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A Study on the Safe Harbor Rules for Online File Hosting Service Providers Under Copyright Law in China

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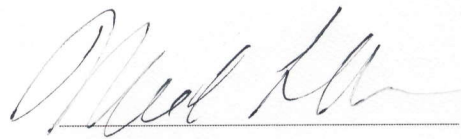
A STUDY ON THE SAFE HARBOR RULES FOR ONLINE
FILE HOSTING SERVICE PROVIDERS UNDER
COPYRIGHT LAW IN CHINA

Shi Xu

Submitted to the faculty of Indiana University Maurer School of Law
in partial fulfillment of the requirements
for the degree
Master of Laws – Thesis
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Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Maurer of Laws – Thesis.

Thesis Committee

A handwritten signature in dark ink, appearing to read "Marshall A. Leaffer", written over a horizontal line.

Marshall A. Leaffer

Distinguished Scholar in
Intellectual Property Law and
University Fellow

Submission date of thesis – March 10, 2014

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Shi Xu

Feb 25, 2014

A STUDY ON THE SAFE HARBOR RULES FOR ONLINE FILE HOSTING SERVICE PROVIDERS UNDER COPYRIGHT LAW IN CHINA

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Chapter 1: Introduction

China established a legal system of copyright law over about a 30-year period through adapting foreign copyright laws. The adapted copyright law may cause conflicts in practice in China because of the social environment, such as the Confucian culture, the level of economic development and political system. During this short time, it was really hard for the Chinese to adopt the idea of “copyright” since they have a tradition of sharing information. And with internet companies expanding around the world and the coming of the age of “user-generated” internet content, all countries face the issue of assigning liability when copyright infringements occurred on the internet.

Chinese people are used to getting information and entertainment being available for free on the internet. Under this circumstance, China, with the largest number of internet users in the world, may face more difficulties than other countries concerning the issue of internet copyright infringements. Because so many copyright infringements online occur every day, infringers cannot be located since they did not use real personal information such as registering registration online.

When a copyright owner finds financially difficult to pursue an individual for online infringements, he or she might seek remedy from internet service providers. To protect the legal right of providers, in 2005, China adopted safe harbor rules from the U.S. Digital Millennium Copyright Act (hereafter DMCA), particularly U.S. DMCA §512. The content of this provision has been incorporated into a number of different Chinese laws, such as Article 36 in the torts law and Article 4 in the Interpretation of the Supreme People’s Court regarding copyright disputes that involve computer networks. However, the Chinese translation and interpretation of DMCA §512 varies from law to law, which causes confusions in practice. For instance, Article 22 of the

Chinese Regulation on the Protection of the Right to Network Dissemination of Information is a nearly complete Chinese replication of DMCA §512(c). It states that the knowledge requirement of safe harbor rules is that internet service providers “have no knowledge of” and “have no justifiable reason to know” the infringements on their servers. On the other hand, in Article 36 of the torts law, the requirement is just “to know”. These terms do not have a clear standard of review in China; thus, Chinese courts face difficulties in deciding whether service providers can be protected by safe harbor rules.

Further, promulgated on December 17, 2012, the Chinese Supreme People’s Court has a new provision for adjudicating cases involving infringement of the right of dissemination on information networks. Although this provision provides a detailed standard of safe harbor rules, some legal loopholes might cause problems in practice. For instance, China has introduced the concept of “inducement infringement,” but only provides a very general definition of this occurring when internet service providers encourage users to infringe through language, recommending technological support, awards, points or other methods. It is hard for a court to judge whether an internet service provider induced infringements based on this one concept.

In this circumstance, this thesis tries to analysis each element of the safe harbor rules, critique the unclear standard of review of them, and examine the reasons for the current standard of the “safe harbor” in China. In order to solve the current “standard” and “implementation” problems, this paper advocates amending the law, to unify the rules and to establish a detailed standard of review by comparing the safe harbor rules of China with those of the rest of the world.

Chapter 2 provides an overview of the relationship between internet service providers’ secondary liability and their safe harbor, and explains the service of

internet file hosting. Chapter 3 explains each factor of the safe harbor rules for providers of internet file hosting services under U.S. law by analyzing several cases involve these rules. Chapter 4 focuses on the safe harbor rules for Chinese providers of internet file hosting service. This chapter also looks at particular cases to examine the unclear standards of review of safe harbor rules and suggests changes in these rules. Chapter 5 examines the EU and Japan's approaches in addressing the liability for third-party copyright infringement of internet file hosting service provider. Finally, Chapter 6 proposes several ways for China to amend its current safe harbor rules.

Chapter 2: The Overview of Internet Service Providers' Secondary Liability and Safe Harbor Rules.

2.1 The Relationship between the Secondary Liability and the Safe Harbor Rules

The online infringement of copyright law is almost always a “corporate” work, since internet users could not act infringe without the help of internet service providers. For instance, say a person bought a copyrighted book, took pictures of each page, and then uploaded the pictures in his storage space on the internet, which is open to the other “net citizens”. In effect, the service provider cooperated in this process. Yet because of fast-developing technology, the cost of this infringement of copyright law keeps decreasing and sometimes there is none. Another person might see the pictures of the copyrighted book online; he could download the files with a simple click of his mouse, and could then upload the files on his own space for others to download. Basically, this person infringed copyright law without paying any fee. Given this dynamic, anyone could easily be a copyright infringer. However, it would cost a great deal for the copyright owner to seek compensation of the copyright infringement, particularly, if the first person registered his online file space with a fake name, address, ID number, which would make it even difficult for the copyright owner to locate the infringer for the purpose of a lawsuit.

To protect the copyright owner, the rule of secondary infringement has been established in many countries. By analyzing statutes and case law throughout the world, we learn that the secondary or indirect infringement occurs when a party does not infringe directly but rather materially contributes to, facilitates, or induces another party's direct infringement with actual knowledge or reasonable awareness. The party's acts cause secondary liability.

Scholars generally classify secondary liability into two kinds: contributory

liability and vicarious liability, based on courts' decisions in these matters.¹ Furthermore, some scholars believe there is a third kind – inducement liability.²

However, to “facilitate the robust development and world-wide expansion of electronic commerce, communication, research, development, and education in the digital age,”³ American law felt it could not impose all the liability on internet service providers, whose interests also need to be protected. Today, more and more countries limit liability for the internet service provider, which has no subjective fault according to the safe harbor rules. The U.S. Congress passed the Digital Millennium Copyright Act; the Chinese Supreme Court established several Interpretations and Regulations in deciding whether internet service providers should be liable for their subscribers' infringements; the European Union developed an E-Commerce Directive⁴ and Japan implemented the Provider Liability Law⁵. Although the statutes vary, their fundamental structure is the same: to provide internet service providers exemption from liability for subscribers' infringing activities under several appropriate conditions, according to the safe harbor rules.

2.2 File Hosting Service

All the statutes mentioned above provide safe harbor for file hosting service providers under certain conditions, because the function of storage online is easy to establish and quite popular and useful. Many internet service providers can be considered file hosting service providers (henceforth, FHSP), such as YouTube, which provides video-storing and sharing services; Myspace, which provides space for the

¹ See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 438 (5th ed. 2010).

² See *id.*, at 443; see also *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2781-82 (2005).

³ S. REP. No. 105-190, at 1-2 (1998).

⁴ Directive 2000/31/EC of the European Union and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.

⁵ Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders, Act No. 137 of November 30, 2001.

user to store his or her blog, photos and other; and Twitter, which is able to store everything micro-bloggers want to share with others. The file hosting service is used widely around the world because of its convenient operability. Given this, it is necessary to protect the FHSP from the liability of their subscribers' copyright infringements. To be protected by the safe harbor rules, many countries' statutes limit the nature of the file hosting service so that (1) they must store material at the direction of users; and (2) any allegedly infringing activities must occur by reason of this storage.⁶

⁶ See 17 U.S.C. § 512(C)(1) (2006). ("A service provider shall not be liable...for infringement of copyright by reason of the storage at the direction of a user of material..."); See also Xinxi Wangluo Chuanbo Tiaoli(信息网络传播条例)[Regulation on the Protection of the Right to Network Dissemination of Information](promulgated by the Standing Comm. Nat'l People's Cong., May 10, 2006, effective July 1, 2006), art. 22(1); E-Commerce Directive, art. 14. ("Where an information society service is provided that consists of the storage of information provided... Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service").

Chapter 3: File Hosting Service Providers' Liability and Their Safe Harbors in the U.S.

3.1 General Background

Before the *Netcom* case,⁷ internet service providers faced the threat of “unreasonable” liability. For instance, both in *Playboy Enterprises, Inc. v. Frena*⁸ and *Sega Enterprises, Ltd. v. Maphia*⁹ cases, the courts found internet service providers liable for their subscribers’ infringing activities. The *Netcom* decision indicated that U.S. courts had taken a new direction in analyzing the liability of internet service providers.¹⁰ In 1998, the U.S. Congress adopted several “limitations of liability,” which would be applied even if an internet service provider “is found to be liable under existing principle of law” according to DMCA.¹¹ This limitation statute, §512, provides “safe harbor” to four categories of internet service providers in avoiding monetary relief and limiting equitable relief. §512(c)(1) provides exclusion of the secondary liability if the FHSPs meet certain conditions mentioned below.

3.2 Contributory Infringement and the DMCA §512(c)(1)(A)&(C)

From the *Napster* case, we know that a third, related party is held liable for the copyright infringement if it has knowledge of the infringing activity and induces or

⁷ Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

⁸ Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993). (In this case, the court held that the BBS operator who provided online storage space should bear a direct infringement liability because of the users’ activities of uploading and downloading copyrighted images without its knowledge.)

⁹ Sega Enterprises, Ltd. v. Maphia, 857 F. Supp. 679 (N.D. Cal. 1994). (This case resulted in the same decision as the Frena case, and the court further held that “even if defendants do not know exactly when games will be uploaded to or downloaded from the MAPHIA bulletin board, their role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement.”)

¹⁰ Religious Tech. Ctr. V. Netcom On-Line Commc’n Servs., Inc., 907 F. Supp. 1361, 1382 (N.D. Cal. 1995). (The court refused to hold that the defendant should bear direct liability for infringement because it would “result in liability for every single usenet server in the worldwide link of computers transmitting message to every other computer”. The court correctly distinguished contributory liability from direct liability, and the defendant would be liable for contributory infringement if he knew, or should have known, of the infringement and had substantially induced, caused, or contributed to it.)

¹¹ H.R. REP. No. 105-796, at 73 (1998) (Conf. Rep.).

materially contributes to it.¹² Napster provided free software for users to share MP3 files that were stored in their computers. Without the service of Napster, users could not locate or download copyrighted files¹⁴ and thus, Napster materially contributed to infringing activities. However, the Ninth Circuit Court also ruled that “absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted information”.¹⁵ DMCA §512(c)(1)(A) and (C) provides limitation of the liability to the FHSPs if they meet two conditions: first, the FHSP does not actually know of the infringing activities or is unaware of facts, or circumstances from the infringing activity are apparent; second, the FHSP moves to remove or block access to the infringing materials expeditiously if it has such knowledge or awareness.¹⁶ If we consider the conditions from another side, we find that these exceptions are actually the same as the conditions for contributory infringement: first, the FHSP has actual knowledge or is aware of facts or circumstances from infringing activity is apparent; second, the FHSP does not expeditiously take down the infringing materials when it has such knowledge. FHSPs provide file hosting services, which means they are actually supplying the means to infringe on their websites.

3.2.1 Actual Knowledge and Red Flag Awareness

From the language of §512(c)(A), we find that the condition of knowledge including two parts: actual knowledge and red flag awareness.¹⁷ However, the DMCA

¹² See LEAFFER, *supra* note 1, at 438. (“Contributory infringement: A will be held liable for B’s infringing acts if A has actively induced the infringement, or, with knowledge of the infringement, A has supplied the means to infringe”); see also *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001).

¹⁴ *Id.*, at 1011.

¹⁵ *Id.*, at 1021.

¹⁶ 17 U.S.C. § 512(c)(1)(A)&(C)(2006).

¹⁷ *Id.* § 512(c)(A) requires that internet service providers lack actual knowledge of their subscribers’ infringements or awareness of facts or circumstances from which the infringement is apparent.

statutes did not explain what constitutes “actual knowledge” or “red flag awareness”. Therefore, we need to analyze the standard of these two conditions under case law. Although there is still much debate about these standards, we can still find opinions that are widely recognized.

Regarding the standard of actual knowledge, an FHSP undoubtedly would be considered as having actual knowledge if it receives a proper notice¹⁸ of copyright infringements from a copyright owner or authorized third party. However, the Ninth Circuit and the Second Circuit have different opinions on whether receiving such notice is the only standard of obtaining actual knowledge. The Ninth Circuit clearly states that actual knowledge cannot be imputed in the defendant – CC Bill as it had not received a proper complaint notice.¹⁹ Further, in the *UMG* case, the Ninth Circuit affirms the district court’s opinion that failing to send a notice “stripped it of the most powerful evidence of a service providers’ knowledge – actual notice of infringement from the copyright holder”.²⁰ Following this, several district courts ignored some facts and held that defendants lack of actual knowledge since they did not receive proper notifications.²¹ The Second Circuit has a different opinion from the Ninth Circuit, it notes that actual knowledge might be obtained from sources other than a DMCA notice, as decided in the YouTube case.²²

The second relevant issue is the specificity requirement that there be actual

Congress created the “red flag test” in evaluating whether the internet service providers is aware of such facts or circumstances.

¹⁸ See 17 U.S.C. § 512(c)(3)(B)(i) (2006). (“A notification that fails to comply substantially with the elements required by the statute “shall not be considered ... in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which the infringing activity is apparent”.); see also *UMG Recordings v. Shelter Capital*, 667 F. 3d 1022, 1037 (9th Cir. 2011).

¹⁹ *Perfect 10 v. CC Bill*, 488 F. 3d 1102, 1112-1113 (9th Cir. 2007).

²⁰ *UMG Recordings v. Shelter Capital*, 718 F. 3d 1006 (9th Cir. 2013).

²¹ See *UMG Recordings v. Veoh Networks*, 620 F. Supp. 2d 1081, 1108-1109 (C.P. Cal. 2008).

²² *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30-34 (2d Cir. 2012). The Second Circuit ruled that as there was evidence indicating YouTube employees had knowledge of specific infringing materials, the only reason for YouTube’s expeditiously taking down was that it knew the particular items to remove, YouTube had actual knowledge.

knowledge of infringement. Both the Second Circuit and the Ninth Circuit agreed that such knowledge should be interpreted as knowledge of specific infringements.²³ Applying the *Sony* rules²⁴ to the internet, the Ninth Circuit held that a computer system operator has actual knowledge if he learns of specific infringing materials on his system from *Napster*.²⁵ The court thinks that if one merely provided the hosting service “with a general knowledge of copyrighted material, [this] was sufficient to impute knowledge to service providers, [and so] the §512(c) safe harbor would be rendered a dead letter”.²⁶

The U.S. Senate Report (105th Congress) discussed the element of a “red flag” test. Congress stipulated that “red flag awareness” has both a subjective element (whether the provider is subjectively aware of the facts or circumstances of infringing activity in question) and an objective element (whether it is apparent to a reasonable person “operating under the same or similar circumstances” that those facts and circumstances constitute infringing activity).²⁷ The courts thought that red flag test is higher than the standard of “should have known” and that in some instances, it should include willful ignorance.²⁸ Both the Ninth Circuit and the Second Circuit agreed that red flag awareness requires awareness of specific infringing activity. The Ninth Circuit shared the district court’s opinion that “general awareness of infringement,

²³ See *id.*, at 30; see also *UMG Recordings v. Shelter Capital*, 718 F.3d 1006, 1021-1022 (9th Cir. 2013).

²⁴ *Sony Corp of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). (The Supreme Court held that there was “no precedent in the law of copyright for the imposition of” liability based on the theory that the defendant had “sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyright material”.)

²⁵ *A&M Records v. Napster*, 239 F.3d 1004, 1021 (9th Cir. 2001). (“if a computer system operator learns of specific infringing material available on his system, the operator knows of and contributes to direct infringement.”)

²⁶ *UMG Recordings v. Shelter Capital*, 718 F.3d 1006, 1021 (9th Cir. 2013).

²⁷ S. REP. NO. 105-190, at 44 (1998); H.R. REP. 105-551 (II), at 53.

²⁸ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 19 (2d Cir. 2012). However, both the Ninth Circuit and the Second Circuit held that it is not clear how to decide that under what circumstance a service provider might deliberately turn a blind eye to illicit materials, as §512(m) bars the obligation of seeking out infringing content.

without more” is insufficient to constitute red flag awareness.²⁹

3.2.2 Materially Contribution

Generally, U.S. courts adopt a liberal interpretation of the standard of “materially contribution”.³⁰ For instance, the Ninth Circuit held that a swap meet or flea market operator is contributorily liable for the sales of infringing records by vendors who lease premises from the operator if the operator has knowledge of the infringements. The court found that operators generally provide space, utilities, parking, advertising, plumbing and other facilities, which allow the infringing activities to take place.³¹ Further, the Ninth Circuit adopted this rule in deciding whether internet service providers materially contribute to third-party infringements. In *Napster*, the court found contributory liability based on the knowledge provision of the site and the presence of facilities for infringement.³² Napster had materially contributed to the infringements by providing the basic facilities: software.

3.3 Vicarious Infringement and the DMCA §512(c)(1)(B)

In fact, the U.S. copyright developed a “vicarious liability” provision based on an extended interpretation of the tort principle.³³ In terms of copyright law, by summarizing the courts’ decisions, especially the *Netcom* case³⁴, vicarious liability arises when the defendant has : (1) the right and ability to control the infringer’s acts

²⁹ UMG Recordings v. Veoh Networks, 620 F. Supp. 2d 1081, 1109 (C.D. Cal. 2008).

³⁰ Daniel Seng, *Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries*, at 52, available at http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf (last visited Dec. 28, 2013).

³¹ Fonovisa, Inc. v. Cherry Auction, Inc., 76 F. 3d 259, 264 (9th Cir. 1996). (“It would be difficult for the infringing activity to take place in the massive quantities alleged without the support service provided by the swap meet.”)

³² A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001).

³³ MELBILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS, § 12.04[A][1], at 12-76 (Supp. 2007). (Vicarious liability is rooted in the tort theory of “enterprise liability.” which means that individual entities can be held jointly liable for some action on the basis of being part of a shared enterprise.)

³⁴ Religious Tech. Ctr. V. Netcom On-Line Commc’n Servs., Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

and (2) a direct financial benefit from the infringement; (3) there is no requirement of knowledge of the infringing acts.³⁵ DMCA §512(c)(1)(B) provides one conditions for FHSP's liability limitation: the FHSP does not receive a financial benefit directly attributable to the infringing activity, though it has the right and ability to control this activity. If we consider this condition from another side, this amounts to the conditions of vicarious liability.

3.3.1 Direct Financial Benefit

There is little discussion of direct financial benefit in U.S. case law. The *Napster* Court found that although Napster was providing a free service when it was sued, it gained a commercial benefit from infringing activities by increasing its user base, which it planned to exploit in the future.³⁶ In the *CC Bill* case, the Ninth Circuit held that “receiving a one-time set-up fee and flat, periodic payments for service from a person engaging in infringing activities would not constitute receiving a ‘financial benefit directly attributable to the infringing activity.’”³⁷

American courts should take the contemporary situation into consideration in the future. Most internet service providers gain financial benefits from attracting users through using infringing contents via increasing their user base; internet service providers can gain more financial benefits by selling advertising space on their websites. Thus, while there may not be “direct” financial benefit, there are many implicative ones, such as pop-up advertising fees.

³⁵ See *Artists Music. Inc. v. Reed Pub. (USA), Inc.*, 1994 WL 191643, *4 (S.D.N.Y. 1994).; see also *H.L. Green Co.*, 316 F.2d at 307. (“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.”).

³⁶ *A&M Records v. Napster*, 114 F. Supp. 2d 896 921-922 (N.D. Cal. 2000). (The *Napster* court held that potential revenue sources include targeted email, advertising, and commissions from links to commercial websites among. This decision has been criticized as an over-interpretation of the direct financial benefit, because there is no direct evidence showing any direct revenue generated from infringing activities.)

³⁷ *Perfect 10 v. CC Bill*, 488 F. 3d 1102, 1118 (9th Cir. 2007). (citing H.R. REP. No. 105-551, pt. 2, at 54).

3.3.2 The Right and Ability to Control

In the *Napster* case, because Napster, which is a peer-to-peer (hereafter P2P) service provider, had the ability to block access to materials or to terminate infringing users, the Ninth Circuit ruled that Napster had the right and ability to control the infringements that happened on its server.³⁸ Generally, U.S. courts agree that in P2P cases, the right and ability to control means the service providers have the ability to block infringers' access or remove the infringing content. However, in recent cases, the courts held that the requirement of "right and ability to control" under §512 needs "something more" than the ability to terminate users' accounts.³⁹ The Ninth Circuit agreed with the Second Circuit's qualification of "something more" that, "in order to have the right and ability to control, the service providers must exert substantial influence on the activities of users".⁴⁰ "Substantial influence" may include "high levels of control over activities of users" or "purposeful conduct".⁴¹

Nonetheless, there are still differences in ruling the requirement of "right and ability to control" between the Ninth Circuit, the Second Circuit and other courts. Based on the language of §512(c), the *Veoh* court ruled that the requirement of ability to control is not "whether Veoh has the right and ability to control its system, but rather, whether Veoh has the right and ability to control the infringing activity".⁴² The Ninth Circuit agreed that "the provider must know of the particular case before he can control it."⁴³ Although the Second Circuit rejected this specific requirement,⁴⁴ the

³⁸ *A&M Records v. Napster*, 239 F.3d 1004, 1027 (9th Cir. 2001). ("Napster maybe vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index.")

³⁹ See *UMG Recordings v. Veoh Networks*, 620 F. Supp. 2d 1081, 1114 (C.D. Cal. 2008).

⁴⁰ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012).

⁴¹ *UMG Recordings v. Shelter Capital*, 718 F. 3d 1006, 1030 (9th Cir. 2013). (Purposeful conduct includes "inducement of copyright infringement, which premises liability on purposeful, culpable expression and conduct".)

⁴² *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1151 (N.D. Cal.2008).

⁴³ *UMG Recordings v. Shelter Capital*, 667 F. 3d 1022, 1042 (9th Cir. 2011).

Ninth Circuit reaffirmed its prior ruling in the *UMG* case.⁴⁵ One reason it gave for doing so is particularly: “Given Congress’ explicit intention to protect qualifying service providers who would otherwise be subject to vicarious liability, it would be puzzling for Congress to make §512(c) entirely coextensive with the vicarious liability requirements, which would effectively exclude all vicarious liability claims from the §512(c) safe harbor”.⁴⁶

3.4 Active Inducement of Infringement

The Supreme Court borrowed the “inducement rule” from patent law in holding that the defendant should bear secondary liability in the *Grokster* case.⁴⁷ According to the Court, the inducement rule refers to “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, is liable for the resulting acts of infringement by third parties.”⁴⁸ The court retains the *Sony* rule that a service provider is not liable for inducement infringement if the product, and its distribution, are capable of substantial noninfringing use. Further the court also stated clearly that the *Grokster* case is different from the *Sony* case, “where evidence goes beyond a product’s characteristics, or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, Sony’s staple article rule will not preclude liability.”⁴⁹ The court found that the “evidence” mentioned above should include evidence of clear affirmative statements or actions that encourage infringement and the culpable intent of the service provider.⁵⁰ For

⁴⁴ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012).

⁴⁵ *UMG Recordings v. Shelter Capital*, 718 F.3d 1006, 1027 (9th Cir. 2013).

⁴⁶ *Id.*, at 1028.

⁴⁷ *Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd.* 125 S. Ct. 2764 (2005) or 545 U.S. 913 (2005).

⁴⁸ *Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd.* 545 U.S. 913, 919 (2005).

⁴⁹ *Id.*, at 931-93.

⁵⁰ See Center For Democracy & Technology, *Interpreting Grokster: Limits on the Scope of Secondary Liability for Copyright Infringement*, STAN. TECH. L. REV.3 (2006). (Based on this analysis, there are still

instance, the categorization feature of songs (such as the “top 40” searches) on the service provider’s site and the advertisement model should be identified as evidence of unlawful objective or intent with “added significance”.⁵¹ And the clear intent should be shown, e.g., that Grokster sought to develop promotional materials to advertise itself as the best Napster alternative.⁵²

In *Arista v. Usenet.com*, the court adopted the *Grokster* decision based on evidence that indicated that the defendants sought to attract Napster and Kazaa users, and their acts of using meta-tags in their source code to attract searches for these infringing services to the his own service, “they would be ineligible for the DMCA’s safe harbor provisions.”⁵³ Although inducement infringement was claimed in both the *UMG* and the *Viacom* cases, the district courts never actually discussed this issue as they determined the eligibility of safe harbor rules first.

several detailed requirements such as: the element of “affirmative statements or actions” requires that the statement or actions must be clear and externally directed and the active steps must be independent and so on.)

⁵¹ Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd. 545 U.S. 913, 978 (2005).

⁵² See Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd. 259 F. Supp. 2d 1029, 1033 (C.D. Cal. 2003).

⁵³ *Arista v. Usenet.com* 633 F. Supp. 2d 124 142 (S.D.N.Y. 2009).

Chapter 4: File Hosting Service Providers' Liability and Their Safe Harbors in China.

4.1 The Overview of Online Copyright Infringements in China and Baidu Case

On March 15, 2011, 50 famous writers in China published a statement⁵⁴ accusing Baidu Library⁵⁵ of allowing infringing material to be uploaded to its system. On March 26, Baidu responded that it would manually police the Baidu Library and take down the infringing files.

The famous writer Han Han personally filed a lawsuit against the Baidu company⁵⁶ because he was dissatisfied with the results (Baidu took down some infringing materials but not all).

The Baidu case became one of the top ten intellectual property cases in China in 2012, and the only copyright infringement case among them. This case finally drew people's attention about the liability of internet service providers and their safe harbors.

In the Baidu case, Han Han argued that (1) he had sent take-down notices to Baidu; (2) Baidu had edited his work; and (3) Baidu got direct financial benefits from the infringing text files.

Baidu in turn argued that the reason it had acted as it had was that it was a FHSP and that it had taken down all the reported infringing materials after receiving

⁵⁴ *A Letter from the Chinese Writer Condemn BAIDU — This Is Our Right* (三一五中国作家讨百度书——这是我们的权利), available at http://blog.sina.com.cn/s/blog_467a3a7f0100pqvs.html (last visited Dec 20, 2013).

⁵⁵ *Baidu Library Definition*, WIKIPEDIA.ORG, available at <http://en.wikipedia.org/wiki/Baidu> (last visited Nov 10, 2013). ("Baidu Library is an open online platform for users to share documents. All the documents in Baidu Library are uploaded by the users and Baidu does not edit or change the documents. Users can read and download lecture notes, exercises, sample exams, presentation slides, materials of various subjects, variety of documents templates, etc. However, it is not completely free. In order to download some documents, users should have enough Baidu points to cover the points asked by the uploaders. Users could gain Baidu points by making contribution to Baidu Library and other users, such as uploading documents, categorizing documents, evaluating documents, etc.")

⁵⁶ HanHan Su Beijing Baidu Wangxun Keji Youxian Gongsi(韩寒诉北京百度网讯科技有限公司)[Han Han v. Beijing Baidu Internet Technology Co., Ltd.](Beijing Haidian Dist. People's Ct. Sep 17, 2012).

notification from Han Han; it added that it could be protected by the safe harbor rules in China.

The court held that Baidu was at fault and should bear corresponding liability, because: (1) Baidu had general knowledge of the infringing materials on its server; (2) based on Han's reputation and the article's (which published by 50 famous writers) significant effect on the Chinese society – it drew widespread attention, Baidu should bear a higher obligation of detecting; (3) Han Han applied for evidence preservation of a specific book on Baidu's server, however, this material was still available to be read or downloaded after the series "take-down" actions of Baidu.⁵⁷

In truth, there are no statutes to regulate secondary liability in China; only statutes that regulate joint liability.⁵⁸ Because of disputes about applying the joint liability to the secondary infringement in this "network era," Chinese courts try to establish the principle of secondary liability and the standard of review by judging cases and learning from foreign rulings.

Copyright infringements are rooted in tort law. Based on this law, most scholars believe that there are also two kinds of principles of responsibility in copyright law: fault liability and non-fault liability. When a person performs an act that violates the exclusive right of the copyright owner, as in publishing a work without the owner's consent, his act constitutes a direct copyright infringement, whether the actor has subjective fault or not. However, all the internet service providers' acts that could constitute a secondary infringement are not controlled by

⁵⁷ Baidu not only directly took down the reported materials but also tried to develop finger-printing software. After getting notice from HanHan and other writers, Baidu declared that it would manually search its server and after that it would use a software (which could be used to search the infringing materials on its server by comparing it the copyrighted works) to police its server. (The software is useful only if it has the whole copyrighted work in its database.)

⁵⁸ Minfa Tongze(民法通则)[General Principles of the Civil Law of the People's Republic of China](promulgated by Order No. 37 of the president of the People's Republic of China, Apr 12, 1986, effective Jan 1, 1987), Article 130: "If two or more persons jointly infringe upon another person's rights and cause him damage, they shall bear joint liability."

the exclusive right of the copyright owner. In this situation, how should the law make the internet service providers assume their responsibility so as to protect the copyright owners? Based on Professor Wang Liming's interpretation of tort law, the conditions that define secondary infringement should include: (1) a fact of direct infringement; (2) evidence that the internet service provider provides services for the direct infringement; and (3) the actor has subjective fault.⁵⁹ The first two conditions are easily met, since net citizens cannot infringe copyright online without the file hosting service provided by FHSPs. But why should the FHSPs have subjective fault? If the law punishes the FHSPs only for their negligent acts which cause infringement or their basic function – providing file hosting service – this seems to put too much of a burden on FHSPs, and would also limit their business and technological development. In order to make the FHSPs take reasonable liability of the secondary infringement, the FHSPs should have subjective fault.

China has many more online copyright infringements than the U.S.. But this situation doesn't mean that the Chinese FHSPs do not need protection. Thus, in 2006, China adopted the DMCA safe harbor rules into its Regulation on the Protection of the Right to Network Dissemination of Information(hereafter the State Council's Regulation).⁶⁰ Most of DMCA §512(c) was incorporated in Article 22 of the Regulation, making it the safe harbor for FHSPs in China. However there are some additional elements and expurgatory elements in Article 22 that will be discussed later in this thesis.

⁵⁹ Wang Liming (王利明), *Minfa: Qinquan Xingweifa (民法: 侵权行为法)[Civil Law: Tort Law]*(5th ed. 2010) (China), at 324. “构成间接侵害专利权行为的条件为: (1) 须存在直接侵权的事实; (2) 须为直接侵权行为提供实施专利的必要条件; (3) 须行为人主观上有过错, 即知道或者应当知道其为他人提供实施专利侵权的条件。”

⁶⁰ *Xinxi Wangluo Chuanbo Tiaoli(信息网络传播条例)[Regulation on the Protection of the Right to Network Dissemination of Information]*(promulgated by the Standing Comm. Nat'l People's Cong., May 10, 2006, effective July 1, 2006).

4.2 Secondary Infringement and the Safe Harbor Rules.

Although “secondary infringement” is not actually mentioned in the Chinese statutes, it seems that China apparently has already separated the secondary infringement into two kinds based on the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks (hereafter the Supreme People’s Court’s Provisions), specifically in Article 7, which concerns regulations about instigating infringement and assisting infringement.⁶¹ According to Article 8,⁶² the court should determine whether the FHSPs are liable for instigating or assisting infringement by analyzing subjective fault. In fact, only when they are sued for assisting infringement can be protected by safe harbor rules, provided that they meet certain conditions.

4.2.1 Instigating Infringement

What constitutes instigating infringement in China is similar to inducement infringement in the U.S. The Supreme People’s Court’s Provisions interpretate instigating infringement as activities of internet service providers to encourage network users to infringe “upon the right of dissemination through information networks by persuading, recommending technical support, giving bonus points or

⁶¹ Zuigao Renmin Fayuan Guanyu Shenli Qinhai Xinxi Wangluo Chuanboquan Minshi Jiufen Anjian Shiyong Falv Ruogan Wenti de Guiding(最高人民法院关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定)[Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks](promulgated by the Jud. Comm. of the Sup. People’s Ct., Nov 26, 2012, effective Jan. 1, 2013). Art. 7(2) states: “Where a web service provider instigates or assists any web user in infringing upon the right of dissemination through information networks by persuading, recommending technical support, giving bonus points or other ways, the people’s court shall decide that its act constitutes the behavior of instigating infringement.”; (3): “Where a web service provider clearly knows or should have known that a web user is using its web services to infringe upon the right of dissemination through information networks but fails to take necessary measures, such as deleting, blocking or breaking relevant links, against such act, or provides technical support or assistance to such infringement act, the people’s court shall decide that its act constitutes the behavior of assisting in infringement.”

⁶² *Id.*, art. 8: “The people’s court shall, according to the faults of a web service provider, determine whether it should be liable for instigating or assisting in infringement.”

other ways.”⁶³ As instigating liability is a kind of secondary liability, it applies to the principle of subjective fault (intentional). The FHSP’s intention of encouraging users to infringe copyright is malicious. As the Ninth Circuit said in the *Fung* case: “...nor there is any inherent incompatibility between inducement liability and the requirements that apply to all of the DMCA safe harbors.”,⁶⁴ because the defendant (Gary Fung) “uses purposeful, capable expressing and conduct aimed at promoting infringing uses of the websites.”⁶⁵ There are no such safe harbors for an internet service provider with malicious intention; it must bear the liability that was caused intentionally and by virtue of the service it provided.

After the Supreme People’s Court’s Provisions came out, a defendant (178.com) was held to bear the instigating liability in April 15, 2013.⁶⁶ In this case, the author authorized Beijing Chinese All Digital Publishing Co.,Ltd.(the plaintiff) to exercise the rights of dissemination of her novel, *The Legend of Zhen Huan* through the internet. A moderator provides the electronic edition of the novel to BBS (Bulletin Board System) users by creating a post on the website that is presently under the control of the defendant, 178.com.

Although the defendant argued that it only provide file hosting services for the BBS, the court held that the defendant should bear the instigating liability based on two grounds: (1) The defendant authorized the moderator to supervise the BBS, so that the moderator used its ability, provided by the defendant, to create a post that offered a “downloadable” version of the copyrighted novel on the first page of the

⁶³ *Id.*, art. 7(2).

⁶⁴ *Columbia Pictures Industries v. Gary Fung*, 710 F.3d 1020, 1040 (2013).

⁶⁵ *Id.*, at 1037.

⁶⁶ *Beijing Zhongwenzaixian Shuzi Chubanshu Gufen Youxian Gongsi Su Beijing Zhizhu Wangluo Jishu Youxian Gongsi* (北京中文在线数字出版股份有限公司诉北京智珠网络技术有限公司) [*Beijing Chinese All Digital Publishing Co., Ltd. v. 178.com.*](Beijing Chaoyang District People’s Ct. Apr 15, 2013).

BBS; the moderator also marked the post as a “moderator recommendation”; (2) Under the BBS rule, if users publish resources for downloading, they can get BBS “coins” as awards. The court ruled that the defendant had a subjective fault since it authorized the moderator to supervise the BBS and gave awards to encourage users by providing downloadable resources.

In considering what amounts to the instigating infringement, we need to draw on American precedents. In the *Grokster* case, the U.S. Supreme Court considered three indications of subjective fault: (1) the defendant tried, through promotion and marketing, to attract former infringing users of Napster; (2) it did nothing in develop filtering tools or to otherwise limit users’ infringements; (3) it made a profit by selling advertisements whose revenue base mandated a huge number of users.⁶⁷

4.2.2 Assisting Infringement and the Safe Harbor Rules

Assisting infringement in China has a similar definition as contributory infringement. According to Article 7(3) of the Supreme People’s Court’s Provisions, it means that the internet service provider clearly knows, or should have known, that network users are using network services to infringe the right of dissemination through such networks, and that an internet service provider does not adopt necessary measures, such as deletion, blocking, breaking links, or providing technological support or other assistance.⁶⁸

This article provides two major conditions for assisting liability: (1) actual knowledge of or “should have known” about the infringing activities; (2) failure to delete, block or other acts of the infringing materials when an FHSP has such

⁶⁷ See *Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd.*, 125 S. Ct. 2764, 2781-82 (2005).; *see also* LEAFFER, *supra* note 1, at 443.

⁶⁸ The Supreme People’s Court’s Provisions, *supra* note 61, art. 7(3).

knowledge. By reading the State Council's Regulation — Article 22 (3)&(5)⁶⁹ in another way, we find that it provides the conditions that constitute assisting liability. The safe harbor rule conditions (3) and (5) can be treated as exclusions of such liability. However, the Chinese safe harbor rule still misses one conbignency when FHSPs obtain knowledge or awareness of the infringing materials and then take them down.

4.2.2.1 Knowledge Condition and Take-Down Procedure

An FHSP's basic function is to provide online file hosting services, and users' infringements occur via the FHSP's services. (Users upload and download files that are stored on FHSP's servers). So, whether or not the FHSP had the intention of providing assistance to the infringing activities, it is already involved in the infringement. The court cannot judge whether the FHSP has subjective fault due to the nature of its services. Article 8 of the Supreme People's Court's Provisions mandates that the subject fault includes cases when the FHSP clearly knows or should know of network users' acts of infringement of the right of dissemination through the internet.⁷⁰ Article 36 from the Chinese Tort Law provides: "...Know [but]...fail to take necessary measures, shall be jointly and severally liable..."⁷¹ Therefore, to hold that the FHSP has subjective fault, the court should determine the degress of its knowledge of infringements and whether necessary corrective measures have been taken.

⁶⁹ The State Council's Regulation, *supra* note 60, art. 22(3): "Having no knowledge of and being justifiable reason to know the infringement of the works, performance and audio-visual products" art. 22(5)"After receiving a notice from the owner, deleting hose works, performance and audio-visual products that the owner regards as infringing ones according to the present Regulation."

⁷⁰ The Supreme People's Court's Provisions, *supra* note 61, art. 8.

⁷¹ Qinquan ZeRen Fa (侵权责任法)[Tort Liability Law](promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010). Art 36(3) states: "If an internet user commits tortious acts through internet services, the infringe shall be entitled to inform the internet service provider to take necessary measures, including, inter alia, deletion, blocking and unlinking. If the internet service provider fails to take necessary measures in a timely manner upon notification, it shall be jointly and severally liable with the said internet user for the extended damage."

Before the State Council's Regulation came out, the Supreme People's Court did not hold an internet service provider responsible for the secondary infringement when the internet service provider has no "actual knowledge" of the infringing materials.⁷² By analyzing the content of the Supreme People's Court's reply,⁷³ most scholars in China believe that the rule of imposing secondary liability on an internet service provider should be: If there is no take-down notice, there is no actual knowledge; if there is no actual knowledge, there is no secondary liability.⁷⁴

This rule provides a very high standard of subjective fault. For instance, say that while a very popular movie is on, an FTP website provides the service of allowing downloading this movie. During that time, website traffic is extraordinarily high. The internet service provider must be aware that the traffic situation is caused by downloading the copyrighted movie. However, if the movie's copyright owner does not send a take-down notice to the internet service provider, he or she could just willfully ignore this infringement, and the court could not impose the internet service provider secondary liability because it does not have actual knowledge of the infringement.

Luckily, the State Council's Regulation,⁷⁵ which came out in 2006, redefined this "knowledge" condition. If the FHSP wants to be protected by the safe harbor rules, Article 22 requires that it has no knowledge of, or justifiable reason to know of,

⁷² *The Supreme People's Court's Reply to Shandong Higher People's Court (2005)*, 360DOC.COM, available at http://www.360doc.com/content/11/0816/12/434582_140751468.shtml (last visited Jan 10, 2014). (鲁高法 7 号《关于济宁之窗信息有限公司网络链接行为是否侵犯录音制品制作者权信息网络传播权及赔偿数额如何计算问题的请示》) Request-and-reply system is one of the main features of China's judicial regime. Under this system, courts at two levels can jointly make a judgment of difficult cases. In general, the lower court would follow the directions of the higher court.

⁷³ *Id.*

⁷⁴ See Wang Qian(王迁), *Wangluo Huanjingzhong Zhuzuoquande Baohu Yanjiu*(网络环境中著作权的保护研究)[Copyright Protection in the Network Environment](1st ed. 2011), at 277.

⁷⁵ The State Council's Regulation, *supra* note 60, art. 22.

the infringement.⁷⁶ Based on the analysis above, the exclusion condition is the same as the imputation condition(if internet service providers meet the conditions, they have no liability; if not, they have to bear liability), which means the knowledge condition of imputation should include at least: actual knowledge and having a justifiable reason to know. However, Article 23 states that the knowledge condition as: the internet service provider has actual knowledge of or should have known about, the materials that constitute an infringement; if either condition is met, it shall be subject to the liabilities of joint infringement.⁷⁷

Yet the questions arises: what exactly is the knowledge condition? Does “having justifiable reason to know” have the same requirements as “should have known”? To answer these questions, we first have to examine Article 36 of Chinese tort law.⁷⁸ The knowledge condition there is summarized in merely one word: know. The drafters of the tort law clearly state that “know” has the same requirement as “actually know and should have known”.⁷⁹ In China, Article 79 of the Law on Legislation ruled that “a law is of higher legal authority than an administrative regulation, local regulation, administrative rule or local rule.”⁸⁰ This tort law was adopted by the 12th session of the Standing Committee of the Eleventh National People’s Congress. However, the State Council’s Regulation was adopted at the 135th executive meeting of the State Council, so it is only an administrative regulation.

⁷⁶ *Id.*

⁷⁷ *Id.*, art. 23: “When anyone is fully aware or should know that any of the works, performance or audio-visual product it has linked to constitute any infringement, it shall be subject to the liabilities of joint infringement.”

⁷⁸ Qinquan ZeRen Fa (侵权责任法)[Tort Liability Law](promulgated by the Standing Comm. Nat’l People’s Cong., Dec 26, 2009, effective July 1, 2010), art. 36(3).

⁷⁹ Wang, *supra* note 74, at 285; *see also*: Wang Shengming, et al., Zhonghua Renmin Gongheguo Qinquan Zerenfa Shiyi(中华人民共和国侵权责任法释义)[Understanding Tort Law of the People’s Republic of China](2nd ed. 2013), at 194-195.

⁸⁰ Lifa Fa(立法法)[Law on Legislation of the people’s republic of China](promulgated by the Standing Comm. Nat’l People’s Cong., Mar 15, 2000, effective July 1, 2000). Article 79 states that “... an administrative regulation is of higher legal authority than a local regulation, administrative or local rule.”

When deciding conditions for knowledge of infringement, the courts should apply the tort law. Based on the decisions of relevant cases, we can conclude that in China “having justifiable reason to know” has the same requirement as “should have known”. Furthermore, Article 8 of the Supreme People’s Court’s Provisions clearly states that subjective fault should include whether the internet service provider has actual knowledge of, or should know of, the users’ act of infringement.⁸¹

In summary, in China, the condition for knowledge of infringement can be separated into two parts: actual knowledge and “should have known”. Although some scholars have different opinions of what constitutes “knowledge”, based on the application of the knowledge condition in the courts and the American definition of this term, it is clear to me that “knowledge” should include both “actual knowledge” and “should have known”.

1. Knowledge Condition

(1) Actual Knowledge

Actual knowledge means that FHSPs actually know the infringing activities. Basically, an FHSP should be seen as having actual knowledge if he received a proper take-down notice from the copyright owner via mail, fax, or email.⁸²

(2) Should Have Known

China did not have the standard of “should have known” until the Supreme People’s Court enacted the Provisions in December, 2012.⁸³ In order to set standard of “should have known,” Chinese courts made great efforts via rulings in a number of

⁸¹ The Supreme People’s Court’s Provisions, *supra* note 61, art. 8: “The faults of a web service provider include that it clearly knows or should have known that a web user is infringing upon the right of dissemination through information networks.”

⁸² *Id.*, art. 13 stated, “Where a web service provider fails to take necessary measures, such as deleting, blocking or breaking relevant links, in a timely manner after receiving the notice on any infringement of the right of dissemination through information networks issued by a right holder by letter, fax, e-mail or other ways, the people’s court shall decide that it clearly knows such infringements.”

⁸³ *Id.*

key cases.

In the case of *11 record companies v. Alibaba.com Limited*,⁸⁴ the plaintiffs (11 record companies) included Universal Music Ltd., Warner Records Inc., EMI Group Hong Kong Ltd, SONY BMG Music Entertainment Ltd, and seven other record companies. They all filed lawsuits against Alibaba.com Limited⁸⁵ because China Yahoo! (the website that was run by Alibaba), illegally disseminated and provided online playing and capability for users to download their copyrighted music files illegally by means of linking web addresses. The defendant, Alibaba, offered the Yahoo Music Engine service on a specialized webpage. People could locate the copyrighted music files by simply typing in keywords in the search engine on that web page. Nevertheless, the search yielded such categories as song names, singer, album, lyrics, music audition, ringtone, music box, music format, size and connection speed. Also, Alibaba arranges and classifies the songs which the users have searched for by song styles, popularity, singer's gender and so on. Further Alibaba organizes information for users by employing such categories as all male singers, all female singers, new songs, movie songs, and European and American classic popular songs. Based on these facts, the Beijing Higher People's Court ruled that the defendant Alibaba clearly had made an active selection of songs, as well as arranged and classified them, according to its own initiative, and that it was running a professional

⁸⁴ Universal Music Limited et al. Su Beijing Alibaba Xinxu Jishu Youxian Gongsi(环球唱片等诉北京阿里巴巴信息技术有限公司)[Universal Music Limited et al. v. Beijing Alibaba.com Co., Ltd.](Beijing Super People's Ct. Apr 24,2007).

Because the facts of these cases are almost the same, this thesis will use the *Universal Music Ltd v. Alibaba* case as an example to analysis.

⁸⁵ *Alibaba.com Limited*, WIKIPEDIA.ORG, available at: http://en.wikipedia.org/wiki/Alibaba_Group (last visited Dec 20, 2013). ("The primary company of Alibaba Group, is the world's largest online business-to-business trading platform for small businesses. In October, 2005, Alibaba Group formed a strategic partnership with Yahoo! and acquired China Yahoo! (www.yahoo.com.cn), a Chinese portal that focuses on Internet services like news, email, and search. In April, 2013, Alibaba Group announced that, as part of the agreement to buy back the Yahoo! Mail stake, technological support for China Yahoo! Mail service would be suspended and the China Yahoo! Mail account migration would begin.")

music website to obtain financial benefits.⁸⁶ For these reasons, the court judged that Alibaba should have known, or been able to know, that infringements occurred via its music search engine. The court in China had basically given a simple standard of “should have known”: whether internet service providers have actively selected, edited, classified, arranged, or recommended, the work, performance, audio or video works.

In several other cases between JOY.CN Co.,Ltd and Shanghai Tudou Network Technology Co., Ltd.⁸⁷, the Shanghai First Intermediate People's Court reaffirmed the opinion of the Beijing Higher People's Court. In these cases, the plaintiff JOY.CN Co.,Ltd,⁸⁸ has received the exclusive right to network dissemination of information on several TV drama.

The defendant, Tudou Network Technology Co., Ltd.⁸⁹(hereafter Tudou), is a well-known video-sharing website in China, where users can upload, view and share videos. However, the plaintiff found that all the episodes of the TV dramas had been uploaded to the defendant's video-sharing website and could be watched there. Tudou is a file hosting service provider; it does not provide videos itself. But Tudou has

⁸⁶ Universal Music Limited et al. Su Beijing Alibaba Xinxu Jishu Youxian Gongsi(环球唱片等诉北京阿里巴巴信息技术有限公司)[Universal Music Limited et al. v. Beijing Alibaba.com Co., Ltd](Beijing Super People's Ct. Apr 24,2007).

⁸⁷ Shanghai Jidong Wangluo Youxian Gongsi Su Shanghai Quantudou Wangluo Keji Youxian Gongsi (上海激动网络有限公司诉上海全土豆网络科技有限公司)[Shanghai JOY.CN Co., Ltd. v. Shanghai Quantudou Network Technology Co., Ltd] (Shanghai 1st Interim. People's Ct. Nov 18, 2009).

⁸⁸ JOY.CN, WIKIPEDIA.ORG, available at: <http://zh.wikipedia.org/zh-cn/%E6%BF%80%E5%8A%A8%E7%BD%91> (last visited Dec 20, 2013). The plaintiff itself is a video sharing website from China. It provides the users six categories of video: news, film and television, entertainment, life, community and beauties. These six categories including 18 channels: news, finance and economics, society, legal institution, sports, military, movie, TV series, on-the-spot report, variety, shopping, music, live show, etc. (激动网是中国一个视频分享网站。向用户提供包括了新闻、影视、娱乐、生活、社区、美女六大类视频内容, 涉及新闻、财经、社会、法制、体育、军事、电影、电视剧、赵客、纪实、综艺、购物、音乐、播客、社区、直播、同城等 18 个频道)

⁸⁹ *Introduction of Tudou*, WIKIPEDIA.ORG, available at: <http://en.wikipedia.org/wiki/Tudou> (last visited Dec 20, 2013). (“Copyright issue: A portion of Tudou's content comes from commercial sources and is not user-generated. The company says that the Chinese often go to Tudou for TV-like media, instead of using their televisions. Starting 2008 Tudou launched licensed content acquisition and partnership programs aggregating selective premium professional contents. Nevertheless, Tudou still comes under criticism for its disregard of some copyright policies.”)

classified its websites into several channels, such as original show,⁹⁰ entertainment, music, film and television, games, etc., and also provides a search engine on the website homepage. The Shanghai First Intermediate People's Court examined whether the arrangement of this website made it convenient for Tudou users to upload videos correctly into different categories and for the reviewers of Tudou⁹¹ to ascertain the video contents. The reviewers (examiners) of Tudou should have noticed that these copyrighted videos were uploaded by individuals. They also should have known that the production of these videos needs many human, material, and financial resources, and that their copyright owners do not usually release their works on websites for free. For these reasons, the court ruled that the defendant, Tudou, which runs a website that specializes in films, TV series, and other forms of entertainment should have known the infringements happened on its server.⁹²

In 2008, the Beijing Second Intermediate People's Court ruled, in *Ningbo Success Multimedia Communication Co. Ltd. v. Alibaba.com Limited*.⁹³ It ruled that the plaintiff has the right to disseminate a popular TV series "FenDou". However people can also watch this series on the TV program's website, which is run by the defendant. Although the defendant claims that the TV series was uploaded by users and that it is just file hosting service provider, the court judged that the defendant

⁹⁰ Original refers to originality, such as original song, original play.

⁹¹ *Introduction of Tudou*, WIKIPEDIA.ORG, available at: <http://en.wikipedia.org/wiki/Tudou> (last visited Dec 20, 2013). ("Video Review: Tudou's in-house reviewers watch, approve, and categorize all uploaded videos. The reviewers screen for inappropriate content such as pornography and categorize / tag each video.")

⁹² Shanghai Jidong Wangluo Youxian Gongsi Su Shanghai Quantudou Wangluo Keji Youxian Gongsi (上海激动网络有限公司诉上海全土豆网络科技有限公司)[Shanghai JOY.CN Co., Ltd. v. Shanghai Quantudou Network Technology Co., Ltd.] (Shanghai Interm. People's Ct. Nov 18, 2009).; Shanghai Jidong Wangluo Youxian Gongsi Su Shanghai Quantudou Wangluo Keji Youxian Gongsi (上海激动网络有限公司诉上海全土豆网络科技有限公司)[Shanghai JOY.CN Co., Ltd. v. Shanghai Quantudou Network Technology Co., Ltd] (Shanghai Pudong Dist. People's Ct. Jun 7, 2010).

⁹³ Ningbo Chenggong Duomeiti Tongxin Youxian Gongsi Su Beijing Alibaba Xinxi Jishu Youxian Gongsi(宁波成功多媒体通信有限公司诉北京阿里巴巴信息技术有限公司)[Ningbo Success Multimedia Communication Co. Ltd. v. Alibaba.com Limited.](Beijing 2nd Interm. People's Ct. Sep 19,2008).

should bear secondary liability because: (1) The TV series was broadcast for the first time in the Beijing area, where the defendant provided file hosting service to the uploaded files and this TV series is very popular; (2) There was an introduction, cast list, and poster of the TV series on the homepage of the TV program website.

In 2010, a writer named Jia Jia brought a lawsuit against Beijing Baidu Network Information Technology Co.,Ltd.⁹⁴ The defendant, Baidu, runs the above-mentioned Baidu Library, and the plaintiff found her copyrighted novel could be read or downloaded for free from there. In this case, although the defendant has classified different channels on its homepage based on the categories of books, Beijing First Intermediate People's Court held that the defendant did not have actual knowledge of, or should have known about the infringements, based on three reasons: (1) The plaintiff's copyrighted novels that were infringed in this case were not that popular or influential; (2) The plaintiff's copyrighted novels could only be located for downloading or read by manually searching the name of the work or the author; (3) The plaintiff's works were not in the "hot documents" category or recommended by the defendant.

The court in *JiaJia v. Baidu*. case correctly classified the file hosting service provided by the FHSPs into video-file, text-file and other services. For FHSPs, infringing text files are much more difficult to observe than video files because (1) the size of text files can be affected by many factors, such as font size, and the spacing between lines of text; it's difficult to judge from the size of a text file whether it has the full contents of the copyrighted materials. Therefore it is also difficult to tell whether the text files are infringing files. (2) It is very difficult for FHSPs to locate the correct infringing files just by the name of a text file, because such files always

⁹⁴ Jia Jia Su Beijing Baidu Wangxun Keji Youxian Gongsi(贾佳诉北京百度网讯科技有限公司)[Jia Jia v. Beijing Baidu Network Information Technology Co., Ltd.](Beijing 1st Interim People's Ct. Dec 9,2010).

show only names, unlike video files, which always show names, posters, and photographic stills of the video. And sometimes uploaders will change the format of the name of the text file. For instance, the novel “Harry Potter and the Philosopher's Stone” could be renamed as “<HP> Philosopher’s stone”. Furthermore, fans of certain books also create “fan fiction”. In order to let readers know what original work of their fan fictions is based on, they will use the original name. For instance, there is a fan fiction with the name of “Harry Potter and the Fight for Love”, the writer’s name is “harrypotterbookwriter”.⁹⁵ In this situation, the FHSPs could not take down all the text files with the name “Harry Potter” for the purpose of protecting the users’ or even the writer’s rights. In conclusion, the court’s decision seems correct—the standard of the text file hosting service providers’ “should have known” should be made differently from that of the video file hosting service providers.

From these cases, we see how that the courts have ruled in deciding whether FHSPs “should have known” of infringements based on particular facts. Finally, the Supreme People’s Court made new Provisions based on opinions from the courts all around the country in December, 2012. The Supreme People’s Court’s Provisions offer several factors in considering the FHSP’s “should-have-known” condition. Article 9 says: “The people’s court shall judge whether a web service provider should have known that a web user is infringing upon the right of dissemination through information networks on the basis of the degree of obviousness of specific facts of such infringement act and by giving a comprehensive consideration to the following factors:(1) Nature and mode of services provided by the web service provider, the possibility that such services may trigger infringement acts and the information

⁹⁵ *Harry Potter and the Fight for Love*, FANFICTION.NET, available at <https://www.fanfiction.net/s/1425890/1/Harry-Potter-and-the-Fight-for-Love> This is one of the results if you type in “Harry Potter” in the search engine of the website “fanfiction.net”.

management capability that the web service provider should have;(2) Type and popularity of the works, performance or audio-video product disseminated and the degree of obviousness of the infringement information;(3) Whether the web service provider has taken the initiative to select, edit, modify or recommend the works, performance or audio-video product involved;(4) Whether the web service provider has taken positive and reasonable measures against infringement acts;(5) Whether the web service provider has set up convenient programs to receive notices of infringement and made timely and reasonable responses to such notices;(6) Whether the web service provider has taken reasonable measures against repeated infringement acts by the same web user; and (7) Other relevant factors.”⁹⁶ Article 10 provides standards for deciding whether the FHSPs “should have known” the infringement of popular movies and TV plays: “Where a web service provider, when providing web services, by establishing charts, catalogues, indexes, descriptive paragraphs or brief introductions or other ways, recommends hot movie and television programs which can be downloaded or browsed or are otherwise accessible by the public on its webpage, the people’s court may decide that it should have know that its web users are infringing upon the right of dissemination through information networks.”⁹⁷

Article 12 specifies several situations when FHSPs should have known about infringement: “Where a web service provider that provides information storage space service falls under any of the following circumstances, the people’s court may, according to the actual circumstances of the cases, decide that the web service provider should have known that its web user is infringing upon the right of dissemination through information networks:(1) Where it places any hot movie or television program on the homepage or other main pages of its website that it can

⁹⁶ The Supreme People’s Court’s Provisions, *supra* note 61, art. 9.

⁹⁷ *Id.*, art. 10.

obviously perceive;(2) Where it takes the initiative to select, edit, rearrange or recommend the subject or content of or establishes special charts for any hot movie or television program; or (3) Other circumstances in which it can obviously perceive that relevant works, performance or audio-video product is made available without authorization but fails to take reasonable measures against such act.”⁹⁸

Most scholars in China believed that it would have been better to transplant the test of “red flag awareness” from the U.S. before these statutes were promulgated. In order to protect the right of the copyright owners, China must adopt a higher standard of the element of “should have known”. I believe that making this standard of “should have known”(Article 9,10, and 12 mentioned above) is much more effective in implementation for China than directly adopting the American “red flag awareness” standard, because:

(1). The element of “should have known” is always used by FHSPs that are the defendants in copyright cases. Because this element is difficult for copyright owners to prove, and because FHSPs could sometimes easily sail into the safe harbor, “should have known” is the only element the court needs to evaluate to decide whether the FHSP should bear responsibility for copyright infringement. Thus, if the standard of “should have known” element is stricter than in the U.S., this means that the safe harbor rules become much more difficult for FHSPs to meet in China.

(2). China possibly has the most internet piracy in the world. In order to suppress piracy, China has established stricter conditions for sailing into safe harbors, and uses a strict standard of review in deciding whether an FHSP “should have known” of an infringement. This standard has to be made based on the real situation of piracy in China, which is worse than the U.S., because: (1) Video-sharing websites

⁹⁸ *Id.*, art. 12.

in China⁹⁹ specifically categorize videos into several genres, such as movies, TV dramas, variety shows, and animation. FHSPs also make more detailed categorizations, e.g. movies are classified by year, film types, area, actors, and directors.¹⁰⁰ Also, most video-sharing websites offer recommendations or a ranking, such for the latest movies or TV dramas, the most popular movies, and the Oscar best animated features; (2) After the user searches the video's name, its length is directly indicated. Unlike with videos on YouTube (where "uploaders" generally divide a TV series or movie into several segments), on Chinese video-sharing websites, video length generally is almost exactly the original length. For example, if a movie lasts two hours, its length on a video-sharing website might be one hour and 56 minutes. (This is a typical because uploaders sometimes cut the credits at the end.) In this situation, a reasonable person can tell that the video is exactly the same as the original movie and not movie clips or advertising videos. Moreover, a person who tries to find a TV series on a Chinese websites can locate every episode easily with a click of your mouse because the website has made the results very clear by classifying the TV series into different seasons and then displaying episodes in orderly rows.¹⁰¹ (3) On the window of the video viewed by users, there are posters, synopses, the name of the director, actors' names, and type of film (such as comedy or action movie). Almost everyone can easily judge whether the video is copyrighted because much information about it is provided. All these situations make the piracy situation worse in China because it is so easy for people to engage in.

⁹⁹ Examples of video sharing websites which have piracy in China, available at: (1) <http://www.09k.net/>; (2) <http://www.66ys.cc/>. (last visited Sep 15, 2013).

¹⁰⁰ *Movie Web Page*, 9KAN, available at <http://www.09k.net/movie/index.html> (This site exemplifies the problems of video-sharing websites in China. 9kan is an HD video website that offers pirated works to the users for free.)

¹⁰¹ *Criminal Minds*, YOUKU.COM, http://www.youku.com/show_page/id_z80d79fa6bc4811e2a19e.html (For instance, this is the page of a famous American TV series "Criminal Minds," on YOUKU. Everyone can easily view each episode of this TV series.)

(3). This stricter standard for infringement in the Supreme People's Court's Provisions necessitates the Chinese government providing more protection to copyright owners and to reduce piracy. When the safe harbor standards of review are much stricter, the FHSPs will be significantly more careful about allowing piracy on their sites, especially when they try to exploit the safe harbor rules to gain financial benefits by piracy without incurring any punishment. The best way to reduce piracy is for FHSPs to try to stop it on their servers, so as to protect themselves from being sued by copyright owners. If the Chinese government had effectively reduced piracy, the world copyright situation would be improved either, because China has a big market and a severe piracy problem.¹⁰²

Based on these three reasons, I believe that making this standard of “should have known” is a much more reasonable move for China than directly adopting the “red flag awareness” from the U.S.

(3) Alter v. Knowledge

Article 22 (2) required FHSPs to not have “altered the works, performance and audio-visual products that are provided to the service objects”¹⁰³ This requirement caused some disputes in terms of its application in China, because some video-sharing

¹⁰² See Office of the Trade Representative, 2013 SPECIAL 301 REPORT, at 31, available at <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf> (China has been put on the priority list of the U.S. for the nine time. The report offered many reasons of why this is so.); see also MPAA's list, available at <http://www.mpaa.org/Resources/007146fe-31b7-4bd5-9a01-b5d636067251.pdf> (The Motion Picture Association of America submitted to the U.S. government a list of piracy-promoting websites that infringe others' copyrights; China has the most number of websites on the list, namely QVOD, Xunlei.com and Yyets.com. These websites also can be visited from outside of China, and some foreigners use them to download pirated videos because they are so easy to use.); *Internet Data*, available at <http://www.cnnic.net.cn/hlwfzyj/jcsi/>; <http://www.internetworldstats.com/stats.htm>; <http://www.internetworldstats.com/stats3.htm> (The data from these websites show that China had 591 million internet users and 2.94 million websites as of June 30, 2013, and the rest of Asia had 107 million internet users in 2012. This implies that China had more than five times the number of users in the rest of Asia combined. The number of Asian internet users comprises 44.8% of the world, which means that the number of the Chinese internet users is a quarter of the world. In short, if the piracy situation get better in China, so will the world piracy situation.)

¹⁰³ The State Council's Regulation, *supra* note 60, art. 22(2).

websites always embed their logos on the side of the videos that are uploaded by users, or add advertisements at the videos' beginning or end. Some courts in China held that this kind of activity is "altering of the works". For instance, in *Beijing Netmovie CO., Ltd. v. PuXinTong Techonology Co., Ltd*, the defendant, PuXinTong, ran a video-sharing website, www. Pomoho.com. When users play "Crazy Money & Funny Men"(which is uploaded by the users), "POMOHO" is shown in the upper-left corner and advertisements are shown at the bottom of the screen. The court held that the activities of automatically adding advertisements and "POMOHO," which is added by the defendant with a predetermined program, should be considered as "altering" the original works.¹⁰⁴ However, if we compare this decision with the U.S. case law, the Chinese court may have some misunderstandings of the notion of "alter".

Almost certainly, Article 22(2) is adopted from the DMCA §512(a) and (b) "without modification to its content".¹⁰⁵ DMCA §512(a)&(b) are liability exemptions for internet service providers that providing transitory digital network communication or system caching services. Basically, the *Netcom* case¹⁰⁶ provides a legislative reference for this element. The court's ruling in *Netcom* was that "common carries exceptions apply where an entity acts only as a conduit and nothing more."¹⁰⁷ According to the Senate Report of the Digital Millennium Copyright Act, "it [the communication] is carried out through an automatic technical process without selection of the material by the service provider,"¹⁰⁸

The nature of "no modification" is an "automatical process in accordance with

¹⁰⁴ Beijing Wangshang Wenhua Chuanbo Youxian Gongsu PuXintong Keji Youxian Gongsu(北京网尚文化传播有限公司诉普信通科技有限公司)[Beijing Netmovie CO., Ltd. v. PuXinTong Techonology Co., Ltd](Beijing 1st Interim People's Ct. Aug 14, 2008).

¹⁰⁵ 17 U.S.C. § 512(a)&(b) (2006).

¹⁰⁶ Religious Technology Center v. Netcom 907 F. Supp. 1361 (N.D. Cal. 1995).

¹⁰⁷ *Id.*, at 1370.

¹⁰⁸ S. REP. No. 105-190, at 41 (1998).

a predetermined program”. In the *Veoh* case, the defendant (Veoh) used third-party software to automatically convert each video that was uploaded by users to the Flash format, and also automatically extracted their-two “screencaps” of the video. The District Court said that the DMCA language never limits the activities to mere storage, and also noted that another court had also noted that “gateway” functions, like the one present in this case, should not act as a bar to the safe harbor.¹⁰⁹ Thus, the Court concluded that Veoh was not disqualified from §512(c)’s safe harbor due to its automated process in responding to user-submitted material.¹¹⁰

Virtually every FHSP that provides video-sharing services, as part of its business model, sets a predetermined program in order to add its logo or advertisement to gain some financial benefit. So if the court does not explain the meaning of “alter” in a strict way, the statute will put too much burden on FHSPs and will conflict with the FHSPs’ business model.

Based on this analyses, it is best to use a strict interpretation of “alter”. In May, 2010, the Beijing Higher People’s Court issued “Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation)”. Article 24 states that “The ‘alter’ that was mentioned in the State Council’s Regulations Article 22(2) means to modify the contents of the works, performance, audio or video products which are provided by the service objects. And the following activities should not be considered as “altering” the works, performance, audio or video products: (1) simply changing the storage format; (2) adding digital watermarking or other logos of the website; (3) adding

¹⁰⁹ *CoStar Group, Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001). (“However, that is a mischaracterization of the process by which the photographs are uploaded. They are uploaded at the volition of the user and are subject, not to a review and selection process, but to a mere screening to assess whether they are commercial property and to catch any obvious infringements. Although humans are involved rather than mere technology, they serve only as a gateway and are not involved in a selection process.”)

¹¹⁰ *IO Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008).

advertisements at the beginning or the end of works, or inter-cutting advertisements during the works.”¹¹¹

I believe that this would have been a good statute if it had clearly stated that the FHSPs had done these activities (which were not considered as “altered” by the Beijing Higher People’s Court) automatically through their predetermined programs. The “automatically” condition is the most important factor in determining whether an FHSP “alter” users’ works or not. For example, if an FHSP manually added advertisements to each video, it necessarily would have had to glimpse the videos; and thus should have had actual knowledge of infringements. So in this instance, the FHSPs would have born subjective fault, and thus would bear the secondary liability.

Some scholars in China believe that the State Council’s Regulation Article 22(2),¹¹² correspond to direct infringement liability. Professor Wang Qian thinks that if the internet service providers that provide file hosting service edit or alter the files that are uploaded by the net users, they in effect have disseminated the information on the internet themselves, and thus are direct infringers.¹¹³ He notes that he gives “alter” a strict interpretation, on that it only means that the FHSP manually edits the works that are uploaded by users and then displays the altered work on its website.

Professor Wang Qian believes that the acts of altering and publishing should be considered as a new uploading activity by the FHSPs that is different from the user’s initial uploading activity. The FHSP should be regarded as the final “publisher” of an altered work. For these reasons, Professor Wang Qian thinks that the “alter” provision in Article 22(2) should be regarded as allowing for the exclusion of direct

¹¹¹ The Beijing Higher People’s Court made “the Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation)” (May, 2010), art. 24.

¹¹² The State Council’s Regulation, *supra* note 60, art. 22(2): “having not altered the works, performance and audio-visual products that are provided to the service objects.”

¹¹³ Wang, *supra* note 74, at 229.

infringement liability. However, if the FHSPs had altered the works, they should bear the direct infringement liability.

But I believe that we should firstly consider that if FHSPs “alter” works, they should have actual knowledge of the infringing activities on their websites. The FHSP thus should be held first to bear secondary liability. Second, we should consider how the FHSPs “alter” the infringing materials. Do they elect to release the works after examining their content? Do their actions of editing infringe other exclusive rights of the copyright owner?

These issues need to be solved on a case-by-case basis. The Beijing Higher People’s Court issued its opinion on this issue in its “ Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation).” Article 6 states that “if the internet service providers who provide file hosting service decide to release the works uploaded by users by detecting the subject, quality and contents of the works or selecting, editing and arranging the contents of the works by themselves, the FHSPs’ activity comprise a direct action of network dissemination of information.”¹¹⁴

The case of *Yuan Ruiliang v. Beijing Sohu Internet Information Service Co., Ltd.*,¹¹⁵ which was judged by the Beijing First Intermediate People’s Court, might also support my analysis of “alter” activities that first lead to an FHSPs’ actual knowledge of infringements. The plaintiff’s (Yuan’s) series of photos had been uploaded to the defendant’s website and his personal mark had been replaced by “club.sohu.com”.

¹¹⁴ The Beijing Higher People’s court gave its opinion in “the Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation)” (May, 2010), art. 6.

¹¹⁵ Yuan Ruiliang Su Beijing Sohu Huiyuanwang Xinxi Fuwu Youxian Gongsi (袁瑞良诉北京搜狐互联网信息服务有限公司) [Yuan Ruiliang v. Beijing Sohu Internet Information Co., Ltd.] (Beijing Interm. People’s Ct. May 16, 2011).

The defendant claimed that: (1) The photos were uploaded by the user; (2) Actions to erase the original mark on the photos were done by the user who uploaded them; (3). The adding Soho's logo was done automatically. However, the Beijing First Intermediate People's Court ruled that: (1) Sohu should bear direct infringement liability because of its violation of Yuan's right of authorship; (2) the defendant should also bear an assisting infringement liability and not be protected by safe harbor rules because it did not meet the requirements of "not having altered the work and of having no knowledge of or reason to know the infringement". The court clarified that (1) the defendant itself made an active selection of photos and edited them by establishing links to the photos on the recommendation section on the website's homepage. This selection and editing process should be considered as "having altered the works"; (2) the defendant should have known it was infringing when it altered the photos; (3) the marks of erasure were manifest, and the defendant should have noticed them. But the defendant kept using the photos without the original marks that reveal the copyright ownership information; thus, the defendant violated the plaintiff's right of authorship.¹¹⁶ The analysis of the court shows that the "alter" element first was used to analyze secondary liability and then to decide about direct infringement liability.

(4) Chinese Special Requirement: Manual Detection Duty for Video-Sharing Websites.

Because of the state system of China, in order to safeguard the national and public interests, the "Administrative Provisions on Internet Audio-Visual Program Service" became effective on January 31, 2008. Article 16 requires that no audio-visual programs may contain illegal contents, such as those that jeopardize the unify,

¹¹⁶ *Id.*

sovereignty, or territorial integrity of the state, disseminate heresy or superstitions, propagating violence, sex, gambling, or terrorist activities,.¹¹⁷

To meet these requirements, an internet service provider that offers internet audio-visual program services must censor videos on its website. Today, almost all FHSPs in China hire individuals to work as censors, which means that the employees, who have such job titles as “video monitoring commissioner,”¹¹⁸ have to manually skim the videos. Because such employees are hired by the FHSPs, should they be considered in the category of “should have known” of the infringing materials? In the Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation), Article 6,¹¹⁹ the Beijing Higher People’s Court ruled that: “after detecting the subject, quality and contents of the works or selecting, editing and arranging the contents of the works, the FHSPs directly disseminate information through the internet, whether they decide to release

¹¹⁷ Huilianwang Shiting Jiemu Fuwu Guanli Guiding(互联网视听节目服务管理规定)[Administrative Provisions on Internet Audio-Visual Program Service] (promulgated by the St. Radio,FilmTelevision Admin. & Ministry of Info. Indus., Dec 20,2007, effective Jan 31, 2008). Article 16:” Audio-visual programs provided by internet audio-visual program service entities and those accessed by network operators shall be in line with the provisions of laws, administrative regulations and departmental rules. Broadcasted audio-visual programs shall be kept intact for 60 days. No audio-visual program may:

1. be against the basic principles determined in the constitution;
2. jeopardize the unification, sovereignty or territorial integrity of the state;
3. disclose state secrets, endanger national security or damage the fame and interests of the state;
4. instigate ethnic grudge or ethnic discrimination, damage ethnic unity, or infringe upon ethnic customs and habits;
5. disseminate heresy or superstitions;
6. disrupt social order or social stability;
7. induce minors to commit violation of laws and crimes, or propagating violence, sex, gambling or terrorist activities;
8. insult or defame other people, or infringe upon the individual privacy and other legitimate rights and interests of citizens;
9. imperil social morality, or endanger excellent cultural traditions of the nation; or
10. contain other contents prohibited by the related laws, administrative regulations and state provisions.”

¹¹⁸ *Hiring Video Monitoring Commissioners*, 51JOB.COM, available at <http://search.51job.com/job/51233670.c.html> (On this website, iqiyi.com which is a famous video sharing website in China is hiring people to do this job.)

¹¹⁹ Beijing Higher People’s court gave their basic opinion in the “ Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation)” (May, 2010), art. 6.

the works that uploaded by users or not...”

However, I believe that to determine whether, according to the guidelines of this statute, the FHSP should have known of infringement, we should categorize infringing materials. If they are popular movies, TV series or complete version of TV productions, the FHSP should be considered as having such knowledge of infringement. This conclusion is based on three assumptions: (1) It is almost impossible for producers to upload on their own video works, which cost too much to make for internet users to watch for free; (2) When FHSPs hire “video monitoring commissioners,” most require these employees to have knowledge about TV productions, movies and other video works; (3) It is almost impossible for the “video monitoring commissioner” to ignore films’ or producers’ names, which are shown at the opening or end of films or TV productions. In short, these employees should have the ability to recognize that works are copyrighted. A Chinese case that supports my perspective is that of NuCom Online International Co., Ltd, which brought a lawsuit against Shanghai Tudou Network Technology Co., Ltd.¹²⁰ The plaintiff had the right to disseminate the movie “Crazy Stone” through the internet; however the full version of this movie had already been uploaded to the defendant’s video-sharing website, “tudou.com”. In deciding whether the defendant had subjective fault, the court commented, “We noticed that according to the introduction of the users’ uploading process, the defendant uses a prior censorship mechanism, which means that the defendant hired ‘video monitoring commissioner’ to judge whether the contents of the videos are legal or not. The ‘video monitoring commissioner’ spends twelve hours to examine the content of the uploaded videos, and then has the right to

¹²⁰ Xinchuan Zaixin Xinxi Jishu Youxian Gongsi Su Shanghai Quantudou Wangluo Keji Youxian Gongsi(新传在线信息技术有限公司诉上海全土豆网络科技有限公司)[NuCom Online International Co., Ltd v. Shanghai Tudou Network Technology Co., Ltd.](Shanghai Super People’s Ct. Jul 30, 2008).

decide whether the uploaded video could be shown to the public or not. The defendant argued that it only investigated the content that jeopardized the unity, sovereignty or territorial integrity of the state, propagating violence, sex and so on. However, the infringing movie “Crazy Stone” was very popular and it was running during that time, so that it is impossible that the defendant did not recognize that the action of uploading this film was illegal. Thus it can be seen that the defendant not only should have known of the infringements but also turned a blind eye to this infringement without taking any reasonable actions to stop it. The defendants should bear the liability for tort.”¹²¹

2. Take-Down Procedure

The expression of “take-down” procedures, which appeared in the DMCA §512(g)(1), means: “disabling of access to, removal of, [or] delete the infringing materials.” Article 36 of Chinese tort law requires an internet service provider to “take the necessary measures”¹²² to institute a “take-down”.

In considering the take-down procedure, two questions arise: (1) Is the take-down procedure a legal obligation in China? (2) Given that statutes require FHSPs to take-down the infringing materials “expeditiously” or in a “timely” way, how expeditiously the infringing materials is taken down?

(1) Do FHSPs be Obligated to “Take Down” Materials?

In considering this question, we need to first analyze the nature of “take-down” procedure in DMCA §512, which China directly adopted from the DMCA §512(c)(1)(A)(iii) & (C) regulates that: “A service provider shall not be liable for...if the service provider..., upon obtaining such knowledge or awareness, acts

¹²¹ *Id.*

¹²² Qinquan ZeRen Fa (侵权责任法)[Tort Liability Law](promulgated by the Standing Comm. Nat’l People’s Cong., Dec 26, 2009, effective July 1, 2010). Art 36.

expeditiously to remove or disable access to, the material” and “upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity”.¹²³ Here, two kinds of “take-down” requirements are specified: (1) after the FHSP becomes aware of infringements, and (2) after getting notification of them from the copyright owner. For the first kind, the FHSP’s “take-down” is done on its own initiative after it is certain about the infringements on its websites. In the second situation, the “take-down” procedure is also done at the FHSPs’ initiative. After receiving notification from the copyright owner, the FHSPs should first judge the authenticity of the notification. When an FHSP believes that the facts in the notification that claim infringements are not true, it can refuse to “take down” the materials.

When this case goes to the court, if the court finds that the content of the notification is true, the FHSP should bear secondary liability. However, if the court finds the content of the notification is false, the FHSP should bear no liability because there was no direct infringement.

Thus, the statute does not impose an obligation for “taking-down” on an FHSP; it is the FHSP’s decision. Furthermore, FHSPs also have a contractual relationship or other cooperative relationship with their users. If they just responded to the notifications and wrongfully took down the materials uploaded by their users, they would violate users’ legal rights. Thus, DMCA §512(g) provides “counter notice and put back”¹²⁴ and the exemption of liability to the FHSP’s subscribers.¹²⁵ This statute

¹²³ 17 U.S.C. § 512(c) (2006).

¹²⁴ After an FHSP, following the copyright owner’s notice and taking down the alleged materials, the uploader of such materials can send a counter notice to the FHSP if he or she feel the materials were taken down unfairly. If the copyright owner did not respond to the counter notice within 10-14 days, FHSP should put the alleged materials back up.

¹²⁵ 17 U.S.C. § 512(g) (2006). (“Replacement of Removed or Disabled Material and Limitation on Other

shows that the legislators recognized that the notifications that required “take-down” procedure may be based on false premises or facts , so they provide a remedy to the users. As Professor Wang Qian observed, “the legislators who enacted the DMCA do not stipulate that it is an obligation on the FHSPs to take down the materials. This is not due to the negligence of the legislators but was enacted deliberately. On the one hand, some people might send a notification in bad faith in order to disrupt their commercial competitors’ business activities; on the other hand, the copyright owners may wrongfully take somebody’s fair use as an infringement, although it is acting in

Liability.—

(1) No liability for taking down generally.— Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception.— Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.

(3) Contents of counter notification.— To be effective under this subsection, a counter notification must be a written communication provided to the service provider’s designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber’s name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber’s address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability.— A service provider’s compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).”))

good faith. For example, most copyright owners do not like parodies of their copyrighted works, however, parody is kind of fair use of copyrighted works.”¹²⁶

Based on the Chinese situation, are FHSPs obliged to “take down” infringing materials? As mentioned, China adopted the take-down procedure from the U.S., and thus the take-down procedure is not an obligation in China. Second, the decisions of the courts in China also undergird this conclusion. In the case of *Universal Music Limited et al. v. Beijing Baidu Network Information Technology Co., Ltd.*¹²⁷, the plaintiffs withdrew their claims concerning 53 songs according to the court’s requirement. The Beijing Intermediate People’s Court required the plaintiff to withdraw because: first, several songs were not produced by the plaintiffs (the sound sources are inconsistent); second, the copyright owners of several songs were not among the plaintiffs; and third, the plaintiffs cannot provide the certificate of copyright for several songs.

The plaintiffs first specified links to 175 songs that they asked the defendant to take down. They then withdrew 30% of the songs from their claims. This fact shows that the take-down notices or the claims from the plaintiffs had so many mistakes that there was no reason to have the FHSPs assume the obligation of a take-down procedure. In fact, in this circumstance, the FHSPs would not be liable to the charge of assisting infringement liability if they did not take down the materials mentioned in the false notice.

¹²⁶ Wang, *supra* note 74, at 266.

¹²⁷ *Universal Music Limited et al. Su Baidu Wangxun Keji Youxian Gongsi*(环球唱片等七大唱片公司诉百度网讯科技有限公司)[*Universal Music Limited et al. v. Baidu Network Information Technology Co., Ltd.*](Beijing Super People’s Ct. Dec 21, 2007). There were seven record companies at the beginning of the lawsuit against Baidu, however, after the first instance and second instance in two years, there were only 5 left that filed the lawsuit. Two plaintiffs, EMI and Gold Typhoon Group, no longer appealed and cooperated with Baidu. In 2007, the Beijing Higher People’s court affirmed the original judgment and held that the defendant Baidu win the lawsuit. Available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a2DlpMuvP_6M (last visited Sep 15, 2013).

Almost all the Chinese copyright scholars reject the opinions given by the Office of the United States Trade Representative, in its 2008 Special 301 Report,¹²⁸ which recommended that China “provide strong administrative supervision, backed by penalties, to ensure that internet service providers take down infringing content and/or links immediately upon receipt of a notice from internationally recognized right holders’ representatives ...” Professor Wang Qian thought this suggestion was ridiculous and illogical. I agreed, since this procedure was set based on a misunderstanding of the nature of the take-down procedure. There is no reason for the Chinese government to adopt a statute which has not been adopted the U.S.. Even if the Chinese government were to adopt this statute,¹²⁹ there would need to be changes. First, this statute only works when Chinese FHSPs get notifications from U.S. copyright owners. Then, it is the American government’s responsibility to monitor every take-down notifications sent by citizens, their enterprises, or other bodies. Furthermore, the U.S. government also has to guarantee that the content of take-down notices is 100% based on true facts and provide a deposition on their notices.

Perhaps the reason for specifying this procedure is that the piracy situation in China is so severe, and that the MPAA (Motion Picture Association of America) and other stakeholders may lose much money because of piracy. However, if stakeholders really want to keep the huge benefits generated in the Chinese market, sanctions or legal remedies are the final and the weakest legal means to obtain them. The best way to gain benefits is to participate in the Chinese commercial activities, such as cooperate with the former pirates. This is possible to do – e.g., Youku.com had bought the rights to screen hundreds of US TV series in Chinese area.¹³⁰

¹²⁸ Office of the Trade Representative, 2008 SPECIAL 301 REPORT, at 22, available at http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf (last visited Sep 20, 2013).

¹²⁹ *Id.*

¹³⁰ *YOUKU U.S. TV series*, YOUKU.COM, available at <http://tv.youku.com/us> This is the web page of the

(2) What Is the Standard of the Speed of “Take Down”?

Concerning the second question about the expeditiousness of “take down”, the Supreme People’s Court’s Provisions stated: “The People’s Court shall judge whether the necessary measures, such as deleting, blocking or breaking relevant links, taken by a web service provider is timely by taking into account factors including but not limited to way of notification by a right holder, degree of accuracy of notification, degree of difficulty in taking measures, nature of web services provided by the web service provider, and type, popularity and quantity of the works, performance or audio-video products involved.”¹³¹

4.2.2.2 Take-Down Notice

The take-down notice appears in numerous places in Chinese laws, and the “take-down” requirement causes disputes among Chinese scholars. It first appeared in the State Council’s Regulation¹³² Article 22(5), which mentions that the FHSP should take down content “after receiving a notice from the owner, deleting those works, performance and audio visual products that the owner regards as infringing ones according to the present regulation”. This requirement also appears in torts law: “When a network user commits a tort through the network service provider to take such necessary measures as delete, block or disconnection. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm to the network user.”¹³³ Based on these statutes, we find that a standard of timely take-down is quite important because (1) if the FHSP immediately takes down the materials which the copyright

US TV series channel of YOUKU. YOUKU had bought the right of lots of very popular TV series, like “Two Broke Girls”, “The Good Wife,” and “The Walking Dead.” YOUKU.com has the exclusive Chinese right to screen these American TV series.

¹³¹ The Supreme People’s Court’s Provisions, *supra* note 61, art. 14.

¹³² The State Council’s Regulation, *supra* note 60, art. 22(5).

¹³³ Qinquan ZeRen Fa (侵权责任法)[Tort Liability Law](promulgated by the Standing Comm. Nat’l People’s Cong., Dec 26, 2009, effective July 1, 2010), art. 36.

holders claimed to be infringing, and it turns out the materials are not infringing, the take-down activities in turn infringe upon the uploader's rights; (2) the wrongfully take-down activities might also violate the other users' right to know; (3) the copyright holders might easily abuse the action of take-down, e.g., by sending notice casually in bad faith.

1. Form of the Notice

As this thesis has mentioned, the take-down notice process in China is modeled on U.S. laws concerning contributory infringement. A notice from the copyright owner could cause the "actual knowledge" of the infringement of the FHSPs. If the FHSPs did not take down the materials mentioned in the notice, they could be liable for the infringements that occurred on their websites. Yet the FHSP might face more problems if they wrongfully took down the materials. For instance, a person sent a notice to an FHSP, declaring that he had found materials that infringed his copyright on the storage space provided by the FHSP. However, say he did not provide any proof to show that he was the copyright owner, and the FHSP quickly took down the claimed works in order to be protected by the safe harbor rules. In the end, the materials taken down turned out to be of fair use to the uploader. The FHSP thus easily violated other rights, such as the right to know and the right of freedom of speech. So in this case, the FHSP may face lawsuits brought by both the uploader and other users. Furthermore, if the real copyright holder sent a notice that does not give the exact web address or the name of the infringing materials, the FHSP had to search his storage space to locate the correct infringing files on its own. Such activity would cost the FHSP labor, money, and time. In order to take down the infringing materials correctly and not violate other rights, the FHSP also has to review the content mentioned in the notice.

In this circumstance, it's better to set a standard form towards the take-down notice for the purpose of easing the burden of the FHSP and to prevent notices which are sent in bad faith. First, the FHSP should have the accurate name, address and contact information of the copyright owner who sends a take-down notice. With this information, the FHSP can locate the copyright owner to ensure that he or she bears the liability of other infringements caused by a false notice. However, the FHSPs should keep the information about the copyright owner confidential and should not engage on any activities that are invasions of privacy or commercial-secrets violation.¹³⁴

The question arises: Should the FHSP investigate the personal information provided by the copyright holder? Also, should the copyright owner provide the names of the infringing files and sufficient information to locate them? Article 14 of the State Council's Regulation¹³⁵ requires "the names of the infringed works, performance and audio-visual products that are required to be deleted or the names of the web addresses whose link is required to cut off." Most scholars in China believe that this statute requires the copyright owners to list the specific web address of each infringing material. This requirement seems too much of a burden for the copyright owners, whereas if the standards are too weak, it will make the FHSPs bear too much burden when they "take down" alleged materials.

I believe that copyright owners are the most appropriate people to protect their own rights. They know their works very well and can easily distinguish them from other works. For the purpose of protecting their own rights, "providing links to infringing materials" does not seem too much work. However, with the development

¹³⁴ Yang Lixin(杨立新), Lun Wangluo Qinquan Zeren Zhongde Tongzhi Ji Xiaoguo (论网络侵权责任中的通知及效果)[Analyzing the Effect of Take-down Notices in Internet Infringements], 6 Falv Shiyong(法律适用)[Journal of Law Application](2011) (China).

¹³⁵ The State Council's Regulation, *supra* note 60, art. 14.

of technology, there still exist some circumstances when copyright owners would not have to provide each web address – see below for more on this.

The copyright owner should provide documentary evidence of his or her right of ownership of the alleged works and factual evidence of infringement. Finally, copyright owners should provide statements that they sent the notification in good faith, that the notification is accurate, and they are responsible for it, by signing them, which they will contain a commitment to and guarantee good faith. Although the function of this “guarantee” is limited in practice, FHSPs still gain assurance from it. Some scholars in China believe that copyright owners should submit guarantee money based on the amount of financial compensation for infringements they are seeking, as mentioned in the notification.¹³⁶

2. The Standard of Review of Take-Down Notice

(1) Is It an Obligation of the Copyright Owners to Send the Take-Down Notice?

Should copyright owners be obligated to send such proper notifications? Article 14 from the State Council’s Regulation states “As for a network service provider that provides information memory space... where the relevant owner believes ... injured his right..., he may file a written notice with the relevant network service provider...”¹³⁷ Article 36 in the torts law states that “where a network user commits a tort through the network services, the victim of the tort shall be entitled to notify the network service provider to take such necessary measures...” The statutes used of the words “may” and “shall be entitled to” implies that sending a take-down notice is the right of the copyright owner, not his or her obligation, as is seen in a Shanghai case. In *Shanghai SenLe Cultural Communication Co., Ltd. v. Shanghai*

¹³⁶ Yang, *supra* note 134.

¹³⁷ The State Council’s Regulation, *supra* note 60, art. 14.

*TuDou Network Technology Co., Ltd.*¹³⁸, the court ruled that “The copyright owners must send a take-down notice to the FHSPs only when FHSPs don’t have actual knowledge of or should not have known the service objects’ infringement of the works, performance, or audio-visual products.”

I believe that, for three reasons, for the purpose of solving the problems of internet copyright infringements immediately and peacefully, copyright owners should send a proper take-down notice to FHSPs: (1) today people are used to getting and sharing information on the internet and copyright owners themselves cannot change this trend of disseminating of information online. Since copyright infringements via internet file hosting services is already occurring, copyright owners would do better to notify FHSPs to take down infringing materials, in order to cut losses of money; (2) if all the copyright owners whose copyright were infringed online brought lawsuits against FHSPs directly to courts, those courts would confront a lot of pressure (for one thing, in the form of a huge number of cases). Most copyright cases in China should be judged by the intermediate courts, as the statute requires.¹³⁹ Considering the copyright infringements caused by the internet that happen every day in China and the number of intermediate courts, each court that has jurisdiction may face a huge number of cases. This situation might prevent the courts from judging other cases. (3) The copyright owners bringing cases directly to the

¹³⁸ Shanghai Senle Wenhua Chuanbo Youxian Gongsi Su Shanghai Tudou Wangluo Keji Youxian Gongsi(上海森乐文化传播有限公司诉上海土豆网络科技有限公司)[Shanghai SenLe Cultural Communication Co., Ltd. v. Shanghai TuDou Network Technology Co., Ltd](Shanghai Pudong Dist. People’s Ct. Dec 28, 2009).

¹³⁹ Zuigao Renmin Fayuan Guanyu Shenli Zhuzuoquan Minshi Jiufen Anjian Shiyong Falv Ruogan Wenti Jieshi(最高人民法院关于审理著作权民事纠纷案件适用法律若干问题的解释)[Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright](promulgated by the Jud. Comm. of the Sup. People’s Ct., Oct 12, 2002, effective Oct 15, 2002). Article 2: “The cases of civil dispute concerning copyrights shall be under the jurisdiction at level not lower than the Intermediate People's Court. Various High People's Courts may according to the actual circumstances of their jurisdiction determine several basic-level People's Court to rule over the cases of civil dispute concerning copyrights of first instance.”

courts is also not suitable for them. In China, the principle of “who advocates, must prove” is used to assign the burden of proof when there is a trial concerning copyright infringement. Based on the decision of the People’s Court of the Pudong New Area of Shanghai, mentioned above,¹⁴⁰ the copyright owners who bring a law suit without notification should bear the burden of proving that the concerned FHSPs have actual knowledge of, or should have known about, copyright infringements on their servers. However, it is very difficult for copyright owners to bring forward such convincing evidence. In general, copyright owners would do better to first send a take-down notice to the FHSPs in order to cut their money losses.

(2) Imperfect Notification

As noted, FHSPs could get actual knowledge of infringements after they receiving proper take-down notices. But what if they receive flawed notices? DMCA §512(c)(3)(A)(iii) states that notice must be “... reasonably sufficient to permit the service provider to locate the material.”¹⁴¹ This statute does not required copyright owners to provide specific web-linking addresses of alleged materials but enough information for FHSPs to locate them. However, without linking addresses, a take-down notice is not complete under the State Council’s Regulation in China. In specific cases, is difficult to assess whether an FHSP really does have knowledge of infringements after receiving an imperfect notification, given technology development.¹⁴² Whether an FHSP derives adequate knowledge from an imperfect notice in China depends on the level of “imperfect”. Some specific Chinese court cases

¹⁴⁰ Shanghai Senle Wenhua Chuanbo Youxian Gongsi Su Shanghai Tudou Wangluo Keji Youxian Gongsi(上海森乐文化传播有限公司诉上海土豆网络科技有限公司)[Shanghai SenLe Cultural Communication Co., Ltd. v. Shanghai TuDou Network Technology Co., Ltd.](Shanghai Pudong Dist. People’s Ct. Dec 28, 2009).

¹⁴¹ 17 U.S.C. § 512(c)(3)(A)(iii).

¹⁴² Currently, specialized search engine such as an image search engine, audio search engine and others, have already been used online. For instance, Yahoo’s audio search engine is able to provide more informations as singers’ name, album and others. It is easier for FHSPs to discover infringements.

illustrate this.

In *Zhejiang Flyasia E-Business Co., Ltd v. BaiduOnline Network Technology (Beijing) Co.Ltd. and Baidu Netcom Science and Technology Co.Ltd.*,¹⁴³ the plaintiff, Flyasia Co. found that its copyrighted works could be searched and downloaded through one of the defendants' products, Baidu MP3 search.¹⁴⁴ Flyasia sent two different kinds of notifications to the defendant. The first fully complied with Article 14 of the State Council's Regulation¹⁴⁵ by providing the linking addresses of each infringed song that the plaintiff found, allowing the defendant quickly to disconnect the linking addresses. A subsequent notification contained only the names of the infringed songs with no further information.

For the defendant to correctly locate the plaintiff's copyrighted works was an unachievable task. The Beijing Higher People's Court held the second notification invalid because "For an MP3 search, the existing search engine technology is not able to let people search by the content of audio files, people can only search by keywords. In this situation, if the demand is made of the defendant to disconnect all the linking addresses which searched by the songs' names, the defendant might take down files wrongfully and infringe others' legitimate rights at the same time."¹⁴⁶

The court's opinion is correct, for to take down the infringing files accurately, the FHSPs need more information than just names. For instance, in this case, songs

¹⁴³ Zhejiang Fanya Dianzi Shangwu Youxian Gongsi Su Baidu Wangxun Keji Youxian Gongsi(浙江泛亚电子商务有限公司诉北京百度网讯科技有限公司)[Zhejiang Flyasia E-Business Co., Ltd v. BaiduOnline Network Technology (Beijing) Co. Ltd.](Beijing Super People's Ct. Dec 19, 2008).

¹⁴⁴ *Baidu MP3 Search*, WIKIPEDIA.ORG, available at <http://en.wikipedia.org/wiki/Baidu> ("Baidu MP3 Search provides algorithm-generated links to songs and other multimedia files provided by Internet content providers. Baidu started with a popular music search feature called "MP3 Search" and its comprehensive lists of popular Chinese music, Baidu 500, based on download numbers. Baidu locates file formats such as MP3, WMA and SWF.")

¹⁴⁵ The State Council's Regulation, *supra* note 60, art. 14.

¹⁴⁶ Zhejiang Fanya Dianzi Shangwu Youxian Gongsi Su Baidu Wangxun Keji Youxian Gongsi(浙江泛亚电子商务有限公司诉北京百度网讯科技有限公司)[Zhejiang Flyasia E-Business Co., Ltd v. BaiduOnline Network Technology (Beijing) Co. Ltd.](Beijing Super People's Ct. Dec 19, 2008).

with the same name could have different melodies, different lyrics, or be sung by different artists. Suppose a song named “Listen” is in the notification and after searching the internet, the internet service provider find seven songs with the name “Listen” but sung by different artists,¹⁴⁷ while the plaintiff has the copyright to just one song. In this case, the internet service provider’s activity of disconnecting all the link addresses with the name “Listen” that can be searched must violate other copyright owners’ rights. In this instance, we can only say that the internet service provider has general knowledge that there are infringing materials on its website, which is the kind of general knowledge that is quite common in China. So when the information provided by the copyright owner is insufficient for an FHSP to locate the infringing works, the FHSP in effect does not have knowledge of the infringements.

However, in the case of *11 Record Companies v. Alibaba.com Limited*¹⁴⁸ mentioned above, the plaintiff had sent a notice to the defendant that listed the names of 34 singers, 48 albums, and the titles of the songs. The plaintiff also provided 136 songs’ specific URL addresses. (There was more than one URL address for each infringing song.) Furthermore, the plaintiff then provided all the link addresses that could be searched on the website of the illegal infringing songs. However, the defendant insisted on deleting the specific URL addresses mentioned in the notification, even after getting further notifications. The court pointed out that the defendant had subjective fault because it had not disabled access to the alleged linking address and thus let the infringements happen. From the court’s opinion, we can conclude that the defendant had the ability to locate each infringing song with the

¹⁴⁷ *Listen(song)*, WIKIPEDIA.ORG, available at <http://en.wikipedia.org/wiki/Listen> (It shows that the number of songs with the name “listen” is seven, and it also provides name of the singers for these seven songs.)

¹⁴⁸ Universal Music Limited et al. Su Beijing Alibaba Xinxi Jishu Youxian Gongsi(环球唱片等诉北京阿里巴巴信息技术有限公司)[Universal Music Limited et al. v. Beijing Alibaba.com Co., Ltd.] (Beijing Super People’s Ct. Apr 24,2007).

name of the singer, album, and the songs it contained, and so the notifications sent by the plaintiff were proper. As mentioned, when the defendant in searching for the name of a song on the website of the defendant, the results come up with much specific information: the name of singer and album, which means that the defendant had the technological ability to obtain detailed information on each song on its website. So the information of the name of songs, singers and albums was enough for the defendant to take down infringing materials. Under this circumstance, notifications sent by the copyright owners are proper, and internet service providers should be considered as having knowledge of the infringements because they can locate each specific infringing work.

4.2.2.3 Other Elements of the Safe Harbor Rules in China

1. Direct Financial Benefit

In 2009, Beijing CiWen Media Group brought a lawsuit against 56.com.¹⁴⁹ In this case, the plaintiff had the copyright for one TV drama which could be watched on the defendant's video-sharing website.¹⁵⁰ However, the court held that the defendant did not gain direct financial benefits from the infringing files because (1) The defendant did not charge the users, the videos on the defendant's website could be watched for free, and (2) Although there was an advertisement beside the infringing drama, there was no evidence to indicate that the defendant could gain direct financial benefits from it.

In 2012, the Supreme People's Court's Provisions reaffirmed the decision of

¹⁴⁹ 56.com, WIKIPEDIA.ORG, available at <http://en.wikipedia.org/wiki/56.com> (56.com is one of the largest video sharing websites in China, where users can upload, view and share video clips.)

¹⁵⁰ Beijing Ciwen Yingshi Zhizuo Youxian Gongsi Su Beijing Wole Xinxi Keji Youxian Gongsi(北京慈文影视制作有限公司诉北京我乐信息科技有限公司)[Beijing CiWen Media Group v. 56.com](Beijing 2nd Interm. People's Ct. Mar 19, 2009).

this case by referring to Article 11(2),¹⁵¹ which gives a general standard of review for what constitutes of direct financial benefit: “Where a web service provider has made profits from advertisements placed for specific works, performance or audio-video product or obtained economic benefits that have other particular connection with any works, performance or audio-video product disseminated by it, it shall be deemed to have directly obtained economic benefits from as specified in the preceding paragraph. The provisions of this paragraph shall not apply to the general advertising fee, service fee or the like charged by a web service provider for its web services.”

In 2013, the Nanjing Yuhuatai District People’s court made a ruling based on this interpretation. Moumou entertainment company filed a lawsuit against a Moumou software company, because the movie “Meet the Inlaws”, which was copyrighted by the plaintiff, was found to be “downloadable” from the defendant’s disc storage space.¹⁵² The court held that the defendant did not gain direct financial benefit because users could upload and download the files for free, and there was no other evidence to prove that the defendant gained direct financial benefits from the infringing files. It seems clear that the court followed the Supreme People’s Court’s Provisions’ guidelines that direct financial benefit has to be gained from a specific infringing file. However, I believe that there is a defect in this guideline for deciding whether an internet service provider gains direct financial benefits from an infringed work, which has to do with whether advertisements are inserted in specific files, something which normally never happens. The FHSP’s act of gaining financial benefits by selling the places for advertisements on its website is a common business

¹⁵¹ The Supreme People’s Court’s Provisions, *supra* note 61, art. 11.

¹⁵² Moumou Yingshi Zhizuo Youxian Gongsi Su Moumou Ruanjian Jishu Youxian Gongsi(某某影视制作有限公司诉某某软件技术有限公司)[Moumou entertainment company v. Moumou software company](Nanjing Yuhuatai Dist. People’s Ct. May 2, 2013). By law, the names of the plaintiff and the defendant could not be shown by law. However, from the details of the case, we can find the defendant’s disc storage space website, available at <http://www.dbank.com/> (last visited Dec 15, 2013).

model of this industry in China. Because it is well known that pirated movies, TV dramas, and novels can attract many more users to a website, and that high website traffic can bring FHSPs more advertisements that yield more financial gains, FHSPs insert advertisements in all materials on their websites, rather than insert advertisements in specific ones. If the courts make the decision to simply follow the Article 11 of the Supreme People's Court's Provisions,¹⁵³ they might hold that almost all FHSPs have not gained direct financial benefits from specific infringing materials. Therefore, Article 11 seems inadequate in determining the degree of direct financial benefits if it just focuses on the point of "specific" infringing materials.

We might remedy this defect by learning from the U.S.. But this time, parallel U.S. court cases are not really applicable to China. In *A&M Records, Inc. v. Napster, Inc.*¹⁵⁴, the Ninth Circuit held that the pirated materials on Napster's system created a "draw" of new customers, which resulted in a direct financial benefit because Napster's future advertising revenue was directly dependent on increases in its user base. It is clear that this decision of the Ninth Circuit would not work in China because of the Chinese default business model mentioned above.

I believe that the key element to solve the defect is to categorize types of advertisements. If they are the header ads, footer ads, floating ad boxes or pop-up ads, the financial benefits that FHSPs gain from these ads belong to the category of "general advertising... charges,..., collected by a network service provider for providing network services"¹⁵⁵ – because everyone who visits the website can see these ads, whether or not they want to see the detailed content of the website. For instance, if a user tries to upload a photo into his microblog, he will see the header ads

¹⁵³ The Supreme People's Court's Provisions, *supra* note 61, art. 11.

¹⁵⁴ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir 2001).

¹⁵⁵ The Supreme People's Court's Provisions, *supra* note 61, art. 11.

the moment he opens the web page.¹⁵⁶

Another category is movie preview ads. There are two kinds of pre-movie advertisements: one display advertising, the other commercials. Most FHSPs automatically add the pre-movie advertisements into the videos that are uploaded by the users. For instance, when a user tries to watch a video on YOUKU.com, he is forced to watch several advertisements for one minute before the video begins. The advertisement cannot be skipped unless the user has paid for a YOUKU membership. Undoubtedly, FHSPs gain financial benefit from these ads, not only from the advertisers but also from potential members who want to skip them. One can also consider this situation as that of an FHSP that “gains economic benefits otherwise related to the disseminated work, performance, or audio or video recording”¹⁵⁷. Nevertheless, if the law rules that the FHSPs gain direct financial benefits because of pre-movie advertisements, that law might be too strict. This situation reflects a common business model in China, where almost every video-sharing website adds pre-video advertisements to videos, with variations in advertisements’ length they added and membership fee they charged (users could skip advertisements with membership).

If the court makes a decision that FHSPs gain direct financial benefits because of the pre-movie advertisements, no FHSPs would be protected anymore by the safe harbor rules in China.

2. The Obligation of the Detection

It is generally agreed that FHSPs do not have an obligation to detect copyright infringements on their servers. However, Article 16 of “the Administrative Provisions

¹⁵⁶ *Sina Microblog*, WEIBO.COM, available at <http://us.weibo.com/gb> (This is the web page of SINA microblog. Before a user log into his or her own page, he or she has to see the header ads.)

¹⁵⁷ The Supreme People’s Court’s Provisions, *supra* note 61, art. 11.

on Internet Audio-Visual Program Service” mandates that no audio-visual program may contain illegal content, such as that jeopardizing the unity, sovereignty or territorial integrity of the state, or that disseminates propagating violence, sex, gambling, or material that promotes terrorist activities.¹⁵⁸ As explained above, the FHSPs hire “video monitoring commissioners” to manually look for the illegal videos. When they do their jobs, they can search for pirated videos based on general knowledge of movies, TV dramas and other videos. This reality makes FHSPs in China obligated to detect pirated materials. Furthermore, Article 2 of the “Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Some Issues on the Application of Law in Handling Criminal Cases of Defamation by Networks” ruled that: “If a defamation has been actually clicked on and browsed 5,000 times or more, or been forwarded (re-tweeted) for 500 times or more...”¹⁵⁹, the publisher bears criminal liability. In China, this article was applied only in one situation: when internet users publish defamatory information on microblogs, blogs or BBSs(Bulletin Board System), when their services all belong to the internet service providers’ file hosting service. Article 2 puts the burden on the FHSPs of detecting whether the information published by users on the website is defamatory.

To seek out defamatory information, the FHSPs still have to manually check the contents. Article 8 of the Supreme People’s Court’s Provisions states that “Where a web service provider fails to take the initiative to examine a web user’s act of infringement of the right of dissemination through information networks, the people’s

¹⁵⁸ Hulianwang Shiting Jiemu Fuwu Guanli Guiding(互联网视听节目服务管理规定)[Administrative Provisions on Internet Audio-Visual Program Service](promulgated by the St. Radio, FilmTelevision Admin. & Ministry of Info. Indus., Dec 20, 2007, effective Jan 31, 2008), art. 16.

¹⁵⁹ Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinxi Wangluo Shishi Feibang Deng Xingshi Anjiande Sifa Jieshi(最高人民法院、最高检察院关于办理利用信息网络实施诽谤等刑事案件的司法解释) [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Some Issues on the Application of Law in Handling Criminal cases of Defamation by Network](promulgated by the Jud. Comm. of the Sup. People’s Ct. & the Procuratorial Comm. of the Sup. People’s Procuratorate., Sep 5, 2013, effective Sep 10, 2013), art. 2.

court shall not decide that it is at fault on these grounds [The faults of a web service provider include that it clearly knows, or should have known, that a web user is infringing upon the right of dissemination through information networks.]”¹⁶⁰

This article means that the FHSPs do not have the obligation of detecting defamatory statements. Also, Article 69 of the draft of a new copyright law clearly states “Where an internet service provider provides file hosting, searching or linking services to network users, it is not required to assume the obligation of detecting information about copyright or other related rights.”¹⁶¹ So a conflict in the law is clear: one administrative provision and one interpretation¹⁶² make the FHSPs assume the obligation of detection in fact, but the Supreme People’s Court’s Provisions and draft of copyright law clearly indicate that FHSPs do not have such an obligation.

In solving this confliction, I believe that government should assume the responsibility for detecting illegal materials instead of forcing the FHSPs to assume this obligation by bringing to bear state power. Here are four reasons why FHSPs should not bear the obligation of detection:

(1) The Administrative Provision and the Interpretation¹⁶³ apparently were made based on the state’s political needs, as seen in the main focus these two statutes, which is to restrict free speech. For instance, the meaning of “defamation” mentioned

¹⁶⁰ The Supreme People’s Court’s Provisions, *supra* note 61, art. 8.

¹⁶¹ Draft of Copyright Law, National Copyright Administration of China, Jun, 2012. This draft had been developed based on from lots of scholars and relative practitioners and Article 69 had been supported.

¹⁶² Hulianwang Shiting Jiemu Fuwu Guanli Guiding(互联网视听节目服务管理规定)[Administrative Provisions on Internet Audio-Visual Program Service](promulgated by the St. Radio, FilmTelevision Admin. & Ministry of Info. Indus., Dec 20,2007, effective Jan 31, 2008); Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinx Wangluo Shishi Feibang Deng Xingshi Anjiande Sifa Jieshi(最高人民法院、最高检察院关于办理利用信息网络实施诽谤等刑事案件的司法解释)[Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Some Issues on the application of law in handing criminal cases of defamation by network](promulgated by the Jud. Comm. of the Sup. People’s Ct. & the Procuratorial Comm. of the Sup. People’s Procuratorate., Sep 5, 2013, effective Sep 10, 2013).

¹⁶³ *Id.*

in the Interpretation¹⁶⁴ might not be the word's usual plain meaning¹⁶⁵, because of China's political system.¹⁶⁶ Overall, if these two articles are designed for the political needs of the state, the state should detect the materials online by itself instead of forcing FHSPs to do so, could cost FHSPs much money.

(2) As mentioned, sometimes detecting the files' content means that the FHSP should have known of the infringements. The obligation of detection could easily prevent the FHSPs from the protection of the safe harbor rules.

(3) The technology of screening for determining the copyright ownership is not available at present. Because of the non-availability of such technology, it is unfair to have FHSPs bear the obligation of detection.

(4) Because of the theory of legal hierarchy, FHSPs should not bear the obligation of detection. The basic rule in China is that a higher-level law is preferred to a lower-level one. And the specific article mentioned above is "a law is of higher legal authority than an administrative regulation, local regulation, administrative rule or local rule."¹⁶⁷ If the draft copyright law is adopted by the Standing Committee of the National People's Congress someday, Article 69, which states that "the internet service providers don't assume the obligation of detecting" infringements will go into effect. The content of other related articles will not contravene the new copyright law.

In general, FHSPs should not have the obligation to detect infringing

¹⁶⁴ *Id.*, art. 2.

¹⁶⁵ *Defamation Definition*, WIKIPEDIA.ORG, available at <http://en.wikipedia.org/wiki/Defamation> ("the communication of a false statement that harms the reputation of an individual, business, product, group, government, religion, or nation.")

¹⁶⁶ Here is a specific example that explains the "meaning" of defamation. On September 17, 2013, a teenager was in criminal detention because of his tweet that questioned the truth of the "9.12" murder case; it had been re-tweeted more than 500 times. On September 22, the teenager was released. In this case, "questioning the truth" was treated as defamation of the local Public Security Bureau. In short, there are many meanings of defamation in China, and the government will select their favorable meaning of it when applying this statute.

¹⁶⁷ Lifa Fa(立法法)[Law on Legislation of the People's Republic of China](promulgated by the Standing Comm. Nat'l People's Cong., Mar 15, 2000, effective July 1, 2000), art. 79 states that "... an administrative regulation is of higher legal authority than a local regulation, administrative or local rule."

materials. However, they should have a reasonable duty of care, meaning an obligation to stop infringements when they are “aware of facts or circumstances according to which infringing activity is apparent”.¹⁶⁸ This is because:

(1) The subjective fault principle should be the legal basis for deciding whether FHSPs should assume the role of detecting infringement liability. This includes two factors: intent and negligence. The standard of judging whether an actor has negligence is estimating “whether he has exercised reasonable duty of care”. Therefore FHSPs should have a reasonable duty of care.

(2) The U.S. Senate Report explains DMCA §512(c)(1)(A)(ii) as providing that “a service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.”¹⁶⁹ As mentioned, the red flag test (awareness) contains two elements: subjective and objective. Objectively, the “infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.”¹⁷⁰

In order for a reasonable person to observe the “red flag” (caused by infringing materials), he should at least pay attention on his observations, which means he should have a reasonable duty of care. As mentioned, China has a stricter standard of the element “should have known” than the U.S. “red flag awareness”. When the “red flag awareness” requires FHSPs to have duty of care, there is no reason for China to abandon it.

(3) Many courts in China have ruled that FHSPs should have the duty of care. Furthermore, Article 11 of the Supreme People’s Court’s Provisions states, “Where a

¹⁶⁸ 17 U.S.C. § 512(c)(1)(A)(ii).

¹⁶⁹ S. REP. No. 105-190, at 48 (1998).

¹⁷⁰ H.R. REP. No. 105-551, at 53 (1998).

web service provider has directly obtained economic benefits from any work, performance or audio-video product made available by a web user, the people's court shall decide that it has a higher duty of care towards such web user's act of infringement of the right of dissemination through information networks.”¹⁷¹ This clearly indicates that FHSPs have the duty of care.

Revealingly, Article 11 of the Supreme People's Court's Provisions and the courts in China use “higher” to describe the duty of care in their rulings. This implies that there are different degrees of this duty, and they indicate several factors which affect these degrees.

The first, mentioned in Article 11, is direct financial benefit. Since how to regulate “direct financial benefits” is unclear, I believe that the court should consider the business model that yields “direct financial benefits”. The FHSPs' business model in China is to gain financial benefit from advertisements by taking advantage of pirated materials on their websites. Undoubtly, then, FHSPs in China should have a higher duty of care, because they already have a general knowledge of copyright infringements on their websites. Furthermore, I believed that the FHSP's position and influence in the industry (of internet file hosting services) affects the standard of duty of care. FHSPs, which are in a leading position in the internet file sharing industry should have a higher duty of care than those of common FHSPs. For instance, in the *Han Han v. Baidu* case, the court held that Baidu should have higher duty of care:¹⁷² “There are millions of text files in Baidu Library and the number keeps increasing. These text files matter not only to the interests of copyright owners, but also to the public's ability to access knowledge and culture. There is no doubt that Baidu Library

¹⁷¹ The Supreme People's Court's Provisions, *supra* note 61, art. 11.

¹⁷² HanHan Su Beijing Baidu Wangxun Keji Youxian Gongsi(韩寒诉北京百度网讯科技有限公司)[Han Han v. Beijing Baidu Internet Technology Co.,Ltd](Beijing Haidian Dist. People's Ct. Sep 17, 2012).

has an important social responsibility in spreading culture, protecting copyrights, and serving the public interest.”¹⁷³

Second, the popularity of authors or works could cause FHSPs to have a higher duty of care. In *Baidu* case, the court held that “Because of the popularity of Han Han himself and the novel *Like a Speeding Youth*... Baidu has the higher duty of care.” Furthermore, due to the relationship between “duty of care” and “should have known.” FHSPs should have the higher duty of care in case where there are popular movies, TV shows or music on their websites. They should also have a higher duty of care if they categorize the videos into several genres, such as movies, TV dramas, variety entertainments, and animation.

¹⁷³ *Id.*

Chapter 5: Global Study on Safe Harbor Rules

5.1 The European Union E-Commerce Directive

With the development of internet file sharing technology and expanded electronic commerce, the European Union is also facing the issue of holding FHSPs liable for third-party acts of copyright infringements and under what conditions. And because the internet treaties of the World Intellectual Property Association fail to address the liability of internet service providers for third-party copyright infringement,¹⁷⁴ the EU established the EU Copyright Directive¹⁷⁵ and the E-Commerce Directive,¹⁷⁶ which have been implemented by a number of EU countries as part of their national legislation. Still, EU directives do not have the force of law in member states because they do require EU member countries to amend their laws to conform to the directives' intended results.¹⁷⁷

5.1.1 Liability Exemption of FHSPs

In general, the EU E-Commerce Directive provides liability exemptions to FHSPs that meet the following conditions: (1) They do not have actual knowledge of copyright infringements and are unaware of facts or circumstances from which the

¹⁷⁴ See World Intellectual Property Organization Copyright Treaty Dec 20, 1996, 36 I.L.M.65 Art 8 ("Author of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means..."); see also WIPO Performance and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76, art. 14 ("Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means..."). No articles address ISPs secondary liability.

¹⁷⁵ Directive 2001/29/EC of the European Parliament and of the Counsel of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society. The EU Copyright Directive Article 5(1) provides exemption for ISPs if their acts of reproduction are temporary or incidental to an integral and essential part of a technological process and their sole purpose is to enable a transmission in a network between third parties by an intermediary or a lawful use of a work that has no independent economic significance. As this article is not relevant to file-hosting service providers, this paper will not discuss it further.

¹⁷⁶ Directive 2000/31/EC of the European Union and of the Counsel of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.

¹⁷⁷ Dov H. Scherzer, *European Copyright Directives Usher in Era of Harmony, Change* (2001) 226 N.Y.L.J. 73; see Treaty on the Functioning of the European Union, art. 288, 2008 O.J. (C115) 47 ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.")

illegal activity or information stems; (2) They expeditiously remove or disable access to infringing information when they obtain such knowledge or awareness.¹⁷⁸ The liability exemption applies only to liability for damages because the last paragraph of Article 14 indicates that member states retain the right to require FHSPs “to terminate or prevent an infringement” and to govern “the removal or disabling of access to information”.¹⁷⁹ Also, Recital 45 states that the limitation of FHSPs’ liability does not affect different kinds of injunctions and court requirements that require “termination or prevention of any infringement”.¹⁸⁰

The EU E-Commerce Directive only provides a general system of liability-exemption for FHSPs; it does not stipulate detailed conditions, such as take-down procedure and requirement of gaining direct financial benefits. In fact, an FHSP’s liability is determined by the national laws of the respective member states when considering each detail element. For example, Section 15 of the Finnish Act 458/2002 provides that FHSPs are not liable if they disable access to infringing materials after receiving a court order or notifications, or when they become aware that the hosted content is contrary to Finnish Penal Code.¹⁸¹

¹⁷⁸ E-Commerce Directive, *supra* note 176, art. 14 para 1: “1. 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 information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”

¹⁷⁹ *Id.* Para 3: “This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

¹⁸⁰ *Id.*, at Recital 45. “The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.”

¹⁸¹ Finnish Act 458/2002 of 5th June 2002 on the Provision of Information Society Services, §15,

National implementation of E-Commerce Directive and court practices differ among member states when assessing each situation.¹⁸² For instance, in some member states,¹⁸³ FHSPs are liable when they have actual knowledge of copyright infringements or civilly liable when they have “awareness of facts or circumstance from which illegal activity or information is apparent”.¹⁸⁴

5.1.1.1 Actual Knowledge

Among the EU member states, there are basically three kinds of approaches to the concept of “actual knowledge” of infringements.

(1) Some member states assume FHSPs have actual knowledge when they have received official notifications of infringements from competent authorities. For Instance, Article 16.1(b) in the 2002 Spanish Act on Information Society Service and Electronic Commerce¹⁸⁵ states that FHSPs should be considered as having actual knowledge when “a competent body has declared the data to be illegal, has ordered its removal, or that access to the data is blocked, or when it has been declared that damages have been done, and the provider is aware of the relevant resolution, without prejudice to notice and take-down procedures that apply to the providers on the basis of voluntary agreements and of other effective knowledge-based means that can be established”.¹⁸⁶

(2) Other member states leave this issue to the courts, which may “refer to general legal standards of obtaining knowledge of illicit content”.¹⁸⁷ Germany implemented

available at <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020458.pdf> (last visited Nov 20, 2013).

¹⁸² See Gerald Spindler, *Study on the Liability of Internet Intermediaries*, at 14, available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf (last visited Dec 20, 2013).

¹⁸³ Germany, Italy, and Portugal, among others.

¹⁸⁴ See Spindler, *supra* note 182, at 34.

¹⁸⁵ Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico.

¹⁸⁶ see Spindler, *supra* note 182, at 42.

¹⁸⁷ *Id.*, at 28.

the E-Commerce Directive in its 2007 Telemedia Act (TMA).¹⁸⁸ According to decisions by Germany courts, “knowledge” in terms of §10 TMA consists of actual positive human knowledge with regard to specific illicit content, but not negligent ignorance or contingent intent.¹⁸⁹

(3) Some Member States relate “actual knowledge” to “notice and take-down procedures”. As mentioned above, §15 of the Finnish Act mentions a situation in which the FHSP could be assumed to have actual knowledge when “obtaining the notification referred to in §22 [of the Finnish Act]”.¹⁹⁰ §22 provides requirements of form and content of the notification from copyright owners.¹⁹¹

1. The Obligation to Remove or Disable Access to Illicit Content.

The majority of member states implemented the liability exemptions of §14(3) of the E-Commerce Directive¹⁹² by empowering courts or other competent authorities to require FHSPs to remove or disable access to illicit content so as to prevent further infringements. The courts in these member states ruled that the liability exemptions are limited to civil liability for damages or criminal responsibility, but not to

¹⁸⁸ See *Telemediengesetz*, Feb.26, 2007, BGB1. I at 179 (Ger.). (“This law is designed to implement Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services...”) translation available on http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Legislation/Telemedia_Act_TMA_.pdf (last visited Nov 21, 2013); see also Emerald Smith, *Lord of the Files: International Secondary Liability for Internet Service Providers*, 1577, available at <http://law.wlu.edu/deptimages/law%20review/68-3n.23Smith.pdf>

¹⁸⁹ See Gerald Spindler, *Study on the Liability of Internet Intermediaries, country report – Germany*, available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/germany_12nov2007_en.pdf; see also Spindler, *supra* note 183, at 36.

¹⁹⁰ Finnish Act 458/2002 of 5th June 2002 on the Provision of Information Society Services, available at <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020458.pdf> (last visited Nov 20, 2013).

¹⁹¹ *Id.*, § 22. (“The notification must be made in writing or electronically so that the content of the notification cannot be unilaterally altered and that it remains available to the parties. The notification must include: 1) the name and contact information of the notifying party; 2) an itemization of the material, for which prevention of access is requested, and details of the location of the material; 3) confirmation by the notifying party that the material which the request concerns is, in his/her sincere opinion, illegally accessible in the communication network; 4) information concerning the fact that the notifying party has in vain submitted his/her request to the content producer or that the content producer could not be identified; 5) confirmation by the notifying party that he/she is the holder of copyright or neighboring right or entitled to act on behalf of the holder of the right; 6) signature by the notifying party.”)

¹⁹² E-Commerce Directive, *supra* note 176, art. 14, para 3.

injunctions from infringements.¹⁹³

2. Notice and Take-Down Procedure.

As there are no explicitly requirements for formal notifications (which are sent by copyright owners to establish FHSPs' knowledge of infringements) in the E-Commerce Directive, today, most member states have not established notice and take-down procedure.¹⁹⁴ This has resulted in many problems. For instance, say a copyright owner sends a notification to an individual who was supposed to deal with infringement complaints, but that individual does not have specific responsibility for such an issue. Also, it could be that even if the copyright owner had sent notifications to the designated person in charge, the form and specific content of the notification might not be clear enough for FHSPs to remove the infringing materials.¹⁹⁵ On this occasion, the European Union encourages self- and co-regulations,¹⁹⁶ more and more member states are making approaches toward this issue through one of these kinds of regulations.

There are three types of approaches. (1) Some countries have adopted notice-and-take-down procedures in their codified laws. For instance, Finland had implemented a complete notice and take-down procedure in §20 of the Finnish Act 458/2002.¹⁹⁷ (2)

¹⁹³ See Spindler, *supra* note 182, at 48-69. (The German, British, French and Austrian courts in share almost the same opinion on the issue of injunctions.)

¹⁹⁴ Germany, Sweden, United Kingdom.

¹⁹⁵ See Spindler, *supra* note 182.

¹⁹⁶ See Linda Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, available at <http://www.ejcl.org/91/art91-3.html> (last visited Dec 25, 2013). ("European self-regulation and co-regulation have been described as 'forms of interaction between Community processes and private actors' and the common feature has been considered to be 'the existence of some form of relationship between binding legislation and voluntary agreements in a particular area'.")

¹⁹⁷ Finnish Act 458/2002 of 5th June 2002 on the Provision of Information Society Services, §20, available at <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020458.pdf> (last visited Nov 20, 2013). ("A holder of copyright or his/her representative may request that the service provider referred to in Section 15 prevent access to material infringing copyright as prescribed in this Section and in Sections 22-24. The same applies to a holder of a neighboring right and his/her representative if it concerns material infringing this right. A request must be presented to the content producer whose material the request concerns. If the content producer cannot be identified or if he/she does not remove the

In some member states there is self-regulation. In France, several leading associations have issued many codes of conduct. Based on these codes, members should “install a complaint site or other instruments to report illicit contents”.¹⁹⁸ (3) Some member states have co-regulation, a kind of a regulation that is developed and works by the cooperation of public authorities and private companies.¹⁹⁹

5.1.1.2 No General Obligation to Monitor

Article 15 of the EU E-Commerce Directive provides that member states not impose a general obligation on FHSPs either “to monitor the information” on their servers or “to actively seek facts or circumstance indicating illegal activity”.²⁰⁰ It is impossible for FHSPs to monitor the content of millions of sites, which would put too much of a burden on them. So basically, under the E-Commerce Directive, there is no general obligation to monitor the informations for FHSPs.

However, FHSPs still have one specific obligation: Under Paragraph 2 of Article 15, they are obliged by member states: (1) to “inform competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service”; (2) to disclose information that enables the identification of users to competent authorities at their request.²⁰¹ And member states can also impose a monitoring obligation in a specific case.²⁰²

material or prevent access to it expeditiously, the request may be submitted to the service provider by notification prescribed in Section 22.”)

¹⁹⁸ See Spindler, *supra* note 182, at 112.

¹⁹⁹ See Spindler, *supra* note 182, at 113-115.

²⁰⁰ E-Commerce Directive, *supra* note 176, art. 15, para 1. (“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”)

²⁰¹ *Id.*, art. 15, para 2. (“Member states may 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.”)

²⁰² *Id.*, Recital 47; see Spindler, *supra* note 182, at 5. (“However, Article 15 does not prevent public authorities in the Member States from imposing a monitoring obligation in a specific, clearly defined

When applying this article, courts have to balance the right of free speech of subscribers of FHSPs and the right of monitoring information under the requirement of member states.²⁰³ For instance, the Austrian Supreme Court of Justice held that the FHSPs don't have an obligation to monitor the posting of articles, which it views as incompatible with Article 15(1) of the E-Commerce Directive and which it believes would unduly restrict the constitutional freedom of speech.²⁰⁴ I believe that the implementation of Article 15(2) should constitute in a "specific, clearly defined individual case" of the right of free speech. For example, if a certain website has been identified as having infringing contents, member state could obligate the FHSP to monitor of the contents.²⁰⁵

Furthermore, Recital 48 of the E-Commerce Directive states that member states may require FHSP to have "duty of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities."²⁰⁶ Apparently, Recital 48 conflicts with Article 15(1): these two provisions need to be reconciled. For instance, perhaps by adding conditions: in specific cases – if there is a widespread knowledge of infringing materials on an FHSP's website, a member state may require the FHSP to assume the duty of care.

5.2 Japan

On November 30, 2001, the Japanese Diet adopted legislation that regulates

individual case.")

²⁰³ See Pablo Asbo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 111., at 126. ("It is assumed that Member States, when implementing this provision, shall take into account the proper legal judicial guarantees in order to balance all the rights at stake, namely the investigative rights of the Member States' organizations, versus the piracy and freedom of speech rights of the recipients of the ISPs services.")

²⁰⁴ PO1.- Sad Rejonowy w Slupsku, 7/3/2007, sygn. Akt II 342/06.

²⁰⁵ See Patrick V. Eecke and Barbara Ooms, *ISP Liability and the E-Commerce Directive: A Growing Trend toward Greater Responsibility for ISPs*. 11 No. 4. J. INTERNET L.3 (2007).

²⁰⁶ E-Commerce Directive, *supra* note 176, Recital 48.

internet infringements of third-party rights, including defamation, copyright infringement, and privacy violations. This act, which is known as the Provider Liability Law,²⁰⁷ was implemented on May 27, 2002. Article 3 provides “specified telecommunications service providers” (hereafter TSP) liability exemptions for their subscribers’ illegal activities. A TSP was defined as “a person who relays others’ communications with the use of specified telecommunications facilities, or provides specified telecommunications facilities to be used for others’ communications”²⁰⁸, which means FHSPs should be considered as TSPs, but the person who provides “direct reception” of telecommunications is not.

5.2.1 Limitation of Liability for Damages

5.2.1.1 Limitation of Liability towards Third Party Infringements

Article 3(1) of the Provider Liability Law offers TSPs with immunity from liability to third-party infringements, unless: (1) it is technically feasible for the TSP to take measures to prevent the transmission of the infringing informations,²⁰⁹ and (2) the TSP knows, or could reasonably know, that the right of others would be harmed by information distribution via said specified telecommunications.²¹⁰ The TSP does have the obligation to pro-actively monitor and filter the communications it transmits, though there are no articles of the Provider Liability Law that obligate a TSP to do

²⁰⁷ Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders, Act No. 137 of November 30, 2001 available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=46&y=17&co=01&ky=limit+the+liability+of+specified+telecommunications+service+providers&page=6> (last visited Dec 15, 2013).

²⁰⁸ *Id.*, art. 2(iii).

²⁰⁹ *Id.*, art. 3(1).

²¹⁰ *Id.*, art. 3(1)(i)&(ii). (“Where said relevant service provider knew that the infringement of the rights of others was caused by information distribution via said specified telecommunications”; “...had knowledge of information distribution by said specified telecommunications, and where there is a reasonable ground to find that said relevant service provider could know the infringement of the rights of others was caused by the information distribution via said specified telecommunications.”)

so.²¹¹ Because if a TSP can technically possible do so, it will be disqualified from indemnity from Article 3(1). For instance, in the *File Rogue* case,²¹² the Tokyo Higher Court held that MMO Japan Ltd., which provided file sharing services, is liable for its subscriber's infringements. One reason the court gave for its ruling is that the defendant "had exercised control or supervision over its users' conduct because it was in a position to take the necessary steps to prevent copyright infringement, even if it was impossible [for the defendant] to detect all infringements".²¹³

The Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People (Japan)²¹⁴ became effective in April, 2009. This statute encourages TSPs to use technologies to limit juvenile access to harmful content, such as glorifying crime or suicide, or including pornographic content or extreme violence. Under this circumstance, TSPs might have little obligation of detecting illegal contents, which is similar to the situation in China. In an act that became effective in April, 2010, Japan made its own approach to solving this problem by requiring manufacturers of devices with Internet connectivity (other than mobile phones) to pre-install filtering software or otherwise facilitate the use of third-party filtering software or services.²¹⁵ This act is a good solution towards the Chinese specific requirement of detection, because it reduces TSPs' responsibility to detect.

5.2.1.2 Limitation of Liability towards TSP's Deleting Actions

²¹¹ In keeping with Japan's constitutional protection of the freedom of speech and the secrecy of communication, the Telecommunication Business Act prohibits ISPs from censoring or infringing on the privacy of communications passing through their networks.

²¹² *File Rogue*, Heisei 16 (Ne) 446 (2003) (Tokyo High Court. Mar. 31, 2005); see Seng, *supra* note 30.

²¹³ *Id.*, at 20.

²¹⁴ Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People (Act No. 79 of 2008) Latest amendment: Act No. 71 of 2009 available at <http://www8.cao.go.jp/youth/youth-harm/law/pdf/english.pdf> (This is not an official translation)

²¹⁵ See ANTHONY LLYOD ET AL. THE TECHNOLOGY, MEDIA AND TELECOMMUNICATION REVIEWS, 167 (John P. Janka et al. eds., 3rd ed. 2012) available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CDcQFjAB&url=http%3A%2F%2Fwww.lw.com%2FthoughtLeadership%2Ftmt-review-japan-november-2012&ei=Wrs_UtXdJeO0yAHyn4HoCw&usq=AFQjCNGPEs-C0tWQTGIQ-8H9rhu0_ezxQ&sig2=aX2dPn7uE2S_vFSUBYON-A (last visited Dec 20, 2013).

Article 3(2) of the Provider Liability Law indemnifies an TSP from any loss incurred by deleting information submitted by subscribers, under the following circumstance: (1) when the TSP has reasonable grounds to believe that others' rights are being infringed;²¹⁶ or (2) when the TSP conveys to the subscriber (sender of the information) a request of deleting the information from a third-party, and the TSP does not receive within seven days an explanation from the subscriber of why the information is not illicit.²¹⁷

If, after the request of a third-party, the TSP deletes the information provided by the subscriber without his permission, it may be held liable for breach of the service contract. Article 3(2) promulgates provisions for dealing with such case.²¹⁸ If the TSP does not get a response from the subscriber, it could decide whether to take down the alleged infringing content based on its own assessment. However, in most cases, the TSP would likely sail out of the safe harbor if it decides not to take down the content that is alleged infringing.

The Providers Liability Law does not explicitly specify a strict notice and take-down procedure. However, Article 3(2)(ii) indicates that Japan has established a more subscriber-friendly statute: The alleged subscriber can be notified and have an opportunity to explain why the information he published is legal before the information is deleted. In this situation, if the TSP does not receive notice of the subscriber's disagreement with the implementation of prevention measures, it can take down infringing materials after seven days from the day it notified the alleged subscriber. In response, major associations of service providers and copyright owners jointly have established a "voluntary guideline" that a specific notice from a copyright

²¹⁶ The Providers Liability Law, *supra* note 207, art. 3(2)(i).

²¹⁷ *Id.*, art. 3(2)(ii).

²¹⁸ See Hisamichi Okamura, *Liability of Internet Service Providers*, at 14, presented at 10th SOFTIC Symposium 2001, available at http://www.softic.or.jp/symposium/open_materials/10th/en/okamura-en.pdf

owner or designated credible organization that enables TSPs to take down immediately the content about which they were notified without waiting for the subscriber's response or waiting seven days.²¹⁹

5.2.2 Demand for Disclosure of Identification Information of the Sender

Article 4 of the Providers Liability Law concerns personal privacy information. Generally, in Japan, the Law Concerning the Protection of Personal Information²²⁰ protects personal information or data that can be used to identify someone. Furthermore, the Ministry of Internal Affairs and Communications (hereafter MIC) has issued Privacy Act guidelines that are specific to the telecommunications businesses and that concern such personal information as usage history, and user location, and which may be only be disclosed to a third-party in certain circumstances. Article 4(1) provides two circumstances for a victim to make a claim for disclosure of the subscriber's information to the TSP: (1) when the victim's right is absolutely infringed; (2) when the identifying information is necessary for the victim to claim damages.²²¹

Article 4(2) provides that before disclosing the subscriber's identification information, the TSP should hear the subscriber's opinion, unless it is unable to contact him or her.²²² This provision does not regulate under what circumstance the TSP can disclose the subscriber's identification. On November 2, 2011, the revised

²¹⁹ See Opinions (suggestions) Regarding "Countermeasures Against Online Copyright Infringement" (December 11, 2009) available at <http://www.mpaa.org/Resources/04aa5055-c682-4378-8085-5b1530e29f95.pdf> (Under the full support of the Motion Picture Association (MPA), Japan and International Motion Picture Copyright Association, Inc (JIMCA) engages in investigational, enlightenment, legal and PR activities to protect movie copyrights and diffuse understanding on copyrights.); See also Masanobu Katoh, *Intellectual Property and the Internet: A Japanese Perspective*. 2002 U. ILL. J.L. TECH.& POL'Y 333, at 341. Also available at <http://illinoisiltp.com/journal/wp-content/uploads/2013/10/Katoh.pdf> (last visited Dec 20, 2013).

²²⁰ Act on the Protection of Personal Information Act No. 57 of (2003), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/APPI.pdf> This is not an official translation.

²²¹ The Providers Liability Law, *supra* note 207, art 4(1)(i)(ii).

²²² *Id.*, art. 4(2).

MIC's Privacy Act guidelines allows an TSP to provide users' locational information to third parties only if (1) it has the user's consent, a search warrant, or any other legal justification; and (2) it obtains a user's locational information pursuant to law enforcement agencies' requests, but only if a warrant is issued and the user is put on notice of this.²²³

Except in those two circumstances, the TSP has discretion in determining whether to disclose subscriber information. Unless there is any willful act or gross negligence, a TSP that refuses to disclose such information when requested to by the alleged victim of infringement will not be liable to the victim's loss.²²⁴ However, the victim could file a lawsuit against the TSP that refused a disclosure.

²²³ See LLYOD, *supra* note 215.

²²⁴ The Providers Liability Law, *supra* note 207, art. 4(4).

Chapter 6: Conclusion

This thesis has argued for what amount to safe harbor rules for file hosting service providers in different countries, especially China. The issue of whether a FHSP would bear secondary liability for its subscribers' infringing activities should be determined by considering several elements of the safe harbor rules, such as knowledge of such infringement, the take-down procedure, and the direct financial benefits it receives. As we have seen, each condition might be understood and interpreted differently in different countries, because of their various legislative systems, history of legislation, and internal needs.

For the purpose of reducing online copyright infringement, balancing the public interest of the public, copyright owners, and FHSPs, this thesis analyzed the Supreme People's Court's Provisions and made a proposal for safe harbor rules in China.

Today, the need to protect copyrights in China is getting more and more attention, and standards for initiating anti-piracy action online by relevant national departments in China have become much stricter. For instance, during the past few months, the Baidu Library has taken down all its literature files, and users have had to pay a fee to read professional thesis files. And Baidu Player, a P2P video search and player product, was shut down after it lost the suit which was filed against by YouKu-TuDou on December 30, 2013.²²⁵ Also, the rapidly developing technology of "fingerprint" filtering software is having an impact. As video-sharing websites in China (like YouKu-TuDou) no longer serve only file-hosting service providers, they have begun to provide videos themselves. In order to deal with these developments that are occurring in China, we still need to understand other countries' experiences in

²²⁵ *Baidu Player*, available at <http://blogs.barrons.com/emergingmarketsdaily/2014/01/02/baidu-copyright-slap-benefits-youku-sohu-says-wedge/> (last visited Dec 25, 2013).

dealing with copyright infringements. My proposal for the Chinese safe harbor rules for FHSPs are:

(1) China had better unify the language in different laws that cover the same issues. As China does not have case law, the courts' judgments should be based on the law only.

(2) When deciding on standards for instigating infringements, China should not focus on the interpretations in of the Supreme People's Court's Provisions. Because almost every website in China offers awards or bonus points in attracting users and none will use specific language to encourage infringements, China needs to provide more legal and administrative details concerning implementation.

(3) When evaluating whether a take-down notice is proper or not, China should not focus on the detailed language of Article 14 from the State Council's Regulations but rather should learn from the U.S. by using language like "reasonably sufficient to permit the service provider to locate the material".²²⁶

(4) A statute should make clear that FHSPs should not bear the responsibility to detect infringements. If the state decide to on the need to detect and take-down some illegal materials based on political demands, it should engage in the detection itself. Further, as video-sharing websites in China began to provide copyrighted videos themselves, they should bear reasonable duty of care.

(5) Although in Japan, some copyright owners and associations are trying to establish a guideline that requires FHSPs to take down alleged materials immediately without waiting for seven days, I believe that China should adopt Article 3(2)(ii) of the Japanese Providers Liability Law, which allows subscribers to have the

²²⁶ 17 U.S.C. § 512(c)(3)(A)(iii).

opportunity to defend their uploading activity.²²⁷ Although this counter-notice rule protects users' rights, it is still a remedy to users, but not a direct protection.

²²⁷ The Providers Liability Law, *supra* note 208, art. 3(2)(ii).

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Resume

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- **Dongbei University of Finance and Economics**, Dalian, Liaoning, China
Bachelor of Laws 09/2007-07/2011

WORK EXPERIENCE

- **Internship in Liaoning Ding Tai Law Firm** 06/2010-09/2010

HONORS AND AWARDS

- **Maurer School of Law**
 - Merit Scholarship 09/2011
- **Dalian, Liaoning, China**
 - Outstanding graduates of Dalian City 06/2011
- **Dongbei University of Finance and Economics**
 - 1st Comprehensive scholarship 11/2010
 - 3rd Comprehensive Scholarship 04/2010
 - 3rd Comprehensive Scholarship 11/2009
 - Excellent Student 2007-2008
 - Study Pacesetter 2007-2008
 - Excellent Editor 09/2008
 - 1st in Competition of Painting 10/2009
 - 3rd place in Law School Freshman Speech Competition 10/2007
 - Highest grade in tax law and in maritime law
 - Win 1st place in the term 2009-2010

EXTRACURRICULAR ACTIVITIES

- **Volunteer** Dalian University Students Legal Aid Center 2008-2011
- **Moot Court** Dongbei University of Finance and Economics 2008-2011
- **Editor in Chief** the college journal of The Students in Dongbei University of Finance and economics 2007-2010
 - Published several articles in the school magazine
- **Propaganda in Chief** Student Union in school of law ,Dongbei University of Finance and Economics 2007-2010
 - Planned activities for school of law
- **Volunteer** Dalian Environmental Protection Volunteers Association 2007-2011