" Recommendations - IIPA Statement on USTR's Decisions in its 2009 Special 301 Review Affecting Copyright Protection and Enforcement around the World. [WWW document] URL <http://www.iipa.com/pdf/IIPASTatementonUSTRs2009Special301Decisions043009.pdf> (visited 2009, May 22)

<sup>482</sup> See discussion in 2.4.4 of Chapter 2.

<sup>483</sup> Notification from the Ministry of Culture on Strengthening and Improving the Review of Online Music Content (The Ministry of Culture, China: September 2009)

particular to search engine services, such as Baidu, which is estimated<sup>484</sup> to have 80% of traffic from music search, is that they must ensure that all music links are from legitimate music websites, otherwise they will be held liable.<sup>485</sup>

Inevitably, copyright litigation increases with the widespread copyright infringements over the Internet. Based on the report of the Supreme People's Court, in 2008 the Chinese courts heard over 20806 intellectual property cases, a large portion of them were in relation to Internet copyright infringement. At this juncture, the 'should know (have reason to know)' standard could be even more needed while litigation against ISPs that assisted or facilitated copyright infringement remains, among other things, a vital approach to tackle the growing problem.

### **3.3.3.3.2 A General Obligation to Monitor**

As discussed earlier in 3.3.2, the 'should know (have reason to know)' standard has been applied by the German courts in order to determine ISPs' 'awareness of infringement'. However, an implied duty to monitor under the 'should know (have reason to know)' standard made such a standard challengeable because it is against the 'no obligation to monitor' principle laid down by the Electronic Commerce Directive and the German TMG. This therefore raised a similar question as to whether the application of the 'should know (have reason to know)' standard in a Chinese ISP copyright liability context has the same adverse effect.

When 'no general obligation to monitor' as a basic principle has been widely acknowledged by other jurisdictions, nowhere in the Chinese legislation prohibited a monitoring obligation except in one occasion that the Beijing Second Intermediate

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<sup>484</sup> According to Tian Hou, an analyst of Pali Research, 80% of Baidu's traffic is from music search. Baidu's CEO however denies reports that Baidu received 30% to 40% of its search traffic from searches for pirated music. See Mathew D, (2009, September 4), 'China's Potential Crackdown on Music Piracy', [WWW document] URL <http://www.theglobaloutpost.com/archives/28> (visited 2009, September 5); Sina Tech, (2009, September 18), 'Baidu Denies 40% of Traffic from Music Search', [WWW document] URL [http://www.marbridgeconsulting.com/marbridgedaily/2009-09-18/article/29733/baidu\\_denies\\_40\\_of\\_traffic\\_from\\_music\\_search](http://www.marbridgeconsulting.com/marbridgedaily/2009-09-18/article/29733/baidu_denies_40_of_traffic_from_music_search) (visited 2009, September 5)

<sup>485</sup> Qiao Chen, (2009, September 5), 'New Regulations for Online Music Management was Introduced, Baidu and Others are Among the Monitored Sites', [WWW document] URL [http://news.xinhuanet.com/internet/2009-09/05/content\\_11999817.htm](http://news.xinhuanet.com/internet/2009-09/05/content_11999817.htm) (Chinese Version) (visited 2009, September 5); Leena Rao, (2009, September 4), 'Watch Out Baidu, China Clamps Down on Music Piracy', [WWW document] URL <http://www.techcrunch.com/2009/09/04/watch-out-baidu-china-clamps-down-on-music-piracy/> (visited 2009, September 5)

People's Court in *Bookoo Limited. v. Beijing Xunneng Network Limited and Tom.com Limited*<sup>486</sup> stated that: 'if the linking providers were required to undertake an advanced view of the linked content, it would hinder the function of the linking service and would have detrimental effect on the development of the Internet industry.'<sup>487</sup> This indicates that arguments may not be established to challenge such an implied obligation under the 'should know (have reason to know)' standard in a Chinese ISP copyright liability system.

### 3.3.3.3 Is the 'Red Flag' Test Applicable?

As discussed earlier in 3.3.1, the 'red flag' test is a criterion for evaluation of ISPs' 'awareness of infringement' with which the American legislature intended to strike a balance between copyright holders and ISPs. In China, the debate on whether the 'red flag' test should be emulated has been extensive. The majority of the legal profession<sup>488</sup> supported the view that the Chinese courts should incorporate the 'red flag' test into a Chinese copyright liability context; some of them even argued that the 'red flag' test has already been incorporated into the Regulations and that paragraph two of Article 23<sup>489</sup> of the Regulations was the reflection of such a test.<sup>490</sup>

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<sup>486</sup> *Bookoo Limited. v. Beijing Xunneng Network Limited and Tom.com Limited*, No.13 (the Beijing Second Intermediate People's Court, 2001)

<sup>487</sup> *Ibid.*

<sup>488</sup> Qian Wang, 'Discussion on the Determination of Indirect Liability of the Information Location Tool Provider – and Compare the Decisions of the *Baidu* and *Yahoo! China* Cases', *Intellectual Property*, Vol. 4, (2007), pp. 3-8, p. 8; Kaiguo Liu, 'Application of the "Red Flag" Test in Determining Liability of Network Service Providers', *New Century Library*, Vol. 5, (2007), pp. 56-61, P. 60; Xuan Zhang, 'Analysis on Liability Issues in Relation to Network Service Providers and Copyright', *Database of the Intellectual Property School of the Huadong Politics and Law Academy*, (2008), p. 6; Yang Liu, 'Discussion on Indirect Copyright Liability of Network Service Providers', *Centre for Studies of IPR Forum*, (2009); Shaoping Chen, 'Liability of MP3 Search Engine Service Provider – Analysis of the Decisions of the Appealing Courts in the *Baidu* and *Yahoo! China* Cases', *Electronics Intellectual Property*, Vol. 8, (2008), pp. 28- 31, p. 29; Guanbin Xie and Xueqin Shi, 'Fair Definition on Fault Liability of Internet Searching Service Provider', *Intellectual Property*, Vol. 1, (2008), pp. 34-37, p. 36; Qian Wang and Lucie Guibault. (2008, January). 'The Regulation and Protection of Online Copyright in the EU and China'. [WWW document] URL [http://www.eu-china-infso.org/UserFiles/File/008%20Online%20Copyright\\_report\\_Jan\\_2008\\_final%20CB%20.pdf](http://www.eu-china-infso.org/UserFiles/File/008%20Online%20Copyright_report_Jan_2008_final%20CB%20.pdf) (visited 2008, May 2), p. 75;

<sup>489</sup> Article 23 of the Regulations on the Protection of the Right of Communication through the Information Networks reads, '... However, where it knows or has reasonable grounds to know the linked works, performances, sound recordings or video recordings infringe another person's rights, it shall be jointly liable for the infringement.'

<sup>490</sup> Qian Wang and Lucie Guibault. (2008, January). 'The Regulation and Protection of Online Copyright in the EU and China'. [WWW document] URL [http://www.eu-china-infso.org/UserFiles/File/008%20Online%20Copyright\\_report\\_Jan\\_2008\\_final%20CB%20.pdf](http://www.eu-china-infso.org/UserFiles/File/008%20Online%20Copyright_report_Jan_2008_final%20CB%20.pdf)



However, my view on the matter is that although there was a good intent behind the ‘red flag’ test introduced by the American legislature, it is not a model for China. I am holding the opinion on the following grounds:

Firstly, the ‘red flag’ test lacks a legal basis for its application in a Chinese ISP copyright liability system. The ‘red flag’ test was derived from the ‘red flag’ law that had enacted in the late 19th century in the common law countries, particularly in the United States of America<sup>491</sup> and in the United Kingdom<sup>492</sup>. It was a law requiring drivers of early automobiles to take certain safety precautions including putting someone waving a ‘red flag’ in front of the vehicle as a warning. However, there is no such a law or concept in the civil law system and neither did it last long in the common law system<sup>493</sup>. Therefore, when the courts in the common law countries are able to apply case law to define what constitutes a ‘red flag’ and explain why it is a ‘red flag’ and not a ‘flag’ in any other colours, the courts in a civil law country for example in China would have no capacity to do the same.

Secondly, although the ‘red flag’ test was applied by some courts in copyright liability cases in relation to adult content websites in the United States of America, it is not sufficient to say that the ‘red flag’ test has been a success in striking a balance between copyright holders and ISPs as the American legislature had expected. Instead, cases that imported the ‘red flag’ test into ISP copyright liability cases misconstrued the clear intent of the statute, as a result, responsibility shared by both parties was disproportionally placed on copyright holders.<sup>494</sup> For example, the *Perfect 10* court had totally ignored the role of numerous notices though they were

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(visited 2008, May 2), p.42; Guanbin Xie and Xueqin Shi, ‘Fair Definition on Fault Liability of Internet Searching Service Provider’, *Intellectual Property*, Vol. 1, (2008), pp. 34-37, p. 35; Wushuang Huang, ‘Discussion on the Tort Liability of a Search Engine Service Provider – A Challenge to the Main Stream View’, *Intellectual Property*, Vol. 17, No. 5, (2007), pp. 9-14, p.10;

<sup>491</sup> David M. Kennedy, Lizabeth Cohen, *The American Pageant*, (New York: Houghton Mifflin, 1994)

<sup>492</sup> It was stipulated in Locomotive Act (Red Flag Act) 1865 that ‘self-propelled vehicles should be accompanied by a crew of three: the driver, a stoker and a man with a red flag walking 60 yards (55 m) ahead of each vehicle. The man with a red flag or lantern enforced a walking pace, and warned horse riders and horse drawn traffic of the approach of a self propelled machine.’

<sup>493</sup> The ‘red flag’ law was repealed in 1896 in the United Kingdom. In the United States of America, the ‘red flag’ laws enacted were also abolished around that time.

<sup>494</sup> Frank P. Scibilia & Vanessa G. Lan, ‘Whatever Happened to the “Red Flag” Test?: Knowledge of Infringing Activity on-and the Burden to Police-User-Generated Content Sites After *CCBill*, *Visa, Jo and eBay*’, *Entertainment, Arts and Sports Law Journal*, Vol. 19, No.4, (Fall/Winter, 2008), pp.23-28, p.28.

defective in evaluating the defendant's 'awareness of infringement'. The court had wrongly transformed Section 512 (c) - limitation of liability for information storage providers - into a mere 'notice and take down' provision. The court placed the responsibility of preventing infringement squarely on the copyright holders. ISPs that have the ability to prevent or limit copyright infringement were thus discouraged from taking feasible technological measures to do so. While copyright infringement over the Internet is prevalent in China,<sup>495</sup> this 'red flag' test with a high evidentiary threshold may arguably discourage ISPs from taking their responsibility and may leave copyright holders with little or no remedy against widespread phenomena of infringements in the history.

### 3.4 Conclusion

It is clear from the case law of the United States of America, Germany, and China that a broad knowledge standard for ISP copyright liability has now been widely adopted. In the United States of America, an actual knowledge standard underpinned by the notice provisions was applied stringently to ISPs. However, in terms of the evaluation of ISPs' 'awareness of infringement', few courts weighed the difference between a 'red flag' standard and the traditional constructive knowledge standard by adoption of the 'red flag' test, on several other occasions other courts diluted the divide and continuously employed the traditional constructive knowledge standard for determination of ISPs' 'awareness of infringement'. It is submitted that although the American legislature intended to provide a stringent and balanced system for ISP copyright liability, the judiciary however had difficulty in so doing, in particular when the 'red flag' test introduced for assessing 'awareness of infringement' was criticised as having offered too much protection to ISPs and putting copyright holders in a vulnerable position.<sup>496</sup> The division of the courts on the matter has

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<sup>495</sup> IIPA. (2009, April 30). 'IIPA 2009 "Special 301" Recommendations - IIPA Statement on USTR's Decisions in its 2009 Special 301 Review Affecting Copyright Protection and Enforcement around the World. [WWW document] URL <http://www.iipa.com/pdf/IIPASTatementonUSTRs2009Special301Decisions043009.pdf> (visited 2009, May 22)

<sup>496</sup> Colin Folawn, 'Neighborhood Watch: The Negation of Rights Caused by the Notice Requirement in Copyright Enforcement Under the DMCA', *SEATTLE U. L. REV.*, Vol. 26, (2003), p. 979; Ben

caused inconsistency and ineffectiveness in dealing with copyright infringement on the Internet.

There was no clarification with regard to ISP knowledge standard in the German legislation, nor did the German legislative history and the European Directive provide guidance on how to evaluate a broad knowledge standard including an actual knowledge standard and the ‘awareness of infringement’ standard. The German courts, nevertheless, formulated a general standard for determining ISPs’ actual knowledge, mainly, through the examination of notices issued by copyright holders. In addition, the German court applied the ‘should know (have reason to know)’ standard that rested on torts of negligence for assessing ISPs’ ‘awareness of infringement’. Compared to the American courts, the interpretation of ISPs’ knowledge standard by the German courts appears to be flexible and less strict; therefore, an implied duty to review imposed on ISPs caused much controversy.

In China, if we were to map the position of the judiciary on the issue of the knowledge standard, there are two stages where the position of the Chinese courts has significantly shifted. The first stage is the pre-Regulations period where the Judicial Interpretation was the only applicable piece of legislation for regulating ISP copyright liability. The Judicial Interpretation clarified, *inter alia*, ISP copyright liability that was not specifically addressed by the Copyright Act 1990 and its implementing Regulations and provided a single actual knowledge standard for determination of ISP copyright liability. Although the application of a single actual knowledge standard had helped the Chinese courts to determine ISP copyright liability, its weakness was shown in circumstances where ISPs denied any knowledge of their user’s infringement, but their knowledge would otherwise be found.<sup>497</sup> The second stage is the post-Regulations era where a broad knowledge

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Sheffner, (2009, September 19), ‘Some Additional Thoughts on *UMG v. Veoh*’, [WWW document] URL <http://copyrightsandcampaigns.blogspot.com/2009/09/some-additional-thoughts-on-umg-v-veoh.html> (visited 2009, October 2); Jonathan Bailey, (2009, September 23), ‘Red Flags, Takedowns and Copyright Law’, [WWW document] <http://www.plagiarismtoday.com/2009/09/23/red-flags-takedowns-and-copyright-law/> (visited 2009, October 2)

<sup>497</sup> For example, if the ‘awareness of infringement’ standard were one of the preconditions for ISP copyright liability, the *Baidu* court (*Gold Label. et al v. Baidu Network Information Technology Ltd.*) could have considered whether Baidu should have known the risk or existence of the infringing links.

standard was adopted due to the influence of the model set forth in other jurisdictions' legislation, predominantly the Americans. The Regulations provided an extended knowledge standard to courts with respect to ISP copyright liability. Article 14 of the Regulations had detailed provision on the standard of notice as actual knowledge and thus a stringent interpretation of an actual knowledge standard in ISP copyright liability cases. Despite the Regulations did not define under what circumstance ISPs 'should know' their users' infringements, the courts employed the 'should know (have reason to know)' standard in the law of tort. By examining whether an ISP as a reasonable person could expect that a copyright violation might follow from its failure to take action while it suspects its users' activities, the court could decide an ISP's liability for copyright infringement.

Having examined a number of ISP copyright liability cases and negated the application of a 'red flag' test in a Chinese ISP copyright liability context, this Chapter has answered the question posed at the beginning of the thesis that a single actual knowledge standard would not warrant adequate copyright protection in particular when Internet copyright piracy is still a very prevalent problem on the Chinese Internet territory. A combined knowledge standard including both an actual knowledge standard and the 'awareness of infringement' standard is desired for an effective ISP copyright liability system in a Chinese context.

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Because Baidu had copyright litigation experience gained from a previous case (*Shanghai Busheng Music and Culture Dissemination Ltd. v. Baidu Network Information Technology Ltd.*) in which Baidu was held liable.

## CHAPTER 4:

# THE COPYRIGHT LIABILITY OF PEER-TO-PEER FILE-SHARING PROVIDERS

### 4.1 Introduction

Online copyright piracy poses a greater threat to authors of copyright works and copyright industry than at any other time in history.<sup>498</sup> It is not only proliferating worldwide, it is also diversifying into new technologies and formats. As discussed earlier in 1.3 and 1.4.3.4, peer-to-peer file-sharing<sup>499</sup>, as a thrilling technology often used for illegal distribution of copyright work, allows a user to maintain an index of files and share them with other users. Peer-to-peer file-sharing technology is now universally deployed, in the meantime, copyright infringement over peer-to-peer file-sharing platforms has also soared.

Before the emergence of decentralised peer-to-peer technology, liability of centralised peer-to-peer file-sharing providers was predicated upon their knowledge, whether actual or constructive, of the infringing material allowing them to exercise their control to remove or block access to those materials. However, with the appearance of decentralised peer-to-peer technology, this is no longer the case because the knowledge of underlying infringement of decentralised peer-to-peer file-sharing providers is no longer verifiable under the fundamentally new and different architecture. As the existing ISP copyright liability regime is inadequate to provide an answer to complicated questions related to liability for decentralised peer-to-peer file-sharing, courts have once again resorted to tortious liability doctrine to analyse such a liability. The American courts created an inducement liability rule when they

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<sup>498</sup> IFPI, (2006, July), 'The Recording Industry 2006 Piracy Report: Protecting Creativity in Music', [WWW document] URL <http://www.ifpi.org/content/library/piracy-report2006.pdf> (visited 2006, July 29); Priest, Eric A., 'The Future of Music and Film Piracy in China', *Berkeley Technology Law Journal*, Vol. 21, (2006), pp. 795-871, p. 795; Rob Kasunic, 'Solving the P2P "Problem" - An Innovative Marketplace Solution', [WWW document] URL [http://fairuse.stanford.edu/commentary\\_and\\_analysis/2004\\_03\\_kasunic.html](http://fairuse.stanford.edu/commentary_and_analysis/2004_03_kasunic.html) (visited 2009, September 18).

<sup>499</sup> Please refer to 1.3 for general discussion on the peer-to-peer file-sharing system and its classification.

were invited to address liability in a decentralised peer-to-peer file-sharing context, when they imposed liability on Grokster on the basis of intent. Although the inducement liability rule may not set a precedent due to its controversial nature, it has a far-reaching effect in the international context. Following the *Grokster* case, several other countries such as Australia, Germany, and Sweden followed suit and adopted similar approaches to determining liability in peer-to-peer file-sharing systems. Apart from the extensive analysis of the intent of the providers in facilitating copyright infringement, the cases also suggested a shift in the responsibilities of ISPs to play a proactive role in protecting copyright content. Nevertheless, despite the courts' efforts to attach liability to peer-to-peer file-sharing providers for copyright violation, the inequity remains that the peer-to-peer file-sharing providers are profiting from the high-volume use of their services without taking appropriate responsibility for the extensive copyright infringement and copyright holders are suffering significant losses while the peer-to-peer file-sharing systems facilitate such infringement. This uncertainty is attributed to the inadequacy of the existing copyright law regulating copyright liability in an evolving peer-to-peer file-sharing system.

When it was recognised that some form of legislative solution would encourage greater responsibility of peer-to-peer file-sharing providers in deterring copyright piracy, many countries considered amending their copyright law or introducing a new law relating to peer-to-peer file-sharing liability, with France leading the way. In France, a so-called 'three strikes' approach was incorporated into the 'Hadopi' law<sup>500</sup>

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<sup>500</sup> 'Hadopi' stands for the High Authority for the Dissemination of Works and Protection of Rights on the Internet (Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet), a government agency created by the Act to Promote the Dissemination and Protection of Creation on the Internet (Loi Favorisant La Diffusion et la Protection de la Création Sur Internet). The 'Hadopi' law is the Act to Promote the Dissemination and Protection of Creation on the Internet (Loi Favorisant La Diffusion et la Protection de la Création Sur Internet). It is the implementation of the Olivennes Report, supported by the Olivennes Agreement, where the main representatives of the copyright industry and the ISPs agreed to collaborate in the enforcement of the 'Hadopi' law. This law introduced a 'three strikes' approach to allow authorities to tackle persistent infringement and disconnect repeated infringers. The first version of the 'Hadopi' law was struck down by the French Constitutional Council on the ground of denying public access to information without trial. The French Parliament has now passed an amended version of the law known as 'Hadopi' 2, which allows a repeat infringer to be tried in a French court before the suspension of his/her Internet service. However, the opposition, French socialist group has referred the 'Hadopi' 2 on the ground of threatening free of expression, the Constitutional Council is due to give its ruling until 28 October

and obligation to take a graduated response process to tackle repeated infringer was mandated by the law. The filtering mandate, *inter alia*, is a technology protection measure to block access to unlawfully distributed copyright content.<sup>501</sup> Whereas the ‘Hadopi’ law caused much controversy in an international context, the provision of the Copyright Amendment Act of the New Zealand that mirrored the French model was opposed and is now in the process of renovation. In addition, the British Government have also dropped the ‘three strikes’ approach and mandatory use of filters that were considered as a preferred government legislation solution after intensive debate. The revamped ‘three strikes’ approach was adopted in two civil law countries, South Korea and Taiwan when they amended their copyright law. In addition, there have been instances<sup>502</sup> where the filtering technology has been implemented by several major Internet service providers, such as MySpace, Google (You Tube), and Lime Wire.

In China, the peer-to-peer file-sharing liability issue has been brought to court on several occasions from 2005.<sup>503</sup> Although provisions of the Juridical Interpretation and the Regulations have been applied on several occasions by way of analogy, the interpretation is open to question. Yet, the law regulating liability over peer-to-peer file-sharing networks is a patchwork of judicial interpretation, case law, and academic opinion that does not always yield an effective outcome. This has in turn resulted in the need for a specific provision that addresses peer-to-peer file-sharing liability. While the filtering mandate has been hotly debated in other jurisdictions,

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2009. See, Alexandre Entraygues, ‘The Hadopi Law – New French Rules for Creation on the Internet’, *Entertainment Law Review*, Vol. 20, Issue. 7, (2009), pp.264-266; France 24, (2009, September 22), ‘Parliament Adopts Internet Anti-Piracy Law’, [WWW document] URL <http://www.france24.com/en/20090922-france-parliament-internet-anti-piracy-law-hadopi-approved-opposition-appeal-court> (visited 2009, September 22); Catherine Saez, (2009, October 2), ‘Second Hadopi Law Faces French Constitutional Test’, [WWW document] URL <http://www.ip-watch.org/weblog/2009/10/02/second-hadopi-law-faces-constitutionality-test-by-french-socialist-party/> (visited 2009, October 3).

<sup>501</sup> *Supra* note 22 and accompanying text

<sup>502</sup> *Infra* note 553, 555 and 556.

<sup>503</sup> Such as, *Shanghai Busheng Music Culture Dissemination Co., Ltd v. Beijing FlyingNet Music Software Co., Ltd and Beijing Boshengfangan Information Teleology Co., Ltd*, No. 13739 (the Beijing Second Intermediate People’s Court, 2005); *Guangdong Zhongkai Culture Development Ltd. v. Guangzhou Shulian Software Technology Ltd*, No. 384 (the Shanghai First Intermediate People’s Court, 2006); *Beijing Ci Wen Film & Television Program Production Ltd. v. Beijing Zheng Le Jia Technology Ltd*, No. 21822 (the Beijing Hai Dian District People’s Court, 2007); *Di Zhi Culture Ltd. v. Baidu Network Information Technology Ltd. & Yimeng Huang*, No. 7251 (the Beijing First Intermediate People’s Court, 2006).

this Chapter discusses the controversy related to the filtering mandate in a Chinese context to see whether it could be the criteria for evaluating peer-to-peer file-sharing providers liability in China. The need and the possibility of the implementation of the filtering mandate in China are also examined in this Chapter.

Unauthorised peer-to-peer file-sharing extends well beyond one country, countries all over the world have been attempting to address copyright liability issues over peer-to-peer file-sharing systems by reviewing their copyright law or introducing new laws. While the Chinese peer-to-peer file-sharing industry is still in its infancy and the legislative solution towards liability in relation to this new technology is lacking, it is helpful to consider what solutions, if any, exist at the international level pertaining to the liability of peer-to-peer file-sharing systems. Hence, in this Chapter, reference is made to more than one or two jurisdictions and it is not limited to merely the United States of America and Germany.

## **4.2 Case Law: the Intent-Based Analysis and the Prospect of Filtering**

While liability of peer-to-peer file-sharing providers was the subject of judicial analysis in many countries, there was no domestic law addressing liability of those who facilitated copyright infringement in peer-to-peer file-sharing networks, nor did the international copyright conventions provide guidance on the matter of liability in such a new technology platform. In the absence of legislative solution in this regard, the approaches the courts adopted have been of great importance.

### **4.2.1 *Grokster* and *KaZaa***

The landmark case that addressed liability of peer-to-peer file-sharing providers is the *Grokster* case. When the Supreme Court of the United States of America was invited to address liability of a decentralised peer-to-peer file-sharing provider by the *Grokster*<sup>504</sup> case, they were troubled by the fact that a distribution architecture used

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<sup>504</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).



by the defendants that facilitated illegal exchange of many copyright works<sup>505</sup> was distinguished from that of the Napster and Aimster systems. In contrast with the central server systems Napster and Aimster operated, the peer-to-peer file-sharing software that Grokster and Streamcast operated had no central server, which meant that once users downloaded and installed the software, users could communicate with each other without using a central server system to index lists of available files. Computers operated by those users created their own network, performed the indexing function and provided access. Therefore, once the software was downloaded and installed onto their users' computers, Grokster and Streamcast as software distributors had no ability to monitor what it was used for, to interfere with the use of the software by disconnecting users, nor stop the exchange of unlawful material. Even though the plaintiffs sent the notices to the defendants, those notices were irrelevant and did not establish that the defendants had specific knowledge of infringement because 'they arrived when defendants did nothing to facilitate, and could not do anything to stop, the alleged infringement of specific copyrighted content.'<sup>506</sup> Based on these facts, Grokster and Streamcast argued in the District Court and the Ninth Circuit that it was impossible for them to know whether infringing materials were exchanged among users, and that they had no knowledge of infringement that was required for contributory liability. In addition, they argued for the application of the *Sony Betamax* ruling<sup>507</sup> that if a technology is capable of commercially significant non-infringing uses, constructive knowledge of an infringing activity cannot be imputed based on a manufacturer generally knowing that the technology could be used to infringe. To support that, they provided many evidences of actual non-infringing uses of their systems and a large number of declarations by people who permitted distribution of their works via the software, or who used the software to distribute public domain works<sup>508</sup>. Moreover, to negate any material contribution to the infringement, the defendants argued that they did not

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<sup>505</sup> *Ibid.*, at 1161. ('the plaintiffs allege that over 90% of the files exchanged through use of the "peer-to-peer" file-sharing software offered by the Software Distributors involves copyrighted material, 70% of which is owned by the Copyright Owners.')

<sup>506</sup> *Ibid.*, at 1037.

<sup>507</sup> The *Sony Betamax* ruling says that the sale of VCRs could not give rise to contributory copyright infringement liability as long as VCRs were capable of commercially significant non-infringing uses, even though the defendant knew the machines were being used to commit infringement. *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984).

<sup>508</sup> *Grokster I*, 259 F.Supp.2d at 1035.

provide ‘sites and facilities’ for those infringements; their systems did not store any infringing materials and maintained no index; they did not provide access to, or have the ability to suspend user accounts.<sup>509</sup> By applying their well reasoned defence in the *Sony Betamax* ruling on the basis of the design of their decentralised system and the capability of substantial non-infringing uses, *Grokster* and *Streamcast* successfully convinced the District Court and the Ninth Circuit that their distribution of peer-to-peer software which facilitated copyright infringements did not give rise to contributory liability.

With regard to the plaintiffs’ allegation of vicarious liability, the design of the defendants’ software again enabled the defendants to escape liability. In the decision of the Ninth Circuit, it was held that the plaintiffs could not establish the defendants’ right and ability to supervise the users of their software because infringing materials and index information did not pass through the defendants’ systems. Unlike the centralised *Napster* system<sup>510</sup>, the defendants did not operate an ‘integrated service’, which enabled them to monitor and control their users. The nature of the relationship between the defendants and their users also differed from the nature of the relationship in the *Fonovisa* and *Napster* cases. Thus, the monitoring and supervisory relationship that has supported vicarious liability in previous cases was completely absent in this case. The Ninth Circuit also concluded that the plaintiffs confused the right and ability to supervise with ‘the strong duty imposed on entities that have already been determined to be liable for vicarious copyright infringement; such entities had an obligation to exercise their policing powers to the fullest extent, which in *Napster*’s case included implementation of new filtering mechanisms.’<sup>511</sup> Moreover, ‘the duty to alter software and files located on one’s own computer system was quite different in kind from the duty to alter software located on another person’s computer.’<sup>512</sup> Therefore, the plaintiffs’ contentions that the defendants could have altered their software to prevent the illegal sharing of copyright works and the possibilities for upgrading software located on another person’s computer were not

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<sup>509</sup> *Ibid.*, at 1037, 1039-41.

<sup>510</sup> *Napster*, 239 F.3d 1004 (9<sup>th</sup> Cir.2001), at 1022.

<sup>511</sup> *Napster*, 284 F.3d, at 1098.

<sup>512</sup> *Grokster I*, 259 F.Supp.2d at 1045.

relevant to determining vicarious liability.<sup>513</sup> Finally, the plaintiffs argued that vicarious liability should be established when the defendants had turned ‘a blind eye’ to infringement. They cited the *Napster* case to support their argument that ‘turning a blind eye to detectable acts of infringement for the sake of profit gave rise to liability’<sup>514</sup>. Nevertheless, the court rejected such an argument and ruled that when the defendants did not have ‘the right and ability to control and supervise that they proactively refused to exercise’<sup>515</sup>, they were not liable for vicarious infringement. In addition, the ‘wilful blindness’ theory alone would not suffice to establish vicarious liability.

After two court trials, all the relevant issues seemed to be well settled and the defendant should have evaded liability with good reason. Nevertheless, the plaintiffs did not abandon their claim, they brought the case to the U.S. Supreme Court and urged a re-examination of the law applied to Grokster and Streamcast and the devastating effects on copyright protection by a decentralised peer-to-peer file-sharing system. The Supreme Court reviewed the facts at hand and noted that the defendants ‘may have intentionally structured their business to avoid secondary liability for copyright infringement while benefiting financially from the illicit draw of their wares’. Considering that imposing no liability on such a technology would encourage copyright infringement and impede efforts to develop legitimate markets for online content, the Supreme Court drew a different conclusion.

In reaching their conclusion, the Supreme Court conducted a three-point analysis and focused on three facts relating to the question of intent. First, Grokster and StreamCast attempted to fill the void for illegal music left by Napster. Second, ‘neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity’<sup>516</sup>. Third, Grokster and StreamCast sold advertising space, directed advertisements to the screens of computers employing their software, and generated advertising revenue from high-volume use of their software. In

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<sup>513</sup> *Ibid.*

<sup>514</sup> *Napster*, 239 F.3d 1004 (9<sup>th</sup> Cir.2001), at 1023.

<sup>515</sup> *Grokster II*, 380 F. 3d, 1154, at 1166.

<sup>516</sup> *Ibid.*, at 2781

addition, the court considered earlier cases<sup>517</sup> in which an inducement of infringement rule was applied to a copyright or patent defendant who ‘not only expected but invoked [infringing use] by advertisement’<sup>518</sup>. Moreover, the court accentuated that nothing in the *Sony* case required courts to disregard evidence of intent to promote infringement if such evidence existed.<sup>519</sup> Therefore, as the defendants had showed that their product was able to be used to infringe and they had taken active steps to encourage direct infringement by advertising an infringing use and instructing users how to engage in an infringing use, the *Sony Betamax* ruling did not preclude their liability. To conclude, the Supreme Court held that ‘for the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbour rule, the inducement rule, too, is a sensible one for copyright.’<sup>520</sup> Accordingly, the court grounded *Grokster* and *StreamCast*’s liability on active inducement of infringements with ‘purposeful, culpable expression and conduct’.<sup>521</sup>

The *Grokster* case not only added a new cause of action to the ISP copyright liability regime, it also provided an improved framework for the future construction of ISP copyright liability in a fast-changing technological environment.<sup>522</sup> The implication given by the case is that copyright liability for peer-to-peer file-sharing services would depend on whether three probative elements were met, including: 1) an infringement-dependant business plan; 2) promotion of infringement (i.e., advertising); and 3) failure to filter. Although there was argument<sup>523</sup> that three

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<sup>517</sup> For example, *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911), 62-63 (copyright infringement); *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912), 48-49 (contributory liability for patent infringement may be found where a good’s ‘most conspicuous use is one which will cooperate in an infringement when sale to such user is invoked by advertisement’ of the infringing use); *Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co.*, 75 F. 1005(CA2 1896), 1007-1008 (relying on advertisements and displays to find defendant’s ‘willingness ... to aid other persons in any attempts which they may be disposed to make towards [patent] infringement’); *Runford Chemical Works v. Hecker*, 20 F. Cas. 1342, 1346 (No. 12,133) (CC N. J. 1876) (demonstrations of infringing activity along with ‘avowals of the [infringing] purpose and use for which it was made’ supported liability for patent infringement).

<sup>518</sup> *Ibid.*

<sup>519</sup> *Sony Corporation of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984), at 439

<sup>520</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005), at 2780

<sup>521</sup> *Ibid.*

<sup>522</sup> Alfred C.Yen, ‘Third Party Copyright Liability after *Grokster*’, *Information & Communications Technology Law*, Vol. 16, Issue 3, (October 2007), pp. 233 - 272.

<sup>523</sup> Tim Wu argued that some peer-to-peer file-sharing systems might encourage infringement and fail to filter, but have no business plan depending on mass infringement. Other might depend on a high

elements might not always be found in a peer-to-peer file-sharing provider cases where the defendant might promote infringement and fail to filter but have no business model, or the defendant might depend on a high volume of infringement but take no step to promote infringement and might implement technology to discourage infringement. However, the opposite view was that it was not the requirement in the *Grokster* decision that ‘all three elements [must] to be present before inducement could be found’,<sup>524</sup>

Despite the controversy that the *Grokster* decision caused on the broad implications for Internet technology that could be potentially used for infringing purpose, the *Grokster* case set an instructive precedent on how to address legal issues endangered by new technologies. The resemblance of judgments issued by other jurisdictions to the *Grokster* ruling is striking. In Australia, the result of *Universal Music Australia Pty Ltd v Sharman License Holdings*<sup>525</sup> suggested such likeness when the court determined liability of the defendant that operated the Kazaa peer-to-peer file-sharing system, which was similar to the systems of Grokster and StreamCast. In this case, the Federal Court noted that there was evidence that the KaZaa system was widely used for the sharing of copyright files.

[D]espite the fact that the KaZaa website contains warnings against the sharing of copyright files, and an end user licence agreement under which users are made to agree not to infringe copyright, it has long been obvious that those measures are ineffective to prevent, or even substantially to curtail, copyright infringements by users. The respondents have long known that the KaZaa system is widely used for the sharing of copyright files.<sup>526</sup>

In fact, there were technical measures, such as keyword filtering and gold file flood filtering<sup>527</sup>, ‘that would enable the respondents to curtail – although probably not

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volume of infringement but take no step to promote infringement and might implement technology to discourage infringement. See Tim Wu, ‘The Copyright Paradox: Understanding *Grokster*’, *Supreme Court Review*, 2006; *Stanford Law and Economics Olin Working Paper*, No. 317., pp. 14-15.

<sup>524</sup> Sam Ricketson and Jane C. Ginsburg, ‘Inducers and Authorisers: A Comparison of the US Supreme Court’s *Grokster* Decision and the Australian Federal Court’s *KaZaa* Ruling?’, *Media & Arts Law Review*, Vol. 11, No. 1, (2006), p.9.

<sup>525</sup> *Universal Music Australia Pty Ltd v Sharman License Holdings*, [2005] F.C.A. 1242 (September 5, 2005)

<sup>526</sup> *Ibid.*, para 407.

<sup>527</sup> *Ibid.*, paras 310 to 330. (‘Gold Files’ refer to the copyright files that made legally available for purchase. When most Kazaa search results are for ‘blue files’ that come free from other users, the

totally to prevent – the sharing of copyright files.’ However, the operator did nothing to implement the available technologies to limit the sharing of copyright files<sup>528</sup> because they wanted to maintain high traffic levels to generate advertising, which ‘was the life-blood of the Kazaa system’<sup>529</sup>. Based on these findings, the Federal Court determined the following issues: 1) the defendant had an infringement-dependent business model; 2) the defendants actively encouraged infringement and profited from the activities by advertising; and 3) the defendants failed to employ available technological measures to prevent infringement when they had the awareness that their products were being used for infringing purposes. By virtue of Section 36 (1)<sup>530</sup> and 101(1)<sup>531</sup> of the Australian Copyright Act, the Federal Court reached their conclusion under the concept of ‘authorisation’ that the operator of the Kazaa peer-to-peer file-sharing system was liable for authorising and facilitating the copying and communication of protected copyright works without the licence of the relevant copyright owners.

Despite some difference in emphasis and the fact that the liability doctrines that each court adopted were different, the analysis of the intent of the defendant for copyright

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‘Gold Files’ results indicate that the files have non-infringing properties. The effect of ‘Gold File’ flood filtering would be to flood a user’s search results with only legitimate ‘Gold Files’.)

<sup>528</sup> *Ibid.*, para 411.

<sup>529</sup> *Ibid.*, para 309.

<sup>530</sup> Section 36 Infringement by doing acts comprised in the copyright (1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright. (1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a work, without the licence of the owner of the copyright, the matters that must be taken into account include the following: (a) the extent (if any) of the person’s power to prevent the doing of the act concerned; (b) the nature of any relationship existing between the person and the person who did the act concerned; (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

<sup>531</sup> Section 101 Infringement by doing acts comprised in copyright (1) Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright. (1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following: (a) the extent (if any) of the person’s power to prevent the doing of the act concerned; (b) the nature of any relationship existing between the person and the person who did the act concerned; (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

violation was based on similar criteria and thus similar conclusions. For example, like the *Grokster* courts, the Australian Federal Court addressed the defendant's affirmation promotion of the infringement, intentional failure to filter out infringing content and an infringement-dependent business plan. As for the effectiveness of copyright protective measures the defendant claimed, the court noted that those website warning and users licence agreements were merely ostensible and had no substantial effect to curtail copyright infringement. Therefore, in both cases, the defendants' knowledge as to the probability and the scale of the infringement was explicit. Nevertheless, the extensive evidence as to the steps that the defendant could have taken to prevent copyright infringement, which the *Grokster* Courts did not have, enabled the Australian Federal Court focused on the level of the control the defendant could have over the infringements. The control element hence also led the court to require the defendant to consider technical measures for avoiding copyright infringement. Finally, the Australian Federal Court provided a means by which the operators of the KaZaa system would be permitted to continue their system if filters were introduced to prevent the further infringement of copyright in the recordings. In terms of maintaining a meaningful balance between copyright protection and technological innovation, the *KaZaa* ruling might hence have a far more practical implication<sup>532</sup>.

#### **4.2.2 Cybersky**

When courts in the common law countries were struggling with peer-to-peer file-sharing liability issues, their civil law counterparts also considered liability for peer-to-peer file-sharing with a theory of tortious. In Germany, the Hamburg District

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<sup>532</sup> Because of the court ruling, Sharman Networks finally switched to a fully legitimate as a subscription-based service. They also agreed to pay settlements to both the music and movie companies in July 2006.

Court in its *Cybersky*<sup>533</sup> case reached a similar conclusion to that of the *Grokster* case though the court rejected a reference to the *Grokster* case<sup>534</sup>.

In the *Cybersky* case, the defendant, TC Unterhaltungselektronik AG (TCU) was a company that developed and provided software that enabled users to send and/or receive encoded content on the Internet from the plaintiff's pay-TV programme. The plaintiff feared an immediate threat of infringement to their exclusive broadcasting rights for their TV programmes and the potential loss of their subscription fee, and initiated proceedings against the defendant for violation of Section 87 (1) (1) of the Copyright Act and Sections 3 and 8(1) of the Act Against Unfair Competition. The plaintiff sought an injunction to prohibit the defendant from offering, disseminating and/or operating the *Cybersky* TV software as long as users could use the software to exchange TV content anonymously without charge. While intent is usually judged by examining a tortfeasor's attitude towards the consequence of his act by virtue of the German tort law theory,<sup>535</sup> the following factors were key in the court's decision for the determination of the *Cybersky* provider' intent. First, the defendant had an infringement-dependent business model. The so-called 'Cybersky TV' software the defendant had created, though it had not yet been distributed, would allow its users to watch digitised TV programmes, including TV shows broadcast by pay-per-view or subscription-only stations. Secondly, the description of the 'Cybersky' software as well as the 'TVOON Media Center' products indicated that their products were suitable for the reception of pay-TV programmes free of charge, along with other possible uses that would not infringe intellectual property rights. Such product description in fact violated the law<sup>536</sup> that prohibited the advertisement and distribution of a product, which was intended to be in breach of copyright and

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<sup>533</sup> 'Premiere' v. TC Unterhaltungselektronik AG (TCU), the Hamburg District Court, Judgment of 26 April 2005, 2005 MMR 547; the Hamburg Court of Appeal, Judgment of 8 February 2006, 2006 MMR 398 (Case No. 5 U 78/05); the Federal Court of Appeal, Judgment of 15 January 2009, (Case No. I ZR 57/07).

<sup>534</sup> The court stated in its judgment that, '... [T]he English-language decisions submitted by the plaintiff ... (including U.S. Supreme Court, *Metro-Goldwyn-Mayer Studios Inc. et. al. v. Grokster Ltd. et. al.* ) ... have likewise not been consulted by this court in its decision. The parties' references, for instance, to various indications made by American judges to the attorneys in the proceedings there lack a sufficiently comprehensible and understandable point of reference to the specific case here that would make the citation understandable....'

<sup>535</sup> Joachim Zekoll & Mathias Reimann, editors, *Introduction to German Law* (Second edition, The Hague: Kluwer Law International, 2005), p. 212

<sup>536</sup> Article 97 and 87(1) (1) of the Copyright Act.



recognizable as such by the potential users. Thirdly, after the defendant had advertised the possibility of infringement and highlighted the feature as a central purpose of its product, the defendant failed to employ the measures necessary to prevent future infringement although they provided plausible copyright-protective measures in their terms and conditions as warnings not to commit infringement.

Although the German court adopted a separate doctrine of joint tortfeasance, however, they analysed the *Cybersky* case by focusing on the active and inducing role of the peer-to-peer technology provider and their failure to implement preventive measures to deter infringement. Therefore, in terms of the result of the cases, the case against *Cybersky* was analogous to that brought against *Grokster* and *Sharman*.

#### **4.2.3 The Pirate Bay**

The global attention the *Pirate Bay*<sup>537</sup> case drew makes the discussion on this case inevitable in this Chapter. Although it was a criminal proceeding against the operators of a peer-to-peer file-sharing site, the outcome of the trial could be far-reaching as the legality of creating a search engine or tracker service that traffics mainly in copyright protected content might be decided based on this. The Pirate Bay is an online service providing, *inter alia*, an indexing and search functionality for torrent files, some of which are stored on the website's servers.<sup>538</sup> With some 3.5 million registered users and 22 million users in total, the Pirate Bay announced itself as 'the world's largest BitTorrent tracker'<sup>539</sup>. However, some of a very large amount of torrent files the Pirate Bay had indexed were also found to be infringing copyright works and these popular torrent files generated a great deal of traffic on the Pirate Bay site. The proceedings against the Pirate Bay were initiated on 31 January 2008

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<sup>537</sup> *SONOFON A/S (formerly DMT2 A/S) v IFPI, Danmark* Stockholm District Court, docket no. B 13301-06, judgment April 17, 2009.

<sup>538</sup> Further discussion on the technology of Pirate Bay and the trial see, Mikko Manner & Topi Siniketo & Elsa Albrant, 'The Pirate Bay Ruling - When the Fun and Games End', *Entertainment Law Review*, Vol. 20, No. 6, (2009), pp.197-205; Henrik Wistam & Therese Andersson, 'The Pirate Bay Trial', *Computer Telecommunication Law Report*, Vol.15, No. 6, (2009), pp.129-130; Per Eric Alvsing, 'The Pirate Bay', *Entertainment Law Review*, Vol. 19, No. 3, (2008), P.62; Hubert Best, 'Sweden: File Sharing: The Pirate Bay, Politics and Copyright Law', *E-Commerce Law Report*, Vol. 8, Issue. 9, (2006).

<sup>539</sup> According to the statistics of Alexa Internet, an U.S.- based subsidiary company of Amazon.com that is known for its toolbar and website, the Pirate Bay is one of the most visited websites in the world, ranking at 110<sup>th</sup>.

when four individuals associated with the Pirate Bay (three were administrators and one was financier) were accused of engaging in the operation of the Pirate Bay that infringed thirty-three copyright works claimed. The trial started on 16 February 2009 and lasted for 15 days until 3 March, with unprecedented media attention. On 17 April 2009, the District Court of Stockholm, Sweden announced its decision, holding that all four individuals were guilty of copyright infringement. The court sentenced them to one year in prison and ordered them to pay monetary damages of 30 million Swedish Kronor (approximately 2.688 million Pounds Sterling)<sup>540</sup> to the plaintiffs, including Sony Music Entertainment, Warner Bros, EMI and Columbia Pictures, for the infringement of thirty-three movie, music and gaming titles.

As discussed earlier in 1.3 of Chapter 1 at page 17, the infrastructure of the Pirate Bay differs from Grokster and other peer-to-peer file-sharing systems. The Pirate Bay only provides an indexing and search functionality for torrent files which contain no copyright content. Therefore, the striking issue with regard to liability of the defendants who were running the Pirate Bay was how the court found their intent when no infringing content was technically stored on or passed through the Pirate Bay servers. To respond to this point, the prosecutor cited several earlier cases<sup>541</sup> and argued that the defendants' liability could be established from mere linking to infringing content. Therefore, although the torrent files themselves contained no copyright content, they were files that contained the information needed to download unauthorised copyright content from others. Thus, the prosecutor's argument was that liability of four defendants arose because they had received take down notices from right holders and therefore they had been aware of copyright infringement; in addition, the defendants had intended to earn and gain financial benefit from the infringement through advertisement. Moreover, the defendants had not taken the measures necessary to prevent infringement and had assisted copyright infringement.

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<sup>540</sup> It is based on the foreign currency exchange rate on 23 October 2009: British Pound Sterling: Swedish Kronor=1: 11.16

<sup>541</sup> For example, Swedish Supreme Court case B363-95, judgment February 22, 1996. See NJA 1996:11. (In this case, the court ruled that the owner of a Bulletin Board System was liable for unlawful copyright content stored on its BBS system) and Swedish Supreme Court case B413-00, judgment June 15, 2000. See NJA 2000:48 (This is a case about liability regarding mp3 files linked from a web page).

The court accepted the prosecutor's argument. After examining the evidences such as the take down notices of copyright owners and the Pirate Bay's responses to various take down notices on its site<sup>542</sup> and the witness statements, the court found that, it has been obvious to the defendant that there were torrent files which pointed to copyright protected content on the website's directory and that was shared by users via the Pirate Bay's tracker. Although the defendants did not know the specific works being infringed or the identities of the actual infringers, knowledge about specific infringement was not required to establish their intent and hence it was irrelevant in this case. The court found that the Pirate Bay was an information service provider as described in the Swedish Act on Electronic Commerce and Other Information Society Services<sup>543</sup> and the European Electronic Commerce Directive and that their services fell within the scope of the aforementioned Swedish Act and the Directive.<sup>544</sup> Therefore, when the Pirate Bay or the individuals who ran the Pirate Bay had knowledge of copyright infringement, they were obliged to act expeditiously to remove or disable access to the illegal or infringing material. By virtue of 19 of the Swedish Act on Electronic Commerce and Other Information Society Services, criminal liability of the defendants as meant in Sections 16 to 18 of the Act was established when they had intentionally assisted copyright infringement.

Since the *Pirate Bay* case discussed here was a criminal case, therefore, the court focused more on the principle of criminal law for establishment of the defendants' liability, although the District Court of Stockholm also applied the Swedish Act on Electronic Commerce and Other Information Society Services and the European Electronic Commerce Directive. However, even if the defendants lost their appeal, the final outcome of the *Pirate Bay* case does not necessarily mean that the Pirate Bay website would be held liable if the existing intent-based analysis applies to them. If the Swedish court also consider infringement-dependent business plan, promotion of copyright infringement and failure to prevent infringement described by the

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<sup>542</sup> Legal Threats Against The Pirate Bay at <http://thepiratebay.org/legal>

<sup>543</sup> Electronic Commerce and Other Information Society Services Act SFS 2002:562, as amended.

<sup>544</sup> The District Court of Stockholm noted that the Pirate Bay provided a service where a user could upload and store torrent files on the website, and hence their service should be deemed to be a 'hosting' service in accordance with Section 18 of the Swedish Act on Electronic Commerce and Other Information Society Services and Article 14 of the European Electronic Commerce Directive.

*Grokster* courts as the liability basis of the Pirate Bay, they may find that the explicit evidence that the Pirate Bay had an apparently infringement-dependent business plan and promoted copyright infringement are lacking. Consequently, the court may have to decide whether they can impose liability on the Pirate Bay on the basis of failure to filter unlawful copyright content.

#### **4.2.4 Taking Stock of *Grokster*, *KaZaa*, *Cybersky*, and *the Pirate Bay***

It has been examined that, despite the lack of liability provision in the existing legal framework in relation to peer-to-peer file-sharing systems, litigation against peer-to-peer file-sharing providers has been on the rise. In the United States of America, the Supreme Court in *Grokster* premised *Grokster*'s liability on the inducement liability rule derived from the traditional contributory liability. They held that '[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.'<sup>545</sup> In Australia, the Federal Court conducted an 'authorisation' liability analysis based on a statutory text<sup>546</sup> and case law reasoning and imputed copyright liability on the providers of the *KaZaa* file-sharing system when the *KaZaa* software providers had authorized their users' copyright infringement. Nevertheless in Germany, the German court based liability of the *Cybersky* providers on general law principles of joint tortfeasorship when the defendant created the risk that future users of the *Cybersky* software would commit infringement of the plaintiff's broadcasting right to its encoded pay-TV programmes, and the defendant took an active role in inducing future direct infringements by promoting the software. Although in another civil law country, Sweden, the District Court of Stockholm issued the ruling on criminal liability of four people who ran the Pirate Bay – an even more sophisticated peer-to-peer file-sharing system, the court's decision raised questions as to how far peer-to-peer file-sharing liability will go and how broad the legislative solution should be in order to match future technologies. Although different underpinning legal theories were

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<sup>545</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005), at 2780

<sup>546</sup> 'Authorisation' liability under Australian copyright law is founded on the text of Section 36 (1) and Section 101 (1) of the Australian Copyright Act.

adopted in the foregoing cases, all the courts conducted a similar intent-based analysis to establish liability of peer-to-peer file-sharing providers by addressing the peer-to-peer file-sharing providers' infringement dependent business plan, their promotion of the infringement, and their failure to take measures necessary to prevent infringement.

Notwithstanding the case law, any decision based on particular cases may not establish a general principle that can be used to guide the courts in other cases, in particular when the Internet technology is fast changing. In addition, a rich body of case law and the traditional liability principles may still provide the technology provider chance to interpret the law in different ways. For example, in the United States of America, the *Sony* precedent may be argued as the defence by peer-to-peer file-sharing providers and be applied again as the District Court and the Ninth Circuit did in the *Grokster* case. Peer-to-peer file-sharing providers might argue that there are substantial non-infringing uses of their services and therefore the *Grokster* ruling should not be applied. In addition, as Tim Wu argued<sup>547</sup>, the court may have difficulty in employing the *Grokster* analysis to evaluate peer-to-peer file-sharing providers' intent when massive infringements have occurred on their services but 'only a few, or even none of the elements *Grokster* described' were satisfied. In Australia, although there is no precedent equivalent to the *Sony* case, it is still possible for the court to find peer-to-peer file-sharing providers not liable because of the lack of control over their users' activity under the 'authorisation' concept and formulation established in case law<sup>548</sup>. In the civil law countries such as Germany, argument may be raised as to whether there is a 'common design' between peer-to-peer file-sharing services and the acts of their users if a joint tort liability theory is applied. In the strict sense, joint liability of joint tortfeasors must be decided when the joint tortfeasor and the direct infringer participate in a 'common design'.<sup>549</sup>

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<sup>547</sup> Tim Wu, 'The Copyright Paradox: Understanding *Grokster*', *Supreme Court Review*, 2006; *Stanford Law and Economics Olin Working Paper*, No. 317, p. 14.

<sup>548</sup> For example, *WEA International Inc v. Hanimex Corporation Ltd* (1987) 10 IPR 349 (blank tape); *Australian Tape Manufacturers Association Ltd v. Commonwealth of Australia* (1993) 176 CLR 480 (HC Australia) (blank tape).

<sup>549</sup> For example, Section 830, Paragraph 1, Sentence 1 of the German Civil Code. Further discussion see, W. V. H. Rogers & W. H. van Boom, *et al*, editors, *Unification of Tort Law: Multiple Tortfeasors* (The Hague: Kluwer Law International, 2004), p. 88

Hence, if a German plaintiff seeks to establish a peer-to-peer file-sharing provider's liability by reference to principles of joint tortfeasorship, he may need to establish that the peer-to-peer file-sharing provider and their users have mapped out a common plan to commit a tortious act.

Despite the limits of the existing case law in a peer-to-peer file-sharing context and the controversy surrounding these cases, the foregoing description of *Grokster*, *KaZaa*, and *Cybersky* makes it possible to begin analysing the means of establishing a law for peer-to-peer file-sharing liability. Taken together, one important point of similarity is that all the cases suggest an increased responsibility for ISPs to play a more proactive role in protecting copyright content. As a result, making a legislative requirement for ISPs to adopt filter technology is likely to provide a basis for evaluating intent if the more sophisticated new technology adapts to the judicially constructed boundaries and subverts the existing intent-based analysis. In fact, following the Ninth Circuit's decision in *Napster* and the Supreme Court's *Grokster* decision, the development of peer-to-peer file-sharing technology that allows filtering of copyright protected material has been the subject of discussion between the copyright industry and technology providers.<sup>550</sup> In addition, it is now a common court practice in a number of jurisdictions<sup>551</sup> to enjoin ISPs to implement filtering technology for preventing third party copyright infringement.

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<sup>550</sup> John Borland, (2005, August 22), 'How Label-Backed P2P was Born', [WWW document] URL [http://news.com.com/How+label-backed+P2P+was+born/2100-1027\\_3-5840310.html](http://news.com.com/How+label-backed+P2P+was+born/2100-1027_3-5840310.html). (visited 2009, January 20)

<sup>551</sup> For example, the courts in *Universal Music Australia Pty Ltd v. Sharman License Holdings*, [2005] F.C.A. 1242 (September 5, 2005) and *SCRL Societe Belge des Auteurs, Compositeurs et Editeurs (Belgian Society of Authors, Composers and Publishers) v. SA Scarlet*, [2007] E.C.D.R. 19. enjoined the defendants to implement filtering. In addition, the *Grokster* court ordered StreamCast to install filtering technology to prevent infringement and appointed an independent expert to select the technology that it should use. (see Proposed Order Re Appointment of Special Master, *MGM Studios, Inc. v. Grokster, Ltd.*, CV 01-8541 at 6 (Oct. 25, 2007).) In France, the rulings of several ISP liability cases also encouraged the adoption of filtering technology. See *Jean Yves L. dit Lafesse v Myspace*, Tribunal de Grande Instance de Paris, Ordonnance de référé, 22 June 2007, *MySpace Inc v Jean-Yves L dit Lafesse*, SARL L Anonyme Monsieur Daniel L, Monsieur Hervé L, CA Paris, 29 October 2008; *Tiscali Media v Dargaud Lombard, Lucky Comics*, Cour d'appel de Paris (4ème chambre, section A) decision of 7 June 2006; *Christian, C., Nord Ouest Production v Dailymotion, UGC Images*, Tribunal de Grande Instance de Paris (3ème chambre, 2ème section) decision of 13 July 2007. Further discussion on these cases see, Christina Angelopoulos, 'Filtering the Internet for Copyrighted Content in Europe', IRIS Plus, Issue 2009-4, pp.3-5.

Now, the adoption of filtering technology is no longer a problem and it has now been proven a potential technical solution.<sup>552</sup> For instance, Lime Wire, a file-sharing alternative to Grokster, has already launched an experimental Beta Filtering System on its own site.<sup>553</sup> According to their filtering system, it is now technically possible to install filters technology to identify the type of files being copied, check the copyright status of the material contained in the file and to check whether the material being downloaded is authorised. The current filter technology can also block the download if the download is in breach of copyright. In fact, copyright filtering technology has become a behind-the-scenes feature on many University sites, User-Generated content sites and online social networking venues. The Audible Magic Solution<sup>554</sup> is one of the filtering products that has now been used by many commercial sites such as, MySpace,<sup>555</sup> YouTube,<sup>556</sup> Facebook and many

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<sup>552</sup> For example, the Audible Magic Solution discussed in *SCRL Societe Belge des Auteurs, Compositeurs et Editeurs (Belgian Society of Authors, Composers and Publishers) v. SA Scarlet*, [2007] E.C.D.R. 19. Further discussion on the filtering technology and other available technology for protecting copyright content see, Bill Rosenblatt, (2007 December 27), '2007 Year in Review, Part 2', [WWW document] URL <http://www.drmwatch.com/watermarking/article.php/3718651> (visited 2009, January 20)

<sup>553</sup> See an introduction of the Lime Wire Beta Filtering System at the website of Lime Wire, available at <http://register.limewire.com/filter/>. Further discussion see, Thomas Mennecke, (2005, September 25), 'Lime Wire Works to Block Unlicensed Material', [WWW document] URL <http://www.slyck.com/news.php?story=927> (visited 2009, January 20)

<sup>554</sup> It refers to fingerprinting technology developed by companies such as the technology and services corporation Audible Magic. This fingerprinting technology uses a unique digital representation of each piece of protected content, such as that of a video-clip (a 'fingerprint' of the content) to identify it among all the traffic uploaded on a hosting website or flowing through a network, by means of comparison with a pre-existing extensive reference database of all fingerprints collected. Copyright holders who want to protect their work online can contribute a fingerprint of that work to the database. If a match is detected, blocking ensues. The advantage of fingerprinting technology over IP blocking is that the detection of unwanted material is automated, while the disadvantage, from a legal point of view, is that it involves the monitoring of the totality of the information passing through an Internet service provider (ISP). Further discussion on this see, Audible Magic Corporation, (2008), 'Response to the European Commission's Creative Content Online Consultation', [WWW document] URL [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_2008/comp/audible\\_magic\\_en.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_2008/comp/audible_magic_en.pdf), (visited 2009, July 3); Christina Angelopoulos, 'Filtering the Internet for Copyrighted Content in Europe', IRIS Plus, Issue 2009-4, pp.2-3; U.S. House of Representatives, Committee on Science and Technology, (2007, June 5) 'The Role of Technology in Reducing Illegal File-sharing: A University Perspective' (Hearing Charter), [WWW document] URL [http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/hearing\\_charter.pdf](http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/hearing_charter.pdf), (visited 2009, July 3); Monica Horten, (2008 August 26), 'Deep Packet Inspection, Copyright and the Telecoms Package', [WWW document] URL <http://www.iptegrity.com/pdf/dpi.telecom.package.monica.horten.26aug2008.pdf> (visited 2009, August 23).

<sup>555</sup> Stone, B., Helft, M., (2007, February 19), 'New Weapon in Web War over Piracy', [WWW document] URL <http://www.nytimes.com/2007/02/19/technology/19video.html> (visited 2009, May 2)

Universities to recognize illegally copied content on their websites. It was revealed in the consultation response received by the UK Government that Audible Magic has claimed that it has currently achieved a demonstrated level of zero false positives in its improved fingerprint technology, which means that it can ensure an accurate copyright status check and can distinguish between lawful/unlawful transactions.<sup>557</sup>

The benefit of the use of filtering technology is also obvious and it could achieve a better result than other options. Firstly, the use of filter technology could significantly prevent copyright infringement taking place and hence could potentially prevent the financial loss borne by the copyright industry. Secondly, the use of filtering technology could exempt peer-to-peer file-sharing providers from liability on the basis of the ‘intent’ established in the *Grokster* case if they demonstrate that they have taken such a more proactive role in protecting third party copyright works.<sup>558</sup> Nevertheless, aside to the advantages of the filtering technology, the negative effects of such a measure on the issue of privacy and a denial of the free access to information remain concerns, though it may be arguably smaller than that of the ‘three strikes’ approach as discussed in 4.3.4 of this Chapter. One difficulty that is worth noting here is who should bear the cost of filtering technology because the cost might create barrier for ISPs, in particular small ISPs, to adopting such an approach. Arguably, the copyright holders could be the one that share the cost with ISPs as they are the beneficiary of the filtering measures.

All in all, although the cases illustrate an increasing acceptance that ISPs, including peer-to-peer file-sharing providers, should bear some form of liability and the prospect of establishing a duty to filter on ISPs; the deterrent effect of the court

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<sup>556</sup> BBC, (2007, October 16), ‘YouTube Rolls Out Filtering Tools’, [WWW document] URL [http://news.bbc.co.uk/nol/ukfs\\_news/mobile/newsid\\_7040000/newsid\\_7046900/7046916.stm](http://news.bbc.co.uk/nol/ukfs_news/mobile/newsid_7040000/newsid_7046900/7046916.stm) (visited 2009, May 2)

<sup>557</sup> Government Response to a Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR: January 2009), p.4

<sup>558</sup> Tim Wu, ‘The Copyright Paradox: Understanding *Grokster*’, *Supreme Court Review*, 2006; *Stanford Law and Economics Olin Working Paper*, No. 317, p. 17; David. O. Blood, (2007, November 19), ‘A Focus on Filters: Latest Developments in *MGM v. Grokster*’, Client Alert on Latham & Watkins, Number. 646, pp.1-8, p. 5



actions has been limited<sup>559</sup> and considerable uncertainty is still associated with peer-to-peer file-sharing liability when the issues are unlegislated.

### 4.3 The ‘Three Strikes’ Law: the Legislative Prospect of Filtering

With the recognition of a need for legislative solution to tackle copyright piracy in the peer-to-peer file-sharing networks, governments around the world have been attempting to introduce new law or make further revision of existing copyright law to match the development of peer-to-peer file-sharing technology. To date, the level of success in this regard varies from country to country. France was the first country that attempted to oblige ISPs to engage with copyright holders to deal with the issue of copyright piracy on peer-to-peer file-sharing networks by the proposed ‘Hadopi’ law. Although the ‘three strikes’ approach introduced by the ‘Hadopi’ law caused much criticism in its own territory, its influence has expanded far beyond its origin. New Zealand was the first country that formally adopted the ‘three strikes’ approach with the passage of the Copyright (New Technologies) Amendment Act 2008,<sup>560</sup> though it has been delayed due to considerable opposition for both its legal and practical implication.<sup>561</sup> In Asia, two French civil law counterparts, Taiwan<sup>562</sup> and

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<sup>559</sup> BBC News, (2006, January 20), ‘File-Sharing “Not Cut by Court”’, [WWW document] URL <http://news.bbc.co.uk/1/hi/entertainment/4627368.stm> (visited 2006, January 20).

<sup>560</sup> Jason Rudkin-Binks & Stephanie Melbourne, ‘The New “Three Strikes” Regime for Copyright Enforcement in New Zealand - Requiring ISPs to Step Up to the Fight’, *Entertainment Law Review*, Vol. 20, Issue 4, (2009), pp.146-149; Earl Gray & Kate Walters, The Copyright (New Technologies) Amendment Act 2008: Updating New Zealand’s Copyright Act for the Digital Age, *Computer and Telecommunications Law Review*, Vol. 15, Issue 4, (2009), pp. 88-89.

<sup>561</sup> Section 92A Review Policy Proposal Document (Ministry of Economic Development of New Zealand: July 2009); Juha Saarinen, (2009, February 23), ‘John Key Delays Copyright Law-The Government May Suspend S92a If No Agreement is Reached’, [WWW document] URL <http://computerworld.co.nz/news.nsf/news/86D681292534A2CCCC25756600143FD1> (visited 2009, May 3)

<sup>562</sup> Intellectual Property Office of Taiwan, (2009, April 24), ‘ISP Liability Bill Completed Third Reading at the Legislative Yuan on April 21’, [WWW document] URL [http://www.tipo.gov.tw/en/News\\_NewsContent.aspx?NewsID=3675](http://www.tipo.gov.tw/en/News_NewsContent.aspx?NewsID=3675), (visited 2009, April 29); Ben Challis, (2009, April 29), ‘Taiwan Adopts “Three Strikes” Law’, [WWW document] URL <http://the1709blog.blogspot.com/2009/04/taiwan-adopts-three-strikes-law.html> (visited 2009, April, 29); Erik Chen & Mark Brown, ‘Taiwan: Taiwan Enacts ISP “Safe Harbour” Amendments to Copyright Act’, *Computer Law & Security Review*, Vol. 25, Issue 4, (2009), pp. 389-390; Soultxc, (2009, April 28), ‘Taiwan Passes “Three-Strikes” Anti-P2P law’ for File-Sharers?’, [WWW document] URL <http://www.zeropaid.com/news/86072/taiwan-passes-three-strikes-anti-p2p-law/> (visited 2009, April, 29)

South Korea<sup>563</sup> have seriously considered such an approach and have implemented the ‘three strikes’ system into their law. Among other things, a filtering mandate emerged as one of the legislative solutions in these enacted or proposed anti-copyright piracy legislations. Elsewhere, in the UK<sup>564</sup> and Australia<sup>565</sup> making installation of filtering technology as a mandatory obligation has also been considered and intensively debated.

In the light of these developments on an international level, it is necessary to examine whether the proposed or enacted legislative solution to address peer-to-peer file-sharing liability can offer a real prospect of filtering technology that will block infringing content and reduce the high level of copyright infringement on the Internet. To seek the answer to the question as posed, the following examination focuses on the provisions in relation to filtering requirements in the enacted copyright law or the proposed legislative solutions in several advanced countries.

#### **4.3.1 The ‘Hadopi’ Law: The Origin of the Filtering Mandate**

The most significant development of peer-to-peer file-sharing liability was the Olivennes Agreement<sup>566</sup> signed by the French government, ISPs, and copyright holders in November 2007. The Olivennes Agreement introduced a ‘three strikes,

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<sup>563</sup> Kim Tong-hyung, (2009, July 21), ‘New Online Copyright Law Baffles Users’, [WWW document] URL <http://www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=48856> (visited 2009, July 29); Nate Anderson, (2009, April 15), ‘South Korea Fits Itself for a “3 Strikes” Jackboot’, [WWW document] URL <http://arstechnica.com/tech-policy/news/2009/04/korea-fits-itself-for-a-3-strikes-jackboot.ars> (visited 2009, May 1); Peter Ollier, (2009, April 9), ‘Korea Passes Three-Strikes Copyright Law’, [WWW document] URL <http://www.managingip.com/Article/2178701/Korea-passes-three-strikes-copyright-law-full-version.html> (visited 2009, April 11); Soulxtc, (2009, March 29), ‘South Korea to Become 1st Country with “Three-Strikes” for File-Sharers?’, [WWW document] URL <http://www.zeropaid.com/news/85895/south-korea-to-become-1st-country-with-three-strikes-for-file-sharers/> (visited 2009, April, 11)

<sup>564</sup> Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR, UK: July 2008); Government Statement on the Proposed P2P File-Sharing Legislation (BIS, UK: August 2009)

<sup>565</sup> Andrew Ramadge, (2008, December 23), ‘Internet Filtering Plan may Extend to Peer-to-Peer Traffic, Says Stephen Conroy’, [WWW document] URL <http://www.news.com.au/technology/story/0,28348,24833959-5014239,00.html> (visited 2009, July 1); Soulxtc, (2009, May 27), ‘Aussie Net Filtering to be “Voluntary Mandatory”’, [WWW document] URL <http://www.zeropaid.com/news/86318/aussie-net-filtering-to-be-voluntary-mandatory/> (visited 2009, July 1)

<sup>566</sup> The Olivennes Agreement, available at: <http://www.popolodellarete.it/showthread.php?t=6010> (Translated Version in French)

you are out' approach<sup>567</sup> towards repeated copyright infringers. In addition, the Olivennes Agreement contained provisions that required ISPs to test and implement filter technology in order to prevent infringing content and diminish infringement. By signing the agreement, the ISPs agreed to 'to cooperate with the right holders on the ways to test filtering technologies which are available but which deserve more preliminary in-depth research'<sup>568</sup> and 'to apply them if the results prove convincing and if their general application proves technically and financially realistic'<sup>569</sup>. Furthermore, the ISPs agreed to 'extend in the short term the effective filtering and fingerprinting and watermarking technologies, notably by establishing with them the acceptable fingerprinting technologies together with the catalogues of fingerprinting sources that the right holders should help to create; or define the conditions within which these technologies will be systematically implemented.' The use of filtering technology was also thoroughly discussed in the Olivennes Report<sup>570</sup>. The Report examined the possibility of implementing filtering under Article L. 336-1 of the Code of Intellectual Property (Article 27 of Law DADVSI<sup>571</sup>), which allows the High Court to order all necessary measures for the protection of copyright or related right when software is 'primarily used for the illegal provisions of works or objects protected'.<sup>572</sup> In addition, the Report discussed the possibility of implementing

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<sup>567</sup> The 'three strikes' approach refers to the following procedure against repeated infringer. First, an ISP sends a warning email to the file-sharer under the direction of the High Authority for the Dissemination of Works and Protection of Rights on the Internet. Secondly, when a repeated infringement is suspected, the ISP sends out second letter in the six months following the first letter. Thirdly, the ISP is required to disconnect the repeated infringer for 2 months to 1 year or if necessary, the repeated infringer will be required to pay a fine of up to 30000 Euros (approximately 27,500 Pounds Sterling, based on the foreign currency exchange rate on 23 October 2009: British Pound Sterling: Euro= 1: 1.09)

<sup>568</sup> The Olivennes Agreement, available at: <http://www.popolodellarete.it/showthread.php?t=6010> (Translated Version in French)

<sup>569</sup> *Ibid.*

<sup>570</sup> The Olivennes Report (The Development and the Protection of Works Culture on the New Networks - Le Developpement Et La Protection Des Oeuvres Culturelles Sur Les Nouveaux Reseaux), (2007, November), (French Version), available at: <http://lesrapports.ladocumentationfrancaise.fr/BRP/074000726/0000.pdf>

<sup>571</sup> DADVSI refers to the Law on Authors' Rights and Related Rights in the Information Society (Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information). It is the law that implemented the 2001 European Directive on Copyright, which in turn implemented the WCT and the WPPT. The law is available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000266350&dateTexte=> (French Version)

<sup>572</sup> 3.3.1.1, A, of the Olivennes Report (The Development and the Protection of Works Culture on the New Networks - Le Developpement Et La Protection Des Oeuvres Culturelles Sur Les Nouveaux Reseaux)

filtering under Article 6-I-8 of the Law on Confidence in the Digital Economy<sup>573</sup> - the law implemented the Electronic Commerce Directive. Moreover, the report pointed out that the filtering techniques have already been used on the sites of hosting or audio and video sharing.<sup>574</sup> While the report highlighted the benefits of the filtering technique in reducing costs, improving efficiency and supporting technological development, it also outlined several drawbacks of filtering measures such as, blocking the exchange of legal content, affecting Internet users' privacy and denying public access to information, which is discussed at 4.3.4 of this Chapter.

In November 2007, the filtering mandate of ISPs along with 'three strikes' approach was subsequently incorporated into the French anti-piracy law - Loi Favorisant La Diffusion et la Protection de la Création Sur Internet (Act to Promote the Dissemination and Protection of Creation on the Internet - nicknamed the 'Hadopi' law)<sup>575</sup> -, which was based on the Olivennes Agreement and the Olivennes Report. In the 'Hadopi' law, ISPs were required to implement filtering services for copyright content using fingerprinting or watermarking technology. The law further stated that implementation of content filtering technology would be overseen by the government agency – the High Authority for the Dissemination of Works and Protection of Rights on the Internet (Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet) - established to monitor the Internet for piracy and manage the 'three strikes' process.<sup>576</sup> Nevertheless, controversy arose as to the adverse effects of such a law on the right to a proper trial, the invasion of the right of privacy and the denial of public access to information.<sup>577</sup> The opposition submitted the

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<sup>573</sup> Article 6-I-8 of the Law on Confidence in the Digital Economy (Loi sur la confiance dans l'économie numérique-LEN) states that 'the judicial authority may prescribe interim or upon request, to any person named in 2 or, alternatively, to any person mentioned in 1, all measures to prevent harm or to stop damage caused by the contents of a communication service to the public online.'

<sup>574</sup> Annex 1, 3.3.1.1, B, of the Olivennes Report (The Development and the Protection of Works Culture on the New Networks - Le Developpement Et La Protection Des Oeuvres Culturelles Sur Les Nouveaux Reseaux) (It did not refer to specific sites that have used such technology, according to the English translation of the Report)

<sup>575</sup> Act to Promote the Dissemination and Protection of Creation on the Internet (Loi Favorisant La Diffusion et la Protection de la Création Sur Internet) (2009, June 14) (French Version), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020735432>

<sup>576</sup> Article L331-23 of the Code of Intellectual Property (Article 5 of the Act to Promote the Dissemination and Protection of Creation on the Internet)

<sup>577</sup> Leigh Phillips, (2009, September 16), 'French Internet Piracy Bill Passes on Third Attempt', [WWW document] URL <http://euobserver.com/9/28673> (visited 2009, September 17); European Digital Rights, (2009, July 15), 'Hadopi 2 Adopted Very Fast by the French Senate', [WWW

review of the law to the Constitutional Council on the foregoing grounds and finally the first version of the ‘Hadopi’ law was struck down. The French Government soon worked out the ‘Hadopi’ 2, which allows the persistent infringers to be tried in a French court before suspension of their Internet service. However, this new version of law is criticised<sup>578</sup> as having failed to resolve the concerns on, *inter alia*, freedom of speech and communication. The law is now under the review of the Constitutional Council again and the Constitutional Council will give its ruling on 22 October 2009.

Same concerns in relation to the use of filtering technology have also been the subject of debate. Questions emerged as to the implication of filtering technology for Internet users who are entitled to access information of their choice. Because the filtering technology is now advancing, it may not be in conformity with different computers and guarantee 100% accuracy. Therefore, when filtering technology blocks content deemed to be infringing others’ copyright, authorised content and content in public domain may also be filtered. Such an adverse effect hence requires the law to provide necessary safeguards for freedom of expression. It was argued that the ‘Hadopi’ law does not provide sufficient safeguards when it enables the government agency to ask ISPs to filter unlawful content. In addition, in a European context, the law of any EU Member State that mandates filtering technology in a copyright context may be in conflict with the provisions of Article 15 of the Electronic Commerce Directive, which prohibits the imposition of a general

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document] URL <http://www.edri.org/edri-gram/number7.14/3-strikes-second-senate> (visited 2009, September 23); Charles Bremner, (2009, April 9), ‘Setback for Sarkozy as French Parliament Rejects Controversial Internet Law’, [WWW document] URL <http://www.timesonline.co.uk/tol/news/world/europe/article6067641.ece> (visited 2009, April 10); Lizzy Davies, (2009, April 9), ‘French MPs Reject Controversial Plan to Crack Down on Illegal Downloaders’, [WWW document] URL <http://www.guardian.co.uk/technology/2009/apr/09/france-illegal-downloads-state-surveillance> (visited 2009, April 10). Alex TÜRK, (2008, November 3), ‘Anti-Piracy Law: the Government Criticised by the CNIL’, [WWW document] URL <http://www.latribune.fr/entreprises/communication/telecom--internet/20081103trib000305843/loi-antipiratage-le-gouvernement-critique-par-la-cnil-.html> (Translated Version in English) (visited 2008, December 20)

<sup>578</sup> Neurone39, (2009, July 13), ‘Hadopi Raises from the Dead, Still Flawed’, [WWW document] URL <http://www.laquadrature.net/en/print/2026> (visited 2009, October 3); Catherine Saez, (2009, October 2), ‘Second Hadopi Law Faces French Constitutional Test’, [WWW document] URL <http://www.ip-watch.org/weblog/2009/10/02/second-hadopi-law-faces-constitutionality-test-by-french-socialist-party/> (visited 2009, October 3)

monitoring obligation on ISPs. Although the Olivennes Report argued<sup>579</sup> that the use of filtering technology was irrelevant to the provisions of the Electronic Commerce Directive because filtering technologies were technical instruments, which did not require the intervention of the ISPs, the French legislature still needs to fully substantiate such a nature of the filtering technology. It might be helpful for the legislature to, rather than accentuate the technical nature of the filtering measures, take advantage of the exception<sup>580</sup> provided by the Electronic Commerce Directive, in which monitoring obligation is allowed to impose on ISPs ‘in a specific case’. Filtering copyright protected content to prevent further copyright infringement may arguably fall within the exception. In addition, it may be arguable that the information being blocked by the filtering technology will be limited to certain, specific copyright content; therefore, no general obligation to monitor is imposed. Nevertheless, the outcome of the European Telecoms Package<sup>581</sup> negotiation that

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<sup>579</sup> Annex 1 of the Olivennes Report (The Development and the Protection of Works Culture on the New Networks - Le Developpement Et La Protection Des Oeuvres Culturelles Sur Les Nouveaux Reseaux)

<sup>580</sup> Recital 47 of the Electronic Commerce Directive states that, ‘[M]ember States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.’

<sup>581</sup> In November 2007, the European Commission adopted proposals for a reform of the EU telecoms rules that aimed to change the EU Telecoms Rules of 2002 and unify Europe’s telecommunications market for all European Member States. In order for the proposal in the ‘Telecoms Reform Package’ become law, the European Parliament and the EU Council of Ministers must approve it. So far, 99% of the text of the telecoms package has already been agreed between Parliament and Council. However, the Council and Parliament are in disagreement over a clause in the proposed ‘telecoms reform package’ which would stop Internet users being cut off for alleged file-sharing without a court’s authority (this was reflected in the ‘Hadopi’ 1). The European Parliament and the EU Council of Ministers must agree a new telecoms reform deal by the end of 2009, otherwise the whole Telecoms Package is deemed not adopted. See, ‘Proposal for a Directive of the European Parliament And of the Council amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on Access to, and Interconnection of, Electronic Communications Networks and Services, and 2002/20/EC on the Authorisation of Electronic Communications Networks and Services’, available at: [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosID=196418](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosID=196418). See also, Juliane Kammer, (2009, October 22), ‘Telecoms Package: Parliament and Council to Open Formal Conciliation Proceedings’, [WWW document] URL [http://www.europarl.europa.eu/news/expert/infopress\\_page/058-62732-292-10-43-909-20091019IPR62731-19-10-2009-2009-false/default\\_et.htm](http://www.europarl.europa.eu/news/expert/infopress_page/058-62732-292-10-43-909-20091019IPR62731-19-10-2009-2009-false/default_et.htm) (visited 2009, October 27); The European Parliament, (2009, April 30), ‘The European Parliament and Council Reach an Agreement on the Telecoms Package’, [WWW document] URL <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20090421BRI54104&secondRef=ITEM-009-EN&format=XML&language=EN> (visited 2009, May 6); The European Parliament, (2009, May 5), ‘Telecoms Package: More Competition and Improved Consumer Rights’, [WWW document] URL

aims to change the EU Telecoms Rules of 2002 and the revision of the Electronic Commerce Directive<sup>582</sup> may affect on the filtering mandate in the ‘Hadopi’ law.<sup>583</sup>

#### 4.3.2 South Korea and Taiwan: The Filtering Mandate in the Enacted Law

While the French pioneered the ‘Hadopi’ law and struggled to get the law approved by Parliament, South Korea leapt to the forefront. In March 2009, the Committee on Culture, Sports, Tourism, Broadcasting & Communications of the National Assembly of the South Korea passed a bill to amend the Copyright Law.<sup>584</sup> The bill took effect on 23 July 2009. The Amendment, *inter alia*, created Article 133-2 for deletion of illegal reproductions through information and telecommunication networks, in which a ‘three strikes’ system is included for tackling illegal file-sharing. Besides the provisions with which the Minister of Culture, Sports and Tourism is granted the authority not only to order the closing of online message boards or suspension of individual Internet accounts, but also to shut down a site after three warnings of infringement, regardless of whether copyright holders requested that or not, Article 133-2 (4) states:

In cases where an online service provider falls under one of the following Subparagraphs and it is considered that the order of use of works, etc. is seriously damaged due to the services of concern in light of the manner of the services and quantity and characteristics of transmitted reproductions, the Minister of Culture, Sports, and Tourism may order information and communication service providers (which refer to such information and telecommunication service providers as provided in Subparagraph 3, Paragraph 1, Article 2 of the Act on Promotion of Information and Communications Network Utilisation and Information Protection.) to block connections to their information and telecommunication

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[http://www.europarl.europa.eu/news/expert/background\\_page/058-54931-124-05-19-909-20090504BKG54930-04-05-2009-2009-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/background_page/058-54931-124-05-19-909-20090504BKG54930-04-05-2009-2009-false/default_en.htm) (visited 2009, May 6)

<sup>582</sup> Article 21 of the Electronic Commerce Directive enjoins the Commission to submit a biannual report on the application of the Directive, accompanied, where necessary, by proposals for adapting it to legal, technical, and economic developments. A public consultation has launched to identify the shortcomings of the Directive, including a possible monitoring role to be assumed by ISPs. A new report may be provided in the second half of 2009 and the consultation may lead to a new legislative proposal. Further discussion on this matter see, Euractiv, (2009, January 30), ‘New EU Battle over Copyright Rules in Sight’, [WWW document] URL <http://www.euractiv.com/en/infosociety/new-eu-battle-copyright-rules-sight/article-178993> (visited 2009, February 20)

<sup>583</sup> Christina Angelopoulos, ‘Filtering the Internet for Copyrighted Content in Europe’, IRIS Plus, Issue 2009-4, pp.1-12.

<sup>584</sup> *Supra* note 563.

network of such online service providers as prescribed under the Presidential Decree after the deliberation by the Commission.

1. has been subject to fine under Paragraph (1) of Article 142 twice and becomes the object of the fine of the same kind again because it fails to take necessary measures pursuant to Paragraph (1) of Article 104.

2. has been subject to fine under Subparagraph 3 of Paragraph 2 of Article 142 three times and becomes the object of the fine of the same kind again because it fails to abide by orders of the Minister of Culture, Sports and Tourism under Subparagraph 2 of Paragraph (1), Paragraph (2) or Paragraph (3).<sup>585</sup>

Therefore, the filtering mandate is stipulated in this Amendment of the Copyright Law. Nevertheless, the filtering mandate is not new in the Copyright Law. In fact, Article 104 of the Copyright Act already made it the obligation of online service providers and the provision was applied in a landmark peer-to-peer file sharing case<sup>586</sup> in which the defendant was ordered to employ audio fingerprinting technologies, hash values, and digital watermarking technologies to intercept illegal file sharing. Article 104 of the Copyright Act is worth quoting here:

(1) Online service providers whose main purpose is to enable different people to interactively transmit works, etc. among themselves by using computers, etc. (hereinafter referred as ‘special types of online service providers’) shall take necessary measures such as technological measures intercepting illegal interactive transmission of works, etc. upon the requests of rights holders. In such cases, matters related to requests of rights holders and necessary measures shall be determined by the Presidential Decree.

(2) The Minister of Culture and Tourism may determine and notify the scope of special types of online service providers in accordance with Paragraph (1).<sup>587</sup>

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<sup>585</sup> The text is cited here can be found from ‘Unofficial Translation of the “Three Strike Out (Graduated Response)” Provision in the Copyright Law Amendment Bill proposed by the Ministry of Culture, Sports and Tourism in July, 2008’ at [http://ipleft.or.kr/bbs/view.php?board=ipleft\\_5&id=488&page=1&category1=3](http://ipleft.or.kr/bbs/view.php?board=ipleft_5&id=488&page=1&category1=3)

<sup>586</sup> Soribada 5 (2007.10, App. Ct.). Further discussion on this case see, IIPA, (2008, February 11), ‘International Intellectual Property Alliance 2008 Special 301 Report – South Korea’, [WWW document]. URL [http://www.iipa.com/rbc/2008/2008SPEC301SOUTH\\_KOREA.pdf](http://www.iipa.com/rbc/2008/2008SPEC301SOUTH_KOREA.pdf) (visited 2009, July 4), pp.334-344, p. 338; Dae-Hee Lee, ‘Online Copyright Protection in Korea’, [WWW document]. URL [http://www.aunsec.org/archive/public\\_html/download/presentations/Online%20Copyright%20Protection%20in%20Korea.ppt](http://www.aunsec.org/archive/public_html/download/presentations/Online%20Copyright%20Protection%20in%20Korea.ppt) (visited 2009, July 4)

<sup>587</sup> The Copyright Law of Korea, (December 28, 2006), [WWW document]. URL [http://eng.copyright.or.kr/law\\_01\\_01.html#Article%20104%20\(Li](http://eng.copyright.or.kr/law_01_01.html#Article%20104%20(Li) (visited 2009, July 2)



It appears from the plain reading of the amendment that South Korea has adopted stringent measures in dealing with illegal file-sharing. Although the government emphasised that the target of the law will be those engaged in massive illegal reproduction or distribution of copyright material with commercial intent, it is not clear what safeguards are available for individual users.

In Taiwan, a similar attempt has been made to curb illegal file-sharing. In May 2009, the Presidential Office promulgated the ISP liability limitation bill as Chapter 6 -1 of the Copyright Act<sup>588</sup> where influence of both the ‘safe harbours’ of the DMCA<sup>589</sup> and the ‘three strikes’ approach<sup>590</sup> can be found. According to Article 90-4 of the Copyright Act:

[A]n Internet service provider shall be entitled to the application of Article 90-5 to Article 90-8 regarding the limitation on liability only if the service provider,

1. by contract, electronic transmission, automatic detective system or other means, informs users of its copyright or plate right<sup>591</sup> protection policy, and takes concrete action to implement it; and
2. by contract, electronic transmission, automatic detective system or other means, informs users that in the event of repeat alleged infringements up to three times the service provider shall terminate the service in whole or in part;

In addition, Article 90-4 of the Copyright Act states that the same entitlement applies to an Internet service provider who accommodates and implements the technical measure, which ‘have been developed based on a broad consensus and are used to identify or protect copyrighted or plate-righted works’ and ‘has been ratified by the competent authority’.<sup>592</sup> In addition, Article 90-6 to 8 stipulate ISPs’ responsibility

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<sup>588</sup> The Amendment of the Copyright Act of the Republic of China, (2009, May 15), [WWW document] URL [http://www.tipo.gov.tw/en/AllInOne\\_Show.aspx?path=2557&guid=26944d88-de19-4d63-b89f-864d2bdb2dac&lang=en-us](http://www.tipo.gov.tw/en/AllInOne_Show.aspx?path=2557&guid=26944d88-de19-4d63-b89f-864d2bdb2dac&lang=en-us) (English Version) & <http://lis.ly.gov.tw/npl/pdf/tw1305200906.pdf> (Chinese Version) (visited 2009, July 1)

<sup>589</sup> Article 90-5 to 11 the Copyright Act of the Republic of China. Further discussion on this see, Zhongxin Zhang, ‘The Consideration of the Legislative Direction on Limitation of Copyright Liability for Internet Service Providers’, Monthly Magazine of the National Lawyers of the Republic of China, (2008, August), pp.1-34, p.23

<sup>590</sup> Article 90-4 the Copyright Act of the Republic of China

<sup>591</sup> According to Article 79 of the Copyright Act of the Republic of China, the plate right is an exclusive right given to a person who arranges and prints a literary that has no copyright or for which copyright has been extinguished, or in the case of an artistic work, who photocopies, prints, or uses a similar method of reproduction and first publishes such reproduction based on such a original artistic work and duly records it in accordance with the Copyright Act.

<sup>592</sup> Article 90 – 4, paragraph 3 of the Copyright Act of the Republic of China

for expeditiously removing or disabling access to the allegedly infringing content or related information upon notification. Although nowhere in the law does it state what constitutes ‘automatic detection system’ and ‘other means’, the legal profession<sup>593</sup> suggests that the ‘automatic detection system’ should refer to programs or systems that detect or filter content infringing copyright, and ‘other means’ might be understood as the setting up of copyright infringement reporting hotline. As for liability for neglecting to adopt filtering technology to prevent illegal file-sharing, the ruling of the *Kuro*<sup>594</sup> case may provide guidance for the future court to interpret the provisions in the new amendment.

While the ‘three strikes’ approach has been hotly debated in other countries, it is unknown whether the implication of the ‘three strikes’ approach to freedom of expression and public access to information has been debated in these two countries due to the limited sources of information pertaining to them. However, there was argument<sup>595</sup> that part of reasons for these two democracies to adopt the aggressive

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<sup>593</sup> Zhongxin Zhang, ‘Article 90 – 4 of the Copyright Act of the Republic of China’, [WWW document] URL <http://www.copyrightnote.org/crnote/bbs.php?board=11&act=read&id=156> (visited 2009, July 4)

<sup>594</sup> September 2005 Taipei District Court 2003 Su-Tzu 2146 Judgment (*Kuro*, a popular Taiwanese peer-to-peer file-sharing service was found guilty of encouraging users to commit copyright infringement and failing to employ filtering technology to prevent illegal copying. Three *Kuro* executives were sentenced to three years in prison and fined. The *Kuro* case was the first criminal peer-to-peer file-sharing liability case in Taiwan. The Supreme Court upheld the decision of the District court on July 2008.) Further discussion on this case see, Guobin Cui, ‘Analysis of the *Kuro* Case – Determination of Copyright Liability behind the Peer-to-Peer File-Sharing’, *Yue Dan Civil & Commercial Law of Taiwan Yuanzhao*, Issue 11, (2006), pp.35-42, p.38, p.40; Gabriela Kennedy, Sarah Doyle, ‘A Snapshot of Legal Developments and Industry Issues Relevant to Information Technology, Media and Telecommunications in Key Jurisdictions across the Asia Pacific’, *Computer Law & Security Report*, Issue 23, (2007), pp. 148-155, p.152.

<sup>595</sup> Intellectual Property expert of the Republic of China (Taiwan), Zhongxin Zhang pointed out that since the passage of the DMCA, the United States of America has repeatedly lobbied countries to accept their legislative model for ISP copyright liability through the signing of the ‘Free Trade Agreement (FTA)’. Two common law countries, Australia and Singapore and South Korea that belongs to the civil law legal system have amended their copyright law in order to sign the Free Trade Agreement with the United States of America. See Zhongxin Zhang, ‘The Consideration of the Legislative Direction on Limitation of Copyright Liability for Internet Service Providers’, *Monthly Magazine of the National Lawyers of the Republic of China*, (2008, August), pp.1-34, p.3. Further discussion on this see, Yufeng Li, *The Law at Gunpoint: Research on Copyright History of China*, (Beijing: Intellectual Property Press, 2006), p.256; William. H. Copper, *et al*, ‘The Proposed U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications’, [WWW document] URL <http://fpc.state.gov/documents/organization/100208.pdf> (visited 2009, July 5), pp.1-56, p. 43; IIPA, (2009), ‘South Korea - International Intellectual Property Alliance (IIPA) 2009 Special 301 Report on Copyright Protection And Enforce’, [WWW document] URL <http://www.iipa.com/rbc/2009/2009SPEC301SOUTHKOREA.pdf> (Visited 2009, July 3) (this report

approach against online copyright piracy is very likely based on their consideration of maintaining good international economic relations with the United States of America, in particular, for fulfilling their obligation under their Free Trade Agreements with the United States of America. In addition, unlike its French counterpart the legislation of which has to implement European Law locally by virtue of its membership to the European Union, South Korea and Taiwan has full autonomy to legislate. Therefore, even if there were criticisms and opposition against the amendment of the law, the legislature can still go ahead and get the law enacted if there is a good reason, such as curbing extensive online copyright piracy, for issuance of the law.

#### **4.3.3 The UK: the Proposed Mandatory Use of Filters**

In the UK, making a legislative requirement for ISPs to adopt filtering technology was also taken as one of the options for addressing the problem of unlawful peer-to-peer file-sharing by the British Government when they issued ‘Consultation on Legislative Options to Address Illicit Peer-To-Peer (P2P) File-Sharing’<sup>596</sup> in 2008. Even though the British Government, on the basis of the responses to the consultation, has decided to move forward with an approach of requiring ISPs to take direct action against users who are identified by the rights holder as infringing copyright through peer-to-peer file-sharing networks..

In the 2008 consultation paper, option A4 suggested two ways of adopting filtering measures. The first was to require ‘that ISPs allow the installation of filtering equipment that will block infringing content (to reduce the level of copyright infringement taking place over the internet)’<sup>597</sup>. The second was to require ISPs themselves to install filtering equipment that would block infringing content. Both

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recommended South Korea to ratify and fully implement the copyright law and enforcement provisions of the Korea-US Free Trade Agreement. Rich Fiscus, (2009, February 25), ‘Prime Minister Blames UK, US for New Zealand 3 Strikes Law’, [WWW document] URL <http://www.afterdawn.com/news/archive/17102.cfm> (visited 2009, July 12) (This article reported that Prime Minister of New Zealand, John Key had said that ‘[I]f New Zealand was to sign a free-trade agreement with America for instance, we would need an equivalent of Section 92A’ )

<sup>596</sup> Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR, UK: July 2008).

<sup>597</sup> Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR, UK: July 2008), p. 34.

can be made a compulsory obligation by legislation. Nevertheless, the consultation paper also pointed out that, as a member of the European Union, making filtering a legislative requirement in the UK law might give rise to questions of compatibility with Article 15 of the Electronic Commerce Directive, which prohibits a general monitoring obligation on ISPs.<sup>598</sup> Having elaborated the technological capability of filtering measures, the consultation paper further delineated the positive outcome that the mandatory use of filters might achieve in preventing infringement taking place and preventing the financial loss of the right holders.<sup>599</sup> The least possible effect of the filtering measures on data protection and its low cost compared to the regulatory process such as the cost of establishing and operating a new regulatory body were highlighted in the consultation paper.<sup>600</sup> However, the consultation paper also raised the question as to the impact of adopting filtering measures on free access to information.<sup>601</sup> It pointed out that mandatory use of filters might lead to the denial of public access to some free content because current filtering technology cannot guarantee 100% accuracy and false positives might occur when the program or system mistakenly blocked authorised files.<sup>602</sup> Additionally, the consultation paper identified the cost for ISPs to deploy and maintain filtering technology, which might create a barrier for small ISPs to follow the scheme.<sup>603</sup>

Although the filtering technology was not considered as the preferred option by the stakeholders based on the responses to the consultation paper, the final report of Digital Britain indicated<sup>604</sup> that filtering technology remains as one of the potential technical measures. Therefore, if the notification process has been fully implemented but has not succeeded in significantly reducing infringement (by 70% of the number of people identified), the Government would provide Ofcom power to ‘place additional conditions on ISPs aimed at reducing or preventing online copyright infringement by the application of various technical measures’<sup>605</sup>, including filtering.

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<sup>598</sup> *Ibid.*, p. 36

<sup>599</sup> *Ibid.*

<sup>600</sup> *Ibid.*

<sup>601</sup> *Ibid.* p. 63

<sup>602</sup> *Ibid.* p. 26

<sup>603</sup> *Ibid.* p. 64

<sup>604</sup> Digital Britain – Final Report (BIS, UK: June 2009), pp. 111-112

<sup>605</sup> *Ibid.* p. 111

However, due to the controversy surrounding the issue, the adverse effects of adopting such a technical measure may still be considered, and for the UK or other European Member States to adopt such an option, the European Law must be a factor. Nevertheless, the thorough analysis of the strengths and weaknesses of the filtering measures proposed by the consultation paper would still be of paramount importance for countries that look for an effective way such as mandatory use of filters of tackling illegal peer-to-peer file-sharing. The legislative potential of the filtering measures, its strengths and weaknesses might be considered in order for these countries to think further on, for instance, how to provide an effective and readily accessible means of recourse and remedy after the application of filtering measures.

#### **4.3.4 The Renovation of the ‘Three Strikes’ Approach in New Zealand**

While the ‘three strikes’ approach is proliferating, resistance to such an approach was met in New Zealand where a stringent ‘three strikes’ alike approach was adopted by Section 53 of the Copyright (New Technologies) Amendment Act 2008.<sup>606</sup> In this amendment, Section 92A of the Copyright Act obliges an ISP to ‘adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.’ Criticisms<sup>607</sup> emerged from the opposition as to whether ISPs should have the power to determine user guilt based on copyright holders’ allegation and the adverse effect of such a provision on freedom of expression, and public access to information. They also argued that the provision was vaguely worded without clarification to terms such as, ‘appropriate circumstances’ and ‘repeat infringer’.

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<sup>606</sup> Simon Power, (2009, March 23), ‘Government to Amend Section 92A’, [WWW document] URL <http://www.beehive.govt.nz:80/release/government+amend+section+92a> (visited 2009, May 3); Telecommunications Carriers’ Forum, (2009, June 9), ‘Process Review Section 92A of the Copyright (New Technologies) Amendment Act’, [WWW document] URL <http://tcf.org.nz/news/93586b37-603a-4eca-8446-cb04da30ae5f.cmr> (visited 2009, June 10);

<sup>607</sup> Nate Anderson, (2009, March 23), ‘“3 Strikes” Strikes Out in NZ as Government Yanks Law’, [WWW document] URL <http://arstechnica.com/tech-policy/news/2009/03/3-strikes-strikes-out-in-nz-as-government-yanks-law.ars> (visited 2009, May 2); Nate Anderson, (2009, March 17), ‘Google: Internet Disconnection a “Disproportionate” Penalty’, [WWW document] URL <http://arstechnica.com/tech-policy/news/2009/03/google-cutting-internet-access-for-p2p-abuse-disproportionate.ars> (visited 2009, May 2); Nate Anderson, (2009, February 19) ‘Kiwi “Three Strikes” Law Countered with “Internet Blackout”’, [WWW document] URL <http://arstechnica.com/tech-policy/news/2009/02/kiwi-three-strikes-law-countered-with-internet-blackout.ars> (visited 2009, May 2); Muriel Newman, (2009, February 15), ‘Three Strikes and You are Terminated’, *New Zealand Centre for Political Research Weekly*, (2009, February), pp.1-2.

New Zealand is now seeking public input to draft ‘a more workable piece of legislation’<sup>608</sup> although the revised version of Section 92A is still being argued<sup>609</sup> to have remained the option to terminate the Internet connection of an accused repeat infringer intact in one of the most controversial parts of the Act.

#### **4.3.4 Summary**

Having discussed the apparent trend in the courts of various jurisdictions to put greater emphasis on requiring ISPs, in particular those engaging in peer-to-peer file-sharing, to take necessary technical measures including filtering technology to prevent their networks being used for disseminating unauthorised copyright content, it is of concern whether there is evidence suggesting a legislative commitment to the progressive implementation of this approach.

Close examination of the filtering mandate in the enacted or proposed legislation suggests that mandatory use of filters differs from the ‘three strikes’ approach. While the ‘three strikes’ approach provides ISPs the power to determine Internet users’ guilt, mandatory use of filters simply helps ISPs to prevent their network being used to infringe copyright based on the database provided by copyright owners or licensed right holders. Therefore, the blocking categories will not reflect a particular ideological viewpoint, although there is still a need to advance such technology to minimise the rates of error, establish an efficient process for changing incorrect settings and providing recourse to remedies after the defective application of filtering measures. Such a filtering technology is hence unlikely to have the adverse effect of the ‘three strikes’ approach on a fundamental right - every person’s right to have a fair and just trial to prove his/her innocence. In addition, mandatory use of filters would not deprive users’ access to the Internet and result in the denial of their free access to information. The information threatened under a mandatory use of filters scheme may therefore be limited to the content protected by copyright law, which is accessible with authorisation of the right holders or under fair use exemption. Nevertheless, there are presently solutions already in place, which can solve, though

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<sup>608</sup> Section 92A Review Policy Proposal Document for Consultation

<sup>609</sup> NetGuide, (2009, July 15), ‘92A Changes Keep Net Termination’, [WWW document] URL <http://www.netguide.co.nz/200907151077/92a-changes-keep-net-termination.php> (visited 2009, July 22)

not completely, the problem.<sup>610</sup> For example, YouTube has employed a video identification system<sup>611</sup>, which allows users to contest blocking so that YouTube can refer the clip to the right holders for manual review. In addition, YouTube is using Audible Magic's audio fingerprinting tool to identify the audio used in uploaded videos. This means that if the audio track matches the video track, it is very likely that the audio track infringes. Moreover, a test have been suggested<sup>612</sup> for YouTube to protect fair users, which is to add a test to determine what proportion of the uploaded video is comprise of content claimed by a right holder. If there is a substantial copying, it might be a copyright infringement.

It is undeniable that the filtering technology is yet rudimentary, in particular, the application in a copyright context and technology will never be the entire solution. Nevertheless, the potential of mandatory use of filters in preventing widespread copyright infringement is enormous, as highlighted in the UK Consultation Paper and other publications.<sup>613</sup> Moreover, in terms of the financial implications, the cost reduction associated with the filtering measures is likely to be substantially less than that of the 'three strikes' approach. Additionally, mandatory use of filters might create more efficiency<sup>614</sup> in stopping infringement than the 'three strikes' approach which might 'be slow – in particular if it is required to handle a large number of requests each day'<sup>615</sup>, without taking into account the privacy issues and data protection issues involved in such an approach.

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<sup>610</sup> Fred Von Lohmann, (2007, October 15), 'YouTube's Copyright Filter: New Hurdle for Fair Use?', [WWW document] URL <http://www.eff.org/deeplinks/2007/10/youtubes-copyright-filter-new-hurdle-fair-use> (visited 2008, September 3);

<sup>611</sup> YouTube, 'YouTube Video Identification Beta', [WWW document] URL <http://www.eff.org/deeplinks/2007/10/youtubes-copyright-filter-new-hurdle-fair-use> (visited 2008, September 3)

<sup>612</sup> Fred Von Lohmann, (2007, October 15), 'YouTube's Copyright Filter: New Hurdle for Fair Use?', [WWW document] URL <http://www.eff.org/deeplinks/2007/10/youtubes-copyright-filter-new-hurdle-fair-use> (visited 2008, September 3)

<sup>613</sup> Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR, UK: July 2008), p. 36; Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety (Australian Communications and Media Authority, 2008), p.47; U.S. House of Representatives, Committee on Science and Technology, (2007, June 5) 'The Role of Technology in Reducing Illegal File-Sharing: A University Perspective' (Hearing Charter), [WWW document] URL [http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/hearing\\_charter.pdf](http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/hearing_charter.pdf), (visited 2009, July 3), pp. 1-7, p. 2

<sup>614</sup> See earlier discussion in 4.2.4 of Chapter 4.

<sup>615</sup> Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR, UK: July 2008), p. 36

Countries such as Germany<sup>616</sup> and Sweden<sup>617</sup> have expressed opposition to this perspective and would not consider the ‘three strikes’ approach in their jurisdictions. And at the time of writing this thesis, it is not ascertainable yet if a mandatory filtering mechanism will thrive in future or if such a mechanism will be moved away from a copyright protection context. The adaptation of a mandatory filtering mechanism in several countries, either through their legislation<sup>618</sup> or through voluntary use of filtering in private sector<sup>619</sup>, however, suggests that filtering technology is one of the ways forward to the prevention of unlawful content.

#### **4.4 The Implication for China**

When copyright infringement over peer-to-peer file-sharing networks is prevalent and many countries are fighting against online copyright piracy, China weighed into the battle. However, apart from the provision of Article 3 of the Judicial Interpretation that is applicable by way of analogy, no specific law or provisions that address liability in peer-to-peer file-sharing services exist. While Article 3 of the Judicial Interpretation is applied, it fails to provide limitation of liability for peer-to-peer file-sharing service providers by clarifying what kind of measures they could take to exempt them from liability.

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<sup>616</sup> Jacqui Cheng, (2009, February 6), ‘Germany Says “Nein” to Three-Strikes Infringement Plan’, [WWW document] URL <http://arstechnica.com/tech-policy/news/2009/02/germany-walks-away-from-three-strikes-internet-policy.ars> (visited 2009, March 20); Janko Roettgers, (2009, February 2), ‘It’s Official: No Three Strikes In Germany’, [WWW document] URL <http://www.p2p-blog.com/item-966.html> (visited 2009, March 20).

<sup>617</sup> Danny O’Brien, (2009, March 18), ‘Three Strikes, Three Countries: France, Japan and Sweden’, [WWW document] URL <http://www.eff.org/deeplinks/2008/03/three-strikes-three-countries> (visited 2009, February 20).

<sup>618</sup> Here it refers to South Korea and Taiwan.

<sup>619</sup> Irish ISP Eircom and four major record labels, Warner, Sony BMG, EMI and Universal agreed to introduce a ‘three strikes and you’re out’ rule to fight against illegal file-sharing. Irish ISP Eircom has now blocked access to the Pirate Bay. See P2P ON, (2009, January 30), ‘Eircom to Help Music Industry Fight Illegal File Sharers’, [WWW document] URL <http://www.p2pon.com:80/2009/01/30/eircom-to-help-music-industry-fight-illegal-file-sharers/> (visited 2009, February 20); John Collins, (2009, September 1), ‘Eircom blocks users’ access to Pirate Bay’, [WWW document] URL <http://www.irishtimes.com/newspaper/ireland/2009/0901/1224253590097.html> (visited 2009, September 2). In addition, Japanese ISPs also agreed to follow such an approach voluntarily. See Danny O’Brien, (2009, March 18), ‘Three Strikes, Three Countries: France, Japan and Sweden’, [WWW document] URL <http://www.eff.org/deeplinks/2008/03/three-strikes-three-countries> (visited 2009, February 20); IFPI (2009). ‘Digital Music Report 2009’ [WWW document] URL <http://www.ifpi.org/content/library/DMR2009.pdf> (visited 2009, January 20), p.25.



The hotly debated filtering mandate in other jurisdictions drew the attention of academic researchers and able judges. They proposed that the mandatory use of filters might be a solution to tackle extensive illegal file-sharing. While China stands at the heart of the international copyright piracy epidemic, it is possible for China to implement the filtering mandate in effectively cracking down rampant copyright piracy on peer-to-peer file-sharing networks. Several influential factors are discussed at the end of the Chapter in order to demonstrate the possibility.

#### **4.4.1 The Current Legal Framework for Peer-to-Peer File-Sharing Liability**

In China, the peer-to-peer file sharing industry mushroomed from the 2000s<sup>620</sup> and has been expanding in a way which has even greater impact on a relatively new online copyright protection system. As a profit-making business, peer-to-peer file sharing technology has been used extensively for the purpose of copying and distributing an overwhelming number of copyright works. While copyright owners face problems relating to massive litigation engaging a high number of individuals and the costly processes for investigation, there is no specific law addressing liability over peer-to-peer file sharing platforms in China.

At this point, two pieces of legislation were argued to be able to draw an analogy between the liability of ISPs that provide hosting, search engine or linking services and that of peer-to-peer file sharing providers. They are the Regulations on the Protection of the Right of Communication through the Information Networks and the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks. However, on the issue of which is more applicable, the view was divided. Some argued<sup>621</sup> that provisions of the

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<sup>620</sup> The Peer-to-Peer Streaming Research Report (IRResearch, China, 2005), p.12; Lin Gui, (2002, April 29), 'Surveying Chinese Peer-to-Peer Software', [WWW document] URL <http://home.donews.com/donews/article/2/25559.html> (Chinese Version) (visited 2007, May 2); Weiguang Wu, 'Peer-to-Peer File-Sharing Challenge on Copyright and the Strategy', *Electronics Intellectual Property*, Vol. 3, (2006), pp.24-27, p.24;

<sup>621</sup> Jin Xu & Haoyuan Hu, (2006, November 24), 'Analysis of Peer-to-Peer File-Sharing Liability', [WWW document] URL <http://www.chinaeclaw.com/readArticle.asp?id=7854> (Chinese Version) (visited 2007, July 3); Yaohui Yang, 'Copyright Strategy Analysis for SkyNet Maze', [WWW document] URL <http://www.pkunetlaw.cn/CenterFuit/DiscDisplay.asp?id=18> (visited 2009, January 20), pp.1-50, p.26; Fengchun Liu, 'Discussion on Legal Issue of Peer-to-Peer File-Sharing', [WWW document] URL [http://www.pkunetlaw.cn/UserImages/FileUpload/刘逢春-P2P\(点对点下载\)相关法律问题探讨.pdf](http://www.pkunetlaw.cn/UserImages/FileUpload/刘逢春-P2P(点对点下载)相关法律问题探讨.pdf) (visited 2008 October 2);

Regulations, in particular Article 23, should be applied to address peer-to-peer file sharing liability. As discussed at page 112 of Chapter 2, Article 23 of the Regulations provides limitation of liability to ISPs that provide search engine or linking services. Since most of peer-to-peer file-sharing applications have the character of not storing files in their systems, Article 23 hence can be only applied to the first generation of peer-to-peer file-sharing system, which provide central indexes. Because the central indexes maintain directories of shared files stored on peers, the act of providing indexes therefore might be deemed as providing links or services for searching sharable files. In a decentralised peer-to-peer file-sharing scenario, Article 23 of the Regulations is, however, not applicable, as once a decentralised peer-to-peer software is downloaded and installed in users' computers the software providers would have no idea what the software is used for and they will not be able to interfere with use of the software. Hence, even if Article 23 of the Regulations can be applied in addressing the first generation of centralised peer-to-peer file-sharing liability, its limitations are apparent.

While Article 23 of the Regulations demonstrated its insufficiency in addressing liability in a decentralised peer-to-peer file-sharing environment, the prevailing view<sup>622</sup> with respect to the most applicable provision in a peer-to-peer file-sharing context is that Article 3<sup>623</sup> of the Judicial Interpretation should apply, with the courts aligned with this view. Firstly, the problem as to whether a peer-to-peer file-sharing provider is a network service provider can be solved within the meaning of Article 3 of the Judicial Interpretation. As it is elaborated in Article 13 of the Interpretation of the Regulations on the Protection of the Right of Communication through the Information Networks<sup>624</sup>, network service providers within the meaning of the Regulations refer to 'service providers that provide the public information or receive

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<sup>622</sup> Jinchuan Chen, 'Points and Analysis of Copyright Cases of the Beijing Municipal Higher People's Court in 2008', *China Copyright*, Issue 5, (2006), pp.22-25, p. 23

<sup>623</sup> Article 3 of the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks: [I]n the event that a network service provider, by means of its network, participates in, induces, or assists copyright infringement committed by others. The People's Courts shall pursue a joint liability for infringement of the network service provider with others involved or the person who directly committed the infringement, pursuant to Article 130 of the General Principles of the Civil Code. Further discussion on this Article see page 108 of Chapter 2.

<sup>624</sup> Jianghua Zhang, editor, *The Interpretation of the Regulations on the Protection of the Right of Communication through the Information Networks* (Beijing: China Legal Publishing House, 2006), pp.1-373, p.52.

information through information networks. For example, those that provide the public Internet access services, transmit information users required, provide webpages to legal entities or individuals, or provide search engine or linking service, or provide their own contents...'. Peer-to-peer file-sharing providers, regardless of their infrastructure and their role, deliver content to their users. Therefore, they should in a broad sense, be included within the meaning of Article 3 of the Judicial Interpretation. Secondly, Article 3 of the Judicial Interpretation bases copyright liability of network service providers on whether they have participated in, induced, or assisted copyright infringement committed by users. Therefore, when peer-to-peer file-sharing providers provide peer-to-peer file-sharing services to users, including searching for, sharing and downloading unlawful contents with promotion of infringement through advertisements, they will be deemed as having participated in, induced, or assisted users' copyright infringement. Consequently, joint tort liability will be applied to them by virtue of Article 130 of the General Principles of the Civil Code, which stipulates civil law liability of joint tortfeasors.

As the argument stands, Article 3 of the Judicial Interpretation seems to have provided a means to determine peer-to-peer file-sharing providers' liability. Nevertheless, issues surrounding the limitation of liability for the peer-to-peer file-sharing providers remain unanswered. When the Regulations established limitation of liability for ISPs that act as mere conduits, caches, hosts of information, etc. to encourage them to prevent copyright infringement, should peer-to-peer file-sharing providers be entitled to the similar limitation of liability if this could encourage them to stop unlawful file-sharing. An analogy may be drawn to applying Article 23 of the Regulations to exempt liability of peer-to-peer file-sharing providers that run central servers, as they can be treated as ISPs that provide search engine or linking service and therefore they can be exempted from liability. However, for those decentralised peer-to-peer file-sharing service providers, if their systems have substantial non-infringing use and they have no knowledge about illicit file-sharing but copyright infringement still occurred and they have taken technical measures such as filtering technology to deter it, will they be exempted for taking those measures as those centralised peer-to-peer file-sharing providers? The design of limitation of liability

for ISPs is to encourage ISPs working together with copyright holders to deal with copyright infringement.<sup>625</sup> However, Article 3 of the Judicial Interpretation only provides a liability basis for peer-to-peer file-sharing providers without offering guidance as to how they can take action to prevent infringement in the meantime avoid liability. Therefore, as a matter of fact, Article 3 of the Judicial Interpretation is an incomplete provision in terms of its glaring limitation and its application may encounter problems.

#### 4.4.2 The Case Law

Despite the limitations of Article 3 of the Judicial Interpretation, cases such as *Beijing Ci Wen Film & Television Program Production Ltd. v. Beijing Zheng Le Jia Technology Ltd.*,<sup>626</sup> *Di Zhi Culture Ltd. v. Baidu Network Information Technology Ltd. & Yimeng Huang*,<sup>627</sup> *Shanghai Busheng Music Culture Dissemination Co., Ltd v. Beijing FlyingNet Music Software Co., Ltd and Beijing Boshengfangan Information Teleology Co. (the Kuro case)*,<sup>628</sup> *Guangdong Zhongkai Culture Development Ltd. v. Guangzhou Shulian Software Technology Ltd.(the POCO case)*,<sup>629</sup> to name but a few; have applied this Article and have ruled that the defendants were liable for joint tort liability for copyright infringement. In the *Kuro* case and the *POCO* case for example, the defendants' awareness of copyright infringement, their inducement and assistance to infringement through vivid advertising, and failure to take necessary measures (though the courts did not clarify what constituted 'necessary measures') were considered as basis of their joint tort liability, regardless of the distinct infrastructure of their peer-to-peer file-sharing systems.

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<sup>625</sup> Article 1 of the Interpretation of the Regulations on the Protection of the Right of Communication through the Information Networks and the House Commerce Report (H.R. Rep. No. 105-551, Part 2: July 1998), at 42.

<sup>626</sup> *Beijing Ci Wen Film & Television Program Production Ltd. v. Beijing Zheng Le Jia Technology Ltd.*, No. 21822 (the Beijing Hai Dian District People's Court, 2007);

<sup>627</sup> *Di Zhi Culture Ltd. v. Baidu Network Information Technology Ltd. & Yimeng Huang*, No. 7251 (the Beijing First Intermediate People's Court, 2006)

<sup>628</sup> *Shanghai Busheng Music Culture Dissemination Co., Ltd v. Beijing FlyingNet Music Software Co., Ltd and Beijing Boshengfangan Information Teleology Co., Ltd*, No. 13739 (the Beijing Second Intermediate People's Court, 2005)

<sup>629</sup> *Guangdong Zhongkai Culture Development Ltd. v. Guangzhou Shulian Software Technology Ltd*, No. 384 (the Shanghai First Intermediate People's Court, 2006); *Guangzhou Shulian Software Technology Ltd. v. Guangdong Zhongkai Culture Development Ltd.*, No. 7 (the Shanghai Higher People's Court, 2008).

The *Kuro* case was the first peer-to-peer file-sharing liability case that involved liability of a centralised peer-to-peer file-sharing service provider. ‘Kuro’ is a peer-to-peer transmission platform for members to share music. Users can quickly search, download, play, and burn the latest MP3 through the ‘Kuro’ software and a central server. In the *Kuro* case, the defendants were the provider and the operator of the ‘Kuro’ peer-to-peer file-sharing system. The plaintiff, Shanghai Busheng Music Culture Dissemination Co., Ltd was a subsidiary of EMI and it was the copyright holder of a large number of music files. They discovered that fifty-three sound recordings in which they had copyright were distributed without their consent via the ‘Kuro’ peer-to-peer file-sharing network operated by the second defendant with technical support of the first defendant who owned the copyright of the ‘Kuro’ software. The plaintiff initiated legal proceedings and asked for the ceasing of the infringement and Chinese Yuan 200,000 (approximately 17,889 Pounds Sterling)<sup>630</sup> for compensation. The Beijing Second Intermediate People’s Court ruled in favour of the plaintiff based on the provision of Article 3 of the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks (2006)<sup>631</sup>, coupled with Article 41 (1)<sup>632</sup>, 47 (4)<sup>633</sup>, 48<sup>634</sup> of the

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<sup>630</sup> It is based on the foreign currency exchange rate on 23 October 2009: British Pound Sterling: Chinese RMB=1: 11.18

<sup>631</sup> Article 3 of the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks (2006) : ‘In the event that an ISP, by means of its network, participates in, incites, or abets copyright infringement by a third party, then the people’s courts shall pursue the joint liability for infringement of the said ISP and the other parties involved or the person who actually committed the infringement, pursuant to Article 130 of the General Principles of the Civil Code.’

<sup>632</sup> Article 41 (1) of the Copyright Act 2001: ‘[A] producer of sound recordings or video recordings shall have the right to authorise others to reproduce, distribute, rent and communicate to the public on the information networks such sound recordings or video recordings and the right to obtain remuneration therefore. The term of protection of such rights shall be fifty years, and expires on 31 December of the fiftieth year after the recording was first produced.’

<sup>633</sup> Article 47 (4) of the Copyright Act 2001: ‘[A]nyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying damages, depending on the circumstances’ and may, in addition, be subjected by a copyright administration department to such administrative penalties as ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine; where the circumstances are serious, the copyright administration department may also confiscate the materials, tools, and equipment mainly used for making the infringing reproductions; and if the act constitutes a crime, the infringer shall be prosecuted for his criminal liability: ... (4) reproducing and distributing or communicating to the public on the information networks a sound recording or video recording produced by another person, without the permission of the producer, unless otherwise provided in the Law;’

<sup>634</sup> Article 48 of the Copyright Act 2001: ‘[W]here a copyright or a copyright-related right is infringed, the infringer shall compensate for the actual injury suffered by the right holder; where the actual

Copyright Act 2001, and Article 130 of the GPCC<sup>635</sup>. They ordered the defendants to cease the infringement and pay the compensation the plaintiff requested.

In reaching their conclusion, the court examined both the defendants' subjective intention and objective action. The court made a less detailed analysis of the first defendant's liability and only accentuated the technical support the first defendant provided to the infringement of the first defendant. However, the court held that there were four elements to establish liability of the second defendant. Firstly, the second defendant had subjective intention to infringe copyright. As a professional internet service provider engaging in music file distribution, the defendant should have known that the sound recordings alleged were unauthorised uploads because they were all popular songs. Secondly, neither did the second defendant provide evidence that demonstrated the legitimacy of those alleged sound recordings, nor did they justify that they had taken necessary measures to prevent the dissemination of the sound recordings. In addition, the defendant provided users a multi-layer and systematic classification of music files, a variety of means to search for and download music files with vivid advertisements to attract users. Furthermore, the defendant had derived financial benefit from the subscription fees that users paid for the full range of services.

Unlike the *Kuro* case, the *POCO* case was about the liability of a decentralised peer-to-peer file-sharing provider. The plaintiff, Guangdong Zhongkai Culture Development Ltd. discovered that the movie 'Sha Po Lang' had been available on the site of the defendant without authorisation 19 days after the premiere in Hong Kong and had been disseminated via the peer-to-peer file-sharing network

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injury is difficult to compute, the damages shall be paid on the basis of the unlawful income of the infringer. The amount of damages shall also include the appropriate fees paid by the right holder to stop the infringing act. Where the right holder's actual injury or infringer's unlawful income cannot be determined, the People's Court shall Judge the damages not exceeding RMB 500, 000 (approximately 44,720 Pound Sterling, based on the foreign currency exchange rate on 23 October 2009: British Pounds Sterling: Chinese RMB = 1: 11.18) depending on the circumstances of the infringing act.'

<sup>635</sup> Article 130 of General Principles of Civil Code of P.R.C: 'where two or more persons jointly infringe a right and cause loss to another, they must bear joint & several liability.'

‘POCO’<sup>636</sup> that the defendant operated. As the right holder of the movie, who had the exclusive right of making the movie available to the public through information networks as well as the right of reproducing and distributing audio-visual products of the movie for five years until 16 October 2010 in Mainland China, the plaintiff brought case to the court.

The court firstly noted that the ‘POCO’ system was a peer-to-peer file-sharing system without a central server although many of the contents available through the ‘POCO’ system can also be found through the defendant’s website. Having considered that the ‘POCO’ system was a multi-purpose system which has a wide range of non-infringing uses, including dissemination of photographs, e-magazines, and information on food ingredients, the court held that the defendant’s act of providing the ‘POCO’ software and allowing users to download and use it was not infringing. However, with regard to the movie the plaintiff claimed, the court ruled that the defendant actively abetted and induced users’ copyright infringement on the movie alleged by providing the search engine and linking service to it. To determine the defendant’s intent in abetting and inducing copyright infringement, the court conducted an analysis similar with that of the American *Grokster* case. Firstly, the court found that the defendant had promoted unauthorised uploading and exchange of the movies by putting up vivid advertisements to attract users. When the defendant advertised the free ‘POCO’ software, they also advertised by using the slogan such as, ‘millions of friends share unlimited movie and music resources, now log in POCO to download a great deal of multi-media resource immediately’. Given that most of the movies and music available were unauthorised, the court held that the defendant’s advertisements abetted users to share music files and movies protected by copyright. This analysis of this element apparently resembled that of the *Grokster*

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<sup>636</sup> According to Hong Yao, the CEO of [www.poco.cn](http://www.poco.cn), ‘the name POCO stands for “People Connect”’. POCO is a broadband entertainment platform. Based on peer-to-peer network enrichment technique, we have built up a powerful POCO product offering, which includes multimedia peer to peer software POCO, e-magazines POCO zine and Interphoto and e-magazine publishing platform MagBox and the POCO website, which includes movies, music, food, travel and other content. Each POCO user can also set up a personal space online at My POCO, which integrates several web 2.0 services such as blogging.’ See, Elias Glenn, (2005, December 5), ‘PE Interview with P2P Company POCO’, [WWW document] URL [http://www.jlmpacificepoch.com/pecontent?id=47347\\_0\\_3\\_0\\_M](http://www.jlmpacificepoch.com/pecontent?id=47347_0_3_0_M) (visited 2009, July 4)

court on Grokster's 'promotion of infringement'.<sup>637</sup> Secondly, the court noted that once users downloaded and installed the 'POCO' software, they would be directly linked to a section called 'Movie & Television Program Exchange Zone' on the site of the defendant so as to search for and download the files shared by other users. To attract users to use the resource, the defendant recommended the functions and purpose of the 'POCO' software in the course of the software downloading by the slogan, '[R]evolutionary multi-point transmission technology will also make movies, music, games and other large file transfer speeds higher than ever before. Using the 'POCO' software to experience the fun of high-speed sharing.' In addition, the defendant had run a pre-set program so that categories of movies could be automatically generated in order for the users to choose. Thirdly, the court emphasised that as the business model of the defendant differed from the usual business model and carried a higher risk of infringement, the defendant owned a greater duty of care to check content on its site, in particular that of the 'Movie & Television Program Exchange Zone' on its site. The general warnings that the defendant provided were not sufficient to exempt the defendant from liability. Apart from the foregoing analysis, the court further referred to the fact that the defendant should have known, as a matter of common sense, that a recently released movie would not be available for free downloading in particular when the defendant conducted daily maintenance checking and read the poster and abstract of the alleged movie. As a result, the court made a decision based on Article 3 of the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks (2006) and provisions of the Copyright Act and the GPCC. The Defendant appealed; however, the Shanghai Higher People's Court affirmed the lower court's decision.

Although the courts ruled in these two cases that the defendants as peer-to-peer file-sharing providers were liable for copyright infringement by their acts of inducing and assisting unlawful sharing of movie and music files, in particular the *POCO* court accentuated that the defendant's duty of care should be proportionate to the risk of infringement they carried depending on their business models. Neither was the

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<sup>637</sup> See discussion at page 181 of Chapter 4.



defendant's duty of care limited to the review of unlawful content notified by right holders, nor was it limited to the reminder to the users. The courts failed to address what constituted 'necessary measures' in a peer-to-peer file-sharing context. Questions as to whether the appropriate measures merely refer to deletion or blocking, or in case of the deleted content being uploaded again filtering technology should be taken, remained unanswered.

#### **4.4.3 The Need and Possibility of Mandatory Use of Filtering in China**

Having shown that Article 3 of the Juridical Interpretation contained no limitation of liability that would motivate peer-to-peer file-sharing providers to prevent unlawful file-sharing, and that the courts did not address the issue and clarify 'necessary measures' the peer-to-peer file-sharing providers needed to take, it is of concern whether mandatory use of filters should be considered as a 'necessary measure' to help peer-to-peer file-sharing providers to curb illicit file-sharing.

While the mandatory use of filtering has not been widely debated in China, the learned scholars and judges have discussed it on several occasions<sup>638</sup>. Among them, Professor Qian Wang's view<sup>639</sup> deserves special mention here as he strongly argued the need and possibility of filtering mandate in a developed technology environment where copyright infringements are intensified. He pointed out that filtering mandate was not given in most ISP liability legislation years ago because the filtering technology was at its infancy. The development of technology has now gone beyond the legislatures' expectation. Filtering technology has now been used widely in many countries as a means to protect users from illegal Internet content, such as child pornography, violence, terrorism or other inappropriate content depending on the law

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<sup>638</sup> Qian Wang, 'Research on Copyright Infringement of the Video-Sharing Websites', Law and Business Research, Issue 4, (2008), pp.42-53, pp.49-50; Chengsi Zheng & Hong Xue, 'The Key Legal Question of the Chinese Electronic Commerce Legislation', [WWW document] URL <http://www.iolaw.org.cn/showArticle.asp?id=1225> (2009, July 4); Jie Chao, Huizhen Hu and Lili Tang, 'Determination of Indirect Copyright Liability of Network Service Providers', [WWW document]

[http://pdipr.gov.cn/pdcqw/gweb/xxnr\\_view.jsp?pa=aaWQ9MzExNDEmeGg9MQPdcssPdcssz](http://pdipr.gov.cn/pdcqw/gweb/xxnr_view.jsp?pa=aaWQ9MzExNDEmeGg9MQPdcssPdcssz) (visited 2009, August 2); Dejun Zhang, (2009, July 4), 'Determining Online Infringement and Legal Liability', [WWW document] URL <http://www.9ask.cn/Blog/user/zhangdejun/archives/2009/81613.html> (visited 2009, August 2)

<sup>639</sup> Qian Wang, 'Research on Copyright Infringement of the Video-Sharing Websites', Law and Business Research, Issue 4, (2008), pp.42-53, pp.49-50

and culture of the jurisdiction.<sup>640</sup> In a copyright context, filtering technology is also used by several major ISPs as an effective and economic method to combat copyright piracy,<sup>641</sup> including Chinese video streaming websites, such as, [www.Pomoho.com](http://www.Pomoho.com), [www.56.com](http://www.56.com) and China's state-run broadcaster CCTV.<sup>642</sup> The requirement of installing filtering technology has been reflected in several court decisions of copyright liability cases.<sup>643</sup>

While it is argued that, there is a possibility that China may consider, by means of court decision, to require ISPs to install filtering equipment that will block infringing content to reduce the level of copyright infringement taking place over the Internet, it is necessary to examine the major factors that suggest such a possibility.

Rampant online piracy over peer-to-peer file-sharing platforms and inadequate legislative mechanisms may be the determining factors for the need of efficient filtering measures. Although there are no internal and external statistics indicating how extensive copyright piracy taking place on peer-to-peer file-sharing networks is, it was revealed<sup>644</sup> by people within the industry that copyright infringement takes place on all peer-to-peer file-sharing related services. Many websites use each other's resources directly or by links without paying royalties. Sometimes it is done

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<sup>640</sup> Developments in Internet Filtering Technologies and Other Measures for Promoting Online Safety (Australian Communications and Media Authority, 2008); Alana Maurushat, 'International Internet Filtering Frameworks', [WWW document] URL [http://www.bakercyberlawcentre.org/2008/censorship/Presentations/23\\_Maurushat.pdf](http://www.bakercyberlawcentre.org/2008/censorship/Presentations/23_Maurushat.pdf) (visited 2009, July 4); Electronic Frontier Australia, (2002, March 28), 'Internet Censorship: Law & Policy Around the World', [WWW document] URL <http://www.efa.org.au/Issues/Censor/cens3.html#intro> (visited 2009, July 4)

<sup>641</sup> *Supra* note 553, 555 and 556.

<sup>642</sup> Vobile, 92007, January 5), 'Vobile Announces Landmark Deployment Of Videodna™ Content Identification And Management System', [WWW document] URL [http://www.vobileinc.com/files/Vobile\\_Announces\\_Landmark\\_Development\\_5\\_01\\_07.pdf](http://www.vobileinc.com/files/Vobile_Announces_Landmark_Development_5_01_07.pdf) (visited 2009, October 1); Owen Fletcher, (2009, March 24), 'Chinese YouTube Rival Adopts US Firm's Copyright Filter', [WWW document] URL [http://www.pcworld.com/article/161828/chinese\\_youtube\\_rival\\_adopts\\_us\\_firms\\_copyright\\_filter.html](http://www.pcworld.com/article/161828/chinese_youtube_rival_adopts_us_firms_copyright_filter.html) (visited 2009, October 2)

<sup>643</sup> *Supra* note 551 and accompanying text

<sup>644</sup> The manager of a peer-to-peer file-sharing service told the media that, it has now become the unspoken rule of peer-to-peer file-sharing industry that the sites are using each other's sources while there is no specific law addressing peer-to-peer file-sharing liability and punishing those responsible for infringement. Further discussion on this see, Bing Zhou, (2006, May 9), 'China's First P2P Case Urges New Legislation', [WWW document] URL <http://www.ppcn.net/n3223c1.aspx> (Chinese Version) (visited 2008, July 3)

without knowledge of other sites. In fact, there are enormous economic interests involved, which have impeded the enforcement of copyright law. Therefore, when the existing law regulating copyright liability in this complex technology environment is merely a patchwork of judicial interpretation, case law and academic opinions that do not have a deterrent effect, peer-to-peer file-sharing providers would be reluctant to search for unlawful content or invest in blocking or filtering technologies. They would be unwilling to do so because enforcing copyright would result in the reduction of the number of users, and their click-through rate and thus further affect their revenue from advertising. In addition, it is practically difficult to ask them to preview each uploaded file when there is no legislative obligation to do so. At this juncture, effective filtering measures that block unauthorised peer-to-peer file-sharing could be of important value.

The adaptation is also in conformity with the requirements of the TRIPs Agreement. China joined the World Trade Organisation (WTO) in 2001 and automatically had to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights. In 2007, the United States of America filed two requests before the WTO Dispute Settlement Body, arguing that several of China's enforcement measures with regard to aspects of the TRIPs Agreement were being inadequately applied.<sup>645</sup> Earlier in 2009, the United States of America claimed victory in the case. The panel decision found China, *inter alia*, to be in violation of TRIPS Article 41.1 that requires members to have available laws 'so as to permit effective action against any act of infringement of intellectual property rights covered by this agreement,' including remedies which 'constitute a deterrent to further infringements.' As a result, China was recommended to alter its copyright law and customs measures to be consistent with its obligations under the TRIPS Agreement. If the application of filtering measures has been proven effective in reducing unauthorised file-sharing, making a legislative requirement for ISPs to implement filtering technology for preventing unlawful file-sharing would be a significant step 'for China to fulfill its international

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<sup>645</sup> Report to the President and Congress on Coordination of Intellectual Property Enforcement and Protection (the National Intellectual Property Law Enforcement Coordination Council of the U.S., January 2008) and WTO. (2009, January 26). 'WTO Issues Panel Report on US-China Dispute over Intellectual Property Rights' [WWW document] URL [http://www.wto.int/english/news\\_e/news09\\_e/362r\\_e.htm](http://www.wto.int/english/news_e/news09_e/362r_e.htm) (visited 2009, January 26)

obligation, but also to promote its development and enhance its capacity for independent innovation.’<sup>646</sup> This would be welcomed by the Western countries, in particular those whose copyright products have been badly infringed in China.

Most importantly, the factor suggesting the possibility of the filtering mandate is that, unlike its European counterpart, China does not have a law that prohibits the imposition of a general monitoring obligation on ISPs in an Internet context. Neither does the Judicial Interpretation prohibit monitoring obligations on ISPs nor do the Regulations. On the contrary, Article 4 of the Judicial Interpretation<sup>647</sup> may arguably be interpreted as imposing such an obligation on ISPs while it gives the court authority to pursue an ISP liability if the ISP ‘knows that network users use its network to infringe the copyright of others’. It should be noted here that this prerequisite for ISPs liability excludes the knowledge ISPs gained via right holders’ warnings.<sup>648</sup> Therefore, only when ISPs conduct some monitoring, they will be able to obtain such knowledge of infringement committed by their users. It is appropriate to say from the plain reading of this provision that a monitoring obligation is arguably implied within the language of Article 4 of the Judicial Interpretation. Apart from that, a number of courts have expanded the duty of care of ISPs and the obligation to monitor is implied in their rulings. For instance, when the *Yahoo* court held that Yahoo!China was liable for providing links to infringing content that was not specified in the right holders’ notices, the court made their decision based on Yahoo!China’s awareness of infringement - Yahoo!China should have known that its music search service had links to content infringing right holders’ copyright. In effect, the court imposed a general obligation on ISPs to monitor their services by acknowledging that one piece of information concerning copyright works and the names of the singers was sufficient to trigger a duty of care towards the right holders’

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<sup>646</sup> Enhance Cooperation to Make Win-Win Progress – the Speech at the 2006 China-Europe Business Summit (Jiabao Wen, 2006)

<sup>647</sup> Article 4 of the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks (2006): ‘[A] network service provider that provides content service knows that network users use its network to infringe copyright of others, or after receiving a substantiated warning from copyright owners but fails to take measures such as removing the infringing content to eliminate consequence of the infringement. The People’s Courts shall pursue joint liability of the network service provider for infringement with network users, pursuant to Article 130 of the General Principles of Civil Code.’

<sup>648</sup> See the first sentence of Article 4 the Judicial Interpretation of Issues Regarding Applicable Laws for the Hearing of Copyright Disputes Involving Computer Networks (2006).

copyright. Similar implications can also be found in the court rulings of the *POCO* case and several hosting service liability cases discussed in Chapter 3, such as, *Xinchuan Online (Beijing) Information Technology Ltd. v. Shanghai Full Potato Network Technology Ltd ('Todou.com')*<sup>649</sup>, *Wangle Hulian (Beijing) Technology Ltd v. Shanghai Full Potato Network Technology Ltd ('Todou.com')*<sup>650</sup>, and *Ninbo Success Mutli-Media Telecom Ltd. v Beijing Alibaba Information Technology Ltd. (Yahoo! China)*<sup>651</sup>, to name but a few.

Another difference between China and its Western counterparts is that China does not have a constitutional basis for free access to information. Therefore, while sensitive political content has been subjected to stringent censorship, if the Chinese government determines to impose impediments on dissemination of unauthorised copyright content, then it actually does have the legislative power to do so. And once the government decides to go for radical change in copyright law enforcement, unlike its constitutionally balanced Western democracies, it can deliver results without worrying too much about the impact on free access to information. Nevertheless, this does not mean that the adoption of a filtering mandate will not arouse controversy. It is believed that same concern would also exist regarding the possible adverse effects. The opposition against Green Dam-Youth Escort, the program the Chinese Ministry of Industry and Information Technology wanted to mandate for every computer shipped to China as of 1 July 2009<sup>652</sup> reflected that the Chinese Internet users are defending their rights of free access to information even a constitutional basis for such a right is lacking in the country's legal system.<sup>653</sup>

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<sup>649</sup> *Supra* note 470

<sup>650</sup> *Supra* note 472

<sup>651</sup> *Supra* note 475

<sup>652</sup> The Green Dam-Youth Escort is a content control program developed in China. It is designed especially for restricting online pornography but could be used for other purposes. According to the Notification regarding Requirements for Pre-Installing Green Filtering Software on Computers from the Ministry of Industry and Information Technology of China taking effect on 1 July 2009, all new personal computers sold in mainland China including those imported from abroad must have either the software, or its setup files accompanied on a compact disc or have the software pre-installed in the computer. See Notification regarding Requirements for Pre-Installing Green Filtering Software on Computers (the Ministry of Industry and Information Technology of China: May 2009).

<sup>653</sup> Due to the controversy surrounding the use of Green Dam-Youth Escort, the mandatory pre-installation of the Green Dam software on new computers for home and business use has been delayed. However, schools, Internet cafes and other public use computers would still be required to install and run the software. See OpenNet Initiative, 'China's Green Dam: The Implications of Government

Arguably, the filtering technology for copyright content differs from the Green Dam-Youth Escort program, which aimed to protect children from inappropriate Internet content but could be used and is very likely to be used to censor other sensitive political terms and websites. Therefore, in terms of a denial access to those copyright infringing content, the use of filters may not infringe free access to information because the illegality of unauthorised reproduction and distribution of copyright content is well accepted by the society. Nevertheless, if the Chinese Government were to adopt the filtering mandate in a copyright context, they should not ignore other negative effects of such a mandatory use of filtering. The after-filtering recourse and remedy should be provided so that the negative effects could be minimised and the affected party can be compensated.

Although the foregoing discussion suggests that a filtering mandate is very likely to be adopted by China to prevent rampant copyright piracy over the Internet, there are constraints that could potentially affect the implementation of filtering measures, such as the cost involved in deploying filtering technology and the availability<sup>654</sup> of filtering technology in the Chinese market.

#### 4.5 Conclusion

The rise of the Internet and the innovations of new technology are fast outpacing legislative development. When countries amended their copyright law to implement

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Control Encroaching on the Home PC', [WWW document] URL [http://opennet.net/sites/opennet.net/files/GreenDam\\_bulletin.pdf](http://opennet.net/sites/opennet.net/files/GreenDam_bulletin.pdf) (visited 2009, September 12); Human Rights in China, (2009, June 11), 'Chinese Lawyer Challenges Filtering Software Order and Requests Public Hearing', [WWW document] URL <http://www.hrichina.org/public/contents/press?revision%5fid=169854&item%5fid=169851> (visited 2009, September 12); Alect, (2009, June 11), 'Four Main Sites Survey: More than 80% Net Users "Reject" Green Dam', [WWW document] URL <http://www.cnbeta.com/articles/86243.htm> (Chinese Version)(visited 2009, September 12); Yang Fang, (2009, June 30), 'China Postpones Mandatory Installation of Controversial Filtering Software', [WWW document] URL [http://news.xinhuanet.com/english/2009-06/30/content\\_11628335.htm](http://news.xinhuanet.com/english/2009-06/30/content_11628335.htm) (visited 2009, September 12).

<sup>654</sup> So far, only Tsinghua University has designed an intelligent filtering technology system for peer-to-peer file sharing networks, which identifies authorised content and blocks illegal file distribution (even where files are encrypted) based on file signatures automatically generated by the filtering system. The system is claimed to be able to block 85% of unauthorised files. Further discussion on this see, Junda Liu; Lin Ning; Yibo Xue; Dongsheng Wang. (2006, September 29). 'PIFF: An Intelligent File Filtering Mechanism for Peer-to-Peer Network'. [WWW document] URL <http://ieeexplore.ieee.org/ie15/4030851/4030852/04030897.pdf> (visited 2008, July 23)

the two WIPO Internet Treaties and to reflect technological changes, the legislature did not contemplate that peer-to-peer file sharing would so quickly adapt to the new legal landscape and subvert the provisions of the revamped legislation. While the existing legal framework is inadequate to provide appropriate protection for the interests of copyright holders in a peer-to-peer file-sharing environment and leaves uncertainty for ISPs, much hope has been placed on the shoulders of the courts. Nevertheless, case law is open to interpretation; it therefore does not offer sufficient certainty to stakeholders.

While the scale of peer-to-peer file-sharing copyright piracy is unprecedented and the impact on copyright owners and right holders is enormous,<sup>655</sup> case law in several jurisdictions illustrate that copyright liability was imposed on ISPs in vast majority of peer-to-peer file-sharing instances when they had ‘intent’ of facilitating or assisting the illegal activities. In addition, the case law highlighted a need to formulate a new principle of law that protects various interests in peer-to-peer file-sharing networks, especially in the light of increasing piracy and a growing difficulty in enforcing copyright against individual infringers. Among other solutions, mandatory use of filtering emerged and is now adopted by several enacted or proposed statutes.

Whether a filtering mandate should be and/or will be considered in China depends on the distinct political, economic, social, and cultural judgment. However, when the existing legislation is unable to accommodate the liability issue emerging from the new peer-to-peer file-sharing environment, it is very likely that China will consider making filtering compulsory by a court order. Although there are concerns about the cost of deploying filtering technology, and the availability of filtering technology applicable to copyright protection is now limited in a Chinese market, an impetus also exists, especially as China does want to improve its intellectual property

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<sup>655</sup> IFPI. (2008). ‘Digital Music Report 2008’ [WWW document] URL <http://www.ifpi.org/content/library/DMR2008.pdf> (visited 2008, January 29), p.3 & 23; IFPI. (2009). ‘Digital Music Report 2009’ [WWW document] URL <http://www.ifpi.org/content/library/DMR2009.pdf> (visited 2009, January 20), p.22; Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing (BERR, UK: July 2008), p.12-13

enforcement in order to fulfill its international obligations. Additionally, no prohibition against ISPs' general monitoring obligation, and the lack of a constitutional basis for free access to information have also provided room for China to take advantage of technological measures to tackle dissemination of unauthorised copyright contents.

Nevertheless, China is a civil law jurisdiction. The courts must establish legal ground under the law to support the application of joint tort liability principles in a copyright context. It is submitted that a collection of conflicting and separate legislation currently regulating peer-to-peer file-sharing liability is the key factor contributing to inadequate copyright law enforcement in a peer-to-peer file-sharing context and resulting in limited deterrence to widespread copyright piracy. Hence, if the filtering mandate were to adopt in a Chinese context, it has to be adopted in a legislative context.



## **CHAPTER 5:**

### **CONCLUDING CHAPTER**

#### **5.1 Overview of the Research**

Copyright piracy prevails on the Internet globally with the advance of the Internet and digital technology. While the Internet is a world without national boundaries, challenges confronting different nations in tackling online copyright piracy are shared ones. Comparative consequences of various countries' solutions to the issue enable one country to find evidence of what has worked in other countries tackling extensive copyright infringement and then to incorporate that experience into their own liability system. At a time when economic and political cooperation between China and other nations is growing,<sup>656</sup> solutions for effective online copyright protection in an international context are of great value to the Chinese legislators.

It was submitted in Chapter 2 that internationally, the United States of America and Germany stood at the forefront of the battlefield against online copyright infringement. The United States of America was the first country to propose copyright liability for ISPs on the basis of two common law tort doctrines – vicarious and contributory liability. American courts rationalised ISP copyright liability on a

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<sup>656</sup> The political and economic cooperation between China and the United States of America has never been so broad, according to the Washington Post, which cited Bingguo Dai, the State Councilor of China. This article also cited the United States of America President Barack Obama as 'declaring that the two countries [China and the United States of America] share a responsibility for the 21st century, and should strive to cooperate not only on economic matters but also on key issues such as climate change, nuclear proliferation and transnational threats.' See Glenn Kessler, (2009, July 28), 'U.S.–China Meeting Renews the Dialogue', [WWW document] URL <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/27/AR2009072700937.html> (visited 2009, September 2) and Statement on Bilateral Meeting with President Hu of China (The White House of the United States of America, April 2009). The political and economic cooperation between China and the EU started in 1998 when China - EU Summit was established. Both sides now held that 'the full and effective political dialogue mechanism established between the two sides had played a positive role in enhancing mutual understanding and trust, and expanding common ground and cooperation, and serves as an important foundation for stronger China - EU political mutual trust.' In the economic sphere, China and the EU 'are becoming each other's most important economic and trade partners'. See The 10<sup>th</sup> China – EU Summit Beijing, 28 November 2007 Joint Statement (Council of the European Union, 2007) and The Second Meeting of the EU-China High Level Economic and Trade Dialogue: 7 and 8 May 2009 in Brussels. Factsheet - Brussels, 8 May 2009. In addition, according to the 2005 White Paper of the Chinese Government, China has joined 130 intergovernmental organisations and signed 267 multilateral treaties. See the 2005 White Paper of the Chinese Government - China's Peaceful Development Road (the State Council of the P.R.C, 2005)

tortious liability basis.<sup>657</sup> They took the view that ISPs who intentionally or negligently fail to prevent tortious conduct should be held liable, and that imposing liability on them is the best means to prevent widespread online copyright infringement as well as shifting the costs of infringement to those who have knowledge of infringement and are in a position to prevent infringement. The DMCA added Section 512 to the U.S. Copyright Act and clarified legal status of ISPs by providing limitation of ISP copyright liability. Among other requirements, knowledge of infringement is one of the important prerequisites for limitation of ISP copyright liability. Such a knowledge requirement has two strands: actual knowledge of infringement and ‘awareness of infringement’. Its interpretation is supplemented by the case law and the American legislative history. Although the broad knowledge standard, in particular ‘awareness of infringement’, has been interpreted differently by courts that have employed either a ‘red flag’ test or a traditional constructive knowledge standard in ISP copyright liability cases, such a broad knowledge standard is proven desirable to cater for the need of an effective copyright protection over the Internet.

Germany also made early attempt to pass overall legislation for all Internet-related content liability. The Media Services State Treaty 1997 (at state level) and the TDG 1997 (at federal level) is evidence of such a movement. As the first European country to enact comprehensive Internet related legislation, the TDG 1997 provided provision for limitation of liability for service providers. Though the knowledge requirement for hosting activities, *inter alia*, was not clearly addressed in this Act, the liability provisions offered guidance for most service provider liability cases with the assistance of a civil law joint tort liability standard. With the implementation of the Electronic Commerce Directive in Germany, some unsettled issues in the TDG 1997 including a clear-cut ISP knowledge standard, were clarified in the amended TDG 2001. Among them, the knowledge requirement was taken as a decisive element in determining service providers’ liability. Nevertheless, by comparison with

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<sup>657</sup> For example, *Sega Enterprises v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994), *Religious Technology Centre v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. Aug. 10, 2000), 918; 239 F.3d 1004 (9th Cir. 2001), *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).

American jurisprudence, ISPs knowledge of infringement requirement determined by the application of the traditional ‘know’ and ‘should know (have reason to know)’ standards is less detailed in the German law. Hence, arguably it provides more support to copyright right holders and may be, to some extent, less in favour of ISPs.

Although the United States of America and Germany were the earliest countries to legislate for ISP copyright liability, they do not seem to be as keen as France to adopt a stringent law for new copyright liability issues surrounding peer-to-peer file-sharing networks. To address illicit unlawful peer-to-peer file-sharing liability, France firstly proposed a ‘three strikes’ law imposing a filtering mandate on ISPs. Two countries - South Korea and Taiwan followed suit and enacted their law with similar approach. Many other countries are studying the French model and seeking nationally balanced solutions. Although the French model is regarded as draconian, it sheds light on the importance of a filtering mandate in preventing dissemination of unauthorised peer-to-peer file-sharing. Apart from the mandatory use of filtering in the enacted or proposed legislation, several prominent cases such as the cases of *Grokster*, *KaZaa*, *Cybersky*, and *the Pirate Bay* have also recommended filtering measures. In addition, filtering technology has now been deployed by several major international ISPs such as LimeWire, MySpace, and Google (Your Tube) and several Chinese ISPs for preventing unauthorised file-sharing.<sup>658</sup>

As a junior country in the copyright law family, China has only had an established intellectual property system for about 30 years.<sup>659</sup> In terms of the legislation in relation to ISP copyright liability, the country has really lagged behind other countries. The Judicial Interpretation of Issues regarding Applicable Laws for the Hearing of Copyright Dispute involving Computer Networks was the first piece of legislation addressing ISP copyright liability in 2000. However, as submitted earlier in Chapter 2, the Judicial Interpretation only has, *inter alia*, a narrow knowledge standard for determining ISPs knowledge of infringement, which may not provide an

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<sup>658</sup> See earlier discussion in Chapter 4 at page 192 and page 219.

<sup>659</sup> Though copyright began in ancient China one hundred years after the invention of type printing technology around AD 1042, the modern copyright law system was established relatively late in 1990. The first Copyright Act of the P.R.C was issued 8 September 1990 and came into force in 1 June 1991.

adequate deterrent against copyright piracy facilitated by ISPs. Having studied the models of other countries, in particular, being influenced by the DMCA of the United States of America and the law of its civil law counterpart, Germany, China issued the Regulations on the Protection of the Right of Communication through the Information Networks in 2006. The Regulations, *inter alia*, provide more detailed guidance on limitation of ISP copyright liability. In particular, the Regulations expand the narrow knowledge standard set forth in the Judicial Interpretation to a broad knowledge standard, with which ISP copyright liability can be determined even if an ISP is proven to only have awareness of infringement committed by its users.

With the development of the Internet and the advance of digital technology, an increasing number of copyright infringements emerged over the Internet. Although China has gradually established an Internet copyright protection framework<sup>660</sup>, which works along together with other necessary measures to thwart unprecedented copyright piracy, such a system is however incomplete and thus less than effective. As this thesis submitted respectively in Chapter 3 and 4, there are two reasons, *inter alia*, attributing to the inefficient copyright protection over the Chinese Internet territory. Firstly, the disparity of the ISP knowledge standard in two relevant legislations. Secondly, the lack of legislative provisions concerning copyright liability on peer-to-peer file-sharing systems.

## **5.2 Research Findings**

Two hypotheses initiated the research. The first hypothesis, as elaborated in Chapter 3, posed the possibility whether a broad ISP knowledge standard is indispensable in an online copyright protection context and if it is, whether the existing knowledge standard in the Chinese Regulations on the Protection of the Right of Communication through the Information Networks is appropriate. With the hypothesis in mind, the thesis started with the examination of a broad ISP knowledge standard in the legislation of the United States of America and Germany in which ISP copyright liability was first addressed. Both the laws of the United States of

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<sup>660</sup> See discussion in 2.4.4 of Chapter 2.

America and Germany defined the ambit of the ISP knowledge standard and stated that it includes not only ISPs' actual knowledge of infringement but also their 'awareness of infringement'; however, the interpretations of such a broad knowledge standard have been different in the judicial practice of the two jurisdictions. Analysis of the legislative provisions in relation to the ISP knowledge standard and their application in case law presented a compelling finding that in both the United States of America and in Germany, such a broad ISP knowledge standard has gained legislative recognition and has proven significant in courts' evaluation of ISPs' fault in assisting and facilitating copyright infringements.

While the importance of a broad ISP knowledge standard has been established in the American and German contexts, the examination of such a knowledge standard in a Chinese context becomes inevitable, in particular, the practical effect of a broad knowledge standard in deterring rampant copyright piracy on the Internet. As the sheer practicality of a broad knowledge standard has been exemplified by a number of online copyright infringement cases, especially by two prominent cases – the *Baidu* case and the *Yahoo!China* case, the first hypothesis was answered in affirmative. A broad knowledge standard provided by the Regulations is not only appropriate but also essential for effective online copyright protection in China particularly where the rise of online copyright piracy is of critical concern to the Chinese government.

In Chapter 4, the second hypothesis was tested: whether the filtering mandate put forward by the courts in several important cases, and the French 'three strikes' approach, can be employed to assess the intent of peer-to-peer file-sharing providers, and if it can, whether China needs such a criterion and how likely China might incorporate such a criterion into its legislative solution for peer-to-peer file-sharing liability. It was submitted that the intent-based analysis created by the American Supreme Court in *Grokster* provided a starting point for addressing liability issues over peer-to-peer file-sharing networks. Such an intent-based analysis was developed by several post-*Grokster* cases in other jurisdictions and a straightforward criterion has been formulated for evaluating the intent of peer-to-peer file-sharing providers –

the duty to filter. The filtering mandate was reflected in the controversial ‘Hadopi’ law proposed by the French Government, which was the fruit of the ‘three strikes’ approach. Even though the effects of a filtering mandate are still in debate in several countries that have considered the French model, two French civil law counterparts – South Korea and Taiwan – have adopted the filtering measures in their amended copyright legislation without hesitation. As part of the supporting evidence, the progress made in the filtering technologies and the uses of the filtering technologies by private actors were delineated. Up to this point, the first part of the hypothesis was tested and the possibility of the filtering mandate as a criterion for evaluation for the intent of peer-to-peer file-sharing providers was confirmed.

Whether the filtering mandate is desired as a legislative solution for peer-to-peer file-sharing liability in a Chinese context depends on the examination of the adequacy of the existing legislation for answering peer-to-peer file-sharing liability questions. While it has been proven that Article 3 of the Judicial Interpretation and Article 23 of the Regulations will not exhaustively address peer-to-peer file-sharing liability in terms of their evident limitation, the need for incorporating a filtering mandate is highlighted. However, only the possibility of the mandatory use of filters has been suggested in a Chinese context, the second hypothesis was confirmed completely. It is that the filtering mandate has the potential to effectively block unlawful copyright content and it is very likely to be incorporated into the Chinese peer-to-peer file-sharing liability provision, particularly as the controversy surrounding such a filtering mandate will be less intense in China than in other Western democracies.<sup>661</sup>

### **5.3 Recommendations**

It was submitted in Chapter 3 and Chapter 4 that there are two aspects to the insufficiency of the existing Chinese ISP copyright liability system, therefore, the recommendations for an enhanced Chinese ISP copyright liability system are also two-fold, associated with the two identified problems.

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<sup>661</sup> See earlier discussion in 4.4.3 of Chapter 4.

### 5.3.1 Making a Broad Knowledge Standard a Condition for ISP Copyright Liability

Having outlined that there are two different knowledge standards in the legislation applicable to ISP copyright liability, Chapter 2 raised the question as to whether a broad ISP knowledge standard is desirable in a Chinese ISP copyright liability regime. The question was answered in affirmative by the analysis in Chapter 3 in which not only the level of piracy on the Internet and judicial experience in the Chinese context supported the necessity for a broad knowledge standard for ISP copyright liability, but also the application of a broad knowledge standard in the American and German context supported this conclusion. With this in mind, the recommendations in relation to the ISP knowledge standard are two-dimensional. Firstly, the broad knowledge standard termed the ‘know or should know (have reason to know)’ standard should be incorporated into the draft of the Tort Liability Act in which ISP liability for all Internet-related contents is regulated. Secondly, the provisions of the Judicial Interpretation and the Regulations should be harmonised to ensure consistent application of the ISP knowledge standard in the copyright liability context. As the thesis submitted in 2.4.4 of Chapter 2, the Judicial Interpretation and the Regulations are the only two applicable laws in relation to ISP copyright liability in the existing legal framework. If we were to allow ISP copyright liability to be determined either on an actual knowledge of infringement or the awareness of infringement, the single actual knowledge standard in the Judicial Interpretation should be replaced by the broad knowledge standard. Thirdly, several issues in relation to an effective notice as discussed in 3.2.3 of Chapter 3, which is essential for establishment of an actual knowledge standard should be clarified, such as whether a representative list of the works in a single notice is sufficient while multiple copyright works are infringed in a single website and whether separate notices can be cobbled together to form an effective notice. While there is a certain amount of case law<sup>662</sup> about these issues, it is better to provide an express standard to

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<sup>662</sup> For example, *Zhejiang Pan-Asia Electronic Commerce Ltd v. Baidu Network Information Technology Ltd.*, No. 1201 (the Beijing Higher People’s Court, 2007); *EMI Group Hong Kong Ltd, et al. v. Yahoo! China.*, No. 02621 to No. 02631 (the Beijing Second Intermediate People’s Court, 2007); *Yahoo! China. v. EMI Group Hong Kong Ltd, et al.*, No. 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1239 (the Beijing Higher People’s Court, 2007); *Guangdong Meng Tong Culture*

avoid controversy. Fourthly, to explicate the ‘rational, prudent ISP with network expertise’ test formulated in the Guidance of the Supreme People’s Court of Guangdong Province on Issues Regarding the Hearing of Copyright Disputes Involving Audio and Video Copyright Infringement<sup>663</sup> so that the court can determine ISPs’ objective knowledge of infringement.

### 5.3.2 Addressing Peer-to-Peer File-Sharing Liability in Legislation

As the thesis submitted in Chapter 4, the rapid pace of development of peer-to-peer file-sharing technology has created a legal vacuum for copyright protection over peer-to-peer file-sharing networks in China. Where the provisions of the Judicial Interpretation and the Regulations have proven inadequate to address peer-to-peer file-sharing liability issues, specific provisions for copyright liability over peer-to-peer file-sharing system are needed.

Firstly, the illegality of downloading copies available from obvious unauthorised sources should be established as the foundation of peer-to-peer file-sharing providers’ joint tort liability. According to the Copyright Act of the P.R.C<sup>664</sup> and the Regulations<sup>665</sup>, making copyright works available to the public on the Internet without permission of the right holders violates the right of communication through an information network. However, the Copyright Act does not address the use of those unauthorised copies by individuals. Since liability of peer-to-peer file-sharing

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*Development Ltd. v. Baidu Network Information Technology Ltd.*, No. 17776 (the Beijing Haidian District People’s Court, 2007)

<sup>663</sup> *Supra* note 354.

<sup>664</sup> Article 10, paragraph 1, (12) of the Copyright Act of the P.R.C reads that, ‘[T]he term “copyright” shall include the following personality rights and property rights: ... (12) the right of communication of information on networks, that is, the right to communicate to the public a work, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them; ...’. And Article 46, paragraph 1, (11) of the Copyright Act of the P.R.C states that, ‘[A]nyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying compensation for damages, depending on the circumstances: ... (11) committing any other act of infringement of copyright and of other rights and interests relating to copyright.’

<sup>665</sup> Article 2 of the Regulations on the Protection of the Right of Communication through the Information Networks reads that, ‘[T]he right of communication through information network enjoyed by right owners shall be protected under the Copyright Act and the Regulations. Any organisation or person that makes any other person’s works, performances, sound recordings and video recordings available to the public through information network shall obtain permission from, and pay remuneration to, the right owner unless otherwise provided for in the laws or administrative regulations.’



providers is not direct liability but is regulated by the principle of joint tortfeasorship, the existence of a direct copyright infringement is necessary. Therefore, the Copyright Act must extend the prohibition to content that is illegally offered on the Internet for purposes of distribution (downloading) in order to cover the unlawful exchange of copies of copyright content. Only after this prerequisite is established, can joint tort liability of peer-to-peer file-sharing providers be imposed. What is more, such a provision would also have a clearly deterrent effect on individuals' file-sharing activities.

Secondly, it should be made a legislative requirement for peer-to-peer file-sharing providers to implement filtering technology for preventing unauthorised file-sharing activity. As the thesis submitted in Chapter 4, legislative pressure is crucial to producing cooperative action in tackling copyright piracy over peer-to-peer file-sharing networks. Hence, requiring peer-to-peer file-sharing providers who have been found to have facilitated or promoted unlawful file-sharing to install filtering technology by a court order would allow them to play a proactive role in protecting copyright content and making it impossible for their users to infringe copyright using peer-to-peer technologies on their networks. This filtering mandate would not only be applicable to peer-to-peer file-sharing providers, but also be applicable to other content providers such as video-sharing websites<sup>666</sup> and search engines<sup>667</sup>. Nevertheless, when the filtering mandate is legislated, questions of how to provide an effective and readily accessible means of recourse and remedy after the application of filtering measures should also be considered to ensure that filtering measures are applied in a way that respects freedom of expression and minimises the adverse effect on the public access to information.

#### **5.4 Final Remarks**

Although a legislative solution is believed to be both necessary and capable of providing copyright owners or right holders with a general right to pursue copyright

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<sup>666</sup> For example, You Tube and MySpace. See earlier discussion in 4.2.3 of Chapter 4 at page 192.

<sup>667</sup> 'Report by the Group of Specialists on Human Rights in the Information Society (MC-S-IS) on the Use and Impact of Technical Filtering Measures for Various Types of Content in the Online Environment, CM(2008)37 add 26 February 2008' (The Council of Europe, March 2008)

infringers over the Internet and to pressurise ISPs to discourage and prevent copyright infringement, it is always the last resort. In fact, the ultimate aim of an enhanced ISP copyright liability is to oblige ISPs to cooperate with right holders against copyright piracy. Therefore, if the cooperation between ISPs and copyright holders can be promoted without the intervention of the law, it would be a win-win situation for all stakeholders. Not only the copyright holders and ISP industry can benefit from the cooperation, but also can the Internet users.

While Internet piracy has made the ISP industry and the copyright industry enemies, the unprecedented promise for distribution and promotion of creative content offered by the Internet and digital technology has also facilitated cooperation between the two parties. Internet sources reported that Chinese ISPs, especially those involved in copyright litigation, are now seeking a change of business model in order to end the war with copyright industry.<sup>668</sup> Have gone through frustrating legal proceedings, many ISPs have realised that only businesses that comply with the law can sustain and ensure their success. And for them, the most direct approach to eliminate the conflict with copyright industry is to work with copyright holders and legalise their website content, if they themselves are content providers.<sup>669</sup> So far, several content providers have already worked directly with copyright holders and have the content they host licensed. By so doing, they have gained the permission to distribute copyright content on the one hand, and on the other hand, have ensured their own financial interests. In the meantime, users' demands are met and the popularity of

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<sup>668</sup> Jin Shun, (2005, September 19), 'The Outbreak the Copyright Issues, The Lost of Baidu Questions the Business Model of Search Engine', [WWW document] URL [http://news.xinhuanet.com/newmedia/2005-09/19/content\\_3512149.htm](http://news.xinhuanet.com/newmedia/2005-09/19/content_3512149.htm) (Chinese Version) (visited 2008, December 2); Binghua Long, (2006, January 16), 'Attractive Prospects of the P2P Market, P2P Alliance Seeks a New Business Model', [WWW document] URL <http://news.itbulb.com/200601/78926.html> (Chinese Version) (visited 2008, December 2); Zhibing Xu, (2006, January 17), 'BT Wants to Clear of Its Original Sin, P2P Seeks a New Business Model', [WWW document] URL <http://soft.yesky.com/info/151/2276651.shtml> (Chinese Version)(visited 2008, December 2); Yue Yu, (2008, July 21), 'How Peer-to-Peer Providers Avoid the Legal Minefield', [WWW document] URL <http://news.ciw.com.cn/Print.asp?ArticleID=64817> (Chinese Version) (visited 2008, December 2); Ting Zhou, (2009, September 16), 'The Launch of the China Internet Video Sharing Anti-Piracy Alliance', [WWW document] URL [http://www.cs.com.cn/xwzx/05/200909/t20090916\\_2214811.htm](http://www.cs.com.cn/xwzx/05/200909/t20090916_2214811.htm) (Chinese Version) (visited 2009, September 20).

<sup>669</sup> Yue Yu. (2008, July 21). 'How Do Peer-to-Peer File Sharing Providers Avoid the Legal Minefield'. [WWW document] URL <http://news.ciw.com.cn/hotnews/20080721110043.shtml> (visited 2008, October 2)

their websites is maintained.<sup>670</sup> Selling sections or channels on their websites to content providers is also a means of cooperation, by so doing, ISPs receive fees and content providers make money by charging advertisers or sponsors for banner advertising and sponsorships.<sup>671</sup> For instance, the Chinese search engine giant Baidu has already formed the Digital Music Alliance with the record industry, by which they share advertising revenue on streaming music and music videos.<sup>672</sup> Wei Wang, CEO of the Todou.com (a Chinese-style YouTube) has also expressed his concern for their business after being sued in more than 14 copyright violation cases, and has stated that they are going to invest tens of millions of Chinese Yuan purchasing copyright rights in movies and working with television stations to license popular TV programs.<sup>673</sup>

Cooperation between ISPs and copyright holders is seen as a trend that allows both the ISP industry and the copyright industry to benefit, and to fight jointly against copyright piracy on the Internet. However, such a change involves the transformation of attitudes and practices in both the ISPs and the copyright industries, and is indeed a long process, in terms of its effect in eliminating copyright piracy. Consequently, it is only one of the solutions for curbing large-scale copyright piracy. While there is no certain solution to online copyright piracy, legislative regulation is thus still a critical element in a comprehensive and effective approach to online copyright protection. For China – a country being named as one of the world’s leading source of illegally copied music, movies and other copyright works, improving its legislative and regulatory regime in the fight against copyright piracy would create a

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<sup>670</sup> Jin Sun (2007, December 24). ‘Baidu Won MPs Search Case by Taking Advantage of “Safe Harbour” Provision’. [WWW document] URL <http://www.china-cbn.com/s/n/000004/20071224/020000063601.shtml> (Chinese version) (visited 2008, January 2) (For example, Baidu has signed contracts with EMI and Gold Label after their litigations on the use of all of Chinese-language songs EMI and Gold Label owned at Baidu MP3 search, they have also agreed to share the revenue generated from advertisements. So far, Baidu has established partnership with more than 60 international and domestic record companies with regard to the use of copyright contents.)

<sup>671</sup> *Ibid.*

<sup>672</sup> Le Tou. (2008, December 22). ‘Baidu Will Initiate Win-Win Cooperation Plan with the Right Holders’. [WWW document] URL <http://sz.seo.cn/baidu-mp3.html> (Chinese version) (visited 2009, January 2)

<sup>673</sup> Haipeng Yang. (2009, March 4). ‘The CEO of the Todou.com Attempts to Spend Tens of Millions of Yuan Purchasing Copyright’. [WWW document] URL <http://news.iresearch.cn/0468/20090304/91408.shtml> (Chinese version) (visited 2009, March 5)

sound legal environment for copyright protection and benefit the long-term development of the Internet, and the country's economy.

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## Lists of Abbreviations

|                               |   |
|-------------------------------|---|
| AZ                            | File Number (German)  |
| AG                            | German Local Court (Amtsgericht)  |
| BGB                           | German Civil Code   |
| BGH                           | German Federal Court of Justice   |
| BBS                           | Bulletin Board System   |
| Copyright Directive           | Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society                  |
| CR                            | Computer and Law (Computer und Recht)   |
| CTLR                          | Computer and Telecommunication Law Review   |
| DADVSI                        | Law on Authors' Rights and Related Rights in the Information Society (Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information)   |
| DMCA                          | Digital Millennium Copyright Act of 1998  |
| ECJ                           | European Court of Justice   |
| EIPR                          | European Intellectual Property Review   |
| Electronic Commerce Directive | Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market |
| ETMR                          | European Trade Mark Report  |
| GG                            | German Constitution Law   |
| GPCC                          | General Principle of the Civil Code of the P.R.C  |
| GRUR                          | Intellectual Property and Copyright Law (Journal)   |
| Hadopi Law                    | Act to Promote the Dissemination and Protection of Creation on the Internet (Loi Favorisant La  |

|                         |  |
|-------------------------|--|
|                         | Diffusion et la Protection de la Création Sur Internet)  |
| IFPI                    | International Federation of the Phonographic Industry  |
| IIPA                    | International Intellectual Property Alliance   |
| ISP                     | Internet Service Provider  |
| Judicial Interpretation | Judicial Interpretation of Issues regarding Applicable Laws for the Hearing of Copyright Dispute involving Computer Networks                                 |
| Länder                  | State  |
| Landgericht             | German Regional Court  |
| MDStV                   | Media Services State Treaty 1997 (MediendiensteStaatsvertrag )   |
| MIR                     | Multimedia, Internet and Legal (Medien Internet und Recht) (Journal)   |
| MMR                     | Multimedia and Legal (Multimedia and Recht) (Journal)  |
| NJW                     | New Legal Weekly (Journal)   |
| OLG                     | German Higher Regional Courts of Appeal  |
| Olivenness Report       | The Development and the Protection of Works Culture on the New Networks - Le Developpement Et La Protection Des Oeuvres Culturelles Sur Les Nouveaux Reseaux |
| P2P                     | Peer-to-Peer   |
| P.R.C                   | The People's Republic of China   |
| Regulations             | Regulations on the Protection of the Right of Communication through the Information Networks   |
| RIAA                    | Recording Industry Association of America  |
| RGSt                    | Decisions of the Supreme Court of the German Reich in Criminal cases   |

|                 |  |
|-----------------|--|
| RGZ             | Decisions of the Supreme Court of the German Reich in Civil cases  |
| TDG             | Federal Teleservices Act 1997 (Teledienstegesetz )                 |
| TMG             | German Telemedia Act 2007 (Telemediengesetz )                      |
| TRIPs Agreement | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| VCRs            | Video Cassette Recorders   |
| WCT             | WIPO Copyright Treaty  |
| WTO             | World Trade Organisation   |
| WPPT            | WIPO Performance and Phonogram Treaty                              |
| WWW             | World Wide Web   |