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ESTABLISHING AN INDIRECT LIABILITY
SYSTEM FOR DIGITAL COPYRIGHT INFRINGEMENT
IN CHINA: EXPERIENCE FROM THE UNITED STATES'
APPROACH

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In order to address the digital revolution that has challenged copyright protection, China has carried out a series of legislative attempts at developing an indirect copyright liability system in recent years. The joint tort oriented, knowledge-centered liability attribution rules and a set of borrowed safe harbor provisions from the United States have set out the rudiments of the indirect copyright liability regime to deal with digital copyright infringements.

However, there have been constant debates on the confusing joint tort law underpinnings, the inconsistent knowledge standard and the conflicting nature of safe harbors, which are major factors impeding the effective copyright law enforcement and the efficient operation of the intermediary's business.

Through analyzing current rules in China and the United States, this article finds that compared to the borrow-to-use approach, a more efficient build-to-suit approach for a viable legal transplantation is recommended. To construct an efficient, well-balanced and predictable indirect copyright liability system

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for dealing with digital copyright infringement in China, this article proposes an independent-tort theory and a culpable conduct based indirect liability system, with modified safe harbor provisions. In this way, a justified and compatible indirect liability system can be optimized through equilibrium among relevant parties.

INTRODUCTION.....	198
I. DEBATES ON NSP LIABILITY RULES IN CHINA.....	204
A. <i>Debate on the Tort Basis for NSP Copyright Liability</i>	209
B. <i>Debate on the NSP’s Knowledge Standard</i>	213
C. <i>Debate on the Nature of Safe Harbors</i>	219
II. EXPERIENCE FROM THE UNITED STATES.....	223
A. <i>Fault-Based Liability Attribution Rules Developed from Common Law Cases</i>	223
1. <i>Is the Sony Rule Still Applicable in a Digital World? The Implied Factors in Contribution Liability</i>	224
2. <i>The Expansion of Vicarious Liability in Copyright Law: Why It Does Not Apply in China?</i>	233
3. <i>Inducement Liability: What could be Learned for China?</i>	236
B. <i>Strict Interpretation of DMCA Safe Harbors</i>	238
1. <i>Clarifying the Knowledge Requirement Under § 512(c) and (d) of DMCA: Actual or Apparent Knowledge of Specific Infringement</i>	240
2. <i>“Control” and “Benefit” Under § 512(c) and (d) of DMCA</i>	246
III. ESTABLISHING INDIRECT LIABILITY SYSTEM FOR DIGITAL COPYRIGHT INFRINGEMENT IN CHINA.....	251
CONCLUSION.....	253

INTRODUCTION

Indirect copyright liability is a term used to describe the liability imposed upon a defendant who is not the direct infringer,¹ but whom the law nonetheless

¹ Copyright law prescribes “acts restricted by copyright” that are enjoyed by copyright owners. (See, e.g., Section 16(1) of The Copyright, Designs and Patents Act of 1988 (“CDPA”)) Direct (or primary) copyright infringement takes place when an infringer conducts a restricted act that he is not entitled to, such as communicating the work to the public. Indirect copyright liability is premised on direct copyright liability. See PAUL GOLDSTEIN & BERNT HUGENHOLTZ,

holds liable for damages which the copyright owner suffers from the infringement.² Indirect liability requires that the defendant (also referred to as the “indirect infringer” below) assist, promote, facilitate or benefit from the direct infringement.³ The indirect copyright liability rule has different names such as secondary liability or derived liability,⁴ and has various forms across jurisdictions.⁵ For instance, the United Kingdom adopts the notion of “authorisation” in its copyright legislation to deal with intermediaries who authorise the infringing acts done by the third party.⁶ The United States, on the other hand, has developed doctrines of contributory liability, vicarious liability and inducement liability through case law.⁷ In China, however, there has been no notion of “indirect liability” in the copyright law regime. The issue of indirect copyright liability has been dealt with under the joint tort liability regime.⁸

INTERNATIONAL COPYRIGHT 338 (3rd ed. 2012) (“For a defendant to be held contributorily or vicariously liable, a direct infringement must have occurred.”).

² See GOLDSTEIN & HUGENHOLTZ, *supra* note 1, at 337. (“The law in most countries will, under prescribed conditions, impose secondary liability on those who, though not directly infringing copyright, have materially contributed to the infringement.”).

³ These are requirements under the different forms of indirect liabilities such as contributory liability, inducement liability and vicarious liability.

⁴ PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW 1 (Alain Strowel ed., 2009); see also Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 580 (2008) (referring to indirect liability as “derivative liability”).

⁵ See DAVID BAINBRIDGE, *INTELLECTUAL PROPERTY*, at 182-185 (9th ed. 2012).

⁶ Section 16(2) of CIPA provides that “[c]opyright in a work is infringed by a person who without the license of the copyright owner does, or *authorises* another to do, any of the acts restricted by copyright” (emphasis added).

⁷ See Allen N Dixon, *Liability of Users and Third Parties for Copyright Infringement on the Internet: Overview of International Development*, in PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW 12, 15 (Alain Strowel ed., 2009).

⁸ See Yiman Zhang, *Establishing Secondary Liability With a Higher Degree of Redefining Chinese Internet Copyright Law to Encourage Technology Development*, 16(1) PAC. RIM L. & POL’Y J. 257 (2007) (“The current legal framework, which premises copyright

In order to address digital challenges, especially the increasing use of peer-to-peer (P2P) technologies, China has developed a series of instruments—including laws, regulations, judiciary interpretations and administrative measures—to regulate Internet intermediaries' copyright liability for infringement committed by users. These legal documents establish a joint tort liability system under which network service providers (“NSPs”)⁹ share joint liability with direct infringing users under certain conditions. The most notable of these legal instruments includes: the Copyright Law of the People's Republic of China 1990¹⁰ which was revised in 2001¹¹ and 2010;¹² the 2000 Networks

liability upon a direct infringement and joint liability theory, unfortunately has produced considerable ambiguity both within the judiciary and the affected industries.”).

⁹ The term Network Service Provider has not been defined in Chinese copyright law, but this term has been used in all relevant laws regulating network service providers in information networks. The services include automatic access services, automatic transmission services, automatic storage services, storage space services, and searching and linking services. *See Regulations for the Protection of the Right of Communication through Information Network*, (promulgated by the State Council, May 10, 2006, effective July 1, 2006, revised on January 16th, 2013), art. 6 (China) [hereinafter *2006 Regulation*], translation available at <http://www.cpahkLtd.com/UploadFiles/20100315165559735.pdf>.

¹⁰ Zhonghua Renmin Gongheguo Zhuzuo Quanfa [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (China) [hereinafter *1990 Copyright Law*], translated in Zheng Chengsi and Michael Pendleton, COPYRIGHT LAW IN CHINA 215 (1991).

¹¹ Zhonghua Renmin Gongheguo Zhuzuoquan Fa [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001), art. 10 (China) [hereinafter *2001 Copyright Law*], translated in WORLD INTELL. PROP. ORG. (2014), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=125980. A new right of “communication of information on networks” was added to the list of exclusive rights. *See* 2001 Copyright Law, art. 10(12).

¹² Zhonghua Renmin Gongheguo Zhuzuoquan Fa [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 48 (China) [hereinafter *2010*

Copyright Interpretation issued by the Chinese Supreme People's Court, which was amended twice in 2004 and 2006;¹³ the Regulations for the Protection of the Right of Communication through Information Network, which embodies a set of so called "safe harbor" provisions;¹⁴ the Tort Liability Law of the People's Republic of China¹⁵ with one specific provision regulating ISP liability;¹⁶ and 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.¹⁷ However, in China, debates surrounding intermediary liability issues have never stopped. First, the judiciary and scholars have been confronted with an obscure legal underpinning of indirect copyright liability due to the lack of an independent category of indirect infringement in the tort law. The success of an indirect copyright liability claim under the joint tort liability principle without the existence of joint intent or knowledge is questionable. It is equally problematic to impose indirect liability on a separate tort basis. To overcome this lacuna, a survey of current tort law is

Copyright Law], translated in WORLD INTELL. PROP. ORG. (2014), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=186569.

¹³ Hereinafter the *Network Interpretations* are respectively referred to as the 2000, 2004, and 2006 Network Interpretation. The 2006 Interpretation was repealed by the 2013 Provision.

¹⁴ *2006 Regulation*, *supra* note 9.

¹⁵ Zhonghua Renmin Gongheguo Qinquan Zeren Fa [Tort Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) (China) [hereinafter *2010 Tort Liability Law*], translated in WORLD INTELL. PROP. ORG. (2014), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=182630. The notes provide that "[t]his Law is the basic tort legislation of China and provides general provisions for determining liability, assumption of liability, and mitigation of liability as well as special provisions concerning joint tortfeasors and seven special torts." *Id.*

¹⁶ *Id.*, art. 36.

¹⁷ Zuigao Renmin Fayuan Guanyu Shenli Qin Hai Xinxu Wangluo Chuanboquan Minshi Jiufen Anjian Shiyong Falv Ruogan Wenti de Guiding [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] (issued by the Supreme People's Court, Dec. 17, 2012, effective Jan. 1, 2013) (China) [hereinafter *2013 Provision*], translation available at <http://en.pkulaw.cn>.

required to test the viability of engaging indirect copyright liability under the guidance of the general tort law regime.

Second, courts have been struggling with the incompleteness of liability attribution rules, especially the constitutive element that has been used to establish the culpability of the defendant. The issue in the spotlight is the inconsistent knowledge standard. Current rules that are used to define and interpret whether someone “knows,” “has reason to know” and “should know” have been the subject of contention.

Third, the Chinese safe harbor provisions, inspired by the United States DMCA safe harbors, fail to accommodate the specific conditions in China. The 2006 Regulation adopted the legislative model of ruling on both liability attribution and liability exemption, which caused confusion as to the nature of the safe harbors. Unlike the United States’ approach that has provided specific guidance on the interpretation of the safe harbors through case law, Chinese legislation has failed to correctly address the knowledge standard or control and benefit standard.

In addition to addressing the above-mentioned debates, this article thoroughly reviews current laws and cases in China and compares them with United States laws on indirect copyright liability. In the United States, liability attribution rules have evolved and formed three categories: contributory liability, which stresses elements of constructive knowledge and material contribution; vicarious liability, which emphasizes factors of ability to control and direct financial interest; and inducement liability, which focuses on purposeful, culpable conduct and expression. China has adopted the aiding and abetting liabilities which correspond to the United States’ contributory and inducement liabilities. However, the one-sided emphasis on applicable knowledge has impaired the importance of other constitutive elements such as the intent, the relationship with direct infringers, the ability to control direct activities, the means that are used for infringement, and due care. The United States has developed concrete explanations for the application of exemption rules in indirect copyright liability

in case laws.¹⁸ In China, however, safe harbors have set a higher standard to exempt liability for NSPs, compared with the standards of the United States.¹⁹

This article begins by exploring three major debates concerning Chinese NSP liability rules. The issues in these debates are factors that have hampered the establishment of an indirect copyright liability system in China. Through an analysis of recent efforts that China has taken to construct a set of NSP liability rules, this study highlights the incompatibility of safe harbor rules, provides an overview of comprehensive liability factors, and calls for remolding and updating China's relevant regulatory instruments by reexamining the United States' experience. Part II revisits the key doctrines of indirect copyright liability in the United States, finding that judicial practice has stepped out of the traditional analysis of knowledge and material contribution elements in contributory liability and of the control and financial benefit factors in vicarious liability. Instead, a series of subjective and objective factors—including the relationship, control, knowledge, means and due care—have all invited consideration. Part III proposes guidelines and specific suggestions in establishing an indirect liability system for digital copyright infringement in China. This article concludes with a strong

¹⁸ See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partner LLC*, 718 F.3d 1006 (9th Cir. 2013); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *Viacom Int'l, Inc. v. YouTube, Inc.*, 07 Civ. 2103 (S.D.N.Y. 2013); *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

¹⁹ The liability provided in Article 22 of the 2006 Regulation is actually stricter than that imposed by the DMCA because it requires only financial benefit as immunity rather than the two indispensable requirements of both financial benefit and right and ability to control the infringing activity in section 512(c) and (d) of the DMCA. A higher threshold for liability exemption is therefore established in the 2006 Regulation.

[T]here are two indispensable constitutive requirements for the 'vicarious liability' in DMCA: The financial benefit directly attributable to the infringing activity, and the network service provider's right and ability to control the infringing activity. But there is only one requirement in the Regulations. If the Regulations are implemented by word, a stricter liability will be imposed on the network service provider than in the US, which is not tenable.

Qian Wang, *Study on Copyright Infringement of Video-Sharing Websites*, 5(2) FRONT. L. CHINA 275, 299 (2009).

recommendation that, to construct an efficient, well-balanced and predictable indirect copyright liability system for dealing with digital copyright infringement in China, an independent tort theory-oriented, culpable conduct-based indirect copyright liability system, with modified safe harbor provisions, is needed.

I

DEBATES ON NSP LIABILITY RULES IN CHINA

In China, there have been no systematic rules on the issue of indirect liability for copyright infringement in legislation. This was compatible with the original focus of copyright protection in China, because the legislative and applicative focus had been the act of direct infringement since establishing the copyright system. This focus can partly be explained by the previous technological conditions where the general public could not afford to copy technologies and only a select few, with certain financial and material resources, were capable of conducting severe direct infringement. In this light, the copyright owners could gain sufficient remedies through chasing legal liabilities from those direct infringers.

With fast developments in copying and disseminating technology, however, individuals are now capable of conducting severe copyright infringement. Nevertheless, it is not easy for copyright owners to locate the infringers, nor to gain sufficient compensation from chasing individual liability. Moreover, if they are not immediately restrained, some expanding infringements will produce very serious outcomes for copyright owners. In practice, the uniformity of court judgments at different levels is not guaranteed.²⁰ Therefore, the copyright laws in China should not only introduce fundamental principles guiding indirect infringement of copyright, but also make concrete and detailed provisions to construct a comprehensive and systematic indirect liability system for copyright infringement online.

Civil liability for copyright infringement is stipulated in relevant articles of the General Principles of the Civil Law (“GPCC”), which prescribes that “citizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works and obtain

²⁰ Jessica Haixia Jia, *Copyright Infringement in the Network Environment—China’s Perspective*, 19(2) COMPUTER L. & SEC. REP. 101 (2003).

remuneration in accordance with the law.”²¹ When dealing with infringement, it provides joint liability for joint infringements.²² The Supreme Court’s Opinion of the Civil Law further states that “any person who incites or assists another to commit a tort is the joint tortfeasor.”²³

Relevant articles in the 2010 Tort Liability Law can be applied when dealing with copyright liabilities,²⁴ including strict liability, fault-based liability, and joint and several liabilities.²⁵ It is noteworthy that the 2010 Tort Liability Law prescribes defines abetting and assisting activities as two forms of infringing acts which lead to joint and several liabilities.²⁶ Article 36, which specifically deals with NSP liability in the network environment,²⁷ affirms the notice and

²¹ Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of the Civil Law of the People's Republic of China], (adopted at the Nat'l People's Cong., April 12, 1986), art. 94 (China) [hereinafter GPC], *translation available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm.

²² *Id.*, art. 130 (“[I]f two or more persons jointly infringe upon another person’s rights and cause him damage, they shall bear joint liability.”)

²³ Opinion of the Supreme People’s Court on Questions Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (issued by the Supreme People’s Court, Jan. 26, 1988) art. 148 (China), *translated in* Whitmore Gray & Henry Ruiheng Zhen, 52 LAW & CONTEMP. PROBLEMS 59 (1989).

²⁴ 2010 Tort Liability Law, *supra* note 15, art. 2 (“Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law. ‘Civil rights and interests’ used in this Law shall include . . . copyright . . .”).

²⁵ *Id.*, art. 6. (“One who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability. One who is at fault as construed according to legal provisions and cannot prove otherwise shall be subject to the tort liability.”); *Id.*, art. 7. (“One shall assume the tort liability for infringing upon a civil right or interest of another person, whether at fault or not, as provided for by law, shall be subject to such legal provisions.”); *Id.*, art. 8 (“Where two or more persons jointly commit a tort, causing harm to another person, they shall be liable jointly and severally.”).

²⁶ “One who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.” *Id.*, art. 9.

²⁷ *Id.*, art. 36(1) (“A network user or network service provider who infringes upon the civil right or interest of another person through network shall assume the tort liability.”).

takedown provisions²⁸ provided in the 2006 Regulation²⁹ and makes clear that a fault-based liability is applied to the NSP who has knowledge of a third party's infringement.³⁰ This article is a principled stipulation for indirect liability that needs to be further interpreted. The main problems involve the interpretation of certain terms in this article such as "necessary measures," "in a timely manner" and "know." For example, whether "know" is perceived as actual knowledge, or as knowledge including "should know," was under hot debate.³¹

The recently issued 2013 Provision has absorbed recent judiciary practice as well as recent academic research.³² By distinguishing direct and indirect

²⁸ *Id.*, art. 36(2) ("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 as deletion, 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 with the network user.").

²⁹ *2006 Regulation*, *supra* note 9, art. 14–17.

³⁰ *2010 Tort Liability Law*, *supra* note 15, art. 36(3) ("Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user.").

³¹ *See, e.g.,* Weixiao Wei, *ISP Copyright Liability in China: Collision of the Knowledge Standard and the New Tort Liability Act*, 33(8) EUR. INTELL. PROP. REV. 507 (2011); *see also* Qian Tao, *The Knowledge Standard for the Internet Intermediary Liability in China*, 20(1) INT'L J.L. & INFO. TECH. 1 (2011).

³² For instance, Article 11 of the 2013 Provision, which agrees with Qian Wang's suggestion, avoids creating the vicarious liability that corresponds to the United States' copyright law out of nowhere. It prescribes that

[w]here a network service provider directly gains economic benefits from the work, performance, or audio or video recording provided by a network user, the people's court shall determine that the network service provider has a higher duty of care for the network user's infringement of the right of dissemination on information networks. If a network service provider gains benefits from inserting advertisements into a specific work, performance, or audio or video recording or gains economic benefits otherwise related to the disseminated work, performance, or audio or video recording, it shall be determined that the network service provider directly gains economic benefits as mentioned in the

infringement of network service providers,³³ especially stipulating the abetting and aiding infringement³⁴ with a specific knowledge standard,³⁵ the 2013 Provision has provided a consistent framework for evaluating and assessing NSP infringement with regard to the relevant issues over online copyright disputes. The imputing and limiting of online copyright liabilities are embodied and the balancing of interests is reflected. Based on the investigation of cases and consultation from academes and different sectors, the promulgation of the 2013

preceding paragraph, however, excluding the general advertising and service charges, among others, collected by a network service provider for providing network services.

2013 Provision, art. 13. *Cf.* Wang, *supra* note 19.

³³ Article 3 of the 2013 Provision differentiates two acts of provision: (i) the providing of works and (ii) the providing of network services. This differentiation actually broadens the meaning of “the right of dissemination on information networks.” In this light, the distinction between direct and indirect infringement occurs – the former corresponds the providing of works and the latter corresponds the providing of network services. This is a breakthrough in the understanding of the infringement of dissemination right, which clears the fog in questions as to whether to use “server standard” or any other standards to determine the right of dissemination on information networks, and the legal nature of the act of providing network technology and facility service.

³⁴ *See id.*, art. 7 (“Where a [NSP] abets or aids any network user in infringing upon the right of dissemination on information networks when providing network services, the people’s court shall hold the network service provider liable for the infringement. Where a [NSP] induces or encourages any network user to infringe upon the right of dissemination on information networks . . . the people’s court shall determine that the [NSP] has abetted the infringement. Where a [NSP] which knows or should have known that a network user is using its network services to infringe upon the right of network dissemination of information fails to take necessary measures . . . the people’s court shall determine that [NSP] has aided in the infringement.”).

³⁵ *See id.*, art. 9 (“The people's court shall determine whether a [NSP] should have known an infringement based on a clear fact that a network user has infringed upon the right of dissemination on information networks and by taking into account the following factors”); *see also id.*, arts. 10–14.

Provision will help courts at all levels in China to keep pace with the times and be more scientific and normalized in adjudicating copyright cases in the future.

However, for several reasons, the 2013 Provision does *not* provide total clarity on attribution rules. First, it has been established that fault is a determinative factor in deciding whether the NSP is liable for infringement as an abettor or aider.³⁶ However, the 2013 Provision defines fault as knowledge, which overlooks other types of intentional fault including inducing or encouraging.³⁷ Second, the 2013 Provision takes an approach that stresses only the subjective element rather than the objective element. Knowledge (know or should have known)³⁸ becomes the key deciding factor; the objective factors, such as nature of the services provided and the NSP's capability of information management, are treated as factors to be taken into account in deciding the knowledge.³⁹ Third, the factors in deciding fault of an NSP are enumerated with examples, which limit judges' discretion.⁴⁰ This legislative technique becomes disadvantageous when facing new technologies. Last but not least, the provisions relating to copyright liabilities in various legal instruments have not yet been unified, especially considering that the Copyright Law is currently under the third

³⁶ *Id.*, art. 8; *see also id.*, art. 6 (“Where . . . the network service provider is able to prove that it only provides network services and is not at fault, the people’s court shall not determine that the network service provider has committed an infringement.”).

³⁷ *Id.*, art. 8 (“The fault of a [NSP] means whether the network service provide knows or should have known a network user's infringement of the right of dissemination on information networks”). *But see* A Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47, 64 (1989) (indicating that fault encompasses different categories such as intent and negligence).

³⁸ *Id.*, art. 8.

³⁹ *Id.*, art. 9 (“The people’s court shall determine whether a [NSP] should have known an infringement based on a clear fact that a network user has infringed upon the right of dissemination on information networks and by taking into account the following factors: (1) The [NSP]'s capability of information management, as required according to the nature of services provided, manners of provision of services, and possibility of infringement attributable thereto.”).

⁴⁰ *See, e.g., id.*, art. 9 (prescribing that clear facts, combined with certain factors, are required to be taken into account in determining whether the network service providers “should have known” the direct infringement).

revision. Therefore, the effect of application of the 2013 Provision remains to be seen.

A. *Debate on the Tort Basis for NSP Copyright Liability*

Generally speaking, tort infringement acts lead to tort liability. However, under current tort theory, debates among scholars on the tort infringement basis of NSP copyright liability have been getting heated. Some argue for joint infringement,⁴¹ while others argue that NSPs are severally liable.⁴² Prior to the promulgation of the 2010 Tort Liability Law, the act of joint infringement was used to define the relationship between the NSP and the network users; for instance, the 2006 Network Interpretation provides that the NSP shall bear joint

⁴¹See, e.g., Yang Ming (杨明), “Jianjie Qinquan” Bian: Cong “Baidu, Yahu An” Shuo Kai Qu (“间接侵权”辨: 从“百度、雅虎案”说开去) [Discussion on “Indirect Infringement”: Taking “Baidu & Yahoo” Cases as the Beginning], 10 WANGLUO FALV PINGLUN (网络法律评论) [INT. L. REV.], no.1, 2009, at 11; see also Wu Handong (吴汉东), Qinquan Zeren Fa Shiye Xia De Wangluo Qinquan Zeren Jiexi (侵权责任法视野下的网络侵权责任解析) [Analysis of the Online Infringement Liability from the Perspective of Tort Law], 140 FASHANG YANJIU (法商研究) [STUD. L. & BUS.], no. 6, 2010, at 28.; Wu Handong (吴汉东), Lun Wangluo Fuwu Tigongzhe de Zhuzuoquan Qinquan Zeren (论网络服务提供者的著作权侵权责任) [Tort Liability for Indirect Infringement of Copyright in the Internet According to Article 36 of the Tort Law PRC], ZHONGGUO FAXUE (中国法学)[CHINA LEGAL SCI.], no.2, 2011, at 38.

⁴² See, e.g., Lixin Yang(杨立新), *Lun Jinhe Qinquan Xingwei* (论竞合侵权行为) [On Overlapping Torts], QINGHUA FAXUE (清华法学) [TSINGHUA L. REV.], no. 1, 2013, at 119; Lixin Yang (杨立新), *Qinquan Zeren Fa Guiding de Wangluo Qinquan Zeren de Lijie yu Jieshi* (<<侵权责任法>>规定的网络侵权责任的解释) [Comprehension and Interpretation of Internet Infringement Liability Regulated in the Tort Law], 18 GUOJIA JIANCHAGUAN XUEYUAN XUEBAO (国家检察官学院学报) [J. NAT’L PROSECUTORS C.], no. 2, 2010, at 3; see also Xu Wei (徐伟), *Tongzhi Yichu Zhidu de Chongxin Dingxing Jiqi Tixi Xiaoying* (通知移除制度的重新定性及其体系效应) [The Redefinition and Systematic Influence of Notice and Takedown Regime], 35 XIANDAI FAXUE (现代法学) [MOD. L. SCI.], no. 1, 2013, at 58.

liability with the users.⁴³ The same approach was adopted in Article 23 of the 2006 Regulation.⁴⁴ However, the 2010 Tort Liability Law recognizes joint and several liabilities for aiding and abetting torts, without referring to its liability basis.⁴⁵ In judicial practice, Chinese courts have been employing the joint infringement theory. For instance, in the case *Zhongkai Culture v. Guangzhou Shulian*⁴⁶, the court applied the 2006 Network Interpretation, stating that the defendant, who did not upload a film for direct downloading, had abetted and assisted the users in committing the infringement and should bear joint infringement liability with direct infringers.⁴⁷

⁴³ 2006 Network Interpretation, *supra* note 13, art. 4 (“[W]here an internet service provider participates in any act of another person to infringe copyright through network, or aids and abets, on the internet, others to carry out any act of copyright infringement, the people’s court shall, pursuant to the provision of Article 130 of the General Principles of the Civil law, investigate it and other actors or any other person having directly carried out the infringement, and impose joint liability thereon.”).

⁴⁴ 2006 Regulation, *supra* note 9, art. 23 (“[W]here a network service provider that provides searching or linking service to its subscribers, disconnects the link to the infringing works, performances, sound recordings or video recordings upon receipt of the right owner’s notification according to these Regulations, it shall not be liable for damages; where it knows or has reasonable grounds to know that the linked works, performances, sound recordings or video recordings infringe another person’s right, it shall be jointly liable for the infringement.”).

⁴⁵ See 2010 Tort Liability Law, *supra* note 15, art. 8 (“where two or more persons jointly commit a tort, causing harm to another person, they shall be liable jointly and severally.”); *Id.*, art. 9 (“[O]ne who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.”).

⁴⁶ Guangdong Zhong Kai Wenhua Fazhan Youxiangongsi Su Guangzhou Shu Lian Ruanjianjishu Youxiangongsi, Shanghai Ka Fu Guanggao Youxiangongsi Guangdong (广东中凯文化发展有限公司诉广州数联软件技术有限公司、上海卡芙广告有限公司) [*Zhongkai Culture Development Ltd. v. Guangzhou Shulian Software Technology Ltd., Shanghai CAV*] (Shanghai No.1 Interm. People’s Ct., Nov. 22, 2007).

⁴⁷ *Id.*

Among academics, Professor Ming Yang argues for joint infringement as a basis for NSP liability in China.⁴⁸ He points out that unlike the criminal law, joint infringement in civil law tort theory stresses an objective infringement act, rather than the existence of conspiracy or joint intent or knowledge.⁴⁹ If the indirect infringement system is used to define NSP liability in the form of assisting infringement, major confusion will occur surrounding the nature of the relationship between a direct and indirect infringer.⁵⁰ Based on this observation, he claims that it is unnecessary to import an indirect infringement system in China.⁵¹

However, the above point of view has been challenged by Wei Xu, whose argument stems from the concept of joint infringement itself.⁵² The major disagreement concerns the question of whether the infringements committed by multiple persons without connected intent constitute joint infringement. For a start, he suggests a systematic reading of articles 8 through 12 of the 2010 Tort Liability Law, and finds that the answer to the above question is no.⁵³ He advises assisting infringement liability rather than joint infringement liability in a situation without connected intent between NSP and its users.⁵⁴ Next, he analyzes a dilemma in practice if the NSP is considered as a joint tortfeasor. Under the joint infringement theory, the joint tortfeasor is required to participate in the necessary joint action as a necessary party to the litigation.⁵⁵ However, in practice, users who commit direct infringement are highly impossible to locate,

⁴⁸ See Yang Ming, *supra* note 41.

⁴⁹ *Id.* at 23.

⁵⁰ *Id.*

⁵¹ *Id.* at 28.

⁵² Xu Wei (徐伟), *Wangluo Fuwu Tigongzhe Liandai Zeren Zhi Zhiyi* (网络服务提供者

连带责任之质疑) [*Questioning the Joint Liability of Internet Service Providers*], FAXUE (法学) [LEGAL SCI. MONTHLY], no. 5, 2012, at 82.

⁵³ *Id.* at 83.

⁵⁴ *Id.* at 84.

⁵⁵ *Id.* at 85.

or the cost is too high to be added as a party to the litigation.⁵⁶ In addition, the NSP that bears liability has a right to pursue recovery from direct infringers, but it is difficult and impractical for an NSP to do so.⁵⁷ Accordingly, Xu proposes that the NSP shall be severally rather than jointly liable.⁵⁸

Tort law Professor Lixin Yang provides a third opinion.⁵⁹ Professor Yang describes a logic gap between the infringement committed by multiple parties and respective liability forms in traditional tort law theory in China.⁶⁰ The unresolved question is whether the combination of direct infringement and indirect infringement constitutes joint infringement. He advises that it is not joint infringement but joint and several liabilities based on consideration of public policy.⁶¹ From his point of view, infringement activity leads to corresponding infringement liability. Given that, joint infringement leads to joint and several liability, the independent infringement act leads to proportionate liability, and the third party infringement leads to third party liability. A gap, consequently, is generated concerning the correspondent form of infringement, which leads to unreal joint liability.⁶² He proposes a concept of “overlapping infringement,”⁶³

⁵⁶ *Id.* at 86.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Lixin Yang, *On Overlapping Torts*, *supra* note 42, at 9.

⁶⁰ *Id.* at 120.

⁶¹ Lixin Yang, *Ruhe Lijie Qinquan Zeren Fa Zhong Wangluo Qinquan Zeren* (如何理解侵权责任法中网络侵权责任) [*How to Understand Online Infringement Liability Under the Tort Liability Law*], JIANCHARIBAO (检察日报) [THE PROCURATORATE DAILY], March 31, 2010. Available at http://newspaper.jcrb.com/html/2010-03/31/content_41945.htm.

⁶² Professor Lixin Yang explains that “unreal joint liability refers to the act conducted by multiple tort-feasors, in violation of the statutory obligations, which results in damage of one victim, or different acts conducted by different tort-feasors, which result in the same tort liability. In each case, any tort-feasor bears full liability for the performance of the others, whose liability are thus eliminated. It also refers to the liability in accordance with the provisions of the special form of torts.” See LIXIN YANG, *TORT LIABILITY LAW* 125 (2d ed, China Law Press 2012).

⁶³ See Lixin Yang, *On Overlapping Torts*, 1 *TSINGHUA LAW REVIEW* 119, 123 (2013).

constituted by multiple infringement activity, which has direct or indirect causation of the damage. The infringer bears the unreal joint liability. When the concept of overlapping infringement comes into play, the logic gap that has long existed in tort law theory is filled. In this light, the theoretical basis for NSP liability can be initially established.⁶⁴

B. Debate on the NSP's Knowledge Standard

The requisite level of knowledge possessed by the NSP in determining its liability of online copyright infringement committed by its users has also been one of the major controversies in China. The 2000 Network Interpretation raises the “explicit knowledge” requirement in Article 5.⁶⁵ The 2006 Regulation sets forth the requisite knowledge requirement for limiting the liability of NSPs that provide services related to information storage and searching or linking. Article 22(3) employs the terms “*knows*” or “*has reasonable ground to know*” for limiting liability of an NSP that provides storage space,⁶⁶ while Article 23 uses the phrase “*explicitly knows*” and “*should have known*” for an NSP that provides searching or linking services.⁶⁷ Prior to the promulgation of the 2013 Provision,

⁶⁴ *Id.*

⁶⁵ See 2000 Network Interpretation, *supra* note 13, art. 5 (“a network service provider that provides content service *explicitly knows* that network users use its network to infringe copyright of others, or after receiving a substantiated warning from copyright owners but fails to take measures such as removing the infringing content to eliminate consequence of the infringement, the People’s Courts shall pursue joint liability of the network service provider for infringement with network users, pursuant to Article 130 of the General Principles of the Civil Code.” (emphasis added)).

⁶⁶ 2006 Regulation, *supra* note 9, art. 22 (“[A] [NSP] that provides its subscribers with network storage space for them to make works, performances, sound recordings or video recordings available to the public, and meets the following conditions shall not be liable for damages: . . . it does not know or has no reasonable grounds to know that the works, performances, sound recordings or video recordings provided by its subscribers infringe any other persons’ rights . . .”).

⁶⁷ *Id.*, art. 23 (“[W]here a [NSP] that provides searching or linking service to its subscribers, disconnects the link to the infringing works, performances, sound recordings or video recordings upon receipt of the right owner’s notification according to these Regulations, it shall not be liable for damages; where it knows or should have known that the linked works,

it was unclear what “should have known” means. For instance, compare *IFPI v. Baidu*⁶⁸ and *IFPI v. Yahoo*.⁶⁹ Both cases are very similar in that they concern recording labels suing search engines and linking service providers. Nevertheless, they produced different results. In *IFPI v Baidu*, the IFPI sued Baidu on behalf of seven music companies for providing links to a website that offered free downloading of infringing songs.⁷⁰ The Beijing First Intermediate People’s Court ruled in favour of Baidu, holding that the plaintiff failed to notify Baidu of the infringing files, and Baidu had no fault for searching and linking to the other websites because it ‘should not have known’ of the infringing material.⁷¹ The Beijing Higher People’s Court upheld the decision.

However, in a similar case *IFPI v Yahoo*, the defendant Yahoo who provided links to the third websites for free music downloading, was held liable for aiding infringement.⁷² It is notable that though the defendants in both cases provided the same service, there were different facts that were essential for the decision. The music labels sent notices to the defendant including the name of the

performances, sound recordings or video recordings infringe another person’s right, it shall be jointly liable for the infringement.”).

⁶⁸ Jinpai Yule Shiye Youxiangongsi Yu Beijing Baidu Wang Xun Keji Youxiangongsi Qinfan Xinxi Wangluo Chuanbo Quan Jiufen Shangsuo An (金牌娱乐事业有限公司(Gold Label Entertainment Limited)与北京百度网讯科技有限公司侵犯信息网络传播权纠纷上诉案) [*IFPI v. Baidu*] (Beijing Higher People’s Ct. Apr. 28, 2007); Jinpai Yule Shiye Youxiangongsi Su Beijing Baidu Wang Xun Keji Youxiangongsi Qinfan Xinxi Wangluo Chuanbo Quan Jiufen An (金牌娱乐事业有限公司诉北京百度网讯科技有限公司侵犯信息网络传播权纠纷案) [*IFPI v. Baidu*] (Beijing No. 1 Interm. People’s Ct. Nov. 17, 2006).

⁶⁹ *IFPI v. Alibaba*, the Beijing No. 2 Intermediate People’s Court, No. Erzongminchuzi 2626/2007; the Beijing Higher People’s Court, No. Gaominzhongzi 1990/2007.

⁷⁰ *IFPI v. Baidu* (Beijing No. 1 Interm. People’s Ct. 2006).

⁷¹ *Id.*

⁷² *IFPI v. Alibaba*, the Beijing No.2 Intermediate People’s Court, No. Erzongminchuzi 2626/2007; the Beijing Higher People’s Court, No. Gaominzhongzi 1990/2007.

song, the name of the album and the singer of each infringing file. The court held that the above three pieces of information were enough to locate the copyrighted music. However, Yahoo refused to disconnect the access to the infringing material.⁷³ Yahoo should have known of the infringement, therefore it constituted aiding infringement.⁷⁴

In another case *Fanya v Baidu*,⁷⁵ the right holder also sent notices to the defendant, demanding the defendant to disconnect access to the infringing material. However, these notices were different from the notices sent in *IFPI v Yahoo* that were sufficient for locating the illegal music files. Instead, the notices from Fanya only provided the name of the song, with which alone would be very difficult to locate the copyrighted material enjoyed by the copyright holders.⁷⁶

In order to understand what constitutes “know” or “should have known” for a searching or linking service provider, first, a notice that is sufficient to locate the infringing material is required. A noncompliance notice will not constitute explicit knowledge; but, if it is sufficient to locate the infringing material, the “red flag” test is met.⁷⁷ Second, there are different types of service provided by the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Zhejiang Fan Ya Dianzishangwu Youxiangongsi Su Beijing baidu Wang Xun Keji

Youxiangongsi Deng Qinfan Zhu Zuo Quan Jiufen An (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等侵犯著作权纠纷案) [*Fanya v. Baidu*] (Beijing Higher People’s Ct.

Dec. 19, 2008).

⁷⁶ *Fanya v. Baidu* (Beijing Higher People’s Ct. 2008).

⁷⁷ The term “red flag,” referring to apparent knowledge, was borrowed from the United States safe harbour knowledge standard. *See* S. Rep. No. 105-190, at 44 (1998) (“ Subsection (c)(1)(A)(ii) can best be described as a “red flag” test. As stated in subsection (1), a service provider need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure complying with subsection (h)), in order to claim this limitation on liability (or, indeed any other limitation provided by the legislation). However, if the service provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.”); *see*

searching or linking NSPs. One is the search box, which has no bias towards the content it linked when the key words are being typed in. The other is the list provided by some search engines. By clicking song or singer's names in the list such as 'top 100' songs, users can reach the same result as typing the name in the search box. However, the culpability of the search engine provider under the two situations is different. By providing the list, the search engine providers are supposed to have higher duty of care. When infringing material is apparent like a 'red flag' from a glance of the list, the service provider is required to disconnect it, rather than turning a blind eye to the infringement.⁷⁸

The NSP knowledge standard has also been uncertain since the drafting of Article 36⁷⁹ of the 2010 Tort Liability Law.⁸⁰ There is no doubt that "know" includes "explicitly know." However, whether it also includes "should have known" or "have reason to know" generates fierce debate. Some legal professionals maintain that "know" includes "should have known" because "many culpable internet service providers might escape liability if their liabilities

Cao Yang (曹阳), *Zhishichanquan Jianjie Qinquan Zeren de Zhuguan Yao Jian Fenxi* (知识产权间接侵权责任的主观要件分析) [*The State of Mind of Infringers in Rendering Intellectual Property Indirect Infringement Liability: Take ISP As the Main Object*], WANGLUO FALV PINGLUN (网络法律评论) [INT. L. REV.], no. 11, 2012, 24, for relevant discussion in China.

⁷⁸ Qian Wang, *On the Determination of Indirect Liability of Information Location Service Providers*, 2 INTELL. PROP. 3 (2009).

⁷⁹ 2010 *Tort Liability Law*, *supra* note 15, art. 36(3) ("[W]here a [NSP] knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user.").

⁸⁰ Qian Tao, *The Knowledge Standard for the Internet Intermediary Liability in China*, 20 INT. J. L. & INFO. TECH. 1, 1, 2-3 (2011) ("In the preliminary draft and the second draft of the Tort Liability Law, the term used was "actually knew", then the legislators changed it to "knew" in the third draft, and it was "knew or should have known" in the fourth draft, ultimately "knew" is used in the final version.") (emphasis added).

are only based on actual knowledge,”⁸¹ while some disagree because “it would incur a considerable duty of care for website operators.”⁸² The third opinion suggests that the knowledge requirement includes “have reason to know” instead of “should have known,” because the latter may increase the level of care for internet service providers, whereas the former is equal to “awareness of facts or circumstances” under the DMCA.⁸³ Though the two terms both relate to the term “constructive knowledge,” and vaguely to the duty of care under the tort of negligence at common law, they have a slight difference:

The term “had reason to know” has a slight difference with “should have known”. The first centers on the “reason”, while, the second emphasizes the “duty” which could be a legal duty of care under a statute or based on an agreement. The “has reason to know” is more like a factual determination based upon the circumstances and information available to the parties, while, the “should have known” is more like a judicial determination of what is a reasonable level of knowledge given the parties and the circumstances. Hence, the first is a party-specific objectivity, and the second is a community-focused objectivity.⁸⁴

Tao disagrees with all above opinions in interpreting “know” in the 2010 Tort Liability Law and instead proposes the United States’ approach in the DMCA.⁸⁵ Since China has enacted no rule preventing the imposition of a monitoring obligation,⁸⁶ the first and third approaches would result in

⁸¹ *Id.* at 3.

⁸² *Id.* at 4.

⁸³ *Id.*

⁸⁴ *Id.* at 13.

⁸⁵ *Id.* at 14.

⁸⁶ The 2013 Provision implies that the NSP has no monitoring obligation to seek out facts and circumstances indicating illegal activities. *See 2013 Provision, supra* note 17, art. 8 (“Where a network service provider fails to conduct proactive examination regarding a network user’s infringement on the right of dissemination on information networks, the people’s court shall not determine on this basis that the network service provider is at fault. Where a network service provider is able to prove that is has taken reasonable and effective technical measures

disproportionate burdens on intermediaries. In addition, Tao argues that the adaptation of the term “reason to know” and “should have known” in Article 22 of the 2006 Regulation is a misunderstanding by legislators⁸⁷ and that an interpretation consistent with the DMCA would avoid more confusion and legal uncertainty.⁸⁸

Prior to the promulgation of the 2013 Provision, Tao’s interpretation of “know” in Article 36 of the 2010 Tort Liability Law was of great significance, because a broad interpretation of the knowledge standard would lead to an excessive burden for the NSP. However, since 2013, the status of NSP liability has changed. Indirect copyright liability attribution rules, which employ “know” or “should have known” have been introduced based on the knowledge of an NSP.⁸⁹

Under the rudimentary framework of indirect liability for digital copyright infringement, the knowledge requirement in different legislation needs to be re-examined. Article 36 of the 2010 Tort Liability Law adopts a horizontal approach which is applicable to both intellectual property infringement and other civil claims governing content including copyright, and defamatory and obscene content.⁹⁰ It is advisable to interpret this article in a broad way, because it “is not only fatal to the imposition of copyright liability on [NSPs] but also important for other kinds of content-related liability for [NSPs] such as liability for defamatory

but it is still difficult for it to discover a network user’s infringement . . . the court shall determine that the network service provider is not at fault.”).

⁸⁷ Qian Tao, *The Knowledge Standard for the Internet Intermediary Liability in China*, 20(1) INT’L J.L. & INFO. TECH. 1, 14 (2011).

⁸⁸ *Id.* at 17.

⁸⁹ 2013 Provision, *supra* note 17, art. 8 (“The fault of a network service provider means whether the network service provide [sic] knows or should have known a network user’s infringement of the right of dissemination on information networks.”).

⁹⁰ 2010 Tort Liability Law, *supra* note 15, art. 36 (“[a] network user or network service provider who infringes upon the civil right or interest of another person through network shall assume the tort liability.”); *id.* art. 2 (“civil rights and interests” include “the right to life, the right to health, the right to name, the right to reputation, the right to . . . copyright . . . and other personal and property rights and interests.”).

content.”⁹¹ Further, as a liability attribution rule rather than liability exemption rule, the knowledge requirement in Article 36 is obviously broader than that of the safe harbor provisions under the 2006 Regulation. It is therefore concluded that the term “know” in article 36 of the 2010 Tort Liability Law embraces the meaning of “explicitly know” and “should have known” to determine the NSP’s knowledge of copyright infringements committed by the third party.

C. *Debate on the Nature of Safe Harbors*

There have been passionate and polarized debates on the nature of the Chinese “safe harbor” provisions⁹² provided in the 2006 Regulation.⁹³ A contextual analysis suggests the language used in the 2006 Regulation reflects divergent approaches towards the liability model. For instance, the safe harbors all use the language of liability limitation, such as “shall not be liable for damages”;⁹⁴ however, the Regulation provides for liability attribution in the second section: “where [the NSP] knows or has reasonable grounds to know that the linked works, performances, sound recordings or video recordings infringe another person’s right, it shall be jointly liable for the infringement.”⁹⁵ Given the ambiguity of what is prescribed in the legislation, both courts and academics suggest clarifying the nature of the provisions.⁹⁶ Although the safe harbors have

⁹¹ Weixiao Wei, *supra* note 31, at 516.

⁹² 2006 Regulation, *supra* note 9, art. 20–23.

⁹³ See, e.g., Wei Xu, *The Redefinition and Systematic Influence of Notice and Takedown Regime*, 1 MOD. L. SCI. 58 (2013); Jiarui Liu, *The Safe Harbor Rules of the Chinese Network Service Providers: a Comment on the Yahoo Case*, 19 INTELL. PROP. 13 (2009); Qian Wang, *Effect of the Safe Harbor Provisions Under the Communication Regulations*, 6 LEGAL SCI. MONTHLY 128 (2010) [hereinafter *Effect of the Safe Harbor Provisions*].

⁹⁴ 2006 Regulation, *supra* note 9, art. 20–23.

⁹⁵ 2006 Regulation, *supra* note 9, art. 23.

⁹⁶ See, e.g., Qian Wang, *Study on Copyright Infringement of Video-Sharing Websites*, 5 FRONTIERS L. IN CHINA 275 (2009); Xue Snow Dong & Krishna Jayakar, *The Baidu Music Settlement: A Turning Point for Copyright Reform in China?*, 3 J. INFO. POL’Y. 77 (2013); Huaiwen He, *Safe Harbor Provisions of Chinese Law: How Clear are Search Engines from Liability?*, 24 COMPUTER L. & SECURITY REP. 454 (2008); Ke Steven Wan, *Internet Service Providers’ Vicarious Liability Versus Regulation of Copyright Infringement in China*, 2 J.L.,

generally been considered by academic circles as liability exemptions, some disagree.⁹⁷

There is general international consensus that the purpose of safe harbors is to be a “limitation of liability” or an “exemption from liability.” For instance, the European Union Directive on Electronic Commerce⁹⁸ defines the safe harbors as a “limitation of liability” or as constituting an “exemption from liability.”⁹⁹ The same approach is adopted in the United States.¹⁰⁰ In China, the 2010 Guiding Opinion issued by the Beijing Higher People’s Court referred to Articles 20 to 23 of the 2006 Provision as constituting a “liability exemption.”¹⁰¹ Similarly, the mainstream academic view is that the major purpose of the notice and take down procedure is to exempt NSPs from indirect liability for direct infringement committed by network users; that the nature of the NSP safe harbors is not liability attribution but exemption; and that the safe harbors are not the final establishment of liability but the defenses.¹⁰²

TECH. & POL’Y 376 (2011); Qian Tao, *Legal Framework of Online Intermediaries’ Liability in China*, 14 INFO. 59 (2012).

⁹⁷ See Wei Xu, *supra* note 93.

⁹⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter *E-Commerce Directive*].

⁹⁹ See *id.* (“In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned . . .”).

¹⁰⁰ See also 17 U.S.C. § 512 (2006) (entitled “Limitations on liability relating to material online”).

¹⁰¹ The Beijing Higher People’s Court’s Guiding Opinions on Several Issues Relating to Trial of Cases of Network Copyright Dispute, effective May 17, 2010, *translation available at* <http://www.lawinfochina.com/display.aspx?lib=law&id=8388&CGid=> (last visited Sept. 14, 2014).

¹⁰² See academic opinions summed up in part 1(1) of Wei Xu, *The Redefinition and Systematic Influence of Notice and Takedown Regime*, 1 MOD. L SCI. 58 (2013); see also Jiarui Liu, *The Safe Harbor Rules of the Chinese Network Service Providers: a Comment on the Yahoo Case*, 19 INTELL. PROP. 13, 14 (2009).

However, Wei Xu disagrees with the academic consensus.¹⁰³ He argues that adopting the theory of liability exemption contradicts the NSP's fault-based liability for third party copyright infringement.¹⁰⁴ He proposes the following inferences, based on the theory of liability exemption. First, infringement liability is established before the notice is received by the NSP, and the NSP is exempted from liability as soon as it deletes the infringing content.¹⁰⁵ Alternatively, infringement liability is not established before the notice is received by the NSP but after, and as soon as the NSP deletes the infringing content, it is exempted from liability.¹⁰⁶ He indicates that the first inference contradicts fault-based liability because before the notice is received, the NSP bears no fault.¹⁰⁷ The second inference, according to Xu, is also incorrect because if receiving the notice means fault, this would contradict Article 36(3) of the 2010 Tort Liability Law,¹⁰⁸ which suggests that fault means knowledge and failing to delete.¹⁰⁹ However, this inference has severe defects. First, the author falsely states that the fault-based liability requires that before the notice is received there has been no fault with the NSP. This statement equates fault with notice, leaving out the possibility of other forms of knowledge of an NSP including an email from a third party, actual knowledge obtained before receiving the notice, or red flag knowledge¹¹⁰. Second, the author misunderstands the meaning of fault as knowledge plus failing-to-delete. It has been made clear under Article 8 of the 2013 Provision that fault of the NSP means knowledge of a network user's infringement.¹¹¹

¹⁰³ Wei Xu, *supra* note 93, at 59.

¹⁰⁴ *Id.* at 61–62.

¹⁰⁵ *Id.* at 62.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *2010 Tort Liability Law*, *supra* note 15, art. 36 (“[w]here a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user.”).

¹⁰⁹ *See* Wei Xu, *supra* note 93, at 62.

¹¹⁰ For a definition of “red flag” knowledge, see note 77 *supra*.

¹¹¹ *2013 Provision*, *supra* note 17, art. 8(1) (“The people’s court shall determine whether a network service provider is liable for infringement as an abettor or aider according to the fault

Qian Wang, a leading professor in the area of NSP copyright liability, argues that the safe harbor provisions are actually two sides of the same coin—serving as both the attribution and limitation of NSP liability.¹¹² By analyzing each condition in the safe harbor provisions, he suggests that some liability exemption provisions correspond to direct liability and some correspond to aiding liability.¹¹³ For instance, Article 22(3) provides that the NSP shall not be liable for damages if “it does not know or has no reasonable grounds to know that the works, performances, sound recordings or video recordings provided by its subscribers infringe any other persons’ rights.”¹¹⁴ This is obviously an expression of liability attribution. Expressing this article another way—as “knows or has reasonable ground to know”—forms the attribution of aiding liability. Prior to the promulgation of the 2013 Provision, this “two sides of the same coin” approach facilitated the understanding of the NSP’s copyright liability for infringement committed by users under circumstances for which there were no relevant laws regarding indirect liability.

Since the 2013 Provision has been issued, Wang’s approach, which has been adopted by China’s courts for years, is no longer compatible. First, not all safe harbor provisions correspond to a form of liability attribution. Distinguishing these provisions becomes a difficult task when applying the safe harbors. Second, problems occur with applying the conditions of each safe harbor: Are the conditions necessary, sufficient or both? An in-depth analysis of United States’ safe harbor provisions below will facilitate an understanding of the changes in China’s safe harbor provisions.

An analysis of laws, cases, and academic debates over recent years in China shows that the absence of systematic indirect copyright liabilities is the root of confusion and chaos in the Chinese copyright regime. The lack of a comprehensive indirect copyright liability scheme not only leaves a degree of

of the network service provider. The fault of a network service provider means whether the network service provide [sic] knows or should have known a network user’s infringement of the right of dissemination on information networks.”).

¹¹² *Effect of the Safe Harbor Provisions Under the Communication Regulations*, *supra* note 93.

¹¹³ *Id.* at 136.

¹¹⁴ *Id.*

uncertainty to the issue of digital copyright infringement, but also creates a loophole in Chinese tort law. Unlike the United States, which has established indirect liability for intellectual property infringement through legislation and the common law, China has been left behind—although a significant body of research has contributed to this area. It is reasonable to speculate that the inconsistency in the copyright regime, even in the tort law regime, has posed a significant threat to the interpretation and application of digital copyright infringement in judicial practice.

II

EXPERIENCE FROM THE UNITED STATES

China, as a developing country, has gained some nutrition from the existing body of law in the United States. For instance, China's 2006 Regulation was a result of learning from the United States' DMCA safe harbor provisions. However, due to the different legal system, the attribution rules of indirect copyright liability in the United States have been ignored by China. The United States' indirect copyright liability doctrines were developed through precedent; accordingly, there have been no codified rules on the attribution of indirect liability for China to borrow. Thus China has stepped into a dilemma: on the one hand, the safe harbor rules play important roles in both attribution and exemption of liabilities; on the other hand, the 2010 Tort Liability Law and 2013 Provision also seek to serve as liability attribution rules. Since these rules have not been systematically organized and interpreted, a thorough reading of United States' doctrines is helpful.

A. *Fault-Based Liability Attribution Rules Developed from Common Law Cases*

As a pioneer in the development of copyright laws based on the "early, rapid and widespread development of computer-based commerce",¹¹⁵ the United States occupies a dominant position in the development of indirect copyright liability laws which has impacted many other jurisdictions. Indirect (or

¹¹⁵ Thomas Hays, *The Evolution and Decentralization of Secondary Liability for Infringements of Copyright-Protected Works: Part 1*, 28(12) EUR. INTELL. PROP. REV. 617, 617 (2006).

secondary) liability¹¹⁶ of service providers for online copyright infringement continues to be a highly controversial issue in the United States. Since Congress enacted its first copyright law in 1790¹¹⁷, copyright law has been in constant conflict with evolving technological trends because technology reduces the ability of copyright holders to control their property.¹¹⁸ This significant judicial dilemma led to the development of three indirect liabilities in the United States copyright regime: contributory liability and vicarious liability, which have been applied in a long line of cases, and inducement liability, which developed only in the last ten years.¹¹⁹

1. Is the Sony Rule Still Applicable in a Digital World? The Implied Factors in Contributory Liability

Contributory infringement in the United States is a common law liability regime. A defendant who engages in “personal conduct that encourages or assists the infringement” may be held liable for contributory infringement.¹²⁰ Courts began recognizing claims of contributory liability for infringement in the late nineteenth century, but only on the basis of intentional acts.¹²¹ In one of the earliest cases involving contributory copyright infringement, *Harper v.*

¹¹⁶ Unlike in the United Kingdom, where the secondary infringement refers to the unauthorized dealing of infringing copyrighted materials, the term “secondary liability” in the US usually means contributory, vicarious or inducing liabilities. This article adopted “indirect liability” instead of “secondary liability” to avoid the confusion. See BAINBRIDGE, *supra* note 5, at 182-185.

¹¹⁷ Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (repealed 1831).

¹¹⁸ See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3 (2010) (discussing the conflict between copyright regimes and technological evolution).

¹¹⁹ Allen N. Dixon, *Liability of Users and Third Parties for Copyright Infringements on the Internet: Overview of International Developments*, in PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW 12, 15 (Alain Strowel ed., 2009).

¹²⁰ *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998).

¹²¹ Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 VAND. L. REV. 675, 683–84 (2011) (describing the development of contributory liability for intellectual property infringement in the United States).

Shoppell,¹²² the defendant was held liable as a joint tortfeasor for selling a printing plate, knowing that the purchaser would use it to make infringing copies. Later, in *Kalem Co. v. Harper Bros.*,¹²³ the owner of a motion picture was held liable for authorizing the infringing activity by selling copies to exhibitors and supplying advertisements for the infringing exhibitions based on his knowledge that the illegal use would constitute an infringement. These early cases reflect the knowledge requirement to impose copyright liability. *Gershwin Publishing Corp. v. Columbia Artists Management*¹²⁴ developed a two-prong test for contributory infringement: “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”¹²⁵

In the 1980s, the Supreme Court again confronted the issue of contributory infringement in *Sony Corp. v. Universal City Studios, Inc. (Betamax)*, which has been considered a conundrum in balancing conflicting interests between copyright holders and technology innovators.¹²⁶ In *Sony*, the District Court borrowed the “staple article of commerce” doctrine from patent law,¹²⁷

¹²² *Harper v. Shoppell*, 28 F. 613, 615 (S.D.N.Y. 1886) ([T]he defendant is in no better position than he would be if he had himself printed and published the copyrighted matter . . . he is to be regarded as having sanctioned the appropriation of the plaintiffs’ copyrighted matter . . .”).

¹²³ *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62 (1911).

¹²⁴ *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159 (2d Cir. 1971).

¹²⁵ *Id.* at 1162.

¹²⁶ *Sony Corp. v. Universal City Studios, Inc. (Betamax)*, 464 U.S. 417 (1984); see Robert I. Reis, *The Sony Legacy: Secondary Liability Perspectives*, 183 AKRON INTELL. PROP. J. 205 (2009) (discussing the background of Sony).

¹²⁷ See 35 U.S.C. § 271 (2006); see also *Sony*, 464 U.S. at 417 n.41 (“The ‘staple article of commerce’ doctrine protects those who manufacture products incorporated into or used with patented inventions Because a patent holder has the right to control the use of the patented item as well as its manufacture, such protection for the manufacturer of the incorporated product is necessary to prevent patent holders from extending their monopolies by suppressing competition in unpatented components and supplies suitable for use with the patented item. The doctrine of contributory patent infringement has been the subject of attention by the courts and by Congress, and has been codified since 1952, but was never mentioned during the

expressing the concern that commerce might be hampered if a mere constructive knowledge of possible infringement rendered the product distributor liable.¹²⁸ After a lengthy review of Constitutional provisions and case law¹²⁹, the Supreme Court also recognized the role that the staple article of commerce doctrine played in balancing the interests of copyright holders and others' freedom of commerce, holding that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."¹³⁰

The *Sony* doctrine was tested in the landmark case of *A&M Records, Inc. v. Napster, Inc.* ("*Napster*")¹³¹, in which the Ninth Circuit refused to apply the *Sony* "staple article of commerce" doctrine to Napster for two reasons: (i) Napster had both the continuous ability to limit copyright infringement in ways that VCR manufacturers did not;¹³² and (ii) actual knowledge of direct infringement rendered the *Sony* rule inapplicable.¹³³ The application of the *Sony* doctrine in

copyright law revision process as having any relevance to contributory *copyright* infringement." (citation omitted)).

¹²⁸ *Sony*, 464 U.S. at 426–27.

¹²⁹ *Id.* at 428–34.

¹³⁰ *Id.* at 442.

¹³¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Plaintiffs alleged both contributory and vicarious copyright infringement because Napster promoted the unauthorized distribution and duplication of copyrighted music. At the trial court level, Napster relied on the *Sony* defense, alleging that its service, like a VCR, was capable of both legal and illegal uses. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

¹³² *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (noting that Napster "could block access to the system by suppliers of infringing material, and that it failed to remove the material"); see also, Rebecca Giblin-Chen, *Rewinding Sony: An Inducement Theory of Secondary Liability*, 27 EUR. INTELL. PROP. REV. 428, 429 ("Unlike *Sony*, Napster had a continuing ability to control its users.").

¹³³ *Napster*, 239 F.3d at 1020 ("We observe that Napster's actual, specific knowledge of direct infringement render's *Sony*'s holding of limited assistance to Napster.") Although contributory infringement is based on actual or constructive knowledge of specific

Napster revealed that, in future cases with respect to mass-market means of copying, courts should “inquire into non-infringing uses when the distributor of the device lacks actual knowledge of and control over specific infringements.”¹³⁴ In addition, when adjudicating a case involving a dual-purpose product (one capable of substantial non-infringing uses), factors such as actual knowledge of the direct infringement and the ability to control direct infringement should also be taken into account.

Sony was further tested in *Aimster*,¹³⁵ in which the Seventh Circuit disagreed with the interpretation of the *Sony* Rule by the district court and with *Napster*'s approach in application of the *Sony* Rule on the element of control.¹³⁶ Judge Posner reasoned from an economic perspective, recognizing that although control is a factor to be considered in determining contributory infringement,¹³⁷ the preliminary injunction the district court granted to the recording industry based on *Aimster*'s ability to control its users could result in the shutting down of the *Aimster* service, contrary to the clear meaning of the *Sony* decision.¹³⁸

The biggest challenge that the *Sony* rule and the doctrine of contributory liability encountered was the *Grokster* case, in which *Grokster* was sued by MGM for distributing free software products that allowed computer users to share copyrighted works through de-centralized peer-to-peer networks.¹³⁹ According to *Grokster*, under the *Sony* rule, the software it distributed was capable of substantial non-infringing uses.¹⁴⁰ Additionally, the remaining areas of uncertainty regarding the *Sony* “staple article of commerce” doctrine became the

infringement cases, the defendant will be contributorily liable even if the product is capable of substantial non-infringing uses. See *Giblin-Chen supra* note 132, at 429.

¹³⁴ Ginsburg, *supra* note 4, at 582.

¹³⁵ In this case, the recording industry sued the Internet service *Aimster* for facilitating the swapping of digital copies of popular music over the Internet. The district court entered a broad preliminary injunction that “had the effect of shutting down the *Aimster* service.” *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003).

¹³⁶ *Id.* at 649.

¹³⁷ *Id.* at 648–49.

¹³⁸ *Id.*

¹³⁹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005).

¹⁴⁰ *Id.* at 933.

core of the case. Unlike Napster, which had actual knowledge of specific infringement and the ability to control direct infringement by operating a centralized system¹⁴¹, Grokster's decentralized structure disclaimed its ability to obtain actual knowledge and prevent infringements once the product was distributed.¹⁴²

Without the two key elements established in the *Napster* decision, it seemed that Grokster was able to shield itself with the *Sony* defense. However, the Supreme Court disagreed on multiple grounds. Major disputes arose as to the interpretation and application of the *Sony* doctrine. Justice Souter refused to visit *Sony* further, but employed an inducement rule, holding that *Sony* did not apply when clear intent to infringe was demonstrated.¹⁴³ Justice Ginsburg argued that the *Sony* rule still applied, but not in this case, which “differ[ed] markedly from *Sony*,”¹⁴⁴ and the Ninth Circuit needed to reconsider the meaning of *Sony*.¹⁴⁵ Justice Breyer insisted on maintaining *Sony*, arguing that neither should it be strictly interpreted, nor should it be modified.¹⁴⁶

There have been a number of criticisms regarding the *Sony* “staple article of commerce” doctrine. The first is that the transplant of the *Sony* doctrine from patent law is a diversion from general tort law principles.¹⁴⁷ Some argue that the Supreme Court abused its discretion by extending its analysis of contributory and vicarious liability when the finding of fair use did not stop their analysis, which is possibly “out of context with the tradition of the Court not to engage in rule making beyond the case before it.”¹⁴⁸ Furthermore, articulating a standard from the Patent Act was “unfortunate and inapposite” for the readiness of technology

¹⁴¹ Rebecca Gilbin-Chen, *Rewinding Sony: an Inducement Theory of Secondary Liability*, 27 EUR. INTELL. PROP. REV. 428, 431 (2005).

¹⁴² Ginsburg, *supra* note 4, at 583.

¹⁴³ *Grokster*, 545 U.S. at 915.

¹⁴⁴ *Id.* at 945.

¹⁴⁵ *Id.* at 944.

¹⁴⁶ *Id.* at 957.

¹⁴⁷ See Reis, *supra* note 126, at 206 (pointing out that the adoption of patent law doctrine “obscured the need for transparent means of technology readiness, utility and risk assessment in the determination of present and potential uses of technology”).

¹⁴⁸ *Id.* at 214–15.

assessment.¹⁴⁹ It was observed that two major problems arose with the application of the “staple article of commerce” equation in the digital world. First, there were no objective standards for the construction of the doctrine that would “prevent an inference of intent to result in infringement by the end user”.¹⁵⁰ Second, safe harbors provided the same function.¹⁵¹ Accordingly, the objective of the “staple article of commerce” doctrine was misread. The purpose of the doctrine was for the protection of technology, and for ensuring that lawful use of a patent is not excluded, rather than “to create an inference of intent to infringe”.¹⁵²

The second criticism concerns the vague meanings of “capable of” and “substantial”. There has been debate as to whether “capable of” simply means current use of technology or also includes potential uses.¹⁵³ After all, “only the most unimaginative manufacturer would be unable to demonstrate that an image-duplicating product is ‘capable’ of substantial non-infringing uses.”¹⁵⁴ It is also evident, as some suggested, that eBay, Amazon, or Google and the multiple of other Internet and Information technologies be categorized as staples of commerce.¹⁵⁵ As for the meaning of “substantial”, it is arguable whether a minority non-infringing use would nonetheless be “substantial”.¹⁵⁶ Like

¹⁴⁹ *Id.* at 215 (“[T]he analogy to the Staple Article of Commerce provision in the Patent Act was unfortunate and inapposite to copyright and may be a factor that retarded the development of technology readiness assessments and other analytical processes that hold the promise of objectivity and transparency in the evaluation of use and intent inferences in new technologies.”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Any article which satisfies the doctrine would enjoy “the safe harbor for any infringement that later occurred, whether intentional or not.”

¹⁵² *Id.* at 219.

¹⁵³ See e.g., Ginsburg, *supra* note 4, at 581; Craig A. Grossman, *From Sony to Grokster, the Failure of the Copyright Doctrines of Contributory Infringement and Vicarious Liability to Resolve the War Between Content and Destructive Technologies*, 53 BUFF. L. REV. 141, 173 (2005).

¹⁵⁴ *Sony*, 464 U.S. at 498.

¹⁵⁵ Reis, *supra* note 126, at 244.

¹⁵⁶ Ginsburg, *supra* note 4, at 581.

Grokster suggested, if 10% of non-infringing uses in *Sony* were regarded as “substantial”, how about the 9% non-infringing uses in *Grokster*?¹⁵⁷ The questions such as how to identify the doctrine, what constitutes non-infringing use, and the time frame of measurement, are left open, which create fears of uncertain futures for innovators of new technologies.¹⁵⁸ Therefore, one may argue that a mature technology analysis is needed in order to conduct inquiries regarding the assessment of new technologies. Put another way, the problems raised by technology are better solved by technology itself.

The third and the most important criticism is whether the *Sony* rule remains applicable in the digital world at all. Copyright law, the Court wrote, must “strike a balance between a copyright holder’s legitimate demand for effective . . . protection, and the rights of others to freely engage in substantially unrelated areas of commerce.”¹⁵⁹ That is why it was observed that “copyright law is important, but at some point copyright incentives must take a backseat to other societal interests, including an interest in promoting the development of new technologies and an interest in experimenting with new business opportunities and market structures.”¹⁶⁰ The driving concern in *Sony* was “a fear that indirect liability would have given copyright holders control over what was then a new and still-developing technology”.¹⁶¹ That concern is why the *Sony* rule has played an important role in balancing the interest between copyright holders and technology innovators.¹⁶² However, *Grokster* was substantially different from *Sony* in that the latter was used for individual non-commercial copying and the former was an unlimited copying tool without any restriction, which made mass-production possible. This difference demonstrates that the *Sony* rule, which was produced in the traditional dissemination world, is not suitable in the digital world anymore. More importantly, the vague and undefined wording in the *Sony* rule

¹⁵⁷ See *Grokster*, 545 U.S. at 933.

¹⁵⁸ Reis, *supra* note 126, at 220–21.

¹⁵⁹ *Sony*, 464 U.S. at 432.

¹⁶⁰ William Landes & Douglas Lichtman, *Indirect Liability for Copyright Infringement: Napster and Beyond*, 17 J. ECON. PERSPECTIVES 113, 118 (2003).

¹⁶¹ *Id.*

¹⁶² Reis, *supra* note 126, at 205 (“*Sony* seeded the ongoing conundrum of balancing protected intellectual property rights with the potential of technologies that enhance the use of intellectual content.”).

has triggered divergence in its interpretation. This was apparent in *Grokster*, where the Court had to apply inducing infringement in order to escape the difficulty of applying the *Sony* rule.¹⁶³

Creating a *Sony* rule might only be a temporary solution concerning the protection of a new technology. When challenged by new cases such as *Grokster*, it is time to consider whether the *Sony* rule is still applicable, and if not, what the alternatives are. Since the *Grokster* case, “ ‘inducement’ and ‘substantial non-infringing use’ will become legal conclusions, separating the *Sony* (good technology) sheep from the *Grokster* (evil entrepreneur) goats.”¹⁶⁴ While Robert I. Reis argued that “*Sony* left us with doctrine and dicta that obscured the need for rigorous methods of evaluation and assessment of new technologies that ensure reasonable standards and transparency”,¹⁶⁵ the interpretation of the *Sony* role has been evolving through cases, especially those with respect to new technologies.

Since copyright holders started to target intermediaries such as ISPs as a shifting strategy under the digital environment, the scope of contributory copyright liability has been expanding with the development of technology with fear that technology would “unjustly enrich secondary actors at the expense of originators and destroy the latter’s creative incentives”.¹⁶⁶ The key factors to determine contributory liability are the defendant’s knowledge of direct infringement conducted by the third person and the material contribution to the infringement.¹⁶⁷ These two criteria have changed over time and continue to evolve, yet still remain “confusingly opaque” and not “suitably apportioned”,¹⁶⁸ especially under the challenge of P2P file sharing cases.¹⁶⁹

¹⁶³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005).

¹⁶⁴ Jane C. Ginsburg & Sam Ricketson, *Inducers and Authorizers: a Comparison of the US Supreme Court’s Grokster Decision and the Australian Federal Court’s KaZaa Ruling*, 11 MEDIA & ARTS L. REV. 1, 7 (2006).

¹⁶⁵ Reis, *supra* note 126, at 208.

¹⁶⁶ Bartholomew, *supra* note 121, at 684.

¹⁶⁷ *Id.* at 683.

¹⁶⁸ *Id.*

¹⁶⁹ Hays, *supra* note 115, at 618.

In order to determine the culpability of intermediaries, Dixon proposes a common set of elements to be considered by courts, including the relationship of the third party with the user, the extent of the third party's involvement, knowledge of infringing activities, intention of the third party, extent of infringement and lawful activities, financial or other benefit of third party, ability to prevent or deter infringement, due care of third party and cost-benefit analysis.¹⁷⁰ Through presenting these elements and analyzing factors in different cases,¹⁷¹ Dixon points out that "no one factor itself will impute liability, but the strong presence of two or more accumulated elements ties a third party more closely to the infringement in ways that courts may find sufficient to impose liability on the third party."¹⁷²

The above elements were not expressly stressed by United States courts but have been taken into account in many occasions. For example, though the relationship between the direct infringer and the third party was not considered as an essential element of contributory liability in any United States court, it was brought about several times. In *Sony*, the district court noted that "Sony had no direct involvement with any Betamax purchasers who recorded copyrighted works off the air."¹⁷³ In the dissenting opinion of the Supreme Court, Justice Blackmun argued that "the District Court reasoned that Sony had no direct involvement with individual Betamax users, did not participate in any off-the-air copying, and did not know that such copying was an infringement of the Studios' copyright", however, the Court stated that the contributory liability "may be imposed even when the defendant has no formal control over the infringer."¹⁷⁴ In *Napster*, the court emphasized Napster's ongoing relationship with its customers.¹⁷⁵ At any time, Napster could have refused service to users who were violating copyright law. VCR manufacturers, by contrast, had no such power; their relationship with any customer ended at the moment of sale.

¹⁷⁰ See Dixon, *supra* note 119, at 37–39.

¹⁷¹ *Id.* at 39.

¹⁷² *Id.* at 39–40.

¹⁷³ *Sony*, 464 U.S. at 426.

¹⁷⁴ *Id.* at 487.

¹⁷⁵ *Napster*, 239 F.3d at 1023.

The element of control has not been officially recognized as a constituting element in deciding indirect copyright liability cases. However, it has functioned as an important nexus between primary and secondary infringers. The element of control is justified not only theoretically, based on fault, as a duty of care exists on the indirect infringer who has the ability to control, but also practically, based on the consideration for cost-efficient litigation.¹⁷⁶ In practice, courts have considered the factor of control not only in contributory infringement cases, through “the knowledgeable giving or withholding of a material contribution necessary to carrying out the infringing activity”, but also in vicarious liability cases, exercised “directly through the supervisory powers of the secondary over the subordinate primary”.¹⁷⁷

From the above analysis, it can be seen that the key factors analyzed in different liability forms should be interpreted under the specific circumstances. Other factors, such as relationship between direct and indirect infringers or due care of third party, are all invited into consideration.

2. *The Expansion of Vicarious Liability in Copyright Law: Why It Does Not Apply in China?*

Vicarious liability was developed out of the doctrine of *respondeat superior*, which provides that employers can be held strictly liable in general tort law for torts committed by their employees in the course of their employment.¹⁷⁸ The traditional formula states that:

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.¹⁷⁹

¹⁷⁶ Hays, *supra* note 115, at 619.

¹⁷⁷ *Id.*

¹⁷⁸ Matt Jackson, One Step Forward, *Two Steps Back: a Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 392 (2002).

¹⁷⁹ Shapiro, *Bernstein & Co. v. HL Green Co.*, 316 F. 2d 304, 307 (2d Cir. 1963).

As a form of risk allocation,¹⁸⁰ the rationale for this form of liability is the incentive theory, which suggests that the employer is in a position to supervise and control the employee.¹⁸¹ This liability was first extended¹⁸² beyond an employer/employee relationship to cover the “dance hall” cases,¹⁸³ in which an independent contractor was found liable because the general contractor was in a better position to supervise and knew the identity of the subcontractor.¹⁸⁴ *Gershwin* extended the formula of vicarious liability in copyright case, in which a defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities”.¹⁸⁵

In *Napster*, the district court determined that Napster had the right and ability to supervise its users’ conduct, because the evidence showed that Napster had the ability to block infringers’ access, retained the right to control access to its system, and had the ability to locate infringing material listed on its search indices as well as the right to terminate users’ access to the system.¹⁸⁶ This approach was challenged by *Aimster*, in which a cost-benefit analysis was conducted to prove that the meaning of control should not include the means to exclude the technology from the market.¹⁸⁷ Similarly, *Grokster* stated that one “infringes vicariously by profiting from direct infringement while declining to

¹⁸⁰ See *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325–26 (D. Mass. 1994) (citing *Napster*, 239 F. 3d. 1004, 1022 (9th Cir. 2001)).

¹⁸¹ Jackson, *supra* note 178, at 392 (“One rationale for vicarious liability (and deep pockets in general) is that a judgment-proof defendant does not feel the incentive created by the imposition of liability, whereas the employer can induce the employee to be careful. Furthermore, the employer is in a position to supervise and control the actions of the employee. It is seen as the employer’s responsibility to make sure that the employee acts properly in pursuing the company’s interests.”).

¹⁸² See *Napster*, 239 F. 3d. 1004, 1022 (9th Cir. 2001) (citing *Fonovisa, Inc., v. Cherry Auction, Inc.*, 76 F. 3d 262 (D.C. Cir. 2001)).

¹⁸³ *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F. 2d 354 (7th Cir. 1929).

¹⁸⁴ Jackson, *supra* note 178, at 393.

¹⁸⁵ *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159 (2d Cir. 1971) (citing *Napster*, 239 F. 3d. 1004, 1022 (9th Cir. 2001)).

¹⁸⁶ *Id.* at 1023–24.

¹⁸⁷ *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003).

exercise a right to stop or limit it.”¹⁸⁸ *Grokster* further explained the “control” element of the vicarious liability test as the defendant’s “right and ability to supervise the direct infringer.”¹⁸⁹ Thus, under *Grokster*, a defendant exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.¹⁹⁰ In analyzing *Perfect 10*, the Circuit Court held the evidence did not support Google’s right and ability to limit the direct infringement of third-party websites.¹⁹¹ Google’s ability to control was even weaker than Napster, which could terminate its users’ accounts and block their access to the Napster system.¹⁹² On the element of direct financial interest, both the district court and the appellate court agreed that Napster had a direct financial interest in the infringing activity based on the finding that by attracting more users through the availability of protected works on its system, “Napster’s future revenue is directly dependent upon ‘increases in user base.’”¹⁹³

The tort law doctrine of vicarious liability, once applied in indirect copyright infringement cases, has expanded, with a broad interpretation of “control” and “financial benefit.” This liability approach would easily disturb many service providers that have certain ability to control their users activities and gain revenue based on advertisement or other business models.

¹⁸⁸ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005).

¹⁸⁹ *Id.* at 930 n.9.

¹⁹⁰ *See Perfect 10, Inc. v. Google, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007).

¹⁹¹ *Id.* (“Perfect 10 has not shown that Google has contracts with third-party websites that empower Google to stop or limit them from reproducing, displaying, and distributing infringing copies of Perfect 10’s images on the Internet.”).

¹⁹² *Id.* at 1174. Practically speaking, Google could not stop any of the third party websites from infringing Perfect 10’s copyrights because the infringing conduct took place on the third-party websites. The district court found that Google lacked the practical ability to police the third-party websites’ infringing conduct. While Napster had the ability to identify and police infringing conduct by searching its index for song titles, Google could not implement measures, as Perfect 10 suggested, to prevent its web crawler from indexing infringing websites and to block access to infringing images, because they were “imprecision and over breadth,” and not “workable”.

¹⁹³ *Napster*, 239 F.3d 1004, 1023 (9th Cir. 2001).

For China, vicarious liability does not apply for two reasons. First, there has been no basis or precedent in copyright law for vicarious liability, which is strictly restrained in the tort law regime of employer/employee relationship. Second, current development of vicarious liability in the United States shows that the interpretation of the constituting elements have not reached a stable status, which, if being transplanted to China's copyright law, could easily become a problem.

3. *Inducement Liability: What could be Learned for China?*

After the shutting down of Napster, Grokster made an architectural modification from Napster's centralized file sharing function to a decentralized model, in order to not only avert actual knowledge, but also eliminate its ability to control. By dissatisfying both the knowledge and control elements, Grokster attempted to defeat both contributory and vicarious liability claims.¹⁹⁴ However, the Supreme Court borrowed an "inducement" theory of liability from patent law and held that:

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, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.¹⁹⁵

What conduct may be sufficient to render a defendant liable for inducement? The Supreme Court pointed out that the *Sony* rule limits imputing culpable intent rather than ignoring evidence of intent.¹⁹⁶ Thus, if evidence shows statements or actions directed to promoting infringement, the *Sony* rule will not preclude liability.¹⁹⁷ *Grokster* and *Sony* had different bases of liability for distributing a product open to alternative uses. *Grokster* emphasized the

¹⁹⁴ See Bryan H. Choi, *The Grokster Dead-End*, 19 HARV. J.L. & TECH. 393, 396 (2006).

¹⁹⁵ *Grokster*, 545 U.S. at 936–37.

¹⁹⁶ *Id.* at 934.

¹⁹⁷ *Id.* at 935.

illegal objective from concrete evidence, while *Sony* stressed prohibiting the imputation of fault.¹⁹⁸

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, as by advertising. Under common law, one who “not only expected but invoked infringing use by advertisement” is liable for infringement “on principles recognized in every part of the law.”¹⁹⁹ According to the court, mental element or conduct alone is insufficient for a finding of indirect liability; an analysis must be based on all relevant factors.²⁰⁰ Here, the summary judgment record was replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in *Sony*, acted with a purpose to cause copyright violations by illegal use of the software.²⁰¹ The Court looked to factors to determine inducement including “advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations.”²⁰² To this end, the court declared that the respondents’ “unlawful objective is unmistakable.”²⁰³

¹⁹⁸ *Id.* at 941 (“If liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was.”).

¹⁹⁹ *Id.* at 935–36 (“The rule on inducement of infringement as developed in the early cases is no different today. Evidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use, shows an affirmative intent that the product be used to infringe, and overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.”).

²⁰⁰ *Id.* at 937 (holding that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”).

²⁰¹ *Id.* at 938.

²⁰² *See id.* at 937–38.

²⁰³ *Id.*

Through importing the inducement rule from patent law, however, the Court failed to make further clarification on how far this rule should be stretched for future P2P illegal file sharing cases, especially on the question of “whether an inducer must have an intent to induce the acts that constitute infringement or an intent to induce infringement.”²⁰⁴ Given the statutory structure in the patent law, a narrower standard was proposed, which required that the “inducer have an intent to induce infringement, not merely intent to induce acts that constitute infringement.”²⁰⁵ This was a pro-competitive standard that encouraged newcomers to enter the market if they obtain a good faith belief in fair competition.²⁰⁶ This approach solved the spiny *Grokster* case, and more importantly, cleared the path for the future application of indirect copyright liability rules on other P2P file sharing cases.

China’s current legislation on online copyright infringement has been focusing on fault of a service provider, which was interpreted as actual or constructive knowledge.²⁰⁷ However, this interpretation overlooked the culpable conduct of an abetting infringer. In its United States counterpart, the culpable conduct of an inducer is the purposeful, culpable expression and conduct, demonstrated by subjective and objective evidence. The ignorance of abetting infringement evidence in China’s legislation will cause trouble in deciding P2P file sharing cases when the P2P service providers have no knowledge and no control over the direct infringement. If elements of inducement infringement are to be imported to China, the service providers will not only avoid presenting

²⁰⁴ Timothy R Holbrook, *The Intent Element of Induced Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECHNOLOGY LAW JOURNAL 399, 404 (2006).

²⁰⁵ *Id.* at 400; see also Sverker K Hogberg, *The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law*, 106 COLUM. L. REV. 909, 958 (2006) (supporting narrowly circumscribing the reach of inducement liability by the court and advocating to abandon the expansion of the intent inquiry in other two forms of indirect copyright liability).

²⁰⁶ Holbrook, *supra* note 204, at 408, 411.

²⁰⁷ *2013 Provision*, *supra* note 17, art. 8 (“[T]he people’s court shall determine whether a network service provider is liable for infringement as an abettor or aider according to the fault of the network service provider. The fault of a network service provider means whether the network service provider knows or should have known a network user’s infringement of the right of dissemination on information networks.”).

unlawful objectives, but also take precautions and pay attention to the due care obligation such as implementing filter technologies.

B. Strict Interpretation of DMCA Safe Harbors

Designed as a balance between protecting the rights of copyright holders and promoting technology development, DMCA safe harbors have played a significant role in U.S. copyright law.²⁰⁸ For technology developers, efficiency of internet services is assured and the variety and quality of the services continues to improve.²⁰⁹ For copyright owners, an efficient remedy is provided without incurring substantial litigation fees.²¹⁰ There has been a significant amount of scholarly literature and judiciary opinions on the interpretation of the DMCA safe harbor rules, especially on the meaning of the knowledge and control requirements.²¹¹ However, recent developments in American copyright litigation

²⁰⁸ With the object of adapting to the new technologies at the turn of the century and satisfying America's commitment to WIPO, the Digital Millennium Copyright Act was enacted by the United States Congress in 1998 to "implement the World Intellectual Property Organization Copyright Treaty", and to "update domestic copyright law for the digital age". The DMCA is divided into five titles, among which Title II provides the Online Copyright Infringement Liability Limitation Act ("OCILLA") in adding a new § 512 to the Copyright Act, which creates a series of safe harbors by placing limitations on liabilities for copyright infringement by Online Service Providers ("OSPs"). Digital Millennium Copyright Act, 17 U.S.C. § 512 (2013).

²⁰⁹ S. Rep. No. 105-190, at 8 ("without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet . . . By protecting service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.").

²¹⁰ Amir Hassanabadi, *Viacom v. YouTube – All Eyes Blind: the Limits of the DMCA in a Web 2.0 World*, 26 BERKELEY TECH. L.J. 405, 412 (2011).

²¹¹ See, e.g., Mark A Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101 (2007); Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 238 (2009); Peter Leonard, *Safe Harbors in Choppy Waters – Building a Sensible Approach to Liability of Internet Intermediaries in Australia*, 3 J. INT'L MEDIA & ENT. L. 221 (2010-2011); R. Anthony Reese, *The Relationship Between the ISP Safe Harbors and the*

make it highly doubtful that the current interpretation is sufficiently clear. For one thing, Circuit Courts demonstrate split judiciary opinions on the content of knowledge, the specificity of the knowledge requirement, the qualifications of actual and red flag knowledge, the willful blindness doctrine, and the relationship between the knowledge requirement and the common law contributory infringement doctrine.²¹² Similar questions arise when courts deal with the interpretation of the control requirement, e.g., whether item specific knowledge is required, whether the control requirement codifies vicarious liability, and what “something more” means in the application.

These uncertainties have caused major confusion in litigations, which threatened to undermine the purpose of the DMCA safe harbors. In practice, after years of their application in litigations, the safe harbors have been under severe criticism as “a confusing and illogical patchwork” which “makes no sense;”²¹³ as very old;²¹⁴ and as baring deficiencies in vague and ambiguous language, which reflect the political compromise.²¹⁵ It is crucial to clear up the uncertainties in order to encourage both the protection of copyright and the development of new technologies.

1. Clarifying the Knowledge Requirement Under § 512(c) and (d) of DMCA: Actual or Apparent Knowledge of Specific Infringement

Section 512(c)(1)(A) and section 512(d)(1) of the DMCA are similar, both providing that a service provider who stores “information residing on systems or

Ordinary Rules of Copyright Liability, 32(4) COLUM. J.L. & ARTS 426 (2009); Hassanabadi, *supra* note 210.

²¹² The Ninth Circuit in *UMG* and the Second Circuit in *Viacom* took different positions in interpreting whether to import a specific knowledge requirement into the control and benefit provision. *Compare* *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1041 (9th Cir. 2011), *with* *Viacom International, Inc. v YouTube, Inc.*, 676 F.3d 19, 25 (2d Cir. 2012).

²¹³ Lemley, *supra* note 211, at 102.

²¹⁴ Lee, *supra* note 211, at 233.

²¹⁵ “A safe harbor generally was the outcome of a political compromise effected after heavy lobbying between rights holders or others and the internet industry. Sometimes the drafting deficiency reflects a political compromise that is reflected in vague or open language.” Leonard, *supra* note 211, at 235.

networks at direction of users” or provides “information location tools” shall not be liable for monetary relief, if the service provider “does not have actual knowledge that the material or an activity using the material on the system or network is infringing”; and “in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent”; or “upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity”.²¹⁶ “Knowledge” may refer either to knowledge of the activity itself or knowledge that the activity constitutes infringement. The latter argument is supported by an analysis of the statutory language, legislative history and case interpretation.²¹⁷ First, from the plain reading of the legislative language, it is evident that relevant provisions clearly require that the provider knows not only of the existence of the infringing material or activity, but also that it is infringing.²¹⁸ Second, with regard to the red flag test,²¹⁹ the committee reports reflecting legislative history made clear that “the red flag must signal to the provider not just that the activity is occurring, but that the activity is infringing”.²²⁰ In other words, knowledge depends on whether the facts and circumstances make apparent the infringing nature of the user’s activity.²²¹ Case law has strengthened the above arguments. For instance, the Ninth Circuit in

²¹⁶ 17 U.S.C. §§ 512(c)(1)(A), 512(d)(1).

²¹⁷ Reese, *supra* note 211, at 433–36.

²¹⁸ 17 U.S.C. § 512(c)(1)(A)(i) (prescribing that a service provider “does not have actual knowledge that the material or an activity using the material on the system or network is infringing”); *see also* 17 U.S.C. § 512(d)(1)(A) (prescribing the same standard).

²¹⁹ S. Rep. No. 105-190, at 44 (“Subsection (c)(1)(A)(ii) can best be described as a “red flag” test.”).

²²⁰ Mere knowledge of the activity’s existence is not enough, the infringing nature of the activity must be known to the service provider. H.R. Rep. No. 105-551, pt. 2, at 57–58 (1998) (“Absent such “red flags” . . . , a directory provider would not be . . . aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.”).

²²¹ Reese, *supra* note 211, at 434.

Perfect 10, Inc. v. CCBill LLC rejected the copyright owner's allegation that the defendants must have been aware of apparent infringing activity because of the obvious nature of the domain names such as "illegal.net" and "stolencelebritypics.com".²²² According to the court, the infringing nature could not be certain because the burden of determining whether photographs were illegal could not be placed on the service provider.²²³ Thus, the relevant question was not "whether the defendants knew about the photographs, but whether they knew of the photos' infringing nature".²²⁴ Another example is *Corbis Corp. v. Amazon.com*,²²⁵ in which the court concluded that although Corbis sent Amazon notices, they did not constitute red flags, because Corbis was silent regarding the content of the complained listings, which meant Amazon had no clue of the infringing nature of those sales.²²⁶ In this light, the court thus articulated the statutory "awareness" standard as more demanding than the common law "should have known" standard.²²⁷

The second concern of the knowledge requirement of safe harbors is whether general or specific knowledge is required. This issue was dealt with in the lengthy *Viacom v. YouTube* case.²²⁸ The court reached its finding from

²²² *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

²²³ *Id.* at 1114.

²²⁴ Reese, *supra* note 211, at 435.

²²⁵ *Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004).

²²⁶ *Id.* at 1108 ("In determining whether a service provider is 'aware of facts or circumstances from which infringing activity was apparent,' . . . the question is not 'what a reasonable person would have deduced given all of the circumstances.' . . . Instead, the question is 'whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.' . . . As articulated by Congress, apparent knowledge requires evidence that a service provider 'turned a blind eye to red flags of obvious infringement.'").

²²⁷ Reese, *supra* note 211, at 436.

²²⁸ *Viacom Int'l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008) [hereinafter *Viacom I*]; *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) [hereinafter *Viacom II*]; *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) [hereinafter *Viacom III*]; *Viacom Int'l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013) [hereinafter *Viacom IV*]. YouTube, owned by Google, is a video-sharing website that allows users to upload videos free of charge. In 2008, Viacom, a copyright holder of many video files that had been uploaded to YouTube, sued YouTube for both direct and indirect

contextual analysis, structural analysis, legislative intent analysis, and case law analysis. First, the court read from the context of the statute.²²⁹ In practice, service providers must expeditiously remove or disable access to the infringing material only if they can locate the material, which requires specific knowledge of the infringement.²³⁰ Second, the structure and operation of the statute require the “specific knowledge” construction of the safe harbors. As pointed out by Judge Fisher in *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*²³¹, considerations of requiring specific knowledge of particular infringing activity were reflected in Congress’s decision to enact a notice and takedown protocol, and in the “exclusionary rule” that prohibited consideration of substantially deficient §512(c)(3)(A) notices which encourage the copyright holders to clearly identify specific infringing material²³², rather than putting the monitoring obligation on service providers. This leads to the second consideration: the requirement of general knowledge would impose an obligation of policing infringement on service providers, which contradicts §512(m) of DMCA.²³³ The view that requiring expeditious removal in the absence of specific knowledge or awareness would be “to mandate an amorphous obligation” and cannot be reconciled with the language of the statute.²³⁴ Third, the legislative intent reflected in the Committee Reports also requires specificity of the knowledge.

copyright infringement, alleging that YouTube had actual knowledge of ongoing infringement and had received a financial benefit from the infringement in the form of advertising revenue from the resulting web traffic. Viacom also alleged that YouTube’s infringing activity was outside the scope of safe harbor provision of DMCA. *See Viacom II*, 718 F.Supp.2d at 526.

²²⁹ *Viacom III*, 676 F.3d at 30.

²³⁰ *Id.* at 30 (stating that “under §512 (c)(1)(A), knowledge or awareness alone does not disqualify the service provider; rather, the provider that gains knowledge or awareness of infringing activity retains safe-harbor protection if it ‘acts expeditiously to remove, or disable access to, the material.’” (citing 17 U.S.C. §512 (c)(1)(A)(iii))).

²³¹ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) [hereinafter *UMG III*].

²³² *Id.* at 1022.

²³³ 17 U.S.C. § 512(m) (“[N]othing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.”).

²³⁴ *Viacom III*, 676 F.3d at 31.

Both the Senate and House Reports noted that the Online Copyright Infringement Liability Limitation Act (OCILLA) was intended to provide “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements.”²³⁵ Copyright holders are better able to efficiently identify infringing copies than service providers “who cannot readily ascertain what material is copyrighted and what is not.”²³⁶ The Reports also cleared the cloud in the construction of the actual and red flag knowledge by indicating that their difference is not between specific and general knowledge, but between a subjective and objective standard.²³⁷ Case law also comports with the specific knowledge requirement. For instance, in *UMG Recordings, Inc. v. Veoh Networks, Inc.*²³⁸, the district court concluded that “CCBill teaches that if investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags’.”²³⁹ The Court of Appeals reached the same conclusion by noting that “we do not place the burden of determining whether materials are actually illegal on a service provider.”²⁴⁰ While the Ninth Circuit opinion in *UMG III* superseded *UMG II*, the argument regarding the specificity of knowledge remains the same: general knowledge is insufficient to meet both the actual and red flag knowledge requirement under §512 (c)(1)(A).²⁴¹

There have been two different approaches in interpreting the DMCA knowledge standard. One is the parallel or co-extensive approach that codifies the contributory infringement knowledge standard; the other is the independent approach that is different from, and more stringent than, the contributory

²³⁵ See S. Rep. No. 105-190, at 20; H.R. Rep. No. 105-551, pt. 2, at 49.

²³⁶ *UMG III*, 718 F.3d at 1022.

²³⁷ *Id.* at 1025 (“[T]he actual knowledge provision turns on whether the provider actually or “subjectively” knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement “obviously” obvious to a reasonable person.”).

²³⁸ *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009) [hereinafter *UMG II*].

²³⁹ *Id.* at 1108.

²⁴⁰ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1038 (9th Cir. 2011).

²⁴¹ *Id.* at 1022–23.

infringement knowledge requirement. The copyright holder in litigation usually argues for the first approach, which sets up a lower standard of DMCA knowledge, under which the service provider will probably lose the benefits of the DMCA safe harbors. The service provider, on the contrary, argues for the latter approach, because a higher standard helps it become immune from contributory liability. In order to decide which approach should be applied, extensive consideration, including structural analysis of the legislation, the purpose of the legislators, and economic analysis is recommended, if possible.

It was argued that the safe harbors and the common law contributory liability principle differ in their treatment of knowledge that comes by way of notice from a copyright owner. Contributory infringement recognizes notice as necessary knowledge for imposing secondary liability. However, safe harbor provisions provide a notice-and-takedown system that imposes more stringent requirements and differ from contributory infringement in operational detail. The form of notice decides whether the obligation of removing is triggered; thus, a noncompliant notice cannot create actual knowledge, according to the requirements of section 512. However, the common law contributory liability principle recognizes a noncompliant notice as sufficient to meet the knowledge requirement.²⁴²

Regarding the “red flags” theory of liability, beyond the actual knowledge such as notice received from the copyright holder, under what circumstances must an ISP remove potentially infringing material in order to invoke the DMCA safe harbor? Under contributory liability, a defendant could be liable if he “knew or had reason to know of another’s direct infringement and materially contributed to it.”²⁴³ However, under the DMCA safe harbor, possession of the knowledge will attract liability only if the ISP did not act “expeditiously to remove, or disable access to, the material.”²⁴⁴ Is the level of knowledge between “should know” in contributory liability and “awareness” under the safe harbor equivalent? In order

²⁴² Reese, *supra* note 211, at 437–38.

²⁴³ Lee, *supra* note 211, at 252.

²⁴⁴ 17 U.S.C. §§ 512(c)(1)(C), 512 (d)(3).

to determine the answer, Edward Lee conducted an analysis of DMCA text, structure, legislative history and case law.²⁴⁵

First, from the plain language of the legislation, infringing activity must be “apparent”, which means it is “plain, clear, or obvious.”²⁴⁶ This is a high standard of knowledge. Second, the structure of the DMCA safe harbors also supports adopting a high standard of awareness of “obvious” or “blatant” infringement, because a low standard would invite constant litigation against Internet companies and turn ISPs into censors, which Congress has expressly avoided.²⁴⁷ Third, legislative history shows in the explanation by the Committee Report that the red flags are apparent from even a brief and casual viewing, with an important policy reason that the Congress “did not want to saddle Internet sites with the impossible burden of trying to differentiate what constitutes copyright infringement in the myriad of situations on the Internet.”²⁴⁸ Fourth, all cases concerning the ISP safe harbors have applied a high standard of particularized knowledge, consistent with the above interpretation.²⁴⁹

From the analysis above, section 512(c) and (d) of DMCA do not codify the common law principle of contributory liability for copyright infringement, because first, the knowledge requirement is different between statutory and common law principle in that the former requires not only knowledge itself but also knowledge of the infringing nature of the activity. Second, the common law and the statute treat notice differently in that the latter requires compliance in form. Third, the level of knowledge requirement is different between the common law contributory liability and the statute’s safe harbor provisions. Therefore, in interpreting the knowledge requirement in the DMCA safe harbors, an independent and narrow approach, rather than a paralleled and broad approach, is adopted.

²⁴⁵ Lee, *supra* note 211, at 252–58.

²⁴⁶ *Id.* at 253.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 256.

²⁴⁹ *Id.*

2. “Control” and “Benefit” Under § 512(c) and (d) of DMCA

The §512 safe harbor provides that an eligible service provider must “not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”²⁵⁰ What does “right and ability to control” exactly mean? Three questions arise as to the concept of control under the safe harbor provisions. First, is “item-specific” knowledge of infringement required in its interpretation of the “right and ability to control” infringing activity under 17 U.S.C. §512(c)(1)(B)? Second, does the control element in safe harbors codify the common law vicarious liability? Third, if not, what more does control exactly mean?

As to the first question, in *Viacom*, the district court concluded that “the ‘right and ability to control’ the activity requires knowledge of it, which must be item-specific.”²⁵¹ In any event, the provider must know of the particular case before he can control it. If infringing material with sufficient particularity is identified as “red flags”, it must be taken down.”²⁵² However, on appeal, the court held that two competing constructions of the “right and ability to control” infringing activity were both fatally flawed.²⁵³

The first construction that “the provider must know of the particular case before he can control it” was adopted by the district court in favor of the defendants.²⁵⁴ The Ninth Circuit in *UMG* took a similar position that “until the service provider becomes aware of specific unauthorized material, it cannot exercise its “power or authority” over the specific infringing item”.²⁵⁵ But the Second Circuit in *Viacom* held that the district court “erred by importing a specific knowledge requirement into the control and benefit provision,” and the case was remanded for further fact finding.²⁵⁶ They disagreed on the aspect of

²⁵⁰ 17 U.S.C. § 512 (c)(1)(B).

²⁵¹ *Viacom II*, 718 F. Supp. 2d at 527.

²⁵² *Id.*

²⁵³ *Viacom III*, 676 F.3d at 36.

²⁵⁴ *Id.* at 30.

²⁵⁵ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1041 (9th Cir. 2011) (citing *Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25 (2d Cir. 2012)).

²⁵⁶ *Viacom III*, 676 F.3d at 36.

literal interpretation of the statute and concluded that “importing a specific knowledge requirement into §512(c)(1)(B) renders the control provision duplicative of § 512(c)(1)(A).”²⁵⁷ According to §512(c)(1)(A), a service provider that has specific knowledge of infringing material and fails to effect expeditious removal would be excluded from the safe harbor protection, and therefore the existence of §512(c)(1)(B) would be superfluous.

The second construction of the “right and ability to control” was that it codifies the common law doctrine of vicarious copyright liability, evidenced by the House Report relating to a preliminary version of the DMCA:

The “right and ability to control” language . . . codifies the second element of vicarious liability . . . Subparagraph (B) is intended to preserve existing case law that examines all relevant aspects of the relationship between the primary and secondary infringer.²⁵⁸

However, this codification reference was omitted from the committee reports describing the final legislation. Before the district court on remand gave its decision in *Viacom v. YouTube*, the Ninth Circuit issued a decision on the same issue in *UMG III*, following the *Viacom* opinion by the Second Circuit, holding that there were several reasons for a stricter interpretation of the “right and ability to control” than vicarious liability, in light of the DMCA’s language, structure, purpose and legislative history. First, the term “vicarious liability” is mentioned nowhere in §512(c), and the language used in common law standard “is loose and has varied”.²⁵⁹ Second, considering the structure of §512(c), if the ability to control is being read as the ability to remove or block access, “the prerequisite to §512(c) protection under §512(c)(1)(A)(iii) and (C), would at the same time be a disqualifier under §512(c)(1)(B) where the ‘financial benefit’ condition is met”, which means that a catch-22 is created by Congress.²⁶⁰ Applying this interpretation would “defeat the purpose of the DMCA and render the statute internally inconsistent.”²⁶¹ Third, according to the legislative history, though it

²⁵⁷ *Id.*

²⁵⁸ H.R. Rep. No. 105-551, pt. 1, at 26 (citing *Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012)).

²⁵⁹ *UMG III*, 718 F.3d at 1027.

²⁶⁰ *Id.* at 1029.

²⁶¹ *Id.* at 1027 n.17.

was not suggested to codify the element of control as vicarious infringement, this suggestion was omitted from later reports.²⁶² Fourth, Congress explicitly stated that “the DMCA was intended to protect qualifying service providers from liability for all monetary relief for direct, *vicarious* and contributory infringement.”²⁶³ In addition, it was clear that “the Committee decided to leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain common activities of service providers.”²⁶⁴ Furthermore, if Congress had intended the control element be coextensive with vicarious liability law, “the statute could have accomplished that result in a more direct manner.”²⁶⁵

According to above analysis, the “right and ability to control” infringing activity under §512(c)(1)(B) “requires something more than the ability to remove or block access to materials posted on a service providers [website].”²⁶⁶ Courts tended to interpret the phrase “right and ability to control” as “exerting substantial influence on the activities of users, without necessarily—or even frequently—acquiring knowledge of specific infringing activity.”²⁶⁷ Therefore, the case was remanded to the district court to consider whether YouTube had the right and ability to control the infringing activity and received a financial benefit directly attributable to that activity.²⁶⁸

Since the Ninth Circuit held that the “right and ability of control” does not codify the common law vicarious liability and requires “something more” than “just ordinary power over what appears on the provider’s website,”²⁶⁹ what constitutes “something more?” In *UMG III*, the Court addressed “high levels of control” and “purposeful conduct” as two standards of “substantial influence” that the service provider must exert on the activity of users.²⁷⁰ In this case, the evidence presented was not enough to create the issue equivalent to the activities

²⁶² *Id.* at 1028.

²⁶³ H.R. Rep. No. 105-551, pt. 2, at 54; S. Rep. No. 105-190, at 44–45.

²⁶⁴ S. Rep. No. 105-190, at 19.

²⁶⁵ *UMG III*, 718 F.3d at 1029.

²⁶⁶ *Viacom III*, 676 F.3d at 38.

²⁶⁷ *Id.* at 38.

²⁶⁸ *Id.*

²⁶⁹ *Viacom IV*, 940 F. Supp. 2d at 111.

²⁷⁰ *UMG III*, 718 F.3d at 1030.

found to constitute substantial influence. Accordingly, the element of “right and ability to control” was not applied to Veoh Networks, which met all of the §512(c) requirements.

In *Viacom IV*, the plaintiffs claimed that “something more” was established by both YouTube’s willingness and ultimate editorial judgment and control over infringing content. This was shown by *YouTube*’s decisions “to remove some but not all infringing material, by its efforts to organize and facilitate search of the videos appearing on the site, and by its enforcement of rules prohibiting, e.g., pornographic content.”²⁷¹ The court took a very strict approach in interpreting the evidence that alleged YouTube’s influence or participation in the infringing activity occurring on its site. The court found that “something more” required by the “right and ability to control” must only be fulfilled when the defendant exercises substantial participation or ultimate editorial judgment over the infringing activity.²⁷² Evidence provided by the plaintiffs demonstrated neither participation in, nor coercion of, user infringement activity. Therefore, YouTube did not have the right and ability to control infringing activity within the context of §512(c)(1)(B).

As discussed, the question arises in *Viacom v. YouTube* as to whether the safe harbor provision in DMCA codifies the common law principle of vicarious liability for copyright infringement. The court’s answer was no, and some commentators agree.²⁷³ The resemblance of factors such as “right and ability to control” and “direct financial interest/benefit” between vicarious liability and safe harbors leads to a loophole theory that the DMCA safe harbors provide no immunity from vicarious liability at all, because safe harbors and vicarious liability share the exact same standard.²⁷⁴ Mark Lemley indicates that the language of DMCA safe harbors suggests that it provides a safe harbor under section 512(c) only against claims of direct and contributory infringement, rather

²⁷¹ *Viacom IV*, 940 F. Supp. 2d at 119.

²⁷² *See id.* at 121.

²⁷³ *See Lee, supra* note 211; Reese, *supra* note 211.

²⁷⁴ Lee, *supra* note 211, at 238. “[B]asically, the DMCA provides no safe harbor for vicarious infringement because it codifies both elements of vicarious liability.” *Costar Group Inc., v. Loop Net, Inc.*, 164 F. Supp. 2d 688, 704 (D. Md. 2001), *aff’d* at 373 F.3d 544 (4th Cir. 2004).

than vicarious liability. However, the legislative history suggests the opposite. Thus, a digital hole is created.²⁷⁵ However, Edward Lee provided the interpretation that the DMCA safe harbors provide partial immunity from some, but not all vicarious infringement claims. He explained that “the term “receive a financial benefit directly attributable to the infringing activity” requires a closer causal connection between the infringing activity and the ISP’s actual receipt of a financial benefit. It must be “directly attributable” to the infringing activity, which is a higher level of proof and causation than required under the common law”.²⁷⁶

III

ESTABLISHING INDIRECT LIABILITY SYSTEM FOR DIGITAL COPYRIGHT INFRINGEMENT IN CHINA

Current Chinese tort law has a logic gap that had existed long before the promulgation of the 2010 Tort Liability Law. Unfortunately, the new legislation has not yet recognized the concept of indirect liability, nor has it developed an independent basis for indirect infringement. Therefore, the tort law needs to be amended, adding an “overlapping tort” as one of the liability forms and theoretical bases for indirect liability.

Constructing indirect liability forms and standards for online copyright infringement involves three steps. The first step is to establish a general rule for indirect copyright liability. This rule requires three key components: direct infringement as a prerequisite, because indirect infringement does not exist without direct infringement; a subjective fault including intent or knowledge; and enablement, that the indirect infringer provides means for direct infringement. The second step constructs two types of indirect liability. Contributory liability is mainly designed for ISPs that provide services such as hosting and information locating, while inducement liability can solve many problems with the issue of P2P infringement, especially for ISPs that provide decentralized software. The third step requires strict interpretation and application of safe harbor provisions. These liability limitation rules should not unduly impede legitimate digital communications, nor should they unreasonably influence the Internet, which has

²⁷⁵ Lemley, *supra* note 211, at 104 n.23.

²⁷⁶ Lee, *supra* note 211.

been an effective communications platform, commercial channel and educational tool.

Specifically speaking, it is proposed that China's legal framework for indirect copyright infringement consists of relevant articles in the 2010 Copyright Law, the 2010 Tort Liability Law and the 2013 Provision as liability attribution, and related rules in the 2006 Regulation work as copyright liability limitation. However, considering the ambiguities in current laws, I make the following recommendations.

To begin with, the 2010 Copyright Law shall explicitly recognize indirect copyright liability. Unlike the United States, which has developed indirect copyright liability in case laws, judicial decisions in China have no binding effects.²⁷⁷ In this light, it is essential for legislators to codify this theory and put it into the statute, as long as the theory matures in tort law as well.

Next, China has transplanted the United States safe harbor provisions, which have served as both attribution and exemption of liabilities, owing to the misunderstanding of safe harbor provisions. This article suggests a strict interpretation of safe harbors, rather than considering safe harbors as a codification of common law principles, based on analysis of legislative history, legislators intent and context reading. Investigating into the nature, role and true meaning of the DMCA safe harbors resolves the confusion that exists in China's legislation, such as the nature of safe harbor provisions, contradictable knowledge standards, and contested control and benefit requirements. I therefore propose a revision of current Chinese safe harbor provisions. The second paragraph of

²⁷⁷ Influenced by Continental European legal systems since the Qing dynasty, China has adopted the civil law tradition and sources of law are written. Unlike common law jurisdictions such as the United States or England, there is no strict precedential concept of case law in China. In theory, each case ruling stands as its own decision and will not bind the decisions of another court. However, in practice, the judges of lower people's courts often attempt to follow the interpretations of laws issued by the Supreme People's Court, which—as a common practice—issues judicial interpretations, opinions, or replies which are ultimately followed by the lower courts. See Donald C. Clarke, *The Chinese Legal System* (July 4, 2005), <http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html>; see also RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 82 (Kluwer Law International 1997).

article 23²⁷⁸ should be removed for two reasons: first, it is an expression of liability attribution rather than liability limitation. Since the 2006 Regulation shall serve as a safe harbor for NSPs, there is no need for the paragraph to exist. Second, it has been proved that NSPs assume independent liability based on the overlapping tort theory rather than joint liability. The existence of this article will create confusion in the future application of law. The other proposition for the modification of the 2006 Regulation is that the article 22(4)²⁷⁹ should be removed. As demonstrated previously, vicarious liability lacks root in Chinese copyright law system, and the stipulation on financial benefit as one limitation to the liability renders a higher copyright liability for NSPs than that in the United States. This is disproportionate for NSPs in China.

Lastly, concern has been raised towards the culpability of NSPs, especially the inconsistency of the knowledge standard. It is vital for both courts and scholars to reach the consensus as to the interpretation and application of the knowledge requirement such as “know”, “should have known” and “have reasonable ground to know.” Great achievement has been made in United States on the theory of knowledge, such as the content of knowledge, the generality of knowledge and the meaning of “red flag” knowledge. China can benefit from the United States experience. In addition, China’s laws have been partially emphasizing the mental element of the defendant, but have overlooked the objective aspects such as culpable conduct.

CONCLUSION

Ever-improving technological advances, especially the development of the Internet and digital technology, have provided impetuses as well as challenges for the application of traditional copyright law principles, which have been tested within the digital environment to see whether the balance between copyright and

²⁷⁸ 2006 Regulation, *supra* note 9. Paragraph 2 of Article 23 of the 2006 Regulation stipulates that “where it knows or should have known that the linked works, performances, sound recordings or video recordings infringe another person’s right, it shall be jointly liable for the infringement.”

²⁷⁹ *Id.*, art. 22(4) (providing that a network service provider will not be liable for damages if ‘it does not seek financial benefits directly from the works, performances, sound recordings or video recordings provided by its subscribers’.).

commerce has been interrupted and whether changes are needed. The indirect copyright liability regime becomes the crux of the contradiction between copyright law and technology by imposing liability on intermediaries who do not commit copyright infringement directly but are held liable for infringement committed by others, based on efficiency and moral grounds. Within the digital environment, ISPs are facing potential liability for the acts of subscribers who are using their services to access, upload or download information. However, a lack of certainty of ISP liability in current digital legislation will inevitably decrease ISPs' incentives for utilizing new technology and participating in e-commerce. Consequently, this may have a negative impact on the progress of science and on economic development in China.

China has been importing the United States' safe harbor models into its own legislation, which, however, has caused confusion from two aspects. First, China and the United States have different legal systems, which makes the transplant inapplicable in certain ways. Second, unlike the United States' safe harbor rules that supplement the attribution of indirect liability principles, such as contributory and vicarious infringements developed in case law, China has not fully developed its own attribution of liability principles, just like water without a source and a tree without roots.

This study finds that in the United States, judicial practice of applying the doctrine of contributory infringement liability has abrogated the *Sony* rule by applying relevant factors, which have displaced the "substantial non-infringing uses" standard. Additionally, courts have been considering all relevant factors—including the relationship, control, means, knowledge, due care and inevitability of infringement, allowing for a wide spectrum of evaluation that work in a correlative pattern. Further, this study argues for a strict interpretation which considers integrity, clarity and uniformity as guiding principles for the efficient application of safe harbors. With a deep understanding of the United States' approach in constructing the indirect copyright liability doctrines and safe harbors, a suitable approach for China could be found.

In conclusion, this article proposes to establish a tort law-oriented, culpable conduct-based indirect copyright liability system, with modified safe harbor provisions, in China. In this way, a justified and compatible indirect liability system can be optimized with equilibrium among relevant parties.