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ISPs' Duty of Care in Copyright Infringement

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ABBREVIATIONS

ISP	Internet Service Provider
ICP	Internet Content Provider
P2P	Peer-to-Peer
CJEU	Court of Justice of the European Union
Regulation on RDIN	Regulation on the Protection of the Right of Dissemination on Information Networks
Provisions on RDIN	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
Enforcement Directive	Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights
Information Society Directive	Directive 2001/29/EC of The European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society
E-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

Fundamental Rights Charter	Charter of Fundamental Rights of the European Union (2000/C 364/01)
Proposal for a Directive on CDSM	Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market
Directive on Privacy	Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector
DMCA	Digital Millennium Copyright Act
AGCOM Regulation	Regulation on Copyright Protection on Electronic Communications Networks

ABSTRACT

This dissertation discussed the Internet Service Provider's duty of care in copyright infringement. The duty hereon refers to the ISP's legal obligation to take care of the influence of the provided service on the protection of others' copyright. The duty is divided into three sub-categories: the duty of general prevention, the duty of assistance in specific infringement and the duty to deal with repeated infringement. In order to provide a comprehensive and systematic explanation of the duty, four main aspects are logically discussed: the background, the status quo, the justification, and the specific application.

Firstly, the background of the ISP's duty of care is discussed from both the technological and the social perspectives. The progress of the Internet and related technologies has brought the pendent problem of online infringement. Although there have been many ways to solve the problem, the ISP's participation is still of fundamental importance. Although the safe harbor mechanism has long been established as the main legal response to the problem, the harbor has never provided absolute safety for the ISPs. And recent development in the judicial decisions as well as the proposed legislation have highlighted the problem again. Therefore, a comprehensive discussion on the ISP's duty of care is crucial to provide a persuasive and systematic theoretical basis and the related suggestions for the legislative modification.

Secondly, a legal dogmatic and comparative research is conducted in Chapter 2, by which to outline the current situation of the ISP's duty of care in 3 representative legal systems which include US, EU and China. For the study of each system, both the regulation of the written and the judicial opinions in practice are analyzed. To be noticed, considering the practice of China is not that familiar to the foreign readers, an independent empirical research of the cases in China is conducted by which to provide

a reliable and innovative factual basis for further research. All of these works reveal that although the notice and takedown mechanism seems to be at the center of the legal mechanism to deal with online copyright infringement, the courts worldwide have been imposing some kind of proactive duty of care on the ISPs. There is no denying the differences in the legal traditions as well as the practical measures, for example, the influence of administrative regulation is much more critical in China, but the consistency of these three legal systems is that they are all trying to limit the ISP's privilege in copyright infringement by which to achieve a balance of different interests.

Furthermore, the theoretical basis for the ISP's duty of care in copyright infringement is analyzed in Chapter 3. The discussion begins with the introduction of the two main relevant legal theories: the general duty of care in German law and the standard of the reasonable person in the common law. Based on these theoretical traditions, the ISP's duty is justified from two perspectives in this dissertation: the interests-balancing approach which is mainly a micro comparison and the utilitarian analysis which is a macro consideration. As for the former one, the interests between different entities are balanced one by one, by which to avoid the superficial discussion and to define the substantial controversy. As for the later one, it is argued that the progress of the Internet industry is not that fatal. The risk and loss during technological progress should be fairly shared by different entities, which is the requirement of the theory of *Kaldor-Hicks improvement*. Besides, it is emphasized that the problems brought by the technology should be solved in full consideration of the technological response and thus the filtering technology should not be forbidden as a whole.

In the last main chapter, specific suggestions to apply the ISPs' duty of care are discussed. First and foremost, it is emphasized that the ISPs should assume a general duty of care by which to keep the infringing activities through their services at a reasonable level. This is particularly different from the reliance on the copyright owners' independent effort in searching for the infringement based on which to send the notice. Afterward, three main measures to assume the duty are discussed: the duty to handle the notice expeditiously, the duty to provide the information of the infringing users and the duty to deal with repeated infringement. As for the duty of different kinds of ISPs,

the main position is that the closer the ISP is to the infringement, the more duty should it assume. In addition, the mechanism to enforce the ISPs' duty of care is discussed which includes the injunction, the liability of compensation to the damage and the administrative penalty which is suggested to be limited in practice.

In the end, the main findings and suggestions of this dissertation are concluded in the final chapter. From the factual perspective, it should be noticed that the safe harbor is not that popularly adopted in judicial decisions and the courts are actually imposing higher duty on the ISPs instead of confirming their passive role in dealing with online copyright infringement. From the theoretical perspective, this kind of position is both strongly rooted in the tort theories and justified from different perspectives. Therefore, it should be clearly acknowledged that a systematic and objective standard of the ISP's duty is the crucial issue in dealing with the ISP's liability as well as promoting the cooperation of the ISPs, the copyright owners and the legal Internet users. Only in this way could the problem of online copyright infringement be solved and if not, be controlled at a better level.

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INTRODUCTION

1. Research Question
2. Main Content
3. Methodology
4. Innovative Aspects

1. Research Question

How to protect copyright in the digital environment? What is the ISPs' role in online copyright protection? These may be the most frequently discussed questions during the legislation, modification and application of the copyright law these years whereas still remain significantly controversial worldwide. Although the mechanism of safe harbor was widely adopted by the Digital Millennium Copyright Act of 1998(the DMCA), the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market(the E-Commerce Directive)and the Regulation on the Protection of the Right of Dissemination on Information Networks of China (2006, the Regulation on RDIN), there have always been different understanding about the requirements for its application. To be honest, the harbor has never provided absolute safety facing the treacherous ocean of the Internet. More importantly, it is the ISPs that are protected by the safe harbor instead of the copyright owners. The later have been struggling in the tempestuous hurricane and rainstorm of online infringement since the beginning of the information society and there is no indication that the problem could be solved by the current mechanism.

The consequence of limiting the ISPs liability as well as duty of care in online copyright infringement has already been predicated before the codification of the safe harbor. Before the adoption of the DMCA, which is of significant promotion for the popularity of the safe harbor, the US National Information Infrastructure Working Group on Intellectual Property published a white paper in 1995, in which the supporting

arguments for limited liability of ISPs in copyright infringement were browsed and contradicted. Particularly, it stated that,

*“On-line service providers have a business relationship with their subscribers. They -- and, perhaps, only they -- are in the position to know the identity and activities of their subscribers and to stop unlawful activities... Exempting or reducing the liability of service providers prematurely would choke development of marketplace tools that could be used to lessen their risk of liability and the risk to copyright owners...”*¹

The position of the NII White Paper was not adopted in the end. While after more than twenty years, there is no denying that the prediction of the NII White paper has nearly come into truth. Although the safe harbor has never been safe enough in a strict sense and the courts worldwide have been “drilling holes in the safe harbor”² by limiting its application, it should be admitted that there is still no compulsory duty for the ISPs to prevent copyright infringement in general sense.³ The main role of ISPs in online copyright protection set by the legislation of the representative legal systems is still a passive one. What the ISPs need to do is only to wait for the notice of the specific infringement from the right holders and to take down the infringing materials if the notice is proven to be qualified.⁴ Only in particularly serious situations will the courts prefer to blame the ISPs for their “willing blindness”.⁵ Generally speaking, the intermediary ISPs need to do nothing even it is obvious for a reasonable person to predicate that more or less there must be online infringement conducted by their subscribers with the assistance of their services.

This safe harbor, though not safe enough, has provided an extraordinarily enabling

¹ See *NII White Paper*, at: <https://files.eric.ed.gov/fulltext/ED387135.pdf>.

² The expression is drawn from the work of Dr. Martin Husovec, see Martin Husovec, Holey cap! CJEU Drills (Yet) Another Hole in The E-Commerce Directive's Safe Harbours, *Journal of Intellectual Property Law & Practice*, 2017, Vol. 12, No. 2, p.115.

³ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.86-87.

⁴ See Jeremy de Beer & Christopher D. Clemmer, Global Trends in Online Copyright Enforcement- A Non-Neutral Role for Network Intermediaries? *Jurimetrics*, Vol. 49, No. 4, p.376.

⁵ *Viacom International Inc. v. YouTube, Inc.*, 676 F.3d 19.

environment for the development of the Internet industry.⁶ With the number of the users and the amount of data flow as the basic sources of profits, the reasonable choice of the ISPs is to tacitly approve even to willingly induce the infringing activity conducted by their subscribers, regardless of the corresponding loss of the copyright owners. Therefore, it is rational to say that the progress of the Internet industry is partially at the cost of the copyright holders as well as the copyright industry as a whole.⁷ With the evolution of the Internet and progress of related technologies, for instance, the scanning machine and 3D printers,⁸ increasingly more copyrighted subject matters could be transformed into digital form and thus distributed online without the permission of the right holders, the tension of the ISPs and the copyright owners will logically become more serious.

At the same time, the copyright owners and their representative organizations are of course making continuous efforts to promote online copyright protection. Considering the factual role of the ISPs involved,⁹ the responsibility of the ISPs is emphasized repeatedly. In response to the copyright owners' appeal, as well as considering the obvious negligence or even connivance of the users' infringement, there have always been efforts of the judicial and administrative authorities to explain the threshold of the safe harbor in a strict way or to find other kind of legal basis by which to impose the ISPs with a higher duty of care and thus to restore the balance of the interests which may otherwise be severely distorted. For example, in US, the common law of inducement was applied in with the ISPs' liability,¹⁰ which was not mentioned by the DMCA. At the same time, the ISPs with "willing blindness" to the infringing activity will not be protected by the safe harbor.¹¹ In China, the ISPs were actually imposed

⁶ See Zhiwen Liang, On the Model of Copyright Regulation on ISPs, on *Legal Science(法律科学)*, Vol.2. 2017, p.101.

⁷ See Robert Ashcroft and George Barker, *Is Copyright Law Fit for Purpose in the Internet Era? An Economic and Legal Perspective*, at <https://ec.europa.eu/futurium/en/content/copyright-law-fit-purpose-internet-era>, p.18.

⁸ See Angela Daly, *Socio-Legal Aspects of the 3D Printing Revolution*, Palgrave Macmillan UK, 2016, pp.24-29.

⁹ See Eva Inés Oberfell & Alexander Thamer, (Non-)regulation of Online Platforms and Internet Intermediaries -the Facts: Context and Overview of the State of Play, *Journal of Intellectual Property Law & Practice*, 2017, Vol.12, No.5, pp.435-436.

¹⁰ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹¹ *Viacom International Inc. v. YouTube, Inc.*, 676 F.3d 19.

some kind of duty to examine the users' behaviors by the courts.¹² More importantly, the campaign-style IP enforcement by the copyright administrative authority substantially improve the standard of the ISPs' duty of care in copyright protection,¹³ although the legality and reasonability of such kind of legal enforcement are questionable. As for EU, there have always been different understanding of the ISPs' duty, represented by the application of the *Störerhaftung* in dealing with the ISPs' liability in third-party infringement.¹⁴ More remarkable, the orders of the Court of Justice of the European Union (CJEU) in the recent cases, represented by *Mc Fadden v. Sony*¹⁵, *UPC Telekabel v. Constantin Film*¹⁶ and *GS Media BV v. Sanoma Media*¹⁷, have substantially improved the ISPs' duty, shaking the basis of the safe harbor established by the E-Commerce Directive.

The most remarkable example of such kind of attempts recently is the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market. As a part of the Digital Single Market Strategy implemented by in 2015, the European Commission presented later the Copyright reform packet. The latter introduced the Proposal for a Directive on CDSM. In Paragraph 1, Article 13 of the proposal, it states that,

“Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with right holders, take measures to ensure the functioning of agreements concluded with right holders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by right holders through the

¹² See Guobin Cui, *Copyright Law: Cases and Materials*(著作权法：原理与案例), Peking University Press, 2014, p.760.

¹³ See Guobin Cui, Reforming the System of Joint Liability of Internet Service Providers (网络服务商共同侵权制度之重塑), *Legal Research* (法学研究), Vol.4, 2013, p.151.

¹⁴ See Wenjie Liu, On the ISP' s Duty to Keep Safety, *Peking University Law Journal*(中外法学), Vol.24, No.2(2012), pp.400-401.

¹⁵ *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, Case C-484/14.

¹⁶ *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH & Wega Filmproduktionsgesellschaft mbH*, Case C-314/12.

¹⁷ *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc. & Britt Geertruida Dekker*, Case C-160/15.

cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate.”

From a legal comparative perspective, this is the first proposal on a suggested duty of the ISPs to take technological measures actively to prevent online copyright infringement, though the obligation imposed on the ISPs is very weak.¹⁸ The suggested “measures” and “content recognition technologies” explicitly impose a duty beyond the threshold safe harbor on the related ISPs. The proposal is actually in a closer similarity to the approach proposed by the NII White Paper, in which the development of the “tools that could be used to lessen...the risk to copyright owners” was also emphasized. Although the proposal was replaced by another version on September 12, 2018, in which the specific expression mentioned above was adopted, the basic position of the revised proposal is still to encourage the ISPs to assume more duty in cooperation with the copyright owners.¹⁹ In addition, although other legal systems like that of China have no regulatory requirement for the ISPs to adopt technological measures to prevent copyright infringement,²⁰ there have also been some academic recommendations for the adoption of these kinds of technological measures.²¹

While comparatively speaking, the suggestions for the ISPs’ further duty of care in copyright infringement conducted by the subscribers and in particular the preventive methods including the application of the filtering technology are still the minority opinion. In contrast, the mainstream is still the principle of net neutrality, the duty-free of general monitoring and the ISPs’ immunity from liability under conditions that they

¹⁸ See Ansgar Ohly, The Broad Concept of “Communication to The Public” in Recent CJEU Judgments and The Liability of Intermediaries: Primary, Secondary or Unitary Liability? *Journal of Intellectual Property Law & Practice*, 2018, Vol.13, No.8, p.674.

¹⁹ See Julia Reda, *European Parliament endorses upload filters and “link tax”*, at <https://juliareda.eu/2018/09/ep-endorses-upload-filters/>. According to the analysis of Reda who has been the strong opponent of the proposal, “the Parliament’s version of Article...leaves sites and apps no choice but to install error-prone upload filters”

²⁰ In the Provisions on RDIN, it is explained that the adopted technological measures could be referred to justify that the ISP is not at fault. (Paragraph 3, Article 8). While according to the general consensus, it could not be explained as that taking technical measures is a legal requirement for the immunity from being recognized as fault.

²¹ See Guobin Cui, On the ISPs’ Duty of Filtering the Content(论网络服务商版权内容过滤义务), *China Legal Research(中国法学)*, Vol.2, 2017, p.215.

are not directly infringing the copyright.²² Without doubts, the Proposal for a Directive on CDSM has sparked widespread controversy, from its legal basis to the applicable standards.²³ In practice, the proposal and particularly the article cited above, was rejected by the EU Parliament in July 2018 and a final vote on the modified version has been approved by it in September 2018.²⁴

The controversial debates on Article 13 of the Proposal for a Directive on CDSM is only one representative example on the ISPs duties of care in copyright infringement. Doubts about the “safe harbor plus” court decisions mentioned above are also common worldwide. Although the specific legal background of different legal systems varies from each other, which will be further discussed in Chapter 2 of this dissertation, the substantial focus of the debates is the ISPs’ duty of care in copyright infringement, especially the duty to adopt the preventive measures against the infringing activities of their subscribers. The complication of the problem is at least resulted from the following elements,

(A) The will of the people. There is no denying that the public’ attitude to online infringement is significantly different from many of other illegal activities. And the basic ISPs’ immunity from liability is beneficial for the general public to distribute and to download the illegal works. While the corresponding damage to the copyright owners as well as the impact on the supply of the works are not foreseeable in real time, or to be more exact, are intentionally ignored by the ISPs and their users, which is a everyday

²² For example, in the Scholars' Recommendations on “The Part of Intellectual Property Rights of the Civil Code of the People's Republic of China” (《中华人民共和国民法典知识产权编》学者建议稿), it is stipulated as a principle that “*the ISPs providing the network users the pure services of hosting, searching and linking, etc., do not assume the duty of examination related to Intellectual Property*” (Paragraph 1, Article 84). And the main concern of the Recommendation is that facing the mass information, the ISPs could never assume the duty of examination and such kind of duty is significantly unfair. For the original version of the Recommendations, see at <http://www.whuipr.com/show/?16-831.html>.

²³ See for instance, Eugenio Foco, *Controversy between Article 13 of the proposed Directive for Copyright in the Digital Single Market and the EU acquis*, available at: <http://www.medialaws.eu/controversy-between-article-13-of-the-proposed-directive-for-copyright-in-the-digital-single-market-and-the-eu-acquis/#prettyPhoto>; Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *Opinion of the CEIPI on the European Commission’ s Proposal to Reform Copyright Limitations and Exceptions in the European Union*, CEIPI, 2017; Christina Angelopoulos, *On Online Platforms and the Commission’ s New Proposal for a Directive on Copyright in the Digital Single Market*, available at: <https://juliareda.eu/2017/03/study-article13-upload-surveillance/>.

²⁴ See at <https://juliareda.eu/eu-copyright-reform/>.

tragedy of the commons. Therefore, the interest of the ISPs and that of the general public consolidate with each other in the short term. As a consequence, it is easy for the general public and the legislators as their representatives to accept the ISPs' lower duty of care as well as to resist the alternative approaches.

(B) The social welfare consideration. It is effortless to argue in favor of the ISPs from a social welfare perspective. The rapid progress of the Internet industry and its tremendous contribution to the connection between people and the communication of information is incontrovertible. This may be cited as the optimistic legal effect of the ISPs' immunity from liability in online infringement. Although it could be further questioned that to what extent did the mechanism of the safe harbor contribute to the progress of the Internet, it is reasonable to take into consideration of the cost and effect and especially the possible influence on the social welfare as a whole when it comes to the ISPs' duty of care.

(C) The fundamental rights consideration.²⁵ From a practical perspective, the duty of care will not only impose burdens on the ISPs themselves, but will also inevitably constitute some kind of threats to the users' privacy, personal data and freedom of expression.²⁶ This kind of concern is especially common in EU and US, where the Charter of Fundamental Rights of the European Union (2000/C 364/01) (the EU Charter of Fundamental Rights) and the Bill of Rights as part of the US Constitution are frequently cited to resist general filtering of the online content and frequent blocking of the ISPs providing assistance to the infringers. The similar concern is also being increasingly remarkable in China after the General Provisions of the Civil Law clearly stipulates the protection of privacy in Article 110 and personal information in Article 111. While from the technological perspective, some kind of interference on the general users' behaviors online is essential if the ISPs are asked to assume the duty of

²⁵ See Christina Angelopoulos, *On Online Platforms and the Commission' s New Proposal for a Directive on Copyright in the Digital Single Market*, available at: <https://juliareda.eu/2017/03/study-article13-upload-surveillance/>, pp.38-40; Christina Angelopoulos, *Sketching the outline of a ghost/ the fair balance between copyright and fundamental rights in intermediary third party liability*, *info*, Vol. 17 Iss 6, pp.72-91; Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.86.

²⁶ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.86.

preventing infringement.

(D) The legal tradition. The ISPs duty of care in third-party copyright infringement is hard to be justified under the traditional tort theory, according to which the liability is based on knowledge of the specific infringements.²⁷ Although the subjective requirement for undertaking tort liability is not limited to intent, the considerations to confirm the negligence as well as the duty of the entity is also of uncertainty and controversy. Although it is clearly understood that “the present liability regime for intermediary service providers...was designed at a time when online platforms did not have the characteristics and scale they have today”,²⁸ the legal system still constitute basic obstacle when it comes to the breakthrough of the court decisions and the modification of the current regime.

Apparently, the former concerns are not only crucial for the ISPs’ duty of care, but also for the whole legal regulation of online activities in a broader sense. Online copyright infringement is only an epitome of illegal activities on the Internet. With the tremendous development of the technology, increasingly more human activities will be digitalized. While considering the pending problem of online copyright infringement as well as the continuing tension between copyright owners, ISPs and the general users, it could be rationally concluded that our current legal system is far from perfect to greet the advent of the information society, not even to say the AI era. Meanwhile, the achievements, problems, divergences as well as limited consensus around the ISPs’ role in online copyright protection bring us an appropriate example to think over the legal regulation of ISPs. And it will also provide analogical experiences for other interdisciplinary and cutting-edge areas like AI and law.²⁹ In short, to promote the solution of the long existing problem of online copyright infringement, as well as to summarize the experiences of regulating ISPs online is the basic motivation of this research. And the ISPs’ duty of care in copyright infringement is of fundamental and critical consideration

²⁷ See Richard Owen, *Essential Tort Law*, Cavendish Publishing Limited, 2000, p.11.

²⁸ See *Communication from the EU Commission on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM (2016) 288 final, pp.7-8.

²⁹ For example, the application of the DMCA provides some remarkable references for the discussion of the ISPs’ higher duty of care in dealing with online trademark violations, see Wendy C. Larson, *Internet Service Provider Liability: Imposing a Higher Duty of Care*, 37 *COLUM. J. L. & ARTS* 573 (2014), p.573.

thereby.

Different from the mainstream, the basic argument of this dissertation is that the ISPs should assume a certain level of active duty in online copyright protection, instead of lying in the safe harbor and waiting for the notice sent by the copyright owners about third-party infringements. To assume the duty as well as to fulfill the objective of online copyright protection, the careful and limited application of the preventive measures may be acceptable, on condition that there are informed content of the users as well as sufficient protection of their personal information. Accordingly, the fundamental position of the Proposal for a Directive on CDSM is supported by this dissertation, although the specific expression of its Article13 needs to be modified.³⁰

2. Main Content

There is no denying that the author does not have sufficient confidence to reverse the trend of the public opinions as well as the major consensus of the academic circle, but he does want to provide another perspective for the solution of the problem, and to provide a direct analysis and a systematic outline of the ISPs' duty of care in copyright infringement. For this purpose, the research work will focus on four aspects that will be analyzed and discussed in the following four chapters: the importance of the ISPs' duty of care from the practical and theoretical perspectives as a core aspect of the legal system related to online copyright infringement; the current legislation related to ISPs' duty of care in representative areas including US, EU and China; the theoretical basis of the ISPs' duty of care, both from the perspectives of natural law and utilitarian; and finally the specific application of the ISPs' duty of care which provide practical suggestions for the rules regarding the ISPs' duty in copyright infringement.

Chapter 1 is an introduction to the social, technological and legal background of the

³⁰ Ansgar Ohly holds the similar opinion, commenting that *"this proposal is not a masterpiece of draftsmanship. But it represents a step into the right direction because it essentially implements a duty of care approach"*, see Ansgar Ohly, The Broad Concept of "Communication to The Public" in Recent CJEU Judgments and The Liability of Intermediaries: Primary, Secondary or Unitary Liability? *Journal of Intellectual Property Law & Practice*, 2018, Vol.13, No.8, p.674.

problem of online copyright infringement, by which to highlight the ISPs' important role in dealing with the problem as well as the critical position of the ISPs' duty of care in the current legal system. The coming of the information society has been digitalizing increasingly more elements of human society, including the works protected by copyright. Correspondingly, the ISPs are not only service providers but also have been being the direct organizers of human life. Therefore, the legal regimes adopted by US, EU and China spontaneously pay close attention to the ISPs' liability, represented by the safe harbor which has been the fundamental mechanism worldwide to deal with online infringement. Furthermore, despite the various ways to solve the problem including civil remedy, administrative regulation and self-regulation, as well as different legal traditions and practical exploration, when it comes to the ISPs' legal status in online copyright infringement, their duty of care is the most critical and controversial element to be considered by the legislators, the judges as well as the ISPs themselves. This chapter then introduces the specific definition and general content of the duty of care of a legal entity, especially the specific duties of the ISPs in copyright infringement as well as their relationship with other relevant legal concepts, for instance, the knowledge in tort law, the notice and takedown procedure and the safe harbor, by which to establish a systematic basis for the following discussion.

The following three chapters discuss successively the Status Quo, the theoretical basis and the practical application of the legal rules on the ISPs' duty of care. Chapter 2 introduces the current legislative regimes and main court's decisions of the ISPs duty of care separately in US, EU and China. As for US, Section 512 of the DMCA is at the heart of the legal system and is also the guiding principle of the judicial decisions. It stipulates in detail the requirements for the ISPs to be excepted from being liable for their users' copyright infringement, which establishes the model mechanism of safe harbor and significantly influence the corresponding rules worldwide including the following choices of EU and China. However, the harbor has never been absolutely safe for the ISPs in US and the courts have been limiting their privilege by restricting the application of the liability immunity rules. As for EU, the E-Commerce Directive draws the experience of the DMCA and also provides the intermediary ISPs the immunity of the subscribers' infringement. At the same time, the Directive 2001/29/EC of The

European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (the Information Society Directive) and the Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights (the IP Enforcement Directive) empowers the member states to issue injunctions against the intermediaries whose services are used by a third party to infringe the copyright, regardless of the liability of the ISPs. Although the safe harbor as well as the principle of no general monitoring have been applied, the recent orders of the CJEU have brought about notable uncertainty. The legislation of China is also influenced by the DMCA. While in comparison, the most significant threat to the safe harbor is neither the ambiguous principles nor the courts' various understandings, but the administrative regulation featured by the campaign-style enforcement. In summarization, it is generally accepted by all the three areas that the ISPs do not have a duty to prevent their users' infringing activities, while there have always been distinctive practices to restore the balance of interests under certain circumstances.

Chapter 3 establishes the theoretical outline of the ISPs' duty of care in third party copyright infringement. First and foremost, two kinds of representative theories are analyzed in the beginning, the general duty of care theory in German law and the reasonable person theory in the common law system. Further, the chapter tries to establish the theoretical basis of the ISPs' duty from three perspectives: the causality analysis, the interests-balancing analysis or the natural law approach, and the utilitarian analysis. As for the causality, two main elements are discussed which are the foreseeability and the proximity. And the factual basis for the ISPs' duty is established thereby. Furthermore, the interests of the ISPs, the copyright owners and the users are balanced in detail by which to provide fairness and justice for the ISPs' duty of care. To be noticed, it responds to the concerns about the users' privacy and freedom of expression and concludes that the limited application of the ISPs' preventive measures will not constitute detrimental threat to the users' interests and thus should not be forbidden as a whole. Moreover, the chapter provides support for the ISPs' duty of care from a utilitarian perspective, raising doubts about the importance of the Internet industry and highlighting the loss of the copyright owners. Accordingly, it is

emphasized that the economical way to protect copyright should be approved. And more importantly, it is particularly underlined in the end of this chapter that the troubles brought by new technology should be considered to solve in a technological way and correspondingly, the imposition of the ISPs' duty of care should promote the creation and application of the technologies which could effectively prevent and stop the users' infringing activities.

Chapter 4 is about the specific application of the ISPs' duty of care in copyright infringement. From the perspective of this dissertation, the main duties of the ISPs could be classified into three kinds, the duty to generally prevent the infringement, the duty to assist the copyright owners in stopping the direct infringement and disclosing the infringers' information, and the duty of specific control on repeat infringement. Different from the current legislations worldwide which is significantly influenced by the so-called principle of network-neutrality, it is argued that the ISPs have never been neutral to different entities. To return to actual network neutrality, the ISPs should take reasonable measures to ensure that the infringing activities of their users are controlled at an acceptable degree. While the notice and takedown procedure is still at the heart of the suggested legal mechanism, and the requirement of a qualified notice as well as the expeditious reaction of the ISPs are analyzed. In addition, the disclosure of the infringing users' information is another kind of support the ISPs could provide in specific infringement. Furthermore, the remarkable cases recently in US and EU reveal the importance of the ISPs' policy to deal with repeat infringers, which is discussed in subsection 3 of this chapter. In the end, the corresponding of legal remedies to enforce the ISPs' duty are analyzed, including the injunction, the damage compensation and the administrative penalty.

Chapter 5 is the conclusion of this dissertation. Based on the background introduction as well as the substantial parts about the current situation, the theoretical basis and the applicable methods of the ISPs duty of care, it provides a systematical reflection on the question. The corresponding research is not only meaningful for dealing with online infringement, but also considerable for regulation online activities as a whole. In conclusion, the more responsible ISPs are appealed and they should play a more active

role in dealing with online infringement mainly by the creation and application of advanced technologies, which is the best to the problems brought by the Internet.

3. Methodology

To define, analyze and to answer the research question, the following research methods are applied in this dissertation.

(A) Empirical Research. Empirical research includes summarization analysis of reliable empirical reports by former researchers, public authorities of national governments, international organizations, etc. In addition, the thesis also provides a few statistical research by the author independently. The empirical research is to base the thesis on practical and reliable fact, including the progress of the Internet and related technologies, the influence of the Internet on copyright protection, the practical effect of current legal mechanism especially the safe harbor rule, and most importantly, the necessity and practicability for the ISPs to take some measures to prevent third-party infringements.

(B) Dogmatic analysis, Case Study and Legal Comparative Research. Protection of copyright online is a worldwide puzzle. As for the legal mechanism to deal with third-party infringement in different legal systems, there are two main points to be noticed. On one hand, almost all the representative countries have adopted the attitude of net neutrality and provide some kind of safe harbor for the ISPs. That is to say, there are similarities between different legal systems. On the other hand, the ISPs' duty is not isolated from a given system's legal process and basic principles, which significantly influence operative rules and judicial interpretation of ISP's duty and liability. To outline the current legal mechanism to deal with third-party copyright infringements, dogmatic analysis and case study are applied in this research, especially in chapter 2. After the detailed research of US, EU and China, the common and pivotal point is concluded, that is the duty of the ISPs to take care of its users' online behavior in order to prevent and stop third-party infringements.

(C) Historical Research. Current society is repeated history. To understand the

formation and the progress of the problem of third-party copyright infringement, as well as that of the corresponding legal reaction, historical research is applied in this thesis.

(D) Economic Analysis. Besides ontological analysis, utilitarian research is inevitable in discussing the ISPs' duty. This is not only important in explaining the legal mechanism and its effect in US which is the origin of economic research, but also necessary in understanding the methods of EU and China. On one hand, many of the opposing opinion against the ISP's duty of care is based on economic research, saying that burden on the ISPs will obstruct the progress and application of the technologies, thus to hurt social welfare as a whole. To respond to this kind of opinions, the corresponding analysis from the similar perspective is thus needed. On the other hand, to define the appropriate duty of the ISPs, the cost and effect of the suggested proposals do need to be balanced since it is impossible to neglect the related parties' interests except that of the right holders.

(E) Typologically Analysis. Last but not least, the typologically analysis is generally applied in this dissertation. As mentioned above, the complication of online copyright infringement is deeply resulted from the various involved entities as well as their respective interests. And the interests are generally expressed in the exaggerated and ambiguous way. For example, one of the representative resistances to the application of the content reorganization technology is that it may constitute threat to the users' privacy. While things are not always like this. For the ISPs providing platforms for uploading and disseminating user-generated contents, their application of such preventive measures will not bring serious interference on the users' privacy. Therefore, it may be not suitable to ask the ISPs without discrimination to adopt the technology, while for the given kind of ISPs, the concern from the perspective of privacy protection is not that meaningful. This kind of approach that defines the specific conflict and bring about the corresponding practical measure is commonly used thereby.

4. Innovative Aspects

There have been abundant monographs, articles, reports, etc., on the topic of the ISPs'

liability in online copyright infringement over last decades of years. And there is no denying that the topic of this dissertation is out of originality. While it is obvious that the current regime is far from perfection.³¹ The actual focus of the problem which is defined in this dissertation as the ISPs' duty of care is submerged in the complicated and indirect discussion of "knowledge", "actual knowledge", "constructive knowledge", "specific knowledge", "general knowledge", "obviously know" "should have known", and so on. Besides, the principle of no general monitoring is quite excessively cited to resist the application of the preventive measures, which is further strengthened by the concern about stifling the progress of the Internet industry and disturbing the users' privacy and freedom, leaving the problem merely to the struggle of the copyright owners whose written rights are significantly diluted in the flood of online infringement.

It is hard to provide actual and meaningful innovation in legal research. As illuminated by Judge Oliver Wendell Holmes, "*the life of law is not in logic but in practice*". While just in compliance this faith, the basic position of this dissertation is to provide a mild and flexible legal basis for solving online infringement as well as determining the ISPs' duty. The mechanism safe harbor was established worldwide at the initial beginning of the Internet era, while what limited accordingly is not only the ISPs' liability but also the possible solutions. Therefore, the first point of this dissertation is doubt the principle of network neutrality and the principle of no general monitoring, which inappropriately limit the modification of the law and the explanation of the courts.

Moreover, it is explicitly emphasized that the ISPs' duty of care which should be stipulated by the law according to an objective standard is at the heart of the regulation on online copyright infringement. Although the legal traditions, the principles of the tort law and the related theories should be carefully considered in order to set a strong foundation of the discussion, the focus of the discussion should not be diffused by these superficial expressions but the substantial and critical determining question, which is the specific duties of care that should be assumed by the ISPs. Therefore, although the legal comparative analysis, the involved interests balance as well as the practical

³¹ See Philippe Jougoux, The Role of Internet Intermediaries in Copyright Law Online Enforcement, on Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou & Thalia Prastitou, eds., *EU Internet Law: Regulation and Enforcement*, Springer International Publishing, 2017, p.268.

methods have already been frequently discussed by former research, this dissertation still provides some innovative contribution by focusing on the ISPs' duty of care from beginning to the end.

Furthermore, I have completed a comparatively systematic and complete research of the ISPs' duty of care in the three main legal systems including US, EU and China. To be noticed, although there have already been plenty of similar research, the discussion in this dissertation has explicitly divide the comparison based on the legislation as well as the representative judgements, by which to provide a more practical map of the current situation. Besides, considering the comparative shortage of the introduction of China's practice for the English readers, I have personally done an empirical research of the judgements regarding to the ISPs' duty of care in 3 recent years, which could provide strong factual basis for the argument. In addition, what is often omitted is that the actual duty of care imposed on the ISPs in China is not only determined by the judgements of the courts, but also the administrative actions with a companion-style. Accordingly, the related administrative notices were systematically introduced in Chapter 2. I hope these works could provide a systematic, accurate and updated basis for further discussion.

In addition, some aspects neglected by current research in solving online infringement are emphasized in this dissertation. First and foremost, the technological response as the best choice. Due to the misunderstanding of the so-called network neutrality and the codification of the non-filtering principle, the importance of technological measures in preventing and stopping online infringement is overlooked. In contrast, it is argued repeatedly in this dissertation the legal response to the problems brought by the technology should take sufficient consideration of the promotion of the responding technology. In addition, it is fundamentally the Internet users, instead of the ISPs themselves that conduct the infringing activity directly. Correspondingly, the legal regime will never constitute effective constraints to the users until the direction of the legislation is set towards the confirmation and punishment of the direct infringers. The limitation on the ISPs' duty of care as well as the corresponding liability significantly influence the innovation of the effective preventive technologies and the ISPs' impetus

to deal with the infringing users and especially the repeat infringers.³² In response, a stricter and flexible standard of the ISPs' duty is suggested in this dissertation.

³² See Zhiwen Liang, On the Model of Copyright Regulation on ISPs, on *Legal Science*(法律科学), Vol.2. 2017, p.102; Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.86-87.

CHAPTER 1 ISP' S DUTY OF CARE AND ITS IMPORTANCE IN COPYRIGHT PROTECTION

(Importance of the ISP' s Duty of Care)

1.1 The Progress of the Internet and its Influence on Copyright Infringement

1.2 The Role of the ISPs in Online Copyright Infringement

1.3 The Current Mechanism to Regulate the ISPs in Copyright Infringement

1.4 ISPs' Duty of Care

1.1 The Progress of the Internet and its Influence on Copyright Infringement

1.1.1 The Progress of the Internet

More widely a concept is used, more hard it is to define it. This is obviously true for the word “Internet”.³³ According to the Oxford Dictionary, the Internet is “*a global computer network providing a variety of information and communication facilities, consisting of interconnected networks using standardized communication protocols*”.³⁴ This is a definition from the ontological perspective. From another epistemological point of view, the Internet is commonly recognized as the most important invention ever created and is the basic infrastructure of our current society. It is increasingly being the center of human activities and correspondingly the key area of legal regulations.³⁵

Strictly speaking, the Internet and the Web are not synonymous.³⁶ While they are commonly interchangeably used especially when it comes to describing the progress of

³³ See Graham J. H. Smith, ed., *Internet Law and Regulation*, Sweet & Maxwell, 2007, pp.1-4.

³⁴ See Definition of *Internet* in English, at: <https://en.oxforddictionaries.com/definition/internet>.

³⁵ For a detailed discussion of the development history of the Internet, see Trisha Meyer, *The Politics of Online Copyright Enforcement in the EU: Access and Control*, Palgrave Macmillan, 2017, pp.40-46.

³⁶ See the Computer History Museum, *What' s the Difference Between the Internet and the Web*, at <http://www.computerhistory.org/revolution/networking/19/314>. Accordingly, “*the Internet, linking your computer to other computers around the world, is a way of transporting content. The Web is software that lets you use that content...or contribute your own*” .

the Internet. This progress is generally numbered as Web 1.0, Web 2.0 and recently but controversially Web 3.0. Related to this dissertation, the distinction between different stages could be generally explained by the generation of the content. Under Web 1.0, the ISPs themselves provide the users with content. Under Web 2.0, the ISPs offer the users the possibility to generate, distribute and to modify the content themselves. The current understanding of Web 3.0 is various and controversial,³⁷ while it could be simply determined that the ISPs will offer the users with a more intelligent tool to conduct man-machine interaction. From the perspective of the process of the generation of the content, they are generated by the machine itself. Different phases are represented by typically different technologies and services, but they are actually coexisting with each other, instead of totally replacing one by one. To be exact, although we have already come to the era of Web 2.0, the ISPs are still providing the public with content themselves under certain business models, which is known as Business to Consumers.

As an instrument to generate and disseminate information, the Internet and its components have their own value.³⁸ But the Internet is so influential more because it is used to connect the elements of the real world: people, organizations, things, etc. This function of linking is based on the digitalization of the former elements. One of the critical reasons for the limitation on the ISPs' liability used to be that the Internet Industry was "young" and thus could not deal with complicated and strict liability rules.³⁹ However, with the development of the Internet and related technologies, increasingly more subject matters could be digitalized and thus disseminated through the Internet. The digitalized matters here include but not limited to personal data, electronic currency, as well as books, music and motion pictures, or in other words, the subject matters of copyright protection. Of course, this happens gradually instead of in an action. At the initial phase of the Internet, the computer screen could only

³⁷ A popular definition of Web 3.0 by Tim O' Reilly is that it is used to describe the evolution of the Web as an extension of Web 2.0. In contrast, Nova Spivack defines Web 3.0 as connective intelligence: connecting data, concepts, applications and ultimately people.

³⁸ For instance, the domain names are mainly created for the application of the Internet, while there is no denying that they are valuable in themselves. But the main reason that the Internet is so important is not because its constructive elements like the domain names, the web pages, or the physical instruments as a loop-locked circle. Is it because the information communicated on it links people and things.

³⁹ See Aleksandra Kuczerawy, *Intermediary Liability & Freedom of Expression: Recent Developments in The EU Notice & Action Initiative*, *Computer Law & Security Review*, Volume 31, Issue 1, February 2015, p.47.

demonstrate easy characters and simple lines, limiting the online copyrighted matters mainly to literary works. Within only decades of years, the online works extend to music, videos and recently the files used to print three-dimensional objects with the development of scanning and 3D printing technologies.⁴⁰ More real subject matters digitalized and disseminated online, more value the Internet conveys. And if we admit that the essence of the right is the interest protected by the law, It is logical to say that our rights are increasingly influenced by the Internet as long with the digitalization process of the real world.

With more users and more interests generated by the Internet, both the society and the law have come to an era of the Internet, or more commonly used, the information age. And the influence of the Internet on our life and work could be clearly shown by the increase of the hours we spend online,

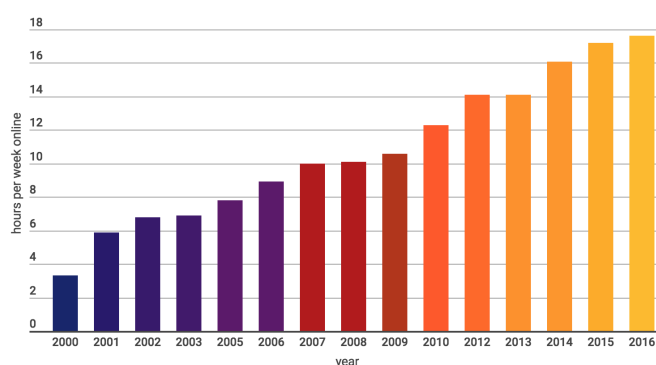


Figure 1: Internet at Home⁴¹

⁴⁰ See Angela Daly, *Socio-Legal Aspects of the 3D Printing Revolution*, Palgrave Macmillan UK, 2016, pp.24-29.

⁴¹ See the 2017 Digital Future Report: Surveying the Digital Future, at <https://www.digitalcenter.org/wp-content/uploads/2018/04/2017-Digital-Future-Report-2.pdf>.

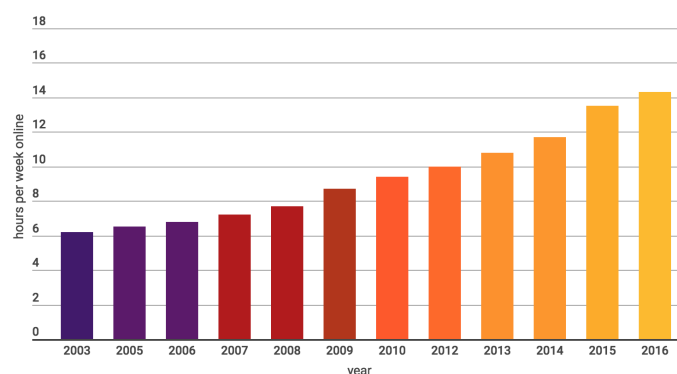


Figure 2: Internet at Work⁴²

Apart from the huge scale of the users and the interests generated, the Internet is also featured by the efficiency and economy of the dissemination of the information. This makes it more popular and more dangerous synchronously. Around the turn of the century, there used to be an influential debate on whether we should establish a legal branch named “Internet Law”.⁴³ Considering the real situation after score years, the answer may be a definite No. But this is not because that it is unimportant to discuss the online behaviors and the corresponding regulations particularly. On the contrary, it is because that almost every department of the law has more or less been informationized, and some scholars hold the opinion that code is law.⁴⁴

Every kind of organization and business gathers human beings as well as their interests. But none of them has been so enormous as the Internet. From a technological point of view, there are multifarious kinds of service providers in the whole Internet activities.⁴⁵ While based on the relationship around the ISPs, the users and the public society, the two basic kinds of ISPs are the ones providing content directly to the users by themselves and the ones offering the service for uploading, hosting, transmitting and searching content. The former ones are sometimes called Internet content providers

⁴² See the 2017 Digital Future Report: Surveying the Digital Future, at <https://www.digitalcenter.org/wp-content/uploads/2018/04/2017-Digital-Future-Report-2.pdf>

⁴³ See Graham J. H. Smith, ed., *Internet Law and Regulation*, Sweet & Maxwell, 2007, pp.4-15; Frank H. Easterbrook, Cyberspace and the Law of the Horse, 1996 *University of Chicago Legal Forum*, p.207; Lawrence Lessig, The Law of the Horse: What Cyber Law Might Teach, *Harvard Law Review*, Vol.113, p.501.

⁴⁴ See Lawrence Lessig, *Code is Law: on Liberty in Cyberspace*, Harvard Magazine, January-February 2000, p.1/5.

⁴⁵ See Graham J. H. Smith, ed., *Internet Law and Regulation*, Sweet & Maxwell, 2007, pp.4-15.

(ICPs), compared with the latter providing pure Internet intermediary services, which are sometimes referred as ISPs *stricto sensu*. In practice, one specific provider may often offer diverse services at the same time. But given a particular situation, whether a provider should be classified into ICPs or pure ISPs is significantly important. As a physical network, the Internet itself does not create content or information and will do no harm or good, meaning that it will lead to neither interests conflicts nor legal relationships around us. This is true at least at the stage of Web 1.0 and Web 2.0. What may influence others is the behavior of uploading and disseminating the information onto the Internet and it is thus important to determine the specific and responsible actor.

It was generally accepted that the ICPs should be responsible for their behaviors that may create damages to others. For instance, according to the Tort Law of China, “A *network service provider who infringes upon the civil right or interest of another person through network shall assume the tort liability*” (Paragraph 1, Article 36). Though different from the ICPs, nor the narrowly defined ISPs are pure technology providers. Nor are they free from responsibility and liability in our society. At the beginning of the Internet Industry, the ISPs are compared to pure tubes, like post offices or telephone companies.⁴⁶ It was considered that both the Internet and the traditional communication instruments are technologically and thus legally neutral, which was concluded as the rule of network neutrality. While considering the powerful function and broad influence of the Internet, especially the feature of gathering a huge number of users and conveying incredibly mass information, the corresponding social role of the Internet and the ISPs should be treated more seriously.⁴⁷ The network is not absolutely neutral, especially when it comes to the relationship of the comparison of the infringers and the infringed on the Internet. Meanwhile, the Internet economy is different from traditional business and the ISPs are frequently not providing their service to the users at a price, creating

⁴⁶ See *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). In the judgment, the courts analyzed the analogy of comparing the defendant, an ISP providing BBS publishing services to “passive conduit for information”, stating that “*netcom would seem no more liable than the phone company for carrying an infringing facsimile transmission or storing an infringing audio recording on its voice mail*”. While the court held the opinion that “*the analogy is not completely appropriate as Netcom does more than just ‘provide the wire and conduits’*”.

⁴⁷ See Wenjie Liu, On the Duty to Keep Safety of the ISPs, *Peking University Law Journal(中外法学)*, Vol.24, No.2(2012), p.402.

an illusion of “free Internet economy”. While we do know that, from a broader perspective, no business is absolutely free, and the virtual difference is only the business model. Generally speaking, both the principle of network neutrality and the appearance of “free Internet economy” could not immune the ISPs from responsibility and the corresponding liability.

From a social point of view, which is important when considering the responsibility and corresponding liability of a given entity, the ISPs are actually gradually taking the role of organizers and administrators of the Internet community.⁴⁸ The ISPs should assume the social responsibility, not only because of the profits they get but also because of their influence or power. Especially for the Internet giants, which may dominate the market share in a given area, they should not just be simply treated as simple market players in the market without considering their virtual influence. Otherwise, the growth of the so-called Internet economy will sacrifice the whole order and social welfare. In summarization, the responsibility and liability of the ISPs should be judged considering their social and virtual influence in our modern society, in addition to the mechanical legal analysis. This is also reasonable when it comes to the protection of copyright in the Internet environment.

1.1.2 The Influence of the Internet on Copyright Protection

Traditionally, there are three main parties involved in the dissemination and protection of a copyrighted work: the right holder, the disseminator and the public. The boundaries between these three members were naturally clear and definite, mainly due to the technological limit. The infringers or the illegal disseminators used mainly to be professional entities, since it was technologically impossible for the general public to copy and disseminate the works in good quality and in large quantity. In this situation, the protection of copyright mainly relied on the control of the professional and profit-

⁴⁸ See Wenjie Liu, On the Duty to Keep Safety of the ISPs, *Peking University Law Journal(中外法学)*, Vol.24, No.2(2012), p.395. The author noted that, the DMCA is the reference of China' s regulation on ISPs. While the enacted at the end of the 20th century, the DMCA supposed the ISPs to be passive, instrumental and neutral entities. While the following development is significantly different from the assumption, and the ISPs are actually playing the role of administrators and regulators in our society.

making infringers. Though it has been a severe problem for the copyright owners from the beginning of the era of copyright protection,⁴⁹ the situation was almost under control.⁵⁰ And this is the practical reason why the legal mechanism built up by the Statute of Anne over 3 hundred years ago could last till now.

However, the appearance and especially the fast and broad application of the Internet totally changed the situation. With the assistance of the Internet, as well as other related technologies like the scanning and printing equipment, it is being increasingly convenient for the general public, or the Internet users, to copy and disseminate the copyrighted works themselves, regardless of the former professional pirates.⁵¹ The works being digitalized soon extend from literature to music, motion pictures, and three-dimensional objects, which are the targets of 3D printing.⁵² Consequently, the general users replace the professional entities to be direct infringers, which leads to an uncontrollable situation for the copyright owners since it is impossible to monitor the anonymous and numerous infringers.⁵³ Accordingly, the conflict between the copyright owners and the professional and profit-making pirates transforms into the one between copyright owners and the general public, which leads to the dilemma for the protection of copyright in the digital environment.⁵⁴

⁴⁹ See Peter Burger, *The Berne Convention - Its History and Its Key Role in the Future*, 3 *J.L. and Tech.* 1 1988, p.3.

⁵⁰ See Joe Karaganis, eds., *Media Piracy in Emerging Economies*, Social Science Research Council, 2011, p.29. It states that, TRIPS-era IP law is well suited to dealing with the latter category of commercial pirates, which generally involves direct, large-scale infringement and clear financial gain.

⁵¹ See Joe Karaganis, eds., *Media Piracy in Emerging Economies*, Social Science Research Council, 2011, pp.29-30; Mark A. Lemley, *IP in a World without Scarcity*, *New York University Law Review*, May 2015, pp.470-471.

⁵² See Mark A. Lemley, *IP in a World without Scarcity*, *New York University Law Review*, May 2015, pp.471-475.

⁵³ Of course, the professional and profit-making pirates still remain today, and they are still the providers of the initial pirated copy of the infringed works in many of the situations.

⁵⁴ See Blayne Haggart, *Copyright: The Global Politics of Digital Copyright Reform*, University of Toronto Press, 2014, p.67.

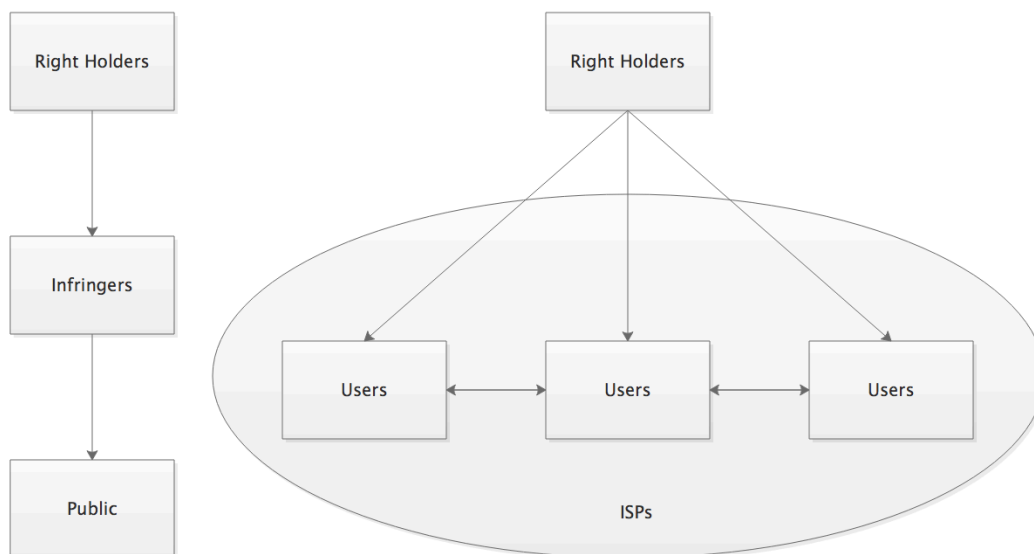


Figure 3: Comparison of Models of Copyright Infringement before and after the coming of the Internet Era

The Internet is a double-edged sword, this is also true when it comes to the relationship between the Internet and the copyright industry. On one hand, the Internet has significantly increased the forms and amount of the works created in a macro view. This is not limited to the new kind works like software, but also includes traditional kinds of works fixed in an electronic form. More importantly, the Internet provides the copyright owners an incomparable platform to publish and distribute their works. This is particularly significant when it comes to Web 2.0 and the age of We-media.

On the other hand, the wide application of the Internet has been leading to the serious problem of online infringement. Compared with the traditional property, intellectual property is more vulnerable in the digital environment, and this is significantly true for copyright. First and foremost, the subject matters protected by IP law are intangible, making them easy to be informationized and shared on the Internet. Second, with the progress of related technologies, the illegal products are nearly the same quality as the original one. While the cost, as well as the price of the pirated works are dramatically low, making them well competitive replacements of the legal works. This is particularly attractive to the general public. Third, the justification of IP protection is still

controversial,⁵⁵ providing to both the uploaders and the downloaders a psychological ease to conduct the online infringements which may do serious harm to the copyright owners. The appealing dogma that “knowledge should be free” even offer them a glorious feeling to go against the “evil” copyright protection. Last but not least, the huge scale of separated and anonymous users makes it practically impossible to enforce digital copyright protection,⁵⁶ substantially reducing the authority of the copyright law.

Online copyright infringement is not strange to every Internet user. Although it is asserted that 100 percent IP enforcement is likely to be harmful to the society, the situation is actually in the other extreme end.⁵⁷ With the detailed legislation and diversified enforcement, it is still not hard for us to find a piece of popular motion picture that are illegally uploaded and disseminated online. Besides of the general impression, empirical research also provides convincing evidence for the serious situation of online copyright infringement. For instance, it is reported that P2P piracy represents 20% of all North American upload traffic, including the infringement of movies, video games, software and books.⁵⁸ According to the IFPI, forty billion songs were shared on P2P networks in one year and that legal downloads represent only 5% of the total circulation of digital music.⁵⁹ As a result, the sales of the recorded music declined and the interests of the music industry has been significantly influenced.⁶⁰ As commented, “no peer distribution system, it emerged, was entirely ‘pure’”.⁶¹ The RIAA estimates that 24% of global Internet traffic is pirated content.⁶² To be noticed, the problem of piracy is not only serious in the developing countries but also the developed

⁵⁵ See Annette Kur and Thomas Dreier, *European intellectual property law: Text, Cases and Materials*, Edward Elgar, 2013, pp.5-9; Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011, pp.9-10; Mark A. Lemley, IP in a World without Scarcity, *New York University Law Review*, May 2015, pp.504-505.

⁵⁶ See Trisha Meyer, *The Politics of Online Copyright Enforcement in the EU: Access and Control*, Palgrave Macmillan, 2017, p.61.

⁵⁷ See Martin Husovec, *Injunctions Against Intermediaries in the European Union*, Cambridge University Press, 2017, p.223.

⁵⁸ See Lawyer Monthly, Update On ISP Liability in The United States for Subscriber Infringements, at <https://www.lawyer-monthly.com/2016/10/update-on-isp-liability-in-the-united-states-for-subscriber-infringements/>.

⁵⁹ See Joe Karaganis, eds., *Media Piracy in Emerging Economies*, Social Science Research Council, 2011, p.30.

⁶⁰ See Robert Ashcroft and George Barker, *Is Copyright Law Fit for Purpose in the Internet Era? An Economic and Legal Perspective*, at <https://ec.europa.eu/futurium/en/content/copyright-law-fit-purpose-internet-era>, p.3.

⁶¹ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.88.

⁶² See Mark A. Lemley, IP in a World without Scarcity, *New York University Law Review*, May 2015

ones.⁶³

1.2 The Role of the ISPs in Online Copyright Infringement

1.2.1 ISPs in this Dissertation

As mentioned above, the so-called Internet Service Provider in this dissertation refers to the entity offering Internet service to the subscribers.⁶⁴ The entity offering content online, which named as Internet Content Provider, are not particularly discussed in this dissertation. When a given entity actively copies or disseminates other's works illegally using his own Internet service, the corresponding liability is no difference in comparison with the ones using other technologies. What makes the situation of online copyright infringement more complicated is when a given service provider offers the public with the technological assistance to infringe copyright themselves, or it promote the dissemination of the infringing materials by hyperlinks instead of intentional recommendations.⁶⁵

From a legal comparative perspective of view, various legislations try to clarify the ISPs by a classification method. As the pioneer in regulating online infringement, the DMCA adds a new section 512 to the Copyright Act, which creates four new limitations on ISPs' liability in copyright infringement. The listed limitations are based on the categorization of the ISPs, which include the transitory communications, system caching, storage of information on systems or networks at direction of users, and Information location tools. Section (k) of Article 512 add the specific definition of the ISPs, emphasizing that the ISPs used here refer to the ones that do not interfere with the content of the materials. The pioneered legislation of US significantly influenced the regulations on online copyright infringement, as well as the numerous ISPs

⁶³ See Mark A. Lemley, IP in a World without Scarcity, *New York University Law Review*, May 2015, p.484. As the author commented in the note 115, the figure may be inflated, while it still suggests that online infringement is serious.

⁶⁴ See also the definition of *Internet Service Provider* on Oxford dictionary, at: https://en.oxforddictionaries.com/definition/internet_service_provider.

⁶⁵ See Marshall A. Leaffer, *Understanding Copyright Law*, LexisNexsi, 2014, pp.634-635.

worldwide.

Soon after that, the E-Commerce Directive of EU listed 3 kinds of intermediary service providers in Section 4 (Liability of Intermediary Service Providers), including the ones providing mere conduits, caching and hosting. To be noticed, the application of the Directive is broader than these three kinds of ISPs since in Article (2)(b), it is stipulated that the service provider in this directive refers to “*any natural or legal person providing an information society service*”.

In comparison, the Copyright Law of China does not give a specific definition of ISPs whose liability are specially discussed. As the main administrative regulation on the protection of copyright in the Internet environment, the Regulation on the Protection of the Right of Dissemination on Information Networks (the Regulation on RDIN), enacted in 2006 and revised in 2013 by the State Council of China mentions kinds of different ISPs offering specific services, including information storage space, searching and linking services (Article 14), as well as automatic access and automatic transmission (Article 20). To be noticed, 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 (the Provisions on RDIN) clearly distinguishes the liability of the ISPs (actually ICPs according to the classification of this dissertation) providing works and the ISPs providing automatic connection, automatic transmission, information storage space, search, link, file sharing technology and other network services. This could be understood as the legislative specification of ICPs and the ISPs in a narrow sense.

To be noticed, the differentiation of ICPs and pure ISPs is not totally clear. This is not only because that some entities may provide the two kinds of services at the same time, but also because that the legal definition of communication to the public is still uncertain,⁶⁶ which is also one of the controversial points of the Proposal for a Directive

⁶⁶ See for example, Jurriaan van Mil, *German BGH – Does YouTube Perform Acts of Communication to the Public?* At <http://copyrightblog.kluweriplaw.com/2019/01/27/german-bgh-does-youtube-perform-acts-of-communication-to-the-public/>; Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015,p.67.

on CDSM. Within the topic of this dissertation, which focuses on the systematical duty of the ISPs in the digital environment, the ISPs refer to the ones providing technological services instead of initial and direct communication of the works. Correspondingly, even the ISPs recognized as direct infringers according to recent EU cases and probable legislations like the Directive on CDSM are in the range of this study.

1.2.2 The Role of ISPs in Online Copyright Infringement

As mentioned above, the Internet has developed from Web 1.0 to Web 2.0 and nowadays toward Web 3.0. At the beginning stage, there was no significant difference between the copyright infringements in the Internet environment and that in the traditional one. That is to say, the ISPs (in the general sense), mainly ICPs according to the classification of this dissertation, uploaded and disseminated the works themselves. In such situations, there was no significant difference for the right holders to discover and to sue the direct infringers in comparison with the traditional model. Nowadays, there may still be some ICPs that uploads and disseminates the illegal works on their websites themselves.⁶⁷ However, it should be noticed that this kind of infringement is no longer the main concern of copyright infringement in the digital environment. Instead, with the development of the Internet technology as well as the appearance of new business models, the infringements brought by the Internet users, or in other words, the general public, soon become the main concern of online copyright infringement.⁶⁸ Compared with the copyright owners and the ISPs as the intermediary platforms, the public users, are often named as the third-parties.

The role of the ISPs in web users' infringement is controversial. For someone, the ISPs are merely the pure intermediary. This kind of opinion is strongly supported by the

⁶⁷ Once a given infringing activity is found the platform of an ISP, it is the latter' s obligation to provide sufficient evidence to justify itself as an intermediary ISP instead of a direct ICP. Otherwise, it should be liable for direct infringement instead of being protected by the safe harbor. See for example, *Chuangqi v. Shandongjike*, Shandong High People' s Court (北京传奇时代影视文化传播有限责任公司与山东机客网络科技有限公司侵害作品信息网络传播权纠纷二审, (2015) 鲁民三终字第 243 号).

⁶⁸ See for example, Ioannis Revolidis, Internet Intermediaries and Copyright Enforcement in the EU: In Search of a Balanced Approach, on Marcelo Corrales, Mark Fenwick & Nikolaus Forgó, eds., *New Technology, Big Data and the Law*, Springer, 2017, p.223.

principle of network neutrality. For others, for instance, the NII White Paper and the court's opinion in the case of *Playboy Enterprises Inc. v. Frena*,⁶⁹ the ISPs are more or less treated as traditional content providers. A strict liability without relieving the ISPs' liability is applied. While considering the development of the worldwide legislation and the judgments, it could be concluded that the ISPs are neither pure technology providers nor traditional works providers.⁷⁰ As for the consensus of the ISPs' role in copyright infringement, especially the ones involving a third-party or an ISP user as the direct infringer, some basic lines could be drawn.

Firstly, there do is a causal relationship between the ISPs and the direct infringement, even under the situation when the ISP is not aware of the specific infringement. There are many standards to establish a causal relationship from the legal perspective, while the generally accepted the method is the "but-for test": "*causation can be established if the injury would not have happened but for the defendant's negligence*".⁷¹ The service provided by the ISPs is an unreplaceable element for the infringements. Of course, the distance between a given ISP and the direct infringement is various and different, while in a given online infringement conducted by a third-party, there will always be one or more ISPs which plays an indispensable role for the result. In a word, without the participation of the ISPs, it would be technologically impossible for the general public to conduct the infringements online.

Secondly, different kinds of ISPs play widely varying roles in online copyright infringement. Accordingly, the benefits they get from the infringement and the difficulty for them to discover and to stop the infringement are various. As mentioned above, taking the ISPs as a whole, they are an indispensable element. While if we glance over the DMCA of US, the E-Commerce Directive of EU as well as the interpretation on judging online copyright infringement of China, it could be clearly found that there

⁶⁹ *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp.1552 (1993).

⁷⁰ As mentioned later, the case of *Playboy Enterprises Inc. v. Frena* was soon replaced by the one of *Religious Technology Center v. Netcom*, which was adopted by the DMCA. In the House report of the US, it was clearly stated that "*as to direct infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another*", see H. Rept. 105-551, Part 1 - WIPO Copyright Treaties Implementation and On-Line Copyright Infringement Liability Limitation, at <https://www.congress.gov/congressional-report/105th-congress/house-report/551>, p.11.

⁷¹ See Keith N. Hylton, *Tort Law: A Modern Perspective*, Cambridge, 2016, p.195.

are different requirements on the specific kinds of ISPs. The main reason behind this kind of classification is that different ISPs are at various levels on the Internet and they are also at different distances from the direct infringing behaviors of the web users. In comparison, it could be seen from Article 512 of the DMCA that the requirements for the ISPs providing transitory communications and system caching to be immune from copyright infringement liabilities are much lighter than that providing storage of information. The factual consideration behind this kind of discriminatory requirement is that the former kind of ISPs provides fundamental and neutral services, and they do not create a direct platform for the users to upload and to download the illegal works.

Thirdly, the given kind of ISPs may still play different roles in copyright infringement. This could be clearly seen from the comparison of the facts and judgments involving different ISPs of the same kind. For instance, in the case of *A&M Records, Inc. v. Napster*⁷² and *MGM v. Grokster*,⁷³ both the defendants were P2P service providers, while their specific involvement in the copyright infringement are various, which is the factual basis that the US courts held the former liable for infringement and the later immune. Correspondingly, whether a given ISP should be held liable for the related infringement depends not only on the kinds of ISPs they belong to but also on their specific behaviors. Of course, from the statistics of the infringements via different ISPs, it could be found that some kinds of ISPs are more “dangerous” in the sense of copyright infringement than others. To be noticed, P2P service is one of the frequently illegally used technologies,⁷⁴ so is the ISPs store and provide access to the public, which is specially regulated by the EU Proposal for the Directive on CDSM.

Moreover, there is no impetus for the ISPs to deal with online infringement unless there is external pressure, mainly the legal requirements.⁷⁵ As it is known that the Internet economy is the economy of attention and accumulation: more subscribers, more valuable. Although there has been being increasingly more business models online, the income of the ISPs is still fundamentally relied on their subscribers. Since the public’s

⁷² *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁷³ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁷⁴ See Joe Karaganis, eds., *Media Piracy in Emerging Economies*, Social Science Research Council, 2011, p.29.

⁷⁵ See Jie Wang, *Regulating Hosting ISPs’ Responsibilities for Copyright Infringement*, Springer, 2018, p.8..

consensus of IP protection is still depending, it is the content and users generated by the platforms, instead of its public reputation of copyright protection that has a more significant influence on the interests of the ISPs. There is no denying that almost all of the giant ISPs, east and west, enjoyed the ascendancy of low stand copyright protection. Even till now, as rational men in the sense of economics, the rational choice of the ISPs would be to tacitly or even actively approve online copyright infringement, unless the cost of adequate legal liability will balance the value gap. Faced with the contradiction, the choice of the law may be to provide enough protection of the copyright owners online or to sacrifice their interests to encourage the development of the Internet industry. If we analyze the process of the past decades, there is no denying that the general orientation has been the second one.⁷⁶ The development of the Internet industry was not facilitated by any single element, but the favorable legal environment must be one of them.⁷⁷ In other words, the development of the Internet industry was partially based on the sacrifice of the copyright owners' interests, which was described as "parasitic growth".⁷⁸ Although the user downloading the illegal files maybe the direct beneficiary in a specific case, the ISPs benefit much more from a loose legal environment for copyright protection.

Last but not least, it would be technologically and economically impossible for the copyright owners to deal with online infringement without the cooperation of the ISPs.⁷⁹ There do have been a few attempts and efforts to regulate the behaviors of the users, represented by the "3 strikes out" rules and the technological protection, but the

⁷⁶ See Robert Ashcroft and George Barker, *Is Copyright Law Fit for Purpose in the Internet Era? An Economic and Legal Perspective*, at <https://ec.europa.eu/futurium/en/content/copyright-law-fit-purpose-internet-era>, pp.11-12.

⁷⁷ See Zhiwen Liang, On the Model of Copyright Regulation on ISPs, on *Legal Science(法律科学)*, Vol.2. 2017, p.101.

⁷⁸ See Robert Ashcroft and George Barker, *Is Copyright Law Fit for Purpose in the Internet Era? An Economic and Legal Perspective*, at <https://ec.europa.eu/futurium/en/content/copyright-law-fit-purpose-internet-era>, pp.11-12.

⁷⁹ See Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, pp.309-310.

efficiency and effect are never satisfying.⁸⁰ Many elements restricted the enthusiasm of both the copyright owners and the government authority to regulate the public's online behaviors, for instance, privacy, efficiency, economy, etc. While the main practical reason is that it is technologically impossible for the copyright owners to monitor the infringement occurring dispersedly and widely. Due to the domino effect, once an illegal work is uploaded online, it will be increasingly hard for the copyright owners to stop the successive infringement. Theoretically speaking, the earlier to discover the initial dissemination, the easier it will be to reduce the loss. If we just treat the ISPs as neutral intermediaries, or only as the target of the alarming notice to be sent to, the online infringement will continue to exist which is the current situation.

1.2.3. Summarization

Concluded from the former discussion, it is clear that the problem of online copyright infringement is brought by the development and application of the related technologies. Although there have been many discussions about the absolute modification of the copyright law,⁸¹ the suggested substantial replacements of the current mechanism still seem to be unpractical. Based on the current legal system to deal with online infringement, it then should be kept in mind that the trouble should end it. To be exact, the problem is brought by new technology, and it should also be solved by technological methods. We still rely on the liability rules and the modification of the traditional theory, while it should be kept in mind that the comparatively advantageous scheme would be to encourage the application of the technologies which could be used to prevent and to stop the direct infringement. Furthermore, the ISPs are the providers of the technology which could be used by the users to infringe the right, and they are also the party which

⁸⁰ See Primavera De Filippi & Félix Tréguer, *Wireless Community Networks: Towards a Public Policy for the Network Commons?* on Luca Belli & Primavera De Filippi, eds., *Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet*, Springer, 2015, p.268. Accordingly, in 2009, France adopted the three-strikes copyright law against P2P file sharing which also introduced a tort for improperly securing one's Internet connection against unlawful activity on the part of a third party. As a result, many community networks willing to establish open Wi-Fi networks in public spaces, such as parks and streets, refrain from doing so out of legal insecurity.

⁸¹ See for instance, William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford Law and Politics, 2004, pp.7-10.

has the advantage to develop and particularly to apply the corresponding technology. Therefore, the problem could not be solved without the participation of the ISPs. The ISPs are never neutral to the copyright owners and the infringers. Correspondingly, the principle of net neutrality should never be explained as absolute when it comes to the legal regulation of the ISPs' liability.

1.3 The Current Mechanism to Regulate the ISPs in Copyright Infringement

From a legal dogmatic perspective, the web users are the direct infringers of copyright. It is reasonable for the copyright owners to deter the specific infringer to ask for compensation. While in practice, this is almost an impossible task, especially without the active participation of the ISPs.⁸² Just as the opinion of the US Supreme Court in the *MGM Studios, Inc. v. Grokster, Ltd.*,⁸³ “*when a widely shared product is used to commit infringement, it may be impossible to enforce rights...against all direct infringers, so that the only practical alternative is to go against the device's distributor...?*”.

It is commonly accepted that the ISPs are playing a pivotal role in online copyright protection.⁸⁴ Based on the involvement of the ISPs in the infringement mentioned above, the copyright owners then spontaneously seek for assistance and compensation from the ISPs as replacers.⁸⁵ Accordingly, the emphasis of legal control on online infringement has long been on the regulation of ISPs.⁸⁶

The coming of the Internet era brings two attractive aspects to the copyright law. on one hand, the right to disseminate the works online has become the comparatively most important one for many of the works, and it could also be clearly found if we consider

⁸² See Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, pp.309-310.

⁸³ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁸⁴ See Ioannis Revolidis, Internet Intermediaries and Copyright Enforcement in the EU: In Search of a Balanced Approach, on Marcelo Corrales, Mark Fenwick & Nikolaus Forgó, eds., *New Technology, Big Data and the Law*, Springer, 2017, p.223.

⁸⁵ Ibid, p.225.

⁸⁶ See Aleksandra Kuczerawy, Intermediary Liability & Freedom of Expression: Recent Developments in The EU Notice & Action Initiative, *Computer Law & Security Review*, Volume 31, Issue 1, February 2015, p.47.

the number of disputes related to different kinds of works.⁸⁷ On the other hand, the rules to recognize the liability of the ISPs has been an independent and complicated system in the copyright law. The traditional copyright theory, as well as the tort law. In addition, the specific standard to deal with the ISPs' liability has also been developing. Besides, there are also other mechanisms in addition to the liability rules set by the enacted laws and the judgements, represented by the self-regulations.

1.3.1 Legal Regulation

There are two main ways of legal regulation of the ISPs in copyright infringement, the civil law and the public law. The former is the main method for most of the legal systems, of which the function is to seek for the compensation of the copyright owners in the specific case. From the perspective of controlling the ISPs, this is a micro way since it relies on the accumulated cases to promote the ISPs to improve the standard their copyright protection. In contrast, the public law, including administrative regulation and criminal rules, is a macro way in which the corresponding public authority representing the copyright owners as a whole will keep an eye on the market players, by which to create a better environment for the enforcement of copyright on the Internet.

1.3.1.1 Civil Law

For most of the developed countries, the civil procedure is the prevailing legal reaction against online infringement. That is to say, the main method to regulate the behavior of the ISPs is to endow the copyright owners a right to ask the ISPs for cooperation and even civil compensations. As for the specific rules, almost all of the representative countries have been deeply influenced by the mechanism of the safe harbor which was

⁸⁷ For instance, according to the IPhouse, which is one of the leading IP case databases in China, the hottest cause of IP actions is related to the right of communication through information network, see at: <http://www.iphouse.cn/>, last access:20/07/2018.

first adopted by the DMCA of US.⁸⁸ The basic position of this system is that the ISPs in third-party infringements are not direct infringers unless in some extreme conditions when it is obvious that the ISPs are inducing the infringement. The copyright owners may ask the ISPs for injunctions, while to ask them for direct compensation, the copyright owners must provide the convincing evidence.

The specific standard of this kind of evidence is usually rooted in the civil law or tort law of different legal traditions. As a consensus, it is generally accepted that the infringement notice sent by the copyright owners should constitute a reliable one, which could be used to prove that the ISP receives the notice must have the knowledge of the specific infringement. While as mentioned above, it is hard for the copyright owners to keep an eye on the whole Internet without a break, limiting the efficiency and function of the notice and takedown procedure. Besides, it is reasonable to judge that in some given situations, the ISPs must do have known the specific infringement, or at least they should have known the serious situation of copyright infringement through their services. In these situations, it seems quite unfair for the ISPs to be immune from the liability to compensate to the copyright owners. As a matter of fact, with the technological advantage, the ISPs must have a better knowledge than anyone else of whether their service could be used for illegal aims, and they usually have a general knowledge of whether there is online infringement conducted by their subscribers. While this kind of general knowledge is one thing, and the impetus to deter the specific infringing user is another.

Accordingly, the notice and takedown mechanism has never been the sovereign rule when it comes to the liability of the ISPs. In other words, the safe harbor of immunity from copyright infringement has always been conditional and limited. The disputes then focus on under what kind of conditions should the ISPs be responsible for the third-party infringements through their services, or from the ISPs' perspective, what kind of

⁸⁸ See Ioannis Revidis, Internet Intermediaries and Copyright Enforcement in the EU: In Search of a Balanced Approach, on Marcelo Corrales, Mark Fenwick & Nikolaus Forgó, eds., *New Technology, Big Data and the Law*, Springer, 2017, p.223; Guobin Cui, Reforming the System of Joint Liability of Internet Service Providers (网络服务商共同侵权制度之重塑), *Legal Research* (法学研究), Vol.4, 2013, p.149; Aleksandra Kuczerawy, Intermediary Liability & Freedom of Expression: Recent Developments in The EU Notice & Action Initiative, *Computer Law & Security Review*, Volume 31, Issue 1, February 2015, p.47.

duty should they assume to avoid the liability.⁸⁹ As for this kind of duty, the copyright law itself provides no specific indications and different legal systems have to consider their own legal system, especially the tort law theories, which are various worldwide. For instance, although drawn from the same EU-level harmonization, the legal basis for ISPs' liability is different in the UK, France and Germany.⁹⁰ The difference is much more obvious when it comes to the legal comparative perspective of EU, US and China, which will be discussed in detail in Chapter 2 of this dissertation.

1.3.1.2 Public Law

In addition to civil procedure, public regulation is also adapted. For some regions, represented by China, public regulation is significantly important.⁹¹ To be noticed, considering the principle of restraining the criminal law,⁹² and particularly the knowledge of the ISPs in specific online infringements, the criminal liability of them is always limited, and the administrative regulation is more available in most of the scenarios.

Compared to civil procedure, the advantage of administrative regulation on the ISPs in copyright infringement is obvious, especially in the efficiency and the deterrence. For instance, according to Article 48 of the Copyright Law of China, the copyright administration department may not only order the infringers to cease the act of infringement, but also may confiscate the illegal gains as well as the reproductions of infringement. Besides, the department has the power to impose a fine on the infringers. In addition, the administrative department could confiscate the equipment used for the infringing activities under serious situations. Accordingly, the administration department may have the power to block the service of the ISPs directly as a whole, which is of significant influence on the fate of them.

⁸⁹ See Simon Stokes, *Digital Copyright: law and Practice*, Oxford and Portland, 2009, p.155.

⁹⁰ See Christina Angelopoulos, Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe, *Intellectual Property Quarterly*, 2013-3, pp.253-274.

⁹¹ See Ke Steven Wan, Internet Service Providers' Vicarious Liability Versus Regulation of Copyright Infringement in China, *2011 U. Ill. JL Tech. & Pol' y* (2011), pp.389-400.

⁹² See Qian Wang, *The Course of Intellectual Property Law(知识产权法教程)*, Renmin University of China Press(中国人民大学出版社), 2016, pp.264-265.

However, considering the attribution of copyright as a civil right,⁹³ the character of the market economy, as well as the congenital defect of administrative regulation, the application of administrative regulation on online copyright infringement should not be abused. For instance, Ke Steven Wan discussed three concerns relating to the strong administrative regulation of copyright infringement in China, which include “a chilling effect on speech”, “national favoritism” and “rent-seeking or corruption”.⁹⁴ In addition, it is also the consensus of the IP academic community in China to limit the public power on regulating copyright infringement. Instead, it is recommended to modify the civil procedure to provide sufficient and efficient relief for the copyright owners as well as to reduce the negative influence of heavy administrative regulation.⁹⁵

There is no denying the importance of administration in online copyright regulation, including regulating the ISPs. While this kind of administration should concentrate more on professional and normal supervision, instead of dealing with the specific dispute which is the main task and the comparative advantage of civil procedures.

1.3.2 Self-Regulation

In addition to the compulsory rules made by the legislative departments or the courts, there have been some forms of self-regulation ways of online copyright regulation, either by the ISPs themselves or by the cooperation of ISPs and copyright owners as well as their representative organizations, e.g., the collective management organizations. Self-regulations are referred to be the “best practice” for some scholars,⁹⁶ while the main problem is that pure self-regulation lacks the universality, the equality, and especially the authority. Until now, the most successful self-regulation system is the

⁹³ See Qian Wang, *The Course of Intellectual Property Law*(知识产权法教程), Renmin University of China Press(中国人民大学出版社), 2016, p.262.

⁹⁴ See Ke Steven Wan, Internet Service Providers’ Vicarious Liability Versus Regulation of Copyright Infringement in China, 2011 *U. Ill. JL Tech. & Pol’y*, pp.400-411.

⁹⁵ See for instance, Li Yongming, Zheng Shuyun & Hong Junjie, On the Restrictions to Administrative Law Enforcement of Intellectual Property: Against the Background of the Latest Revision of Intellectual Property Laws, *Journal of Zhejiang University (Humanities and Social Science)*《浙江大学学报(人文社会科学版)》, Vol.43, No.5, Sept. 2013, p.160.

⁹⁶ See Jie Wang, *Regulating Hosting ISPs’ Responsibilities for Copyright Infringement*, Springer, 2018, pp.212-219.

content identification system named “Content ID” developed by Google, which is used on Youtube.⁹⁷ However, it should be noticed that the ID content system is a unique case which has not been repeated by the small competitors without further legal force.

To be noticed, the practices of self-regulation and especially the trail of the Content ID by Google provides a remarkable example to promote the cooperation of the copyright owners, the ISPs and the legal users. Only with the active efforts of all these parties, instead of isolating the copyright owners themselves on the Internet, can we prevent as well as to stop the third-party infringement in a proper and immediate way, by which to coordinate the development of the Internet industry as well as to maintain the incentive function of the copyright law which is of unreplaceable function for the abundance of human culture. The modification of the current legal system, including the general standard and specific application of the ISPs’ duty of care to deal with online infringement which is the topic of this dissertation, should take the advantage of the self-regulation practice and in particular to reduce the cost in the negotiation between the right holders and the ISPs,⁹⁸ as well as to promote the application and standardization of the useful technologies like the Content ID.

1.3.3 Summarization

In summarization, the rules regarding the ISPs’ liability are the fundamental part of the whole mechanism to regulate the ISPs in online copyright infringement. There is no denying the function of administrative regulation and self-regulation by the ISPs themselves, while the liability rule is of basic importance both for compensating to the copyright owners, as well as to supervising the behavior of the ISPs.

Furthermore, as for the liability of the ISPs in online copyright infringement, the most controversial question is whether the ISPs should take some measures to control its users’ online activities by which to prevent the online infringement, instead of passively waiting for the notice of the copyright owners about the situation. On one hand, it is

⁹⁷ See *How Content ID works*, at <https://support.google.com/youtube/answer/2797370?hl=en>.

⁹⁸ See Jie Wang, *Regulating Hosting ISPs’ Responsibilities for Copyright Infringement*, Springer, 2018, pp.224-225.

generally accepted that the ISPs do not have an obligation to filter the illegal content through their service.⁹⁹ Actually, it is not allowed considering the need to protect the users' privacy. On the other hand, as discussed above as well as supported by the former related cases worldwide, the safe harbor of the ISPs has never been absolute.¹⁰⁰ There have been abundant researches on the notice and takedown procedure, the safe harbor as well as indirect infringement, while the focus of the disputes, which refers to the standard of the ISPs' duty of care has never been analyzed in a systematical way. That is why it is argued in this dissertation that the specific discussion of the ISPs' duty of care in online copyright infringement is of significant importance.

1.4 ISPs' Duty of Care

There are two kinds of legal sources regarding the ISPs' duty of care. As for the scope of the infringed rights, it is regulated in the copyright law. While the copyright law itself is not independent in deciding the ISPs' liability, which is part of the whole civil law system and is of a crucial part of the tort law.¹⁰¹ Correspondingly, the discussion on the ISPs' duty of care should originate from the tort law in order to keep the consistency.

1.4.1 Duty of Care in Different Legal Systems

The basic problem faced in comparative and interdisciplinary research is the adoption of the norm as well as its concrete meaning. The same is for the so-called "Duty of Care". According to The Oxford Law Dictionary, the duty of care is "*the legal*

⁹⁹ For instance, Section 512 (m) of the DMCA and Article 15 of The E-Commerce Directive of EU. The regulation of China is not quite the same while it is neither the ISPs' duty to imply the general monitoring. According to Paragraph 2, Article 8 of the Provisions on RDIN, if an ISP fails to adopt preventive measures, the court could not directly recognize them at fault.

¹⁰⁰ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.87.

¹⁰¹ The application of the tort law in copyright disputes is clearly supported in the case of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 435, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984), in which the court held the opinion that "the absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another."

*obligation to take reasonable care to avoid causing damage.*¹⁰² There would be no liability for negligence unless the given entity is stipulated to take some kind of duty of care which is found out to be omitted.¹⁰³ On one hand, there is no general duty to keep others from being damaged. On the other hand, there is being more legal obligations on a given entity to prevent the damage caused to others which could be reasonably foreseen with the coming of the risk society. Although the expression of “tort” in traditional scenarios and “infringement” in the case of copyright are not the same,¹⁰⁴ the elements in the tort theory to impose some kinds of duty of care on an entity are of considerable meaning when we discuss that in the scenarios of copyright infringement.

In tort theory, there are mainly two kind subjective states that may lead to the liability which are intent and negligence. Both of these two kinds of subjective states exist when we consider the situation of the ISPs in copyright infringement. For instance, when the ICPs illegally upload works online themselves or the ISPs induce or contribute willingly to the users’ infringing activities, they would be recognized as directly or indirectly infringing copyright intently. Under these situations, the liability of the ICPs or the ISPs is clear and justified. However, according to the tort theory, the most controversial situation is not when the damages are caused by intent but by negligence.¹⁰⁵ As for this, the law does not provide a remedy for everyone who suffers from the negligence of others.¹⁰⁶ And just as mentioned above, people do not have a general duty

¹⁰² See Elizabeth A. Martin, ed., *A Dictionary of Law (Fifth Edition)*, Oxford University Press, 2003, p.165. In addition, according to the Business Dictionary online, duty of care is “*the responsibility or the legal obligation of a person or organization to avoid acts or omissions (which can be reasonably foreseen) to be likely to cause harm to others*”, see at <http://www.businessdictionary.com/definition/duty-of-care.html>.

¹⁰³ See Satish Kumar Jain, *Economic Analysis of Liability Rules*, Springer, 2015, p.79.

¹⁰⁴ See Qian Wang, *The Course of Intellectual Property Law(知识产权法教程)*, Renmin University of China Press(中国人民大学出版社), 2016, pp.247-248. According to the author, the constructive requirements of “tort” should include the subjective state of the entity while that of “infringement” would not. Furthermore, the subjective state of the entity in copyright infringement would only influence the specific liability and especially the damage compensation. To be noticed, there are being more and more situations in tort theory and practice in which the entities are imposed some kind of liability regardless of their intent state. And more importantly, the liability of damage compensation is actually the most critical elements in deciding the legal sanctions on the ISPs. In a word, there do is a distinction between tort and infringement, while it does on influence the meaning to refer to the tort theory when we consider the ISPs’ duty of care in copyright infringement.

¹⁰⁵ See Brendan Greene, *Course Notes: Tort Law*, Routledge, 2012, p.1; Catherine Elliott & Frances Quinn, *Tort Law*, Pearson Longman, 2011, p.17.

¹⁰⁶ See Catherine Elliott & Frances Quinn, *Tort Law*, Pearson Longman, 2011, p.17.

to prevent other persons from suffering damage. For a given entity to be liable for its negligence, there is an underlying assumption it should not have been negligent, or in other words, it should have taken some kind of care to prevent the damage. If there has been a legal duty of care of the defendant while it breaches that duty, the defendant then should be liable for the caused damage.¹⁰⁷

The crucial point then comes to the establishment of the duty of care. In the common law system, the widely accepted standard is *the Caparo test*, which was set down in *Caparo v. Dickman* (1990).¹⁰⁸ When we consider whether a given party should undertake some duty of care under certain situations, three requirements should be considered: foreseeability, proximity, as well as fair, just and reasonableness.¹⁰⁹ These requirements are of notable importance when it comes to the ISPs' duty. However, all of the three elements are uncertain in some way. Although there has developed numbers of precedents and detailed theories to explain the requirements, it still needs to be discussed in specific situations, which is almost the most distinguishing feature of modern tort law.

Besides, the term "duty of care" as well as the requirements mentioned above is semantically adopted by the common law system. Nevertheless, it is also commonly used as a general expression by the scholars from the continental legal system and it is even adopted by the corresponding national legislations.¹¹⁰ And if we consider the legislation of the civil law system, we could also find similar rules undertaking the function of duty of care in the common law system. For instance, the German courts

¹⁰⁷ See Brendan Greene, *Course Notes: Tort Law*, Routledge, 2012, p.1.

¹⁰⁸ See Catherine Elliott & Frances Quinn, *Tort Law*, Pearson Longman, 2011, p.21.

¹⁰⁹ See Brendan Greene, *Course Notes: Tort Law*, Routledge, 2012, p.3.

¹¹⁰ For instance, France has just adopted a law naming "Devoir de vigilance des entreprises" , concerning a corporate's "duty of vigilance" or "duty of care" in English, see Jane Moyo, *France adopts new corporate "duty of care" law*, at <https://www.ethicaltrade.org/blog/france-adopts-new-corporate-duty-care-law>; Norton Rose Fulbright, *A new duty of care for the most significant companies in France*, at <http://www.nortonrosefulbright.com/knowledge/publications/147606/a-new-duty-of-care-for-the-most-significant-companies-in-france>. According to these reports, the legislation is to "establish and implement a diligence plan which should state the measures taken to identify and prevent the occurrence of human rights and environmental risks resulting from their activities, the activities of companies they control and the activities of sub-contractors and suppliers on whom they have a significant influence" . It is clear that the rules on the cooperate is just about their duty of care in the English context.

have developed the rules of Verkehrssicherungspflichten, meaning that whoever leads to some potential dangers to others by his activity or property should be obliged to prevent the risk.¹¹¹ This is quite similar to the meaning of duty of care in the context of the common law.

1.4.2 ISPs' Duty of Care in Copyright Infringement

Drawn from the concept of duty of care in the whole legal system and considering the specific situation of online copyright infringement, ISPs' duty of care in the context of this dissertation refers to the duty of the ISPs to take reasonable care to avoid indirect infringement of others' copyright. Here the subject matter of the "care" is not their direct and intent copyright infringement, nor is it their deliberate contribution or inducement to other entities' infringing activities. Under these situations, the ISPs are actually conducting the infringement on their initiative, which is undoubtedly forbidden by the tort law, and will not be protected by the safe harbor provided by the copyright law.

To be noticed, copyright is usually recognized as a kind of absolute right, meaning that the violation of the right is not determined by the intentional subjective state of the infringer. Once a given entity is found to be conducting the activities within the extension of others' copyright, there is no further need to consider whether or not it has actual knowledge of the infringement. Although this kind of legal obligation imposed by the copyright law on every one of us is sometimes expressed as the "duty of care",¹¹² it is not the specific scenario discussed in this dissertation. To be noticed, there may be some scenarios that the ISPs are not infringing other's copyright intently, but the objective results of their services may constitute copyright infringement. While this

¹¹¹ See Basil S Markesinis & Hannes Unberath, *German Law of Torts: A Comparative Treatise*, Hart Publishing, 2002, p.86.

¹¹² For example, in the case *Zhang v. Dangdai* (Futian District People's Court of Shenzhen (张某诉被告深圳市当代景观艺术设计有限公司侵害作品信息网络传播权纠纷一案, (2017) 粤 0304 民初 14084 号), the defendant published the works of the plaintiff online without permission. The court held the opinion that, "the defendant has not provided the legal origin of the works and thus has not assume the reasonable duty of care. Therefore, it should be recognized as at fault and should assume the liability of compensation to the damage". Here the content of the "duty of care" is to check the legal condition of the works.

kind of situation is not that different from the traditional ones that when somebody is accused for copyright infringement but defend himself for non-acknowledge of the attribution of the infringed work. There is no denying that the whole copyright legal system is some kind of substantial legal obligation or burden on the general public including the ISPs, and there are also controversial disputes on the extension of the copyright which is in decisive relationship with the recolonization of direct infringement, but it does not mean that all these substantial “duty” should be considered under the concept of “duty of care”.

What is confused and needs to be discussed is the situation that the ISP itself is not infringing the copyright directly and intently, or in other words, it has not conducted the behaviors in the range of the copyright, but it is substantially contributes to the fulfillment of the direct infringements or enlarges the damage caused thereby. Correspondingly, the extension of the ISP’s duty of care according to the definition of this dissertation as well as the crucial meaning of the “duty of care” in a strict way is not only depended on the analysis of the constructive requirements which will be discussed in the following chapters, but is also defined by the extension of the copyright. If a given kind of behavior is found to be prohibited by the content of the copyright, there is no need to discussed whether the ISP should have a duty to prevent the behavior.

For example, one of the most controversial kinds of online copyright infringement is the one fulfilled by hyperlinks.¹¹³ If we accept the opinion that the dissemination of the works by one given ISP is not directly prohibited by the right of communication to the public, it will then need to be analyzed whether the linked works is legal or not on the original web.¹¹⁴ Once the linked work is uploaded illegally, the ISP providing the dissemination through the hyperlinks may be considered to be liable for contributory links. However, if the dissemination itself is recognized as being controlled by the copyright, there is then no need to go further to look into the linked webs. The influence of the model of regulation is quite obvious for the drafted Proposal for a Directive on CDSM. In the current version of the draft, it is directly stipulated that “*online content*

¹¹³ See Guobin Cui, *Legal Regulation on Framed Links*, on Politics’ and Law(政治与法律), (5)2014, p.74.

¹¹⁴ See Emanuela Arezzo, *Hyperlinks and Making Available Right in the European Union – What Future for the Internet After Svensson?* IIC(2014)45, pp.524-525.

sharing service providers perform an act of communication to the public”¹¹⁵ The corresponding result would be that the ISPs may be asked for direct copyright liability even the illegal content is uploaded users. This would lead to further confusion of the exact content of the right of communicating to the public, as well as that of the system of copyright infringement. It would further be discussed in this dissertation that this kind of modification is not supported by the author.

ISPs’ duty of care has already been mentioned in various legal documents. For instance, In Recital 40 of the E-Commerce Directive of EU, it is stipulated that ISPs may have a duty to prevent or stop illegal activities under certain situations. More clearly, according to Recital 48 of the directive, the member states have the power to impose additional duty of care on the ISPs based on the listed liability of the intermediary service providers in Section 4 of the directive, although no general obligation to monitor was emphasized.

As mentioned above, although “duty of care” as a specific term is not generally used in different legal systems which have various traditional terminologies and rules, the substantial content of the duty exists widely. The duty may be legislated by the tort law or the copyright law, or substantially established by the judicial judgments.¹¹⁶ For instance, the Proposal for a Directive on CDSM does not adopt the term of “duty of care”, while it is generally accepted that Article 13 of this proposal imposes a significant duty of care on the specific kinds of ISPs with large amounts of works uploaded by the subscribers, asking them to take “appropriate and proportionate” measures to cooperate with the right holders. Besides, the compromise amendment of this article published on February 20, 2018 even adopted the term of “duty of care”.

As for the specific content of “duty of care”, Dr. Angelopoulos has concluded the main duties of care that have been considered by the courts on both the national and EU level, mainly including “*the suspension of the perpetrator of the infringement*”, “*measures for the identification of the perpetrator*”, “*the monitoring of content, including*

¹¹⁵ Paragraph 1, Article 13 of the Proposal for a Directive on CDSM.

¹¹⁶ Generally speaking, the basic rule of the ISPs’ duty of care is legislated in the tort Law of China while in the copyright law of US. And as for Germany, although the duty roots in the civil code, the substantial standard is established by the judicial decisions. For specific discussion, see at Chapter 2.

filtering”, “*the blocking and removal of infringing content, including notice-and-take-down*”, “*warning systems*” and “*notification to the authorities*”.¹¹⁷ Different from simply offering the software or providing the platforms without considering the actual convenience for online infringement, these measures impose a higher requirement for the ISPs to make up for the vulnerable copyright owners, by which to realize the comparative balance of the copyright owners’ and the service users’ respective ability online.

To define the ISPs’ duty of care in copyright infringement in a systematic way, this dissertation classifies the duty into three main kinds, the duty of general prevention, the duty of assistance in specific infringement and the duty of supervision of specific users.

(1) The duty of general prevention is to adopt possible measures to prevent online infringement as a whole. Although it is widely accepted that there is no general obligation of the ISPs to monitor the content through service, there do has been generally accepted duty of the ISPs to prevent their user’s direct infringement, for instance, the duty to accommodate and does not interfere with standard technical measures under Section 512(i)(1)(B) of the DMCA.

(2) The duty of assistance in specific infringement is when the ISPs have found or have been noticed the existence of a specific infringement, they should adopt appropriate measures to stop the infringement expeditiously. This kind of duty is the most maturely accepted and applied one, represented by the notice and takedown procedure.

(3) The duty of supervision of specific users refers to dealing with the repeated infringers. Although it is inappropriate to monitor the users as a whole, it is remarkable to consider the “highly dangerous” ones considering their former online infringement using the service provided by the same ISP. This is not an unfair discrimination, but a compromise of copyright protection and the Internet freedom.

In the following chapters, the current practice, the justification and the specific application of the ISPs’ duty of care will be further discussed based on the former

¹¹⁷ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.302.

classification.

1.4.3 The Relationship of ISP's Duty of Care with Relevant Concepts

As mentioned above, ISPs' liability for copyright infringement is generally judged according to two kinds of legal sources, the copyright law and the tort law. Besides, there have already been specific rules or explanations regarding the ISP's obligation, represented by the notice and takedown procedure and the safe harbor rules. It has been explained that the duty of care is a part of considering the negligence of the ISPs, while it still needs to be discussed of the relationship between the ISP's duty of care and other related mechanisms, mainly the standard of the ISP's knowledge as well as its fault, the notice and takedown procedure and the safe harbor rules.

1.4.3.1 Duty of Care and Knowledge in the Tort Law

According to Article 36 of the Tort Law of China, the ISPs should undertake joint liability with the users if they "know" the infringing activities of the later. This clause is of significant importance since once it is qualified, the copyright owner could directly ask the ISPs for damage compensation. Meanwhile, it also leads to controversial confusion since the standard to judge the "knowledge" is not easy to outline.¹¹⁸ The same confusion also exists when we consider the standard of knowledge in the EU legal system.¹¹⁹

One of the main disputes regarding the standard of the knowledge is whether it should be limited to "actual knowledge" or it could be extended to "constructive knowledge". In China, it is also concluded as the difference between "have known" (the infringement by a third party) and "should have known".¹²⁰ There is no denying that if reliable evidence could be provided to demonstrate that the ISP has actually known the

¹¹⁸ See Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015, pp.200-202.

¹¹⁹ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, pp.271-279.

¹²⁰ Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015, p.200.

infringement, it should be liable for the loss of the copyright owner. Therefore, a provable action of contributory or accessory infringement could be established. However, in most of the situations, which are the focus of this dissertation, the ISPs do not have an actual knowledge of the specific infringing activity, or at least it is impossible for the right holders to provide the corresponding evidence. At this time, the additional standard of constructive knowledge is crucial, and it is of close relationship with the ISP's duty of care. For example, in the case *Xunlei v. Sanmianxiang*, the court holds the opinion that, “‘knowledge’ includes actual knowledge as well as constructive knowledge precomputed by the law base on the entity’s duty of care”.¹²¹ Accordingly, the ISP's duty of care is treated as the standard to judge the construction of the knowledge here.

Both the standard of constructive knowledge and the duty of care are the legal mechanisms to overcome the strict standard of actual knowledge. While it does not mean that violation of the duty of care equally constitutes the establishment of the constructive knowledge. As a matter of fact, with all the measures required by the law or suggested by this dissertation, the ISPs may still do not have the actual knowledge of the specific infringement. It is thus unreasonable to say that under this situation, the justification for the ISP to be liable is that they “should have known” the infringement (if they do have applied the measures). Otherwise, the duty of care will be equal to a kind of strict obligation which means that the adopted measures must be strong enough for the ISP to find the specific infringement which conflicts directly with the principle of no-general monitoring. Compared to intentional infringement or contribution, both the identification standard of the constructive knowledge and that of the duty of care are objective ones. Correspondingly, it is more concise to adopt the objective legal requirement according to the balance of the involved interests and the related values, instead of proving and determining whether the ISPs “should have known” the specific

¹²¹ See *Xunlei v. Sanmianxiang*, Tianjin High People's Court (深圳市迅雷网络技术有限公司与北京三面向版权代理有限公司侵害作品信息网络传播权纠纷二审, (2017)津 01 民终字 2830 号).

infringement.¹²² Even the legislated measures to assume the duty could not provide the ISPs with the knowledge of the specific infringement, the mere negligence or carelessness in adopting these measures itself could justify the ISP's liability.

As adopted by almost all the representative legal systems, the ISPs do not have an obligation to monitor the Internet or to supervise their users' behaviors. This kind of control on the Internet is both rationally unfair and technologically difficult. Therefore, it is out of the question for the ISPs to know every specific infringement with the assistance of their service. Of course, the ISPs have many ways to have a general judgment of the legality of their users' behaviors. And more importantly, there are many ways to improve the legality of their users, by which to prevent and to stop the infringements from a general perspective. In other words, although the ISPs should not be accountable just based on general knowledge of the infringements through their service, they should be responsible when appropriate measures could be taken to improve the general situations of controlling infringement, especially when these measures seem to be fair, just and reasonable.

Practically speaking, from the perspective of dogmatism of law which is the basic opposition of the civil law system under which the courts do not have the authority to create the rules by could only apply the statute law by explanation, the legal basis in the written judgments could not be referred to "duty of care" which is not stipulated in the law. Under the current situation, the actual duty of care could only be concluded and expressed by the explanation of the rules like Paragraph 3, Article 36 of the Tort Law of China. The standard of constructive knowledge and the measures to assume the duty of care do have a significant intersection. It is suggested in this dissertation to adopt the concept of duty of care as additional requirements to the ISPs in third-party copyright infringements, while the notion of constructive knowledge like the so-called "should have known" may still be used in practice to nominally express the duty

¹²² Similar to the conclusion of Arnold J in *L'Oréal SA v. eBay International AG*, which states that "it can often be circular to reason backwards from a presumed legal duty without directing attention to whether any such duty exists in the first place", (see Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.161.) The reorganization of the so-called "should know" would lead to the circular argument of the intent.

imposed on the ISPs. In fact, the crucial importance of the recognition of the ISP's duty of care in deciding whether it should have known the infringement and whether it should be liable for the fault has already been mentioned in some of the judicial decisions. For example, in the case *Zhongqing v. Baidu*, it is asserted by the court that "the recognition of the ISP's fault for it should have known (the infringement) is in close relationship to the level of the duty of care imposed on it".¹²³

To be noticed, the specific expression of "duty of care" is sometimes wrongly used to justify the entity's intentional fault, or the fault of using the copyright owner's works without authorization. For example, in the case *Zhang v. Dangdai*, the defendant published the works of the plaintiff online without permission. The court held the opinion that, "*the defendant has not provided the legal origin of the works and thus has not assumed the reasonable duty of care. Therefore, it should be recognized as at fault and should assume the liability of compensation to the damage*".¹²⁴ Here the content of the "duty of care" is to check the legal condition of the works. However, in another case, *Wuxuelan v. Jiubang*, it was interpreted in the right way that, "*as a part of the copyright, the right of communication to the public is a kind of absolute right. And the violation of this right is not based on the subjective fault or the acquisition of the interests. Any activity that controlled by the right and conducted without authorization should be recognized as infringement on condition that there is no legal or contractual exceptions from liability*".¹²⁵ Besides, in the case *Zhongsou v. Liheng*, the court holds the opinion that, "*under the circumstance of right of communication to the public, the reasonable duty of care in only an element to be considered when it comes to the judgement of the Internet technology provider's fault, and it is in no relationship with the Internet content provider*".¹²⁶ The critical point of the court is that when the given entity is uploading the infringing materials by himself, or when it could not provide reliable evidence to prove

¹²³ See *Zhongqing v. Baidu*, Beijing First Intermediate People's Court (北京中青文文化传媒有限公司与北京百度网讯科技有限公司侵害作品信息网络传播权纠纷一审, (2014) 一中民初字第 1401 号).

¹²⁴ See *Zhang v. Dangdai*, Futian District People's Court of Shenzhen (张某诉被告深圳市当代景观艺术设计有限公司侵害作品信息网络传播权纠纷一案, (2017) 粤 0304 民初 14084 号).

¹²⁵ See *Wuxuelan v. Jiubang*, (吴雪岚与广州市久邦数码科技有限公司侵害作品信息网络传播权纠纷一审民事判决书, (2017)浙 8601 民初 870 号).

¹²⁶ See *Zhongsou v. Liheng*, (北京中搜网络技术股份有限公司与李恒侵害作品信息网络传播权纠纷二审, (2017)京 73 民终 1216 号).

its identity as an intermediary ISP, it should be responsible for the violation of the copyright owners' right regardless of the recognition of its fault duty of care.

1.4.3.2 Duty of Care and the Notice and takedown Procedure

From the general perspective of the tort law or the civil law, the closest legal mechanisms to the ISP's duty of care is the recognition of knowledge as well as the fault. In comparison, focusing on the regulations on the ISPs specifically, it should be noticed the relationship of the ISPs' duty of care with the notice and takedown procedure as well as the so-called safe harbor.

According to Dr. Angelopoulos, the blocking in the notice-and-take-down procedure is also an action under the requirement of the duty of care.¹²⁷ While to be exact, when the ISPs have received a qualified notice from the copyright owners, it could be constructively recognized that the ISPs have an actual knowledge of the specific infringement. Under this situation, if the ISPs do not respond to the notice and indulges the infringement, they are actually willingly providing successive contributory conditions for the infringement, which is always forbidden by the tort law.

However, I am not denying the classification of Dr. Angelopoulos. Considering the whole process of the notice and takedown procedure, there are actually two continuous obligations of the ISPs, to take care of the notice and to take the successive measures. The legal foundation for the later one could be based on the ISPs' actual knowledge of the infringement, while the former obligation of providing the copyright owner a confirmed and convenient way to send the notice and to deal with the notice in a due way is indeed based on the duty of care. Otherwise the ISPs could assert that they do not have an obligation to cooperate with the copyright owners to deal with the infringement to which they are not involved intently.

In summarization, the notice and takedown procedure which is the most accepted and reliable legal mechanism is based both on the justification of the duty of care, as well

¹²⁷ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.302.

as the obligation to stop contributory assistance to a known infringer. Accordingly, to build a proper mechanism for receiving the notice from the right holders is one part of the measures to assume the duty of care which will be specifically discussed later in this dissertation.

1.4.3.3 Duty of Care and the Safe Harbor

The so-called “safe harbor” is not a formal terminology used by the written law, but is commonly used by the academic circle to name the limitations to the ISPs’ liability in copyright infringement. The relationship of duty of care and the liability limitation rules is clearly demonstrated by the E-Commerce Directive of EU, which stipulates in Recital 48 that the directive itself which provide limitations on the ISPs’ liability would not affect the power of the member countries to further impose reasonable duty of care on the ISPs. Actually, the Proposal for the Directive on CDSM is in close relationship with this article. Based on the E-Commerce Directive which acknowledges the member states’ authority of setting the duty, the Proposal is actually promoting the application of the additional duty of care to some specific kinds of ISPs at the whole EU level.

Theoretically speaking, once it is proven that the ISPs have diligently abided the rules that limit their obligation they should be excluded from further liability. Thus the listed requirements to acquire the protection of the safe harbor are just the duty that the ISPs should assume in copyright infringement. While considering the practice of EU member states and US, it could be found that the so-called “safe harbor” has never been absolutely safe. Under certain circumstances, which would be detailedly discussed in Chapter 2 of this dissertation, the courts will leave aside the liability limitation rules and will instead try to find the legal basis from the tort law or the common law. The result is that the actual standard of duty of care is generally higher than the requirement of the liability limitation rules expressed in the written law.¹²⁸ In conclusion, under current legislation and practice, some of the duty of care for the ISPs to assume are listed by the requirements of the limitation rules, while the specific and actual standard of the ISPs’ duty of care should be further considered within the whole legal system of

¹²⁸ See at Chapter 2, the judicial decisions of US, EU and China.

a given nation.

This kind of practical dissymmetry between the requirements of the safe harbor and the ISP's substantial duty of care in the legal system as well as the judicial decisions is one of the motivations of this dissertation. Traditionally, the law will only deal with the infringing activity and the constructive requirements of the liability. Once the illegal activities are clearly defined, there is no need to stipulate the legal activities from the contrary perspective since the latter are logically to be deduced. At the same time, the regulation from the contrary perspective will also lead to the confusion in explaining the dividing line between the legal and illegal ones. However, the safe harbor principle is just this kind of mechanism. Instead of stipulating when should the ISPs be liable, the content of the safe harbor is when should the ISPs be immune from liability. This kind of double systems is the legislative background for the uncertainty of the safe harbor in practice.

Further speaking, there is a fundamental difference between the mechanism of "duty of care" and the "safe harbor". Under the first mechanism, the given entity would be liable if he does not follow the legal duties imposed by the law. But there may be some situations when the court could further ask the entity to assume the liability even all the listed duties are fulfilled, with the judicial basis as the legal principles in the civil law system, or the creation of the courts in the common law system. That is to say, the mechanism is open at the direction of imposing obligations on the ISPs by which to protect the right holders in a proper way. In comparison, the mechanism of the safe harbor is different in the sense that it tries (but fails as mentioned above) to provide the ISPs with a certainty from liability once the requirements of the rules are fulfilled. And the critical point would be to guarantee the safety of the Internet industry instead of the protection of copyright (under the situation of the E-commerce Directive also other kinds of rights). The development of the Internet industry seems to prove the positive effect of the safe harbor, although the causing relationship needs to be specifically discussed, but the negative influence on the protection of copyright is also obvious. Throughout the history, there has been no such influential and specific regulation to protect the development of a given industry (with the scarification of others), and the

justification of the second mechanism should be analyzed again after 20 years of its development.

Similar to the relationship of the standard of knowledge and the duty of care, it is practically difficult for different legal systems to replace their traditional terminologies by the legislative model of the ISP's duty of care as a whole. But it should be noticed that the protection of the safe harbor could never be sufficiently provided unless the given ISP has assumed all the duties of care from a legal systematic perspective. Of course, it is better from the ISPs' perspective to list the duties to be assumed in one specific legal document by which to limit the confusion. As for this, the model of DMCA is comparatively preferable which tries to list all the duties for the ISP to be protected by the safe harbor, although the successive judicial decisions have still added more rules to the Section 512 of the Act which is discussed in the following chapter.

CHAPTER 2 ISPS' DUTY OF CARE IN CURRENT LEGISLATION AND PRACTICE

(Status Quo of ISP' s Duty of Care)

2.1 ISPs' Duty of Care in US

2.2 ISPs' Duty of Care in EU

2.3 ISPs' Duty of Care in China

2.4 Comparison and Analysis

Generally speaking, ISPs are never held as primary infringers unless there is sufficient proof that they actively duplicate or distribute the works themselves. On one hand, this is in line with the basic tort law theory; on the other hand, this is clarified by the widely accepted mechanism of safe harbor. At the same time, the safe harbor principle has never been absolute. On one hand, to obtain the privilege provided by this principle, the ISPs must follow the listed requirements; on the other hand, different legal systems have developed various rules of secondary liability, accessory liability, contributory liability and vicarious liability, etc., to hold the ISPs to be responsible for their users' copyright infringement. Besides, it is also a consensus that the right holders may ask an injunction against the ISPs to stop the continuation of the direct infringement regardless of their damage compensation.

Of all the representative legal systems, including US, EU and China, the ISP's duty of care is controversial as well as separated in different legal documents, including the copyright law, the tort law, the judicial precedents and the concluded treaties which are of significant importance for EU member states. Meanwhile, although the traditions and nominal are various,¹²⁹ the critical criteria to judge the ISPs' liability in third-party copyright infringement is still identical in different legal systems. That is to say, different specific rules and explanations are all objectively establishing a duty on the ISPs to take care of their business model as well as the practice of their service. This

¹²⁹ See for example, Graeme B. Dinwoodie, A Comparative Analysis of the Secondary Liability of Online Service Providers on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, p.72.

chapter is to explore the related legal history as well as the current statute laws and the representative case judgments to summarize the ISPs' current duty of care in different legal systems, by which to conclude the similarities and the differences, and to provide the legal dogmatic (Rechtsdogmatik) for further discussion.

2.1 ISPs' Duty of Care in US

There have been controversial debates on the ISPs' liability of online infringement at the end of the 20th century. In some legal suggestions, for instance the NII White Paper, as well as some court judgments, represented by the *Playboy Enterprises Inc. v. Frena*,¹³⁰ the ISPs are held to assume a strict liability in the infringements through their service. However, the NII White Paper was later resisted due to the objections from the ISPs' representatives. Soon after that, both the court opinions and the legislative attitudes changed dramatically.

In replacement of the NII White Paper, the US Congress soon passed the Online Copyright Liability Infringement Act and the Digital Copyright Clarification and Technology Education Act in 1997.¹³¹ Both of them excepted the ISPs from copyright liability on condition that they played the roles of pure technology providers. More importantly, the former act was then passed as a part of the DMCA in 1998, adding Section 512 to the copyright act, which is the fundamental regulation on the ISPs' liability in copyright infringement in US. The legislation as well as its judicial application of the DMCA is also the most important legal sources to explore the ISPs' duty of care in US.

2.1.1 The DMCA

Section 512 of the DMCA creates four new limitations on the ISP's liability for copyright infringement. As mentioned above, in the current legal systems, the

¹³⁰ *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp.1552 (1993).

¹³¹ See Christopher Wolf, *Digital Millennium Copyright Act: Text, History, and Case Law*, Pike & Fischer, 2013, p.464.

requirements to enjoy the safe harbor are not equal to the ISPs' duty of care. According to Section 512(I), the copyright owners could not simply ask the ISPs to be responsible just on the factual basis that they do not qualify the requirements listed in Section 512.¹³² Instead, they still need to demonstrate the ISPs' direct infringement or secondary infringement including contributory infringement, vicarious infringement or inducement infringement. The safe harbor is actually the ISPs' defending facts, not the copyright owners' advantage for the ISPs to assume the corresponding duty of care.

However, practically speaking, it is not hard for the copyright owner to prove the relationship between the ISPs' service and the users' infringement. Under this situation, whether the ISPs have followed the requirements of liability limitation in Section 512 is actually of great influence on the judgment. Although these requirements are not equal to the duty of care in a strict sense, the legal effect of them do have remarkable similarities.

Article 512 of the DMCA regulates the ISPs' liability according to the specific categories, including (a) Transitory Digital Network Communications; (b) System Caching; (c) Information Residing on Systems or Networks at Direction of Users; and (d) Information Location Tools. To begin with, the specific requirements for them to be exempted from liability are differently regulated from Section 512 (a) to 512(d). In addition, there are common requirements on them following the particular requirements for different ISPs.

2.1.1.1 General Requirements on the ISPs

According to Section 521(k)(1), the ISPs regulated by the DMCA is quite broad, including any "*provider of online services or network access, or the operator of facilities*". The general requirements apply to all of the four kinds of ISPs specially regulated, as well as any other possible kinds of ISPs.

First and foremost, it is explicitly stipulated in Section 512(m) that the ISPs do not have

¹³² In addition, the ISPs may also find other defenses otherwise available under copyright law, see Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O' Rourke, *Copyright in A Global Information Economy*, Wolters Kluwer, 2010, p.505.

an obligation of general monitoring. If we consider the context of Section 512 (m), it should be understood that the clause itself should not be considered as the legal obligation for the ISPs to monitor the service. However, it could neither be understood that the DMCA itself directly prohibit the application of these kinds of measures. The actual legal basis for the prohibition of these kinds of measures is in other legislation, for instance, the ones protecting the consumers' privacy.

Furthermore, there are three main kinds of requirements on the ISPs,

(A) To disclose the identity of an infringing subscriber. According to Section 512(h), A copyright owner may request a subpoena to an ISP for the identification of its users who is found to be conducting copyright infringement. Upon receiving a qualified subpoena, the ISP should expeditiously provide the needed information. This is the ISPs' duty of assistance in identifying the specific infringer.

(B) To stop the repeat infringers. According to Section 512(i)(1)(A), to enjoy the protection of the safe harbor, the ISP should have adopted the systems by which to terminate the services to the users conducting repeated infringement. As classified by this dissertation, this is the duty of supervision of further specific infringers.

(C) To accommodates standard technical measures. The ISPs should be able to accommodate and does not interfere with standard technical measures (Section 512(i)(1)(B)), which are applied by the right holders for the purpose of copyright protection. To be noticed, Section 512(i)(1) stipulates further definition on the so-called "standard technical measures",¹³³ which substantially limits the range of qualified technical measures to be accommodated by the ISPs. Meanwhile, the section itself does not impose a duty on the ISPs to cooperate with the copyright owners to reach the consensus on the specific standard of the technical measures. Until now, the adopted measures in practice are limited to very rare situations. In other words, the

¹³³ The so-called "standard technical measures" means "technical measures that are used by copyright owners to identify or protect copyrighted works and—(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks."

corresponding legal burden on the ISPs is quite limited. While this article does impose to some extent a duty to prevent the infringement in a general sense.¹³⁴

2.1.1.2 Specific Requirements on Different ISPs

Except for the general requirements for all kinds of ISPs, Section 512(a) to (d) list specific circumstances for four representative kinds of ISPs to be exempted from infringement liability.

(A) Limitation for Transitory Communications. According to Section 512(a), the corresponding ISPs providing this kind of service must play a totally independent and automatic role during the transmission, without any influence on the initiation, recipients or content. Besides, the intermediate copy during the transmission should not exceed the reasonable range.

To be noticed, Section 512(k)(1)(A) stipulates a special definition on the ISP used in Section 512(a). Combining this specific and narrow definition as well as the requirements for limiting the liability, it could be concluded that the emphasis of this circumstance is to limit the corresponding ISPs to pure passive conduits, or described in the E-Commerce Directive, “mere conduit”. In fact, this kind of ISPs could be analogs to the traditional tubes like post offices or telephone companies. And the application of the principle of network neutrality or technology neutrality is comparatively reasonable enough under this situation. As for the duty of care, it could be concluded that there is actually no specific and active duty for these transitory communications.

(B) Limitation for System Caching. According to Section 512(b), the ISPs should keep as an independent intermediary between the users of the services and the original uploaders. And the main purpose is to limit the extension and function of the caching to a technologically essential degree. Besides, the ISPs have a duty to delete the caching once noticed by the copyright owners.

The system caching is not an independent service, but more like a technical best practice

¹³⁴ See Marshall A. Leaffer, *Understanding Copyright Law*, LexisNexsi, 2014, p.636.

since it reduces the recourses of both the ISPs and the web users.¹³⁵ The infringement directly results from the application of this service is quite limited and thus the positive duty of the ISP is only to deal with the notice from the copyright owner. To be noticed, the qualified notice is really limited since the copyright owner must prove that the material should be and has been removed from the originating site. To be honest, the application of the system caching just benefits the ISP and the specific user, and it will not independently provide the user any substantial convenience to distribute the materials illegally to others. Consequently, the influence of this service itself on online copyright infringement is comparatively limited.

(C) Limitation for Information Residing on Systems or Networks at the Direction of Users. According to Section 512(c), the ISP should have no requisite knowledge of the infringement and should not get any profits from the infringement which it is able to control. Besides, the ISP should follow the notice and takedown procedure thereby.

This kind of ISPs are the most common ones that may provide significantly direct and substantial convenience to the general users for uploading and sharing the works without the authorization of the right holders. Paragraph (A)、(B) and (C) actually provide three requirements for the residing on systems or networks to get relief from liability: not to constitute the contributory liability, not to constitute vicarious liability and to respond the notice of the copyright owner in a due way.

Of all the three requirements, the response of the notice could be classified as an active duty of care, which is classified in this dissertation as the duty of assistance in specific infringement. While Paragraph (A) and (B) could also be explained as some kind of duty. As for Paragraph (A), the underlying duty is to keep an eye on the apparent infringing activity. To be exact, if the ISP does have taken possible kinds of measures to prevent the infringement as a whole, it should be explained that it “*is not aware of facts or circumstances from which infringing activity is apparent*”, which is stipulated

¹³⁵ See The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary, p.10.

in Section 512(c)(1)(A) (ii) as a circumstance of liability limitation.¹³⁶ And as for Paragraph (B), the underlying duty is that the ISPs should pay attention to the legality of the activities through their service which are under control of them and could also bring them direct profits. In the common sense, it is impossible for the right holder to prove that the ISP does have an actual knowledge of the infringing activity and the legal basis for the possible liability is then not the intent of the ISP but its negligence. Correspondingly, the strict requirement of liability limitation means a higher level of duty of care in these circumstances.

(D) Limitation for Information Location Tools. According to Section 512(d) and similar to the regulation on the hosting ISPs, the information location tool is another influential service that may constitute direct and contributory assistance for infringing activities. To be precise, the hosting ISPs provide the users the possibility to upload and to share the pirated works, while the location tool will facilitate other users in finding the works and thus the whole procedure of wide distributing and receiving is fulfilled by concatenating the disseminators and the receivers of the pirated works. The requirement of liability limitation, as well as the duty of care on these two kinds of ISPs is the same according to the DMCA.

While comparatively speaking, the information location tool has a much stronger feature of technical neutrality, unless it modifies the searching result willingly, represented by the paid ranking service provided by the search engines. Correspondingly, the practical standard of duty of care of the information location tool should not be as strict as the information residing on systems or networks, especially when it comes to the application of Section 512(d)(1)(A) (ii). In practice, complaints about the information location tools' knowledge of the specific infringement on the

¹³⁶ Of all the three circumstances listed in Section 512(c)(1)(A), Section 512(c)(1)(A) (ii) is the most controversial one since whether the ISP "have actual knowledge that the material or an activity using the material on the system or network is infringing" , as stipulated in Section 512(c)(1)(A) (i), is hard to prove. So is it the so-called "upon obtaining such knowledge or awareness" which may be proven to be convincing only with the notice from the copyright owner about the existence of the specific infringement. This could also be partially proven in Section 512 (c)(3)(B) (i). On the contrary, a qualified notice should have this kind of presumption effect. The circumstance stipulated in Section 512(c)(1)(A) (ii) is the most representative one when we try to consider the active duty of care of the ISPs in third-party copyright infringement.

basis of the technologically natural searching results are not common.

2.1.2 Judicial Opinions

The judgments of the US courts laid the basis for the formation of the DMCA. And after that, the following representative cases further explained the rules of the DMCA in consideration of the specific disputes and provide us with a practical and detailed understanding of the ISPs' duty of care in US.

2.1.2.1 From Strict Liability to Secondary Liability

At the beginning of the Internet era and even before the DMCA, the US courts used to hold the ISPs to be generally responsible for the users' infringement. To be representative, in the case of *Playboy Enterprises, Inc. v. Frena*,¹³⁷ the Court held the opinion that there was no need to consider the ISP's intent or knowledge of the online copyright infringement and thus it should be certainly responsible for the loss of the right holders.¹³⁸ It is notable that the judgment did not separate the liability of the direct infringers and the secondary liability of the ISP. Correspondingly, the ISPs' duty was to be responsible for all the behaviors of the users and the corresponding liability should be attributed as strict ones.

This kind of strict liability, as well as the ISPs' duty to prevent all the infringing activities through their services were soon abandoned in the following cases, represented by *Religious Technology Center v. Netcom*.¹³⁹ Different from the judgment in *Playboy Enterprises, Inc. v. Frena*, the court held the opinion that the defendants were not liable for direct infringement or vicarious infringement. Meanwhile, by referring to the precedent of *Gershwin Publishing Corp. v. Columbia Artists*

¹³⁷ *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp.1552 (1993). The defendant was accused for copyright infringement when some of the photos owned by the plaintiff was posted on a BBS operated by him. Besides, the defendant just deleted the infringing materials once noticed by the right holder.

¹³⁸ The court cited the precedent of *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29 (2d Cir.1990).

¹³⁹ *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). The plaintiff asked the defendant as an ISP to block its user' s infringing materials and the defendant as an ISP asked the plaintiff to provide the proof of its right on the related works. The plaintiff refused the feedback and the ISP also insisted not to follow its request and asserted that it should not be responsible for the users' activity.

*Management, Inc.*¹⁴⁰, the court held the opinion they were not entitled to summary judgment on plaintiffs' claim of contributory copyright infringement considering that the defendants should have known the infringing activities of the users in which they had substantially participated. In other words, the contributory infringement of the ISP was established in this case. The judicial decision in this case substantially influenced the related rules of the DMCA.¹⁴¹

2.1.2.2 Specific Knowledge and No-monitoring

The role of the ISPs as passive recipients of the copyright owners' notice set by the DMCA is generally accepted by the US courts. For instance, in the case of *Viacom International Inc. v. YouTube, Inc.*¹⁴², the circuit court analyses the requirement of the DMCA safe harbor, especially the specificity requirement, which is of crucial meaning for us to understand the US courts' opinion about the ISPs' duty of care. First and foremost, the court alleged that the text of the DMCA is the determining basis to be considered regarding the ISPs' liability. Moreover, the court alleged that the DMCA requires specific knowledge instead of the general awareness of the infringement, on the basis that only in this way could the ISP be aware of the infringing materials that should be further deleted following the notice and takedown procedure. It also means that there is no stipulated obligation to monitoring the activities of the users according to the explanation of the court in this case.

2.1.2.3 The Limited Application of the Safe Harbor

The safe harbor established by the DMCA brought legislative obstacles to ask the ISPs to take active measures to deal with online infringement. While in practice, the courts were not rigidly following the context of the legislation, but to ask the ISPs to be

¹⁴⁰ *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* (443 F.2d 1159 (1971)). According to this case, contributory copyright infringement was defined as "one who, with knowledge of the infringing activities, induces, causes, or materially contributes to the infringing conduct" .

¹⁴¹ See H. Rept. 105-551, Part 1 - *WIPO Copyright Treaties Implementation and On-Line Copyright Infringement Liability Limitation*, at <https://www.congress.gov/congressional-report/105th-congress/house-report/551>, p.11 and p.24-25. To be noticed, the judicial decision of this case was said to be the "most thoughtful" one on the definition of directive infringement by the House Report.

¹⁴² *Viacom International Inc. v. YouTube, Inc.*, 676 F.3d 19. Viacom filed a \$1 billion lawsuit against Google and YouTube alleging that many of its copyrighted works has been uploaded on the site.

responsible under given circumstances to keep the balance.

For instance, soon after the DMCA comes the case of *A&M Records, Inc. v. Napster, Inc.*¹⁴³ At the beginning, the district court held the opinion that there was no need for the ISP to have specific knowledge of the infringement according to the law, and the defendant could not be immune from liability with the excuse that they could not distinguish the illegal activities with the ordinary use. Further, the circuit supported this kind of analysis considering that the defendant should have actual and constructive knowledge of the infringement of the users. Besides, the court held the idea that the comparison of the number of illegal and illegal activities is not the determining element to be considered. Instead, the main element is whether the ISP had reason to know the infringing activities of the users. In this way, the ISP was liable for contributory liability. At the same time, both the district and the circuit court held the opinion that the ISP had the ability to supervise the users' activities, though their understanding of the ISP's specific ways of this supervision were different. More importantly, the two courts had the consensus that the ISP benefited financially from the infringement on the basis that the further revenue of the defendant was basically determined by the number of the subscribers to which the infringement contributed significantly. To be noticed, here the benefits is not the direct revenues from the specific infringement. Under this kind of explanation, it would be quite easy to prove the ISP's benefits from the infringing activities.

To be noticed, both the ISPs' liability of contributory infringement and vicarious infringement have their legislative basis in the DMCA, which excludes the immunity of the ISPs under these circumstances in Section 512(c) and 512(d). Besides, there are also other possible explanations to limit the application of the safe harbor, for instance, Section 512(i)(1)(A) of the DMCA asking the ISPs to implement to deal with repeat infringers. A representative case is *EMI Christian Music Group, Inc. v. MP3tunes,*

¹⁴³ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The defendant operated a P2P service which was accused by the plaintiff for contributory and vicarious copyright infringement. In response, the defendant asserted that the service had legitimate purposes, referring to the case of *Sony Corp. of America v. Universal City Studios*.

LLC.¹⁴⁴ The district court held the opinion that the defendant had duly applied a policy to deal with repeat infringers which was understood as the uploaders of the infringing materials. This kind of explanation was further refused by the circuit court on the consideration that the so-called repeat infringer should also include the downloaders of the corresponding works. Besides, the circuit court also emphasized that the users' state of mind should not be taken into consideration when judging the constitution of the repeat infringement.

The similar requirement was analyzed in *BMG Rights Management v. Cox Communications*.¹⁴⁵ The defendant's held the opinion that the so-called repeat infringers could only be recognized by a judicial procedure, meaning that the corresponding policy should only be applied on the users who had been held for repeated infringements by the court. In comparison, the circuit court rejected this contention and explained the terminology in a common and literal way. Besides, the court agreed with the idea that the ISP should had some kind of freedom in deciding the specific policy, but the policy must be effective and advanced enough instead of being an excuse for the ISP's immune from liability which was the situation of the defendant in the case which "leaving it essentially with no policy".

2.1.2.4 The Establishment of Inducement Infringement

In addition to the strict explanation of the requirements of the safe harbor, the US courts also draw from the experiences from the common law by which to exclude the ISP's immunity from indirect copyright infringement. As for this, the most representative one is the reference to the inducement infringement in *MGM Studios, Inc. v. Grokster, Ltd.*¹⁴⁶ To be noticed, it is often said that this case is a re-examination of the principles set by

¹⁴⁴ *EMI Christian Music Group, Inc. v. MP3tunes, LLC.*, No. 14-4369 (2d Cir. 2016). The plaintiff asked the defendant for the users' direct copyright infringement. And the main controversial issue was whether the latter had implied reasonably the policy to deal with repeat infringers.

¹⁴⁵ *BMG Rights Management v. Cox Communications.*, No. 16-1972 (4th Cir. 2018). This is also a case regarding contributory copyright infringement of the P2P service providers. To be noticed, the defendant applied a policy that after the 13th notice of infringement, the infringing subscriber would be considered for termination. However, the defendant had never practically terminated any infringers

¹⁴⁶ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Again, this is a case regarding the liability of a P2P provider. MGM and other copyright holders sued the defendants on the basis that they knowingly and intentionally distributed their software which could be used by the users for sharing copyrighted works.

*Sony Corp. v. Universal City Studios.*¹⁴⁷

The district court excused the defendant as a P2P provider the same liability like that in the *Napster* case.¹⁴⁸ When it came to the supreme court, there was a notable disagreement on the comparison of this case with that of Sony. To be noticed, the plaintiffs asserted that the defendant refused to imply the filtering system, which could be drawn to prove its intent to contribute to infringing activities. But this kind of logic was not accepted by the court considering that the service itself could be used for substantial non-infringing purposes. At the same time, the court held the opinion that the secondary rules rooted in the common law should still be applicable in deciding the liability for copyright infringement. In this way, the court introduced the doctrine of inducement infringement in recognizing the ISP's liability in copyright infringement.

2.1.2.5 Red Flag and Willful Blindness

The most notable breakthrough of the safe harbor by the US courts is the creation of red flag standard as well as the recognition of the willful blindness of the ISPs.

For instance, in the case of *Viacom International Inc. v. YouTube, Inc.*,¹⁴⁹ responding to the plaintiff's argument of citing the Section 512 (c)(1)(A)(ii) which was called as the "red flag" knowledge provision, the court explained that the knowledge stipulated by the DMCA should be a specific one. Based on this, the focus of the red flag provision was that there was no need to justify the subjective knowledge of the ISP. Instead, it should be considered referring to whether a reasonable person could be aware of the specific infringements referring to an objective standard. At the same time, the defendant could only be accused for willful blindness of the specific infringing activities instead of the general activities of the users. Thereby, the court asserted again that the ISPs should not be imposed on an obligation of general monitoring.

Red flag and willful blindness were also discussed in the recent case of *EMI Christian Music Group, Inc. v. MP3tunes, LLC*. The circuit court first emphasized that the DMCA

¹⁴⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁴⁸ See Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, p.312.

¹⁴⁹ *Viacom International Inc. v. YouTube, Inc.*, 676 F.3d 19.

did not impose a general obligation on the ISPs to take action in response of the general evaluation of infringement. And thus it should be the duty of the right holders to prove the obviousness of the infringing activities, or the “red flag”. Meanwhile, the court also asserted that a limited duty on the ISP would not lead to an ‘amorphous’ duty of general monitoring which was in contrary with the DMCA.¹⁵⁰

2.1.2.6 A Short Summarization

As mentioned above, the US courts have tried to explain the requirements of the safe harbor in a strict way, as well as to refer to common rules like inducement infringement and willing blindness to impose heavier duty of care on the ISPs, by which to rectify the shortcomings of the DMCA which inappropriately reduces the ISPs’ duty of care.¹⁵¹

While it should be noticed that, the DMCA is still at the heart of the ISPs’ liability in copyright infringement, which is clearly stipulated in the judgment of *Recording Industry Association of America v. Verizon*,¹⁵² stating that

“we are not unsympathetic either to the RIAA’s concern regarding the widespread infringement of its members’ copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen Internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress”.

In particular, the courts refer again to *Sony Corp. v. Universal City Studios, Inc.*,¹⁵³ asserting that this kind of fundamental evaluation of the interests which are implicated

¹⁵⁰ To be noticed, the specific situation in this case was that the attribution of the infringed works was proven to be known to the defendant.

¹⁵¹ Different from my observation, some scholars conclude that the US court have been limiting the application of contributory infringement and the ISPs are predicated to get more freedom, see Salil K. Mehra and Marketa Trimble, Secondary Liability of Internet Service Providers in the United States: General Principles and Fragmentation, on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, p.108.

¹⁵² United States Court of Appeals, District of Columbia Circuit. *Recording Industry Association of America v. Verizon*, Appellant. Nos. 03-7015 & 03-7053. Decided: December 19, 2003.

¹⁵³ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

by new technologies could only be conducted by the Congress according to the constitutional mechanism of US.

2.2 ISPs' Duty of Care in EU

EU' legislation on the ISPs' liability is substantially based on the E-Commerce Directive,¹⁵⁴ which applies not only to copyright infringement but also disputes related to other kinds of subject matters in the electronic environment.¹⁵⁵ Besides, according to Recital 48 of the Directive, it does not influence of the choice of the member countries to apply some duties of care on the ISPs under given circumstances if it is supported by national law to detect and prevent the illegal activities. In other words, the requirement of the directive on the ISPs is the minimum standard, upon which the member states could add other duty of care.

2.2.1 EU Legislation

The E-Commerce Directive has many similarities as the DMCA in regulating the ISPs' liability. First and foremost, both of them immune the ISPs from monitoring the users' activity as a general obligation. Besides, for the specific requirements for the ISPs to be immune from liability due to their users' online infringement, both of them adopt a legislative model of separated regulation, imposing various requirements for different kinds of ISPs.

At the same time, different from the DMCA, the E-Commerce Directive is quite much simpler in the following aspects. First, there is no general requirement as the DMCA, including disclosing the identity of an infringing subscriber, stopping the repeat infringers and accommodating standard technical measures. Instead, Article 15 of the

¹⁵⁴ C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.325. The author holds the idea that "the current EU framework on intermediary liability is scattered across a range of different sources, but its heart is found in the E-Commerce Directive".

¹⁵⁵ See Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, p.314.

Directive leaves these requirements to further legislation of the member states. Second, compared the DMCA, only the liability limitation requirements of three kinds of ISPs are mentioned in the E-Commerce Directive, that is the mere conduit, caching and hosting, omitting the so-called Information Location Tools in the DMCA.¹⁵⁶

Besides, later the EU Information Society Directive and the IP Enforcement Directive provide that the owners of the intellectual property rights could request injunctions against the ISPs, while the liability limitation rules of the E-Commerce Directive still apply.

2.2.1.1 General Requirements

According to Article 15 of the E-commerce Directive, it is not allowable for the member countries to impose a general duty on the ISPs to actively monitor the information through their service. In other words, the ISPs should not be imposed on a duty to prevent the copyright infringement in the form of general monitoring.

To be noticed, both Article 12(3), Article 13(2) and Article 14(3) stipulate that, the special requirements mentioned later although with the limitation on the liability, it should be possible for the given court or the administrative authority to send an injunction on the ISPs by which to stop or prevent the ongoing illegal activities. In addition to that, Article 14(3) adds another circumstance under which the member states could establish corresponding procedures by which to remove the illegal information. In other words, the directive provides with a possibility for to add duties of care on the ISPs to stop and even to prevent the infringement at the level of national legislation. As for the duty to terminate the infringement regardless of the limitation on the liability of compensation, it is in line with the application of the injunctions. While as for the duty to prevent the infringement, there may be the technological measures and the policy to deal with repeated infringers as regulated by the DMCA. But the E-Commerce Directive itself does not apply a compulsory duty like this. In comparison, the Proposal for a Directive on CDSM adds a compulsory duty in Article 13, regarding the duty to

¹⁵⁶ See Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, p.314.

prevent the infringement to some extent.

Besides, according to Article 15 of the E-Commerce Directive, the public authorities could ask the ISPs to play a more active role. It would be possible for the member countries to impose an obligation on the ISPs to provide promptly the essential information by which the public authorities could identify the users of the ISPs who could be conducting illegal activities including copyright infringement. According to this dissertation, this is the duty of disclosing the identification of the infringing subscriber.

Combining Article 12(3), Article 13(2), Article 14(3) and Article 15(2) together, the E-Commerce Directive provides a flexible and broad basis for the member states to ask the ISPs to assume more duties of care in copyright infringement. While considering the lack and the inconsistency of the member states' following legislation, there comes the necessity to stipulate it from the EU level and this is partially the circumstances of the Proposal for a Directive on CDSM.

2.2.1.2 Specific Requirements of Liability Limitation

(A) Mere Conduit. For the ISPs majoring caching, the conditions to not be liable are when the ISP does not interfere with the initiation, the receiver as well as the content of the transmission. Similar to Section 512(a) of the DMCA, the mere conduit under the E-Commerce Directive could be eliminated from liability generally on condition that they keep passive.

(B) Caching. For the caching, the conditions to not be liable are when the ISP follows the rules regarding the access, updating, protection of the cached information. At the same time, when the original information is removed or it is thus requested by the authority, the ISP should disable the corresponding access. Shortly speaking, the aim and process of the caching should be strictly limited to the neutral function of the service.

(C) Hosting. For the hosting, the conditions to not be liable are when the ISP is truly unaware of the direct infringement and follow the procedure of notice and takedown

expensively.

There are both similarities and differences on the liability of the hosting ISPs in the E-Commerce Directive and the DMCA. Both of them ask the ISPs do not have actual or some kind of constructive knowledge of the infringement, though with different expression in words. And the ISPs should assume the duty to stop the infringement upon receiving the qualified notice. While the DMCA also ask the ISPs to be more careful when they receive directive financial benefit from the infringement, which is not clearly stipulated by the DMCA.

2.2.2 EU Judicial Opinions

The CJEU does not deal with disputes involving private parties directly, but it plays a significant role in explaining the EU rules when related controversy comes up in the member states courts. According to the summarization of Dr. Martin Husovec, the exact scope of the safe harbor provided by the E-Commerce Directive depends on the explanation of the “information society services”, the extension of the specific services, the content of liability and injunctive relief, as well as the requirements of the safe harbor.¹⁵⁷

2.2.2.1 A Systematic Understanding Approach

The duty of the ISPs is not independently understood by the E-Commerce Directive but is systematically determined by many of the EU legislation, including the Fundamental Right Charter, and a methodology of “fair balance” between conflicting fundamental rights is heavily relied on.¹⁵⁸

For instance, in the order of the *LSG v. Tele2 Telecommunication GmbH*,¹⁵⁹ 2009, the

¹⁵⁷ See Martin Husovec, Holey cap! CJEU Drills (Yet) Another Hole in The E-Commerce Directive' s Safe Harbours, *Journal of Intellectual Property Law & Practice*, 2017, Vol. 12, No. 2, p.115.

¹⁵⁸ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.325.

¹⁵⁹ *LSG v. Tele2 Telecommunication GmbH*, Case C-557/07. See also at Irini A. Stamatoudi, eds., *Copyright Enforcement and the Internet*, Wolters Kluwer, 2010, p.215. The plaintiff asked the defendant to provide the identification information of its users. The defendant denied on account that it was not an intermediary and did not store the information.

CJEU rules that it is not precluded by the EU rules for the member countries to impose an obligation on the ISPs by which to provide the identification information to bring the civil suits. Meanwhile, when considering the application of such an obligation, the member countries should refer to the E-Commerce Directive, the Directive of the Information Society, the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Directive on Privacy) and the IP Enforcement Directive, by which to make a balance of the involved fundamental interests. Moreover, the member states should also take into consideration of other general principles of the communality law, for example the principle of optionality, by which to avoid the legal conflicts.

It is not only for the disclosure of the data but also for the whole aspects when it comes to the liability or duty of the ISPs that a systematic consideration should be taken, including the specific directives as well as the fundamental treaties or charters of the EU. Actually, many of the disputes regarding the Proposal for a Directive on CDSM are related to different understanding and interpretation of the former directives. In response, it was added in the amended version of the proposal to take account of many elements including the safe harbor mechanism, technological development and users' fundamental rights.

2.2.2.2 No General Filtering

In the case *L'Oréal v. eBay*,¹⁶⁰ the CJEU confirmed that the measures required by Article 15 of the E-Commerce Directive should not be interpreted to be consistent with the ISPs' obligation of monitoring the whole information of the users for the purpose of copyright protection. Besides, this kind obligation of general monitoring obligation would also conflict with Article 3 of the IP Enforcement Directive, emphasizing that related measures should abide the principle of proportionality as well as economical

¹⁶⁰ *L'Oréal v. eBay*, Case C-324/09. The plaintiff accused the defendant for the interference on its closed distribution network due to the individual sellers who were also users of the defendant's service. Accordingly, the defendant provided convenience to counterfeit, parallel-trade and other improper activities.

fairness.¹⁶¹

Following that, in the order to *Scarlet Extended SA v. SABAM*,¹⁶² 2011, the CJEU rules that taking into comprehensive consideration of the directives 2000/31/EC, 2001/29/EC, 2004/48/EC, 95/46/EC and 2002/58/EC which are all founded on the basis of the fundamental rights, it is unacceptable to apply an injunction asking the ISPs to install the kind of systems which could be used for monitoring all the information passing through its service. CJEU further list some specific examples of eliminating the ISP to apply the filtering system, including the application of P2P software and those could be applied to all the users for an unlimited period, even as preventive measures and especially at the cost of the ISPs. This judgment further confirms Article 15(1) of the E-Commerce Directive, eliminating the ISPs' duty of filtering the service as a whole.¹⁶³

To be noticed, although a higher level of duty was imposed on the ISPs by the Proposal for a directive on CDSM, it is also emphasized that the application of the technological measures should not be used for the general monitoring but should be applied to specific content. And the purpose should be limited to preventing the illegal communication to the public of the works which are specifically identified by the right holders.

2.2.2.3 More Freedom of the National Law

As mentioned above, it is commented that the function of the E-Commerce Directive in unifying the member states' regulation on the ISPs' is limited, especially when it comes to the comparison of it with the detailed rules of the DMCA. While the Directive has actually leaved the space for the member states to impose more obligations on the ISPs in Article 15(2).

Similarly, In the judgement of *Valsts policijas Rīgas reģiona pārvaldes Kārtības*

¹⁶¹ See also at Christina Angelopoulos, Sketching the outline of a ghost/ the fair balance between copyright and fundamental rights in intermediary third party liability, *info*, Vol. 17 Iss 6, p.75

¹⁶² *Scarlet Extended SA v. SABAM*, Case C-70/10. SABAM as a collective management organization asked an injunction on the ISP to stop and prevent its users' sharing of copyrighted works.

¹⁶³ See Christina Angelopoulos, Sketching The Outline of A Ghost: The Fair Balance Between Copyright and Fundamental Rights in Intermediary Third Party Liability, *info*, Vol. 17 Iss 6, p.75; Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, p.315.

*policijas pārvalde v. Rīgas pašvaldības SIA 'Rīgas satiksme'*¹⁶⁴, the CJEU concluded that Article 7(f) of Directive 95/46/EC (of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data) did not empower a third party the right to ask for the identification information by which to bring further law suits. But it would be possible if the member countries had the corresponding legislation. Therefore, it confirms that the national law may impose higher level of obligation on the entities including the ISPs possessing the information of an infringing entity to disclose the essential data for the protection of the legitimate interests unless the corresponding disclosure would lead to the violation of the fundamental rights of the opposite entity according to Article 1(1) of Directive 95/46.

2.2.2.4 Injunctions Against Infringing Users should be approved

In the order to *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH & Wega Filmproduktionsgesellschaft mbH*,¹⁶⁵ the CJEU confirms the possibility to ask the ISPs assume the duty of specifically preventing the accessing of protected works without influencing the possibility of accessing the Internet as a whole. To be noticed, it is emphasized that the authority should not “specify the measures” to fulfill the objective. And when the ISP has taken “all reasonable measures”, a liability of compensation could be excluded. This is of significant meaning when we consider the rationality and the modification of Article 13 of the Proposal of Directive on CDSM.

Further, in the case *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*,¹⁶⁶ 2016, the CJEU decided that Article 12(1) of the E-Commerce Directive did not empower the copyright owners to claim for compensation from an entity providing others Internet connection which could be used for infringing activities. However, an

¹⁶⁴ *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v. Rīgas pašvaldības SIA 'Rīgas satiksme'*, Case C-13/16.

¹⁶⁵ *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH & Wega Filmproduktionsgesellschaft mbH*, Case C-314/12. The right holders asked the court to issue an injunction on the UPC to block access to the copyrighted films

¹⁶⁶ *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, Case C-484/14. Fadden runs a store and offers free Wi-Fi to the consumers without securing protection. Sony Music noticed Fadden that its copyrighted works could be illegally downloaded through the service while Fadden asserted that he could not control the infringement.

injunctive relief against the continuation of the infringement would be acceptable accordingly. At the same time, the CJEU mentioned that it should not be precluded by the protection of the fundamental rights that the entities providing public access to the Internet could identify the information of the users for the protection of copyright, nor should it be precluded of the issuing of such an injunction.

To be noticed, the remedy provided by the injunction here is much beyond the essential extent to stop the specific infringing activity or to prevent future repeat infringement, but is more or less close to the preventive measures. Such kind of an enforcement practice was criticized as “a short-sighted policy” and did not address the compatibility of the measures with data protection and privacy.¹⁶⁷

2.2.2.5 New Trend of a Broad Explanation of “Communication to the Public”

As concluded by Ansgar Ohly, there is a trend revealed in the orders of the CJEU to explain the concept of “communication to the public” broadly. Accordingly, it extends from the direct uploading of the works online to the activities used to be recognized as intermediary ones including the providing of the platform, the distribution of the facilities which could be used for illegal purpose and the posting of the hyperlinks to the originally illegal works.¹⁶⁸ As commented, this will substantially impose a higher duty on the ISPs.¹⁶⁹ To be noticed, once this kind of intermediary activities are classified as direct violation of the right of communicating to the public, the legal obligation on the ISPs is not classified as a kind of “duty of care” defined in this dissertation. But it would significantly influence the interests of the ISPs and the substantial burden on them would be similar, though different when it comes to the legal results since there would be no room for the ISPs to avoid the liability once the users of their service are found to be conducting illegal activities.

¹⁶⁷ See Martin Husovec, Holey cap! CJEU Drills (Yet) Another Hole in The E-Commerce Directive’s Safe Harbours, *Journal of Intellectual Property Law & Practice*, 2017, Vol. 12, No. 2, pp.123-124.

¹⁶⁸ See Ansgar Ohly, The Broad Concept of “Communication to The Public” in Recent CJEU Judgments and The Liability of Intermediaries: Primary, Secondary or Unitary Liability? *Journal of Intellectual Property Law & Practice*, 2018, Vol.13, No.8, p.675.

¹⁶⁹ See Miquel Peguera, Hyperlinking Under the Lens of the Revamped Right of Communication to the Public, *Computer Law & Security Review*, 000(2018), pp.15-17.

In the judgement of the case *Stichting Brein v. Ziggo BV & XS4ALL Internet BV*,¹⁷⁰ 2017, the CJEU ruled that the concept of communication to the public includes the providing and managing of a platform by which the users could locate the works and share them in the form of P2P. In the judgement of the case *Stichting Brein v. Jack Frederik Willems*,¹⁷¹ 2017, the CJEU asserted that the concept of communication to the public should also cover the activities of selling a multimedia player on which there are pre-installed hyperlinks to websites with illegal uploaded copyrighted works.

Generally speaking, the CJEU would consider two elements to judge whether the ISP would be recognized as communicating to the public directly or just as a passive intermediary: whether the ISP has conducted some kind of additional activities except the necessary function as a pure intermediary, and whether a new consumer has been reached due to the application of the service provided thereby.¹⁷² To be noticed, according to the amended version of the Proposal for a Directive on CDSM approved by the EU Parliament, it is confirmed that “*online content sharing service providers perform an act of communication to the public*”, which is stipulated right at the beginning of Article 13.

2.2.2.6 A Short Summarization

The approach of interests balancing in the EU legal system is quite obvious, represented by different understanding of the related charter or directives. While the practical possibility of the injunctions and the currently broad understanding of “communication to the public” do have shown a remarkable evidence of the CJEU’s understanding of the ISPs’ higher duty of care. The Court’s stated aim is to provide a high level of protection for right holders.¹⁷³ And the “passive role” approach adopted by the CJEU

¹⁷⁰ *Stichting Brein v. Ziggo BV & XS4ALL Internet BV*, Case C 610/15. The Netherland association seek for the protection of the rights of the entertainment industry seeks an order to block the well-known file-sharing website, the Pirate Bay.

¹⁷¹ *Stichting Brein v. Jack Frederik Willems*, Case C 527/15. The Netherland association brought an action against the defendant on the basis that the providing of the devices which contain hyperlinks to the illegal works constituted some kind of communication to the public.

¹⁷² See Karl-Nikolaus Peifer, Platform Economy and Liability Questions – Desperately in Search of Concepts Lost in the Virtual World or ‘Storerhaftung’ Resurrected? *IIC* (2017) 48, p.623.

¹⁷³ See Miquel Peguera, Hyperlinking Under the Lens of the Revamped Right of Communication to the Public, *Computer Law & Security Review*, 000(2018), p.19.

possesses the potential to neutralize the safe harbor's provision,¹⁷⁴ and the trend is described as a “shift towards an active-preventive approach”.¹⁷⁵ This is particularly in line with the legislative reform of the Proposal for a Directive on Copyright in the CDSM.

2.2.3 The Application of the Member states

Due to the absence of the complete substantial rules in the E-Commerce Directive and in line with the orders of the CJEU, the ISPs' liability as well as the expressed or implied duty of care is further regulated or understood in the national legal system of the member states.¹⁷⁶ Accordingly, the actual safe harbor reformed by the specific legislation of the member countries are usually in consistent and narrow.¹⁷⁷

2.2.3.1 Italy

In Italy, the ISPs' liability is mainly contained in Legislative Decree No. 70 of 2003 (LD 70/2003), which implemented the Information Society Directive and the E-Commerce Directive.¹⁷⁸ Following the EU Directives, Italian courts hold the opinion that the ISPs do not have a general control obligation,¹⁷⁹ and are not liable provided that they do not have a knowledge of the infringement and have removed the infringing materials upon real knowledge.¹⁸⁰ To be noticed, there is no distinction between primary and secondary infringement under the Copyright Law or any other Italian law or

¹⁷⁴ See Philippe Jougoux, The Role of Internet Intermediaries in Copyright Law Online Enforcement, on Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou & Thalia Prastitou, eds., *EU Internet Law: Regulation and Enforcement*, Springer International Publishing, 2017, p.275.

¹⁷⁵ See Jeremy de Beer and Christopher D. Clemmer, Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries? *Jurimetrics*, Vol. 49, No. 4 (SUMMER 2009), p.375.

¹⁷⁶ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.326.

¹⁷⁷ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.87.

¹⁷⁸ See Elisa Bertolini, Vincenzo Franceschelli & Oreste Pollicino, Analysis of ISP Regulation Under Italian Law, on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, p.143.

¹⁷⁹ See See Elisa Bertolini, Vincenzo Franceschelli, and Oreste Pollicino, Analysis of ISP Regulation Under Italian Law, on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, p.149.

¹⁸⁰ See Massimo Sterpi & Angela Tasillo, *Copyright litigation in Italy: Overview*, at [https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhpc=1](https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhpc=1).

regulation on copyright.¹⁸¹ In the case of *Mediaset v. YouTube*, the Italian court ordered YouTube to locate and remove all the copyrighted works of the plaintiff and thus overcome the ruling of the E-Commerce Directive.¹⁸²

Moreover, on December 12, 2013, the Italian Regulatory Authority on Communications (AGCOM) issued the Regulation on Copyright Protection on Electronic Communications Networks (The AGCOM Regulation) which provided a special procedure to remove copyright infringing materials from the Internet. Long later on March 30, 2017, the Regional Administrative Court of Lazio put an end to the proceeding started to challenge and announced the validity of the Regulation.¹⁸³ The Regulation introduced an alternative procedure in addition to the generally accepted notice and takedown procedure and civil lawsuits, empowering the AGCOM to receive the petition from the copyright owners about the infringing activity online. In response, the AGCOM could decide to open the proceeding and inform the ISP about the situation. Upon receiving the notice, the ISP may choose to remove the infringing content or to rebut. Based on the reaction of the ISP, the AGCOM may choose to send an order for removing the infringing works, or event to completely disable access to the works and to readdress the public of the infringement. As for the enforcement, non-fulfilment of the authority's orders may result in a fine from EUR10,000 to EUR250,000. And the authority could also decide to shorten the deadline in a serious situation.¹⁸⁴ To be noticed, the Regional Administrative Court of Lazio announced that the costs related to the removal of contents should not be laid on the copyright owners.

¹⁸¹ See Massimo Sterpi & Angela Tasillo, *Copyright litigation in Italy: Overview*, at [https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

¹⁸² See Emerald Smith, Lord of the Files: International Secondary Liability for Internet Service Providers, 68 *WASH. & LEE L. REV.* 1555 (2011), p.1579.

¹⁸³ See Daniela De Pasquale, *The Italian regulation against on line copyright piracy is valid: the decision of the Regional Administrative Court of Lazio*, at <https://www.lexology.com/library/detail.aspx?g=dffbee3b-b0a1-4a37-886d-8ab886062c19>. For detailed background of the regulation, see Gianluca Campus, *Italian public enforcement on online copyright infringements: AGCOM Regulation held valid by the Regional Administrative Court of Lazio (but there is still room for the CJEU)*, at <https://www.lexology.com/library/detail.aspx?g=dffbee3b-b0a1-4a37-886d-8ab886062c19>.

¹⁸⁴ See Massimo Sterpi & Angela Tasillo, *Copyright litigation in Italy: Overview*, at [https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

The AGCOM Regulation has its EU legal foundation in the E-Commerce Directive, which stipulates in Article 12(3), Article 13(2) and Article 14(3) that, the special requirements should not affect the member countries further legislation which empower the court or the administrative authority to issue an injunction on the ISPs to stop or prevent the infringement. In addition to that, Article 14(3) adds another possibility for member states to establish the corresponding procedures according which to remove or block the illegal content. It provides a remarkable example for the member states' further exploration of enhancing online copyright protection. It contributes to solving the problems during the notice and takedown procedure, including the reliability of the copyright owners' notice, the delayed reaction of the ISPs as well as the flexibility and force of the procedure.

2.2.3.2 Germany

The E-Commerce Directive was implemented in Germany as part of the 2007 Telemedia Act. Accordingly, the ISPs should not be imposed on a general obligation to monitor the activities of the users.¹⁸⁵

As for the ISPs' liability, Germany relies on its Störerhaftung regime, which "*imposes liability on persons who causally contribute to an infringement in violation of a duty to review incumbent upon them*".¹⁸⁶ "Störerhaftung" means the liability of a "Störer", meaning "interferer". The concept is based on Section 1004 of the German Civil Code (BGB), which is at the center of the German civil law system. Section 1004 of the BGB is about claim for removal and injunction. Accordingly, unless there is specific obligation, the owner may ask the disturber to remove the interference or ask for a preventive injunction.¹⁸⁷ To be noticed, Störerhaftung focuses only on injunctive relief and is different from the liability of damage compensation.¹⁸⁸

¹⁸⁵ See Emerald Smith, Lord of the Files: International Secondary Liability for Internet Service Providers, 68 *WASH. & LEE L. REV.* 1555 (2011), p.1577.

¹⁸⁶ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, pp.326-327.

¹⁸⁷ This English transition is quoted from the German Federal Ministry of Justice and Consumer Protection, see at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3984.

¹⁸⁸ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.327.

Although it has been established by the German courts as the principle that the ISPs do not have a duty of general monitoring, which limits the broad application of the “Störerhaftung” in dealing with the ISPs’ liability in third-party copyright infringement, the current trend of the German judgements is remarkable. Accordingly, the instrument of “Störerhaftung” has been applied by the German Federal Court of Justice to the ISPs of Wi-Fi by which to issue the injunction to prevent further infringement. As a result, the network is protected by password.¹⁸⁹ Just as the criticism of the CJEU judgement, this kind of injunction is actually preventing the general users’ possibility of online infringement, instead of that of the repeat infringers. The preventive function as well as the influence on the users’ privacy is more or less similar to that of the monitoring technology.

2.2.3.3 France

To imply the E-Commerce Directive, France passed the Law on Copyright and Related Rights in the Information Society. Accordingly, the ISPs should not be imposed on an obligation to monitor the content through their service for the purpose of copyright protection.¹⁹⁰

To be noticed, French parliament introduced a law in 2009 to promote the distribution and protection of creative works on the Internet,¹⁹¹ which is called the HADOPI law in French or the Creation and Internet law in English for short. It required ISPs to send warning letters to the users when they are conducting infringing activities. As a response to the users’ negligence, the ISPs could choose to terminate the users’ account for a year. However, the proposal was rejected by the Constitutional Council in June on the consideration that it was unconstitutional for the ISPs instead of the judicial authorities

¹⁸⁹ See Eva Inés Obergfell & Alexander Thamer, (Non-)regulation of Online Platforms and Internet Intermediaries -the Facts: Context and Overview of the State of Play, *Journal of Intellectual Property Law & Practice*, 2017, Vol. 12, No. 5, p.437-438.

¹⁹⁰ Emerald Smith, Lord of the Files: International Secondary Liability for Internet Service Providers, 68 *WASH. & LEE L. REV.* 1555 (2011), p.1575. To be noticed, the judges may issue such kind of measures aiming to combat incitement to violations of human dignity such as child pornography.

¹⁹¹ The full French name of the law is “Haute Autorité pour la Diffusion des Œuvres et la Protection des droits d’auteur sur Internet” , which means “Supreme Authority for the Distribution and Protection of Intellectual Property on the Internet” . For the background of the law, see Jeremy de Beer & Christopher D. Clemmer, Global Trends in Online Copyright Enforcement- A Non-Neutral Role for Network Intermediaries? *Jurimetrics*, Vol. 49, No. 4, p.389.

to terminate the access to the Internet. Besides, it was also worried that such kind of surveillance would bring problems of people's right to privacy. Afterwards, the Constitutional Council approved a revised version of the legislation which asked the participation of the judicial authority to approve the suspension or termination.¹⁹² While the practice of the law was not very successful and further modification has long been under discussion.¹⁹³

As for the ISPs' liability, the French courts have attempted to apply the rules of primary copyright rules infringement directly onto ISPs by holding that primary liability encompasses the "provision of the means" to infringe.¹⁹⁴ To be noticed, one of the French court set the ISP free from its user's activities of uploading copyrighted works online, although the ISP itself had organized the illegal content. Accordingly, the scope of the safe harbor was said to be extended in this case.¹⁹⁵ By contrast, the court did hold liable an ISP that host their-party content, but sold advertising on the users' personal pages, there by exceeding the ISPs' neutral role.¹⁹⁶

2.3 ISPs' Duty of Care in China

Different from the DMCA and the E-Commerce Directive, the ISPs' liability in China is not established on the system of liability limitation, but on the knowledge of the ISP according to the Tort Law and the Understanding of the Right of Dissemination on Information Networks.

¹⁹² See Kimberley Evans, *Online Copyright Infringement: Recent Cases Worldwide and Legislative Responses*, at: <http://dcc.com/services/litigation-dispute-resolution/online-copyright-infringement-recent-cases-worldwide-and-legislative-respon/>.

¹⁹³ See Julie Perrin, *Towards the end of HADOPI Law in France*, see at <https://www.le-vpn.com/towards-the-end-of-hadopi-law-in-france/>.

¹⁹⁴ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.326.

¹⁹⁵ In contrast, it is clearly stipulated in Article 9 of the Provisions on RDIN of China that the ISPs' choice and organization of the works uploaded by the users should be significantly recognized as constituting the knowledge requirement. Besides, this principle set by the Provisions have been commonly accepted by the courts in the related cases.

¹⁹⁶ See Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, p.314.

2.3.1 Legislation

2.3.1.1 The Tort Law

The Tort Law is of the highest level in the legal system relating to the ISPs' liability in China. Article 36 of the Tort Law establish the general rules for the ISPs' liability as well as the duty of care regarding online infringement of civil rights including copyright. As for this, the 3 paragraphs are of clear logic and different emphasis respectively. To begin with, Article 36 is included in Chapter 4 of the Tort Law, which is about special provisions on the subject of the liability. This means that the ISPs' liability has its specialty compared with the general rules about the construction of the liability and the methods to assume the liability.

The basic rule regarding the ISPs liability is stipulated in Paragraph 1 of Article 36, stating that the user or the ISP should assume the tort liability once they infringe others' civil right through the Internet. This refers to the situation when the ISP is willingly infringing others' right through the network.¹⁹⁷

Furthermore, Paragraph 2 of Article 36 stipulates the notice and takedown procedure. Accordingly, the right holder could notice the ISP through the service of which the user commits tortious activities. Once noticed, the ISP should take reasonable and immediate measures to deal with the situation otherwise it should be jointly liable for the damage after that. To be noticed, it is clearly stipulated in the Tort Law of China that the negligence of the notice or the improper feedback should lead to the ISP's liable only for the related damage which starts to be counted since the receipt of the notice. According to the principle of fair compensation which is the common way in deciding the portion of the liability, this kind of regulation seems to be reasonable in comparison

¹⁹⁷ To be noticed, in many of the cases, the works exhibited by the ISPs are provided by a third partner, which whom the ISP may have a contractual relationship. Under this situation, it is commonly recognized by the courts of China that the ISP should assume a high level of duty of care. See for example, *LiJiangwei v. Hongwen*, Pudong District People' s Court of Shanghai (黎江伟诉上海宏文网络科技有限公司侵害作品信息网络传播权纠纷案, (2015) 浦民三(知)初字第 951 号). In the judgement, the court held the opinion that, although the defendant had a proof showing that the infringing work was authorized by a third party, while it did not assume the reasonable duty of care by checking the related documents initiatively and carefully. Therefore, the defendant should be recognized as being fault and should assume the liability of compensating to the damage.

of asking the ISP to compensate to the right holders for the whole loss due to the users' infringement.

Paragraph 3 of Article 36 is the most controversial one of the three and it is also of basic importance regarding the ISPs' duty of care in third-party online infringement. Accordingly, when an ISP "knows" the user's infringing activities and fails to adopt necessary measures, it should be jointly with the user for the corresponding damage to the right holders. During the legislation process of the Tort Law, there used to be strong disputes regarding the subjective state of the ISPs to be accountable. The final version of the Tort Law is obviously a compromise of different opinions and leaves the scope of illumination to further application and explanation. The paragraph itself does not provide with a definite standard on the standard knowledge of the ISP.

On one hand, the semantic interpretation of the paragraph leads to the standard of actual knowledge and specific knowledge. The contextual word used to describe the accountable subject is when the ISP "know" the tort, which is better to be explained to be actual knowledge.¹⁹⁸ And the corresponding liability arising from violation of the obligation to take necessary measures is to be jointly liable with "the network user", which specially refers to the user conducting the tort. From the perspective of the ISPs' duty of care, it should be understood that the ISP should not be held to undertake the liability merely based on a general understanding of the potential tortfeasors, but should be liable for specific knowledge of the particular tortious user.

On the other hand, there is still strong supporters of the standard of constructive knowledge, meaning that the ISPs should be accountable when they have apparently known or should have known the tort. As for the ISPs' liability in copyright infringement, the Tort Law is of significant importance but not definite direction, and

¹⁹⁸ To be noticed, in the first version of the Chapter on Tort Liability of the Draft Civil Code of China, the current Paragraph 3, Article 36 of the Tort Law of China is replaced by Article 972, which states that "When the ISP 'should know' that their user is infringing other's civil right by the network and does not adopt essential measures, it should assume joint liability with the user". Accordingly, it is clearly stated that the subjective state of the ISP to be hold for joint liability is suggested to be replaced from "knows" to "should know", which "improves the ISPs' duty of care", see Youjun Zhou, *Comment on the Chapter of Tort Liability of the Draft Civil Code of China*, on the China Civil and Commercial Law Website, at <http://www.civillaw.com.cn/zt/t/?id=34632>.

the latter task is fulfilled by the special regulations of the administrative authorities and provisions of explanation by the courts.

2.3.1.2 The Regulation on the Right of Dissemination on Information Networks

The Regulation on RDIN was initially enacted in 2006 and was then modified in 2013. It is an administrative regulation adopted by the State Council of China and is one of the earlier legislation on the ISPs' role in protecting copyright online. It is also one of the main legislation regarding the ISPs' duty of care which is separated in different articles of the regulation.

Article 13 of the regulation provides the administrative department with the authority to ask the ISPs to declare the information of the suspected infringers, which could also be explained as the ISPs' duty of assistance in specific infringement.

Article 14 to 17 stipulate the notice and takedown procedure in detail. To be noticed, these articles do not only provide with the requirements of a qualified notice, but also the procedure of a reverse notice from the suspected infringing user. Besides, Article 24 and 25 also stipulates in particular the liability of the right holders for false notice, and the liability of the ISPs for refusing to provide or delaying in providing the information of the infringers.

Moreover, article 20 to 23 of the regulation stipulates the liability limitation rules of the ISPs, respectively pointing to four kinds of ISPs which are close in line with Section 512(a) to (d) of the DMCA with some differences from the requirements of the latter. For the ISPs providing Internet access and automatic caching, the circumstances for liability limitation is more or less the same, mainly keeping as a technologically neutral position.¹⁹⁹ As for the hosting ISP, the special rules of liability limitation are quite similar to that stipulated in the DMCA, which ask the ISPs not to have known or not have a rational reason to know the infringement, and not to directly obtain economic

¹⁹⁹ In the case *Yisou v. Zhongwenzaixian*, Beijing Intellectual Property Court, (深圳市宜搜科技发展有限公司与中文在线数字出版集团股份有限公司侵害作品信息网络传播权纠纷二审, (2016)京73民终186号), the ISP asserted itself to be an ISP providing caching service. However, the court found that the infringing works could still be provided when the original websites were deleted. Accordingly, the ISP was asserted to be providing the works directly instead of the service of caching.

benefits from the infringement.²⁰⁰ The ISPs' duty of care is correspondingly similar to that under the DMCA. Moreover, as for the ISPs providing searching or linking to be immune from the liability, it is required for them to deal with the notice according to the regulation, and not to know or should have known the infringement. Comparing with the requirement of liability limitation with the hosting ISP of this regulation, as well as the requirement stipulated by the DMCA for the information location tools, it could be realized that the duty of the searching or linking ISPs under the regulation is lower since thereof.

2.3.1.3 The Provisions on the Right of Dissemination on Information Networks

The Provisions on RDIN, which is of further explanation of the Tort Law and other related laws by the supreme court as well as the summarization of the judicial experience, is an important legal document as for the ISPs' duty of care in copyright infringement. There are plenty of detailed stipulations and here listed are the pivotal parts.

First and foremost, it is clearly stipulated that the knowledge standard for the ISPs to be reliable for contributory infringement is when the ISP "know or should have known" the direct infringement of the user, as regulated in Paragraph 3 of Article 7. The standard is further emphasized in Paragraph 1 of Article 8, stating that when considering whether the ISP should undertake the liability for inducing or contributory infringement, the court should refer to the ISP' fault, which refers the knowledge or obvious knowledge of the users' direct infringement. Correspondingly, the legislative emphasis of the Provisions on RDIN is on the recolonization of the ISPs' intent state of "know or should have known".

Moreover, it is stipulated in Paragraph 2 and 3 about the ISPs' active examination and the technical measures. On one hand, it is emphasized that there is no legal obligation

²⁰⁰ To be specific, according to the regulation, there is no parallel requirement on the ISPs to have the right and ability to control the infringement (which is the requirement of the DMCA in the same circumstance) when they directly obtain benefits from the infringement. From a perspective of explanation and especially in comparison with the DMCA, there may be a possibility to ask the ISP to be responsible for the direct benefits even when they do not have the ability to control.

for the ISPs to have to conduct active examination.²⁰¹ Accordingly, the court should not hold the ISP to be liable only based on the fact that it has not actively check the infringing activity. On the other hand, the reasonable and effective measures taken by the ISPs to provide the ISPs with a persuasive immunity from liability. That is to say, once the ISP could prove that it has already adopted reasonable and effective technological measures while it still could not find the infringement of the user, the court should recognize it as not at fault.

Furthermore, Article 9 of the Provisions on RDIN, listed detailed elements to be taken into consideration when it comes to the recognition of whether the ISP know or should have known the infringement, including the ISPs' attribution of the service and the ability to manage the information, the popularity of the infringed works, the passivity of the ISPs, the adopted measures to prevent the infringement, the response procedure of the ISPs to deal with notice from the copyright owners, the reasonable measures taken by the ISPs to deal with the repeat infringers, etc..

Although all these elements are stipulated as to judge the knowledge of the ISPs, it is significantly obvious that all of them are objective standards which focus on the behaviors of the ISPs instead of the examination of the ISPs' subjective or actual knowledge. However, the problem of the Provisions on RDIN is that, many of these elements are hard to be defined as the compulsory duty of care of the ISPs, at least explained from the context of the Article. For instance, it is listed in Item 4 that whether the network service provider has proactively taken reasonable measures to prevent infringement should be taken into consideration, but it is not equal to say that the ISPs have to take some kinds of preventive measures. On the other hand, when the ISPs do have taken some measures, it neither absolutely excludes the ISPs from liability since it is stipulated at the beginning of Article 9 that whether the ISP has taken reasonable measures should be taken into consideration. As for the reason of such a legislative model, it should be noticed that the Provisions on RDIN is not a formal law or regulation in the legal system of China, limiting its authority to impose a definite duty

²⁰¹ See Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015, p.259.

of care on the ISPs without upper legal resources.

Moreover, the Provisions on RDIN do provide some comparatively definite direction on the recolonization of the ISPs' constructive knowledge of the infringement. According to Article 10 of the Provisions on RDIN, the ISP should be recognized as at fault when the ISP provides the public with service to download or browse the popular movies or TV serious which is recommended in the form of setting raking, catalogue, index, descriptive paragraphs or brief introduction, etc. Similar circumstances are also stipulated in Article 12 of the Provisions on RDIN, mainly meaning that when the ISPs actively take part in the distribution of the popular works, the court could recognize them as constructive knowledge of the infringement. Besides, it is quite definite that when the ISPs do have received notice from the ISPs while they do not take appropriate measures, it should be understood as that the ISPs do have known the infringement.

In addition, the Provisions on RDIN also provide some rules on the relationship of the ISPs' benefits and the corresponding duty and liability. To be noticed, it is directly and explicitly regulated in Article 11 that when the ISP gets direct economic interests from the infringement, it should undertake "a higher standard of duty of care". Of all the legal resources, this article is the only one in which the term of "duty of care" is directly used. Besides, the following paragraph of Article 11 also defines the so-called "directly gains economic benefits. Particularly, the interest here does not include the general fees from the advertisement or the service.²⁰² In comparison, it is clearly stipulated that the interests refers to the benefits directly from the specific infringement.

2.3.1.4 The Criminal Law

To be noticed, The Amendment (IX) to the Criminal Law of China was adopted at the 16th Session of the Standing Committee of the Twelfth National People's Congress of

²⁰² As mentioned above, this kind of understanding of the relationship with the liability or obligation between the benefit of the ISP and its users' infringing activities is significantly different from the opinion of the US court in the case of *A & M Records, Inc. v. Napster, Inc.*, according to which the increasing of the numbers attributed to the infringing activities should also be classified as the notable benefits of the ISP from the infringement.

the People's Republic of China on August 29, 2015. And the Amendment add some crucial articles related to the ISPs' duty of care in China.

One article is added after Article 286 of the Criminal Law as Article 286A. More importantly, two articles are added after Article 287 of the Criminal Law as Article 287A and Article 287B. Accordingly, it is confirmed by the Criminal law of China that the ISPs should assume "*information network security management obligation*", which is a kind of duty of care. Although the main objective of this amendment was not aimed to impose a duty of care of copyright protection, the so-called "*causing the spread of a large amount of illegal information*" could still be explained to include the illegal dissemination of pirated works. More directly, Article 287B is more related to the ISPs' duty of care in third party copyright infringement, since it definitely stipulates that the ISPs could be hold for criminal liability on condition that they are found willingly providing the service to serious online infringement of which the users' infringing activities related to others' copyright is a representative situation.

Till now, there has not been notable related cases related to the application of the newly amended criminal law.²⁰³ And according to the principle of moderate criminal law which is asserted by many of the criminal law scholars in China, the recognition of the so-called "*obviously aware*" should be strictly limited.²⁰⁴ While the amendment to the Criminal law does have provide the ISPs' duty of care with the most strict legal protection in China.

²⁰³ To be noticed, before the amendment to the Criminal Law, there did have been a notable criminal case in China related to the role of the ISPs. In 2013, QvodPlayer which is an Internet video displaying service provider, was found to providing caching service for numerous online pirated and obscene files. While at that time, the manager of the ISP was accused for crimes of manufacturing, selling, and spreading obscene publications. See at: <http://www.chinaz.com/news/2016/0913/580650.shtml>.

²⁰⁴ This is another reason that it is asserted in this dissertation to adopt the intent requirement of knowledge in the civil cases to determine the ISPs' liability. Once introduced in the civil law, the courts would have to enlarge the extension of the so-called "obvious knowledge" to ask the ISPs to assume the liability of compensation. While this kind of wide explanation of the intent standard, which is not surmise but could have already been adopted as representative cases in China, which could be found in the following part, would lead to confusion of the recognition in the criminal procedure. It is a basic requirement of the principle of consistency in the legal terms and the replicated plan recommended by this dissertation would provide clearer differentiation of the willing infringement and the negligence in undertaking the duty of care.

2.3.2 Judicial Opinions

China' courts' opinion on the ISPs' liability is quite led by the Provisions on RDIN, considering that it was published by the Supreme Courts.²⁰⁵ While the rules of the RDIN itself is not that clear, therefore, there are still significant disputes in practice, especially when it comes to the ISPs' duty to examine the content actively. For many of the courts, the ISPs should assume the duty of preventive examining of the users' behaviors, and the standard of "should know" is easy to satisfy. While for others, there is no such kind of duty on the ISPs and the criteria of the constructive knowledge is stricter.²⁰⁶

2.3.2.1 The General Opinions of the Courts

To be noticed, although it is pending whether the ISPs should assume the duty of care in third-party copyright infringement in China, the duty is comparatively definite when it comes to the protection of some other kinds of interests, especially when there is direct income of the ISPs and what is infringed is more important interests, represented by the others' right to life and health. For example, after two cases in which the users of Didi, an ISP that provide the connection of the drivers and the passengers, it initiatively suspended the service since the general public hold the idea that the ISPs should be responsible for its users' behavior that may constitute dangerous threat to the right to life.²⁰⁷ Accordingly, there is certainly some duty the ISPs to care about the influence of their services on a third party, what uncertain is whether copyright should be protected at such a high level.

Whether the courts hold the idea that the ISPs should assume the duty of care of its user's behavior is of significant importance when it comes to their liability in copyright infringement. For example, in the case of *Huagai v. Weimeng, etc.*,²⁰⁸ the court held the

²⁰⁵ See Guobin Cui, *Copyright Law: Cases and Materials*(著作权法：原理与案例), Peking University Press, 2014, p.760. Accordingly, practically speaking, the courts of China prefer to refer to the rules established by the Regulation on RDIN and the Provisions on RDIN instead of the Tort Law of China.

²⁰⁶ Ibid, p.760.

²⁰⁷ See at <https://baijiahao.baidu.com/s?id=1613836981248020669&wfr=spider&for=pc>.

²⁰⁸ *Huagai v. Weimeng, etc.*, Futian District People' s Court of Shenzhen, (华盖创意(北京)图像技术有限公司与北京微梦创科网络技术有限公司、中粮金帝食品(深圳)有限公司、中粮食品营销有限公司、中粮食品营销有限北京分公司侵害作品信息网络传播权纠纷一审, (2013) 深福法知民初字第 558 - 560 号).

idea that “*the plaintiff could not prove the ISP willingly knows the infringement and has not deleted the infringed work timely*”. In other words, the ISP does not have the duty to initiatively check the information on their platform and it is the plaintiff’s obligation to prove the knowledge and the subjective fault of the ISP.

In significant contrast, in the case of *Zhonglianhuameng v. Tudou*,²⁰⁹ the courts held the opinion that, “*since the production of film and television works generally requires a lot of manpower, material resources and financial resources, it is usually not possible for the right holder to publish the film and television works on the Internet for the public to download or play freely. Even if it is free to download or play, it will be cleared fixed the information of the copyright owner. In this case, a whole set of the TV series was uploaded on the platform of the defendants. As a video sharing website specializing in video services, entertainment and other content services, the defendant should have known that the uploader of the relevant video is not the right holder. However, it has not adopted necessary measures such as deleting, blocking, and disconnecting links...although it does not directly implement the uploading behavior, it provides assistance to the infringement. Therefore, there is a fault of the defendant, which constitutes contributory infringement and should assume corresponding civil liability.*”

It is clear that the legal basis of the judgement is that the ISP in this case should have assumed the duty and the negligence of the duty constitutes leads to the liability. To be noticed, one of the significant feature of the defendant which leads to the justification of the duty is that the ISP in this case is its professionalization as well as the attribution of the involved subject matter as TV series. It is in obvious contrast with the ISP in the former case as general platforms and the subject matter as ordinary pictures. This kind of different treatment is in line with the Provisions on RDIN as mentioned above.

Furthermore, when it comes to the ISPs’ duty of care in copyright protection, there is no general opinion of the courts in China. Although the conflicts around the right of dissemination on information networks has long been the first kind of cause of action

²⁰⁹ *Zhonglianhuameng v. Tudou*, Minhang District People’s Court of Shanghai, (北京中联华盟文化传媒投资有限公司(以下简称中联华盟公司)与被告上海全土豆文化传播有限公司(以下简称全土豆公司)侵害作品信息网络传播权纠纷, (2014) 闵民三(知)初字第 693 号).

in IP area,²¹⁰ the related judgements vary from each other. According to the empirical research of Dr. Bo Yu who analyzed 30 cases that got through the appeals courts and in which the ISPs were recognized with faults, 18 courts of the initial instances hold the opinion that the ISPs should assume the duty of initiative censorship, and 11 courts of the second instances hold the same opinion. Moreover, 26.7% of the courts of the second instances hold the opinion that the ISPs should assume the general duty of care, and 30% of the courts of the initial instances as well as the courts of the second instances hold the opinion that the ISPs should assume “higher duty of care”.²¹¹ According to the summarization of Professor Xiangjun Kong, it seems to be increasingly easier for the copyright owner to ask the ISP to be liable for direct infringement recently in China since the degree of the involved works’ popularity is going down and the burden of the plaintiff to provide acceptable evidences is being simpler.²¹²

To provide a more specific and comprehensive judgement of the courts’ opinion of the ISPs’ duty of care independently, this work does an empirical research about the published judgements by the courts. The database used is IPhouse, which is one of the leading providers and analysis tolls focused on IP cases in China. As mentioned above, the ISPs’ duty of care in copyright infringement in China is in closest relationship in the right of dissemination on information networks, which is the most common causes of IP cases in China.²¹³ Based on the statistics, it was analyzed all the cases with the cause of action about infringement on the right of dissemination on information networks during the past 3 years (2015-2017), and further the judgements with the keyword of “duty of care (注意义务)”. Besides, it is also analyzed the cases from the perspectives of the level of the judging courts and the order of the case. In the end, it is chosen 30 qualified cases that the ISPs’ duty of care in third party copyright infringement in the first instances and the second instances in the separated years, by

²¹⁰ See at: <http://www.iphouse.cn/>, last access:10/10/2018.

²¹¹ See Bo Yu, On the Reasonability of the Internet Intermediary Service Providers’ Duty of Censorship, *Lan Zhou Xue Kan*(兰州学刊), 2014.01, p.172; Bo Yu, *On the Legal Duty of the Internet Intermediary Service Providers*(网络中介服务商知识产权法律义务研究), Doctoral Thesis, East China University of Political Science and Law, 2013, p.60.

²¹² See Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法), China Legal Publishing House(中国法制出版社), 2015, pp.220-221.

²¹³ See at See at: <http://www.iphouse.cn/>, last access:20/07/2018.

which to provide a general opinion of the courts about the ISPs' duty in copyright infringement. The final statistics are as follow,

Key Word in the Judgement	Year	2015	2016	2017
	The Right of Dissemination on Information Networks		6060	9830
The Right of Dissemination on Information Networks + Duty of Care		608	440	455
The Right of Dissemination on Information Networks + Duty of Care + The Court Holds the Opinion ²¹⁴		114	124	1

Table 1: Number of the Cases Based on Duty of Care

It is definitely clear that number of the cases with the cause of infringement on the right of dissemination on information networks keeps increasing from 2015 to 2017. While the number of the cases related the negligence of duty of care and has not been increasing at the same time. This means that, at least according to these statistics, the ISPs as intermediaries are less being involved in the disputes since only in the ones of

²¹⁴ The key word "the court holds the opinion(本院认为)" is generally used by the Chinese courts to conclude its analysis of the facts and the legal source, thus it is of critical importance. While it does not mean that in the judgements the courts do not adopt the expression of "duty of care" the corresponding analysis would have been omitted. The corresponding analysis may have already been conducted in the part about the fact-finding, or the substantial analysis of the topic may have already been mentioned, although the specific expression of "duty of care" has not been adopted in the final conclusion. This is why in the year 2017, only in one case the expression of "duty of care" was adopted in the final conclusion, but we can still find 30 samples to judge the courts' opinion about the ISPs' duty of care. While it is interesting further to find why the specific expression is not being adopted in the concluding part of the judgements.

indirect of infringement would the analysis of duty of care have been conducted. As for the direct infringement, there is no need to discuss about the intent of the infringer.

Moreover, the cases that with the cause of infringement on the right of dissemination on information networks and with the keyword of duty of care in the judgements could be further demonstrated according to the level of the judging courts and the process of the cases (mainly first instances and second instances), which could be shown as follows,

Year	2015	2016	2017
Cases of Different Instances			
The Supreme Court	16	2	0
The High Courts	7	31	7
The Intermediate Courts	208	163	250
The Basic Courts	377	244	198
All	608	440	455

Table 2: Number of the Cases in Different Courts (with the keyword of “The Right of Dissemination on Information Networks” + “Duty of Care” in the Judgement)

Year	2015	2016	2017
Cases of Different Instances			

The First Instance	380	284	205
The Second Instance	210	127	248
The Retrial Procedure	18	29	2
All	608	440	455

Table 3: Number of the Cases of Different Instances (with the keyword of “The Right of Dissemination on Information Networks” + “Duty of Care” in the Judgement)

In the end, a specific study of the judgements of the first and the second instances during the past 3 years is conducted. Based on the keywords set above, there are 869 cases of the first instance and 585 cases of the second ones. However, of all these cases, many of them are successive ones meaning that the plaintiff, the defendant as well as the court hearing the cases are all the same. From the perspective of statistical study, it is preferable to treat these successive cases as just one example. Besides, in many of the cases, the so-called “duty of care” is analyzed in the wrong way and the ISP is actually uploading the infringing materials by themselves. To provide a more specific statistical result, only the cases in which the ISPs are playing an intermediary role and their duty of caring the users’ behaviors or the linked works automatically are concluded in. In this way, 105 cases of the first instances and 55 cases of the second instances are further confirmed as the samples. Based on these effective samples, the involved ISP’s duty judged by the courts are analyzed by which to find whether the confirmed duty is a kind of initiative one or a passive one. For the former one, the court prefers to hold the opinion that the involved ISP should assume an active duty of checking the content online or of preventing the infringement in spite of its role as an intermediary from the technological perspective. And for the latter one, the court prefers to provide a safe harbor for the ISP and the main duty of the ISP would be to wait for the notice from the copyright owners. Thereby, the findings are as bellow,

Category	Year			
	2015	2016	2017	All
All the Judgements	380	284	205	869
Qualified Samples	31	53	27	111
Judgements of Unclear Duty of Care	0	2	1	3
Judgements Supporting Passive Duty of Care	8	8	7	23
Judgements Supporting Proactive duty of Care	23	43	19	85
Percentage of Proactive duty of Care	74%	81%	70%	75%

Table 4: Number of the Opinions on Duty of Care in the First Instances

Category	Year			
	2015	2016	2017	All
All the Judgements	210	127	248	585
Qualified Samples	12	34	10	55
Judgements of Unclear Duty of Care	2	4	2	8
Judgements Supporting Passive Duty of Care	1	8	2	11

Judgements Supporting Proactive duty of Care	9	22	6	37
Percentage of Proactive duty of Care	75%	65%	60%	67%

Table 5: Number of the Opinions on Duty of Care in the Second Instances

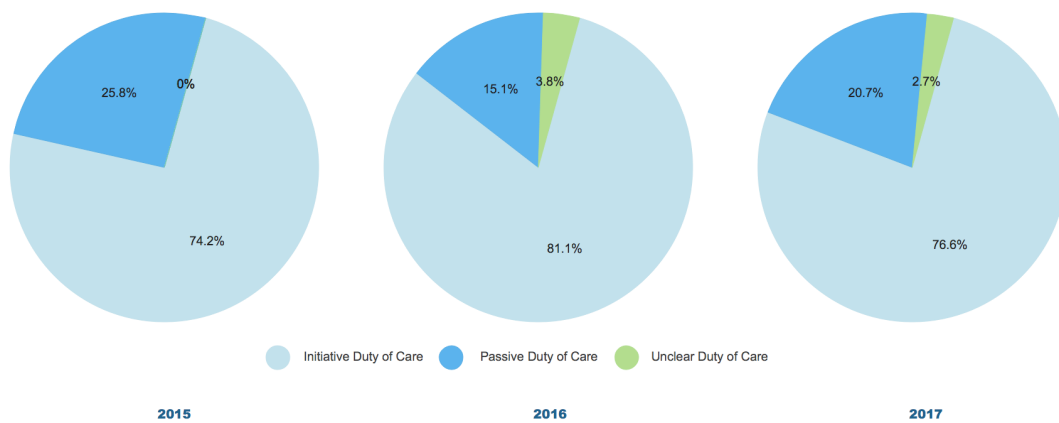


Figure 4: Percentage of Judgements Supporting Proactive duty of Care (First Instances)

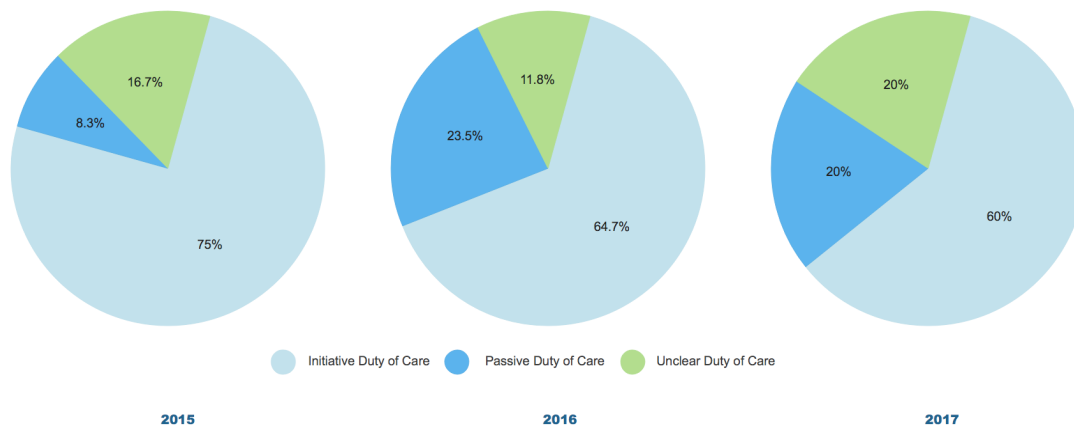


Figure 5: Percentage of Judgements Supporting Proactive duty of Care (Second Instances)

All these samples are chosen according to the timeline set by the IPhouse and the opinion of the courts about the ISPs' duty of care. To be noticed, due to the different

facts, especially the attribution of the infringed works (whether renown or not) and the situation of the ISPs (services provided by them as well as the involvement in recommending and organizing the infringing works), the statistics could not reflect the change of the courts' opinion on the ISPs' duty of care gradually. Nor could it reflect the whole judicial opinion about all kinds of ISPs' duty of care since the ISPs providing pure accessing and caching, as well as the passive and pure storing platform and searching tools are usually not involved in these kinds of disputes. However, some initial conclusions could still be concluded by the analysis of the samples,

First and foremost, the statistical result may be different from the intuition of the courts' opinion on the ISP's duty of care. In other words, the so-called safe harbor is not that popular in the judicial decisions once the ISP is initiatively not providing pure and passive technological assistance to the infringements of the users.²¹⁵ Therefore, the substantial level of the ISPs' duty of care adopted by China's judicial system is considerably high enough.

Secondly, it seems that the courts of the higher level may hold a more conservative position than the lower ones. This could be reflected by the comparison of the percentage of the judgements in which the courts prefer to impose a proactive duty of care on the involved ISP. Besides, the courts in the second instances sometimes prefer to avoid the discussion of the ISP's proactive duty of care and the judgement may be based on the ISP's direct infringement instead of the assistance to the direct infringers. This is why in some of the cases of the second instance there are no clear explanation of the ISP's duty of care.

Thirdly, a further analysis of these cases reflects that the most popular kinds of cases in which the ISPs' duty of care are discussed are related to the ISPs providing the storage and dissemination platforms. Besides, the ISPs providing the service of aggregating videos which is based on the searching and linking technologies are also frequently involved in the disputes of copyright infringement in which the ISPs' duty of care are

²¹⁵ See Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015,p.221.

discussed.

Last but not least, the most common reasons adopted by the courts to impose a high level of duty of care on the ISPs are usually related to the attribution of the works and especially the initiative measures adopted by the ISPs to promote the distribution of the infringing works which are not initially uploaded by them though. To be noticed, the elements listed by Article 9 and other parts of the Provisions on RDIN are not essential requirements as a whole by which to justify the ISP's duty of care. In other words, only limited unnatural activities of the ISPs like the editing or recommending the infringing materials may result in the courts decision to the disadvantage of the ISP.

2.3.2.2 The Opinions of the Courts in Representative Cases

The empirical analysis above provides us a general idea of the courts' opinion on the ISPs' duty of care in China, while considering the different facts involved, the persuasion of the research is limited. Based on the statistics, it is important to go further into the analysis of the courts in different cases, and what important is the right sample from the judgements to be chosen.

Generally speaking, China adopts the civil law system in which the fundamental legal basis is the written regulations instead of the judgements. While considering the uncertainty of the subject matter as well as the protected interests in the IP area, it has been adopted the so-called guiding cases system and the representative cases. Accordingly, the supreme court as well as some of the high courts will choose some of the representative cases and especially the corresponding judgements to be published with the special intention of providing references for the successive judgements.

As mentioned above, according to the statistics of IPhouse, which is the leading IP case databases in China, the hottest cause of IP actions is related to the right of dissemination on information networks which is in close relationship with the ISPs' duty of care in copyright infringement. Until the date of this dissertation, there have been 7 representative cases in all of 43,527 cases.²¹⁶ These representative cases provide us a

²¹⁶ See at <http://www.iphouse.cn/cases/list.html?anyouid=88&doclevel=2>, last access:2018/10/10.

notable direction of the courts' opinion of the ISPs' duty of care. To begin with, of all the 7 cases, 2 of them were about the proof were not in close relationship with the topic of this dissertation.²¹⁷ While the other 5 are of notable importance when it comes to the opinion of the courts of China about the ISPs' duty of care.

In *Apple v. Maijia*,²¹⁸ which is an instance of the second trial, the Beijing High Court hold the opinion that whether Apple, as the platform should assume comparatively higher duty of care is one of the key elements to be considered. Referring to Article 8, 9 and 11 of the Provisions on RDIN, the court held the opinion that Apple should assume higher standard of duty of care since it enjoyed direct profits from its uploaders' behavior. Considering it had not adopted reasonable measures, Apple was recognized as being at fault and therefore should assume the liability. The fact that the ISP makes direct profits from the infringement is then of significant influence in this judgement.

In *Baishitong, China Telecom v. LeTV*,²¹⁹ the Shenzhen Intermediary court agreed with the court of the initial instance that China Telecom as the ISP in the service of IPTV, should not be recognized as a common ISP providing access service, but should be responsible for the content provided by a third party. And similar to the former case, it is based on the fact that only by specially ordering the service of IPTV could the users watch the infringed works. The court did not mention it in a clear way but it could be interfered that the direct profits from the infringement is also of importance here. Moreover, the court held the opinion that China Telecom could not provide sufficient

²¹⁷ *China Film Group Corporation v. Xingkongmuyangxing Internet Bar*, Chengdu Intermediate People' s Court (中国电影集团公司电影营销策划分公司与成都市金牛区星空牧羊星网吧侵害作品信息网络传播权纠纷, (2012) 成民初字第 1093 号); *Xinchuanzaixian v. Zigong Branch Company of China Network Communications Group*, Supreme People' s Court of China, (新传在线(北京)信息技术有限公司与中国网络通信集团公司自贡市分公司侵害作品信息网络传播权纠纷再审, (2008) 民申字第 926 号).

²¹⁸ *Apple v. Maijia*, Beijing High People' s Court (苹果公司与麦家侵害作品信息网络传播权纠纷二审, (2013) 高民终字第 2619 号). Maijia, a well-known Chinese writer argued that an uploader of the APP provided by Apple had infringed his copyright and asked Apple to be responsible. In the first instance, the Second Intermediate People' s Court of Beijing hold the opinion that Apple had strong ability to control and to regulate its Applestore, and it got direct profits from the uploading of the files on its platform. Therefore, it should "assume higher duty of care" . And although Apple should have noticed the infringement, it "did not adopt reasonable measures" and therefore, it "had not assumed the duty above" . The court then considered Apple to be fault and asked it to assume the corresponding liability.

²¹⁹ *Baishitong & Shenzhen Branch Company of China Telecom Corporation v. LeTV*, Shenzhen Intermediate People' s Court (上海百视通电视传媒有限公司、中国电信股份有限公司深圳分公司与乐视网信息技术(北京)股份有限公司侵害作品信息网络传播权纠纷二审, (2014) 深中法知民终字第 328 号).

evidence that it has checked the content provided by the third party. Therefore, it should be held as at fault. Although the specific expression of duty of care is not mentioned in the judgement, the obligation of the ISP in this case to check the content is certainly the key element of the duty.

In *Zhongwenzaixian v. Zhizhu*,²²⁰ the moderator of the defendant which is an ISP for publishing digital books illegally published a literature work to which the plaintiff had the copyright. To be noticed, the moderator was approved by the ISP and the infringed work was published on the first page by him, which constituted recommendation to the public. Besides, the ISP itself provided some kind of digital award to the publishers. Considering these facts, the court held the opinion that the involved ISP was actually inducing and encouraging its users to conduct the infringements and thus it should be held responsible for the loss of the plaintiff.

In *Shanghai Jidong v. Wuhan Board of Broadcasting, Film and Television & Wuhan Network Television*²²¹, the court held the opinion that it was of critical importance whether the ISP was uploading the content themselves or it was just providing the service of searching. Considering the defendant in this case as the latter, and the original source of the controversial subject matter was legally licensed, it should not assume the liability of infringing the plaintiff's copyright according to the judgement.²²²

²²⁰ *Zhongwenzaixian v. Zhizhu*, Chaoyang District People's Court (北京中文在线数字出版股份有限公司与北京智珠网络技术有限公司侵害作品信息网络传播权纠纷, (2013) 朝民初字第 8854 号)

²²¹ *Shanghai Jidong v. Wuhan Board of Broadcasting & Wuhan Internet TV Corporation*, Wuhan Intermediate People's Court (上海激动网络有限公司与武汉市广播影视局、武汉网络电视股份有限公司侵害作品信息网络传播权纠纷, (2012) 鄂武汉中知初字第 00003 号) .

²²² In this judgement, the extension of the right of dissemination on the network was decided according to the standard of storage (服务器标准). While it has been a controversial topic whether this standard, or the standard of substantial display(实质呈现标准, or 用户感知标准) according to which the feeling of the users is more critical should be adopted. For the debate, see for example, Guobin Cui, The Standard of Internet Server: Getting the From while Forgetting the Meaning, on *Intellectual Property(知识产权)*, Vol.8, 2016, p.3; Qian Wang, On the Recognition of Direct Infringement in the Network Environment, on *Fongfang Law Research(东方法学)*, Vo.2, 2009, p.12. It is of significant importance to the ISPs' liability when it comes to the standard to be chosen, since it will influence the recognition of the ISPs' intent. According to the standard of substantial display, the ISP will have to check the content on their platform, regardless of the technology adopted. This will significantly improve the ISP's duty of care in comparison with the standard adopted in the case of *Shanghai Jidong v. Wuhan Board of Broadcasting, Film and Television & Wuhan Network Television*.

In *Zhuang so-and-so, Zuo so-and-so v. So-and-so Network Technology*,²²³ the plaintiffs complained that the users of the defendant had transformed their literature work into audio books and published online. The court of the first instance held the opinion that the infringed work was uploaded by the user instead of the ISP and was not stored in the service of the ISP. Moreover, the links provided by the users was numerous and it was impossible for the ISP to check the linked works one by one. Additionally, the audio works were different from films or televisions, and the cost of producing these kinds of works was quite low. Therefore, it is common for the general users to produce this kind of works and publish online. Considering the information published by the user, the court of the first instance held the opinion that “*it could not be interfered that the defendant willingly knew or should have known the work was not licensed by the right holder...considering that the defendant had shielded the keyword after receiving the notice, the defendant had already assumed the obligation as an ISP*”. It is obvious that the court of the first instance held the opinion that the ISP should not assume the duty to check the content of its users initiatives.

However, the court of the second instance changed the judgement. Considering that the defendant was actually a P2P service provider, it should not be recognized as direct infringer. At the same time, it still should be considered whether the behavior of the ISP constituted indirect infringement, and whether the ISP had subjective fault was critical here. By judging the fault of the ISP, the court took a route of comprehensive analysis. To be noticed, the court held the opinion that the defendant was a well-known website in China and as an ISP, it should have sufficient knowledge of the business information. The involved user, who was the direct infringer in this case as well as the user of the defendant of a high level, had already been sued in a former case. Moreover, even the general users should have some doubts about the behavior of the direct infringer since what published by him were well-known works, and the defendant as professional ISP should have better ability to find the infringement. Additionally, the profits from advertisements was in close relationship with the clicking rates on the web, and

²²³ *Zhuang so-and-so, Zuo so-and-so v. So-and-so Network Technology*, Shanghai Intermediate People's Court (庄某某、佐某子与被上诉人上海某网络科技有限公司侵害作品信息网络传播权纠纷上诉案, (2011)沪一中民五(知)终字第 33 号) .

“balance of the right and the obligation therefore improve the ISP’s duty of care and the obligation of examination related to the popular posts”. In conclusion, “to a certain level the happening of this case was due to the ISPs’ negligence of its duty of care, turning blind eyes to the infringement of its user of high level”. Therefore, the ISP was hold liable for contributory infringement in the second instance.

Considering that in the case of *Shanghai Jidong v. Wuhan Board of Broadcasting*,²²⁴ the ISPs mainly plays the role of searching engine, it is different from the other four cases in which the ISPs are platforms for the users to store and disseminate the infringing materials, it is clear that in all the representative cases, the ISPs are held to assume a higher level of duty to care about their users’ activities. Although limited to the number of these cases, the percentage is could not be understood as the general opinion of the courts in China which may be better demonstrated by the statistics in the former part, it should be noticed that these cases’ being chosen as “representative” should at least be explained as that the entities which are usually high courts of different provinces are trying to encourage the successive courts to apply the similar standards in successive cases.

2.3.3 Administrative Regulation

As mentioned in the beginning, the copyright law system of China is of notably influenced by administrative regulation, of which the legal basis is not that crucial and thus the practical standard on the ISPs’ duty of care is extraordinarily influenced by the substantial standard established by the administrative authority. The reasonability of this kind of campaign-style law enforcement is one thing, and its practical influence on the ISPs is another. There have been plenty of criticism on the shortcomings of strong administrative regulation especially the legal enforcement based on the decisions or policies of the administrative government instead of the law and regulation adopted by

²²⁴ *Shanghai Jidong v. Wuhan Board of Broadcasting & Wuhan Internet TV Corporation*, Wuhan Intermediate People’ s Court (上海激动网络有限公司与武汉市广播影视局、武汉网络电视股份有限公司侵害作品信息网络传播权纠纷, (2012)鄂武汉中知初字第00003号) .

the national council or the central government through formal and strict procedures,²²⁵ while the campaign-style law enforcement does have its influence based on the brute administrative force.²²⁶

Since the year 2005, the National Copyright Office has started the companion-style administrative enforcement action named “Network Sward(剑网)”. In each of the following years, the copyright administrative departments of China chooses a specific area to promote the related copyright protection.²²⁷ Although the national legislation and the administrative regulations was usually referred as the legal basis of the actions, the actual standard on the enforcement was usually the notice announced every year. These kind of temporary notices, instead of the normal legislations mentioned above, has actually established a higher level of duty of care for the ISPs.

For example, in the year 2010, the National Copyright Office published the Notice about the “Sword Network Action” on Initiative Examination, in which 15 websites and many important works were listed as the attachment. According to the notice, the listed ISPs were asked to “*check the license of the works of them referring to the list of initiatively examined works, and to delete the works or to stop the links regarding to the works without authorization or the attribution of the right is not clear*”. In the concluding part, the national office asked the listed ISPs to “set an example for the whole industry”.²²⁸ For the listed ISPs, the notice established a substantial and strict level of duty of care regarding to the important works. The standard applied by the notice is much stricter than the requirement of the legislations mentioned in the former part of this dissertation.

For another example, in the year 2013, the National Copyright Office published the

²²⁵ See Qi Xiong, Ten Years of Copyright Protection in Cyberspace: The Interaction between Copyright Industry and Copyright Law, *Electronical Intellectual Property(电子知识产权)*, Vol. 10, 2016, p.10; Ke Steven Wan, Internet Service Providers’ Vicarious Liability Versus Regulation of Copyright Infringement in China, 2011 *U. Ill. JL Tech. & Pol’y*, pp.400-411.

²²⁶ See Guobin Cui, Reforming the System of Joint Liability of Internet Service Providers (网络服务商共同侵权制度之重塑), *Legal Research (法学研究)*, Vol.4, 2013, p.151.

²²⁷ See Qi Xiong, Ten Years of Copyright Protection in Cyberspace: The Interaction between Copyright Industry and Copyright Law, *Electronical Intellectual Property(电子知识产权)*, Vol. 10, 2016, pp.10-11.

²²⁸ See *The National Copyright Office’ Notice about the “Sword Network Action” on Initiative Examination(国家版权局关于做好“剑网行动”主动监管有关工作的通知)*, 2010.

Notice on the Application Plan for the “Sword Network Action” to Strike Infringement and Piracy in the Cyberspace.²²⁹ In Paragraph 2, Part 2 of the notice, it was stated that “the initiative supervision of the National Copyright Office will extend to important Music Websites this year. The copyright administrative departments everywhere should include the local influential video websites and music websites into initiative supervision, and should ask the websites to imply initiative examination and correction on time.” Accordingly, the ISPs that should assume the proactive duty of care was extended to music websites this year.

Similar duty of care of the ISPs have been generally mentioned in almost all of the notice of the Sword Network Actions, in which the ISPs are asked to check the intent on their platforms initiatively. Besides, the national copyright office has published many other notices aiming to improve the online regulation in China, which are closely related to the ISPs’ duty in copyright protection.²³⁰ In addition, the office has been issuing the so-called “ten cases about copyright infringement and piracy handled” every year, by which to provide the public with representative administrative activities against copyright infringement.

²²⁹ See *The National Copyright Office’ Notice on the Application Plan for the “Sword Network Action” to Strike Infringement and Piracy in the Cyberspace*(2013年打击网络侵权盗版专项治理“剑网行动”实施方案), 2013.

²³⁰ For example, Notice of the General Office of the National Copyright Administration on Strengthening the Administration of Copyrights in Cyber literature(国家版权局办公厅关于加强网络文学作品版权管理的通知), 2016; Notice of Ordering Online Music Service Providers to Stop Unauthorized Distribution of Music Works(关于责令网络音乐服务商停止未经授权传播音乐作品的通知), 2015; Notice of the National Copyright Administration on Regulating the Copyright Order of Network Disk Services(国家版权局关于规范网盘服务版权秩序的通知), 2015; Notice of the National Copyright Administration, the Ministry of Industry and Information Technology and the State Administration of Radio, Film and Television on the Prohibition of illegal Broadcast of the Olympic Games and Related Events on the Internet(国家版权局、工业和信息化部、国家广播电影电视总局关于严禁通过互联网非法转播奥运赛事及相关活动的通知), 2008; Opinion of the State Copyright Bureau on Copyright Protection of Computer Software(国家版权局关于对计算机软件版权保护问题的意见), 2003, etc. For example, the Notice of Ordering Online Music Service Providers to Stop Unauthorized Distribution of Music Works was published on July 8th, 2015. And “considering the serious situation of the ISPs’ unauthorized distribution of music works”, it asked the ISPs to “stop distributing music works without authorization”, and to “download all the music works without authorization” right in the end of the same month. Besides, it was emphasized that, “as for the ISPs continue to distribute music works without authorization, the National Copyright Office will investigate and punish strictly according to the law”. Here the notice did not distinguish the works uploaded by the ISPs themselves and that by the users, significantly improving the ISPs’ duty of care and the deterrent force of the administrative regulation. See also Zhiwen Liang, On the Model of Copyright Regulation on ISPs, on *Legal Science*(法律科学), Vol.2. 2017, p.100.

As for the effect of these actions and notices, at least in some of the areas it is much more powerful than the civil procedure. It is even asserted that the principle of safe harbor has been substantially replaced by the rules of administrative regulation.²³¹ This is quite notable in the regulation of illegal online music and videos sharing.²³² However, it is doubtful whether the discrimination of different websites and works is reasonable, and the fact that these actions have the feature of champion enforcement limits the stability and chronicity of the standard of duty established by them.²³³

2.4 Comparison and Analysis

As mentioned above, US, EU and China have all established their regulation on online copyright infringement on the mechanism of notice and takedown process, although the specific requirements for the notice from the copyright owner and the response from the ISP are not entirely identical. Another similarity is that, in addition to the mechanism of the safe harbor, all these three legal systems have been trying to improve the ISPs' duty of care in certain circumstances, and it could be said that the so-called "safe harbor" has never been totally safe.

As for the mechanism to clarify the duty, US and EU member states mainly rely on the explanation of the courts, although the specific legal principles are different. Generally speaking, the US courts prefer to draw the experience of contributory infringement, inducing infringement and vicarious infringement. Although the specific legal basis for the EU member states are various, it should be noticed the recent broad explanation of the right of communication to the public which is repeatedly approved by the CJEU. Besides, represented by the Proposal for a Directive on CDSM, EU is trying to improve the duty of the ISPs in online copyright protection from the perspective of legislation modification, which is supported by this dissertation.

²³¹ See Zhiwen Liang, On the Model of Copyright Regulation on ISPs, on *Legal Science(法律科学)*, Vol.2, 2017, p.100.

²³² See Guobin Cui, Reforming the System of Joint Liability of Internet Service Providers (网络服务商共同侵权制度之重塑), *Legal Research (法学研究)*, Vol.4, 2013, p.151.

²³³ Ibid.

In comparison, although the explanation of the courts in China is being increasingly important for the ISPs' duty of care, it should be noticed the practical influence of the companion-style administrative regulations represented by the so-called "Sword Network Actions" which has substantially improved the level of the ISPs' duty of care in copyright protection in China. While considering the uncertainty and unfairness of the administrative actions, it is recommended to limit the power of the copyright administrative departments, especially when it comes to the judgement of the substantial duty of care of the ISPs. Comparatively speaking, the experiences from the representative cases by the courts of China is a better way to replace the role of administrative regulations.

Based on the former discussion, some initial conclusion of the ISPs' duty of care from the dogmatic perspective and the comparative perspective could be drawn,

First and foremost, ISPs' duty of care is definitely the crucial as well as the controversial element when it comes to the ISPs' obligation and liability in online copyright infringement. It is of certainty that the ISPs should not be totally free from any liability, so is that the intermediary ISPs are not treated as direct infringers. However, it is of great uncertainty that to what extent should the ISPs be involved in dealing with online infringement, especially when the direct infringement is conducted by a third party. Although there have been discussion and legislation since the end of last century, there is still coming controversial disputes in all of the three legal systems.

Second, from the legal dogmatic perspective which is discussed above, there are three main legal branches to be taken into consideration when it comes to the duty of the ISPs, the copyright law, the tort law and the legal sources of supporting other protected civil rights, for instance, the right to privacy and the freedom of expression. Of all the branches, the tort law which contains the rules to impose the duty as well as the corresponding liability is of basic importance since other branches mainly provide the rights to be balanced, while it is the tort law and theory that provide the criterion to

balance.²³⁴

Third, from the perspective of the tort law, there are two main controversial problems to be further discussed as to the ISPs' duty. Beforehand, it is commonly accepted that the ISPs should be liable when there do is persuasive evidence regarding the ISPs' actual knowledge of the specific infringement, whether by the active participation of the ISPs or by the notice from the copyright owner. However, it is significantly confusing of the standard to judge the ISPs' constructive knowledge when it comes to the establishment of the contributory liability. Same confusion occurs when it comes to the ISPs ability to control the infringement when we try to establish the vicarious infringement. No matter from the copyright owners' or the ISPs' perspectives, respectively focusing on the circumstances to ask for compensation and the rules to conduct the business, it is not the subjective knowledge or the ability but the objective rules stipulated that make significant sense. In other words, although there must be some flexibility to leave the space for further discussion as well as for the free jurisdiction, the basic methodology is to conclude the experiences gradually and to provide with more specific and objective rules of conduct for the ISPs to follow.

Moreover, there have been two main ways to solve the complicated problem of online copyright infringement, the procedural way and the substantial way. The procedural way mainly refers to the notice and takedown procedure, by which it is to solve the problem by providing the legal environment for the copyright owners and the ISPs to cooperate with each other. The shortcoming of the notice and takedown procedure is that the burden of searching for the information regarding the infringement is totally laid on the copyright owners who are familiar with what is infringed but unfamiliar with the Internet user that is conducting the infringement. In comparison, the information regarding the infringers' behavior is better acquired by the ISPs. Besides, the procedure could not totally replace the mechanism to recognize contributory infringement and vicarious infringement. In other words, the positive duty to care about

²³⁴ In some countries, mainly those following the British legal tradition, the secondary liability rule is bases on the law of copyright. While in most of others, it is rested on more general principles of private(tort) law, see Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, Oxford, 2012, p.309.

the users' activity through their service is still needed to be specified. While the worldwide application of the notice and takedown procedure as well as its success do have reminded us that, in addition to the substantial way mainly regarding the objective and positive duty of the ISPs, it is of notable significance of the procedural way to promote the cooperation of the copyright owners, the legal users and the ISPs to solve the problem of third-party infringement online. In conclusion, the ISPs' duty of care should be further specified from the perspective of caring the infringing activity as well as caring the motion of the copyright owners for further cooperation.

CHAPTER 3 THEORETICAL BASIS OF THE ISPS' DUTY OF CARE

(Justification of ISP' s Duty of Care)

3.1 Current Theoretical Analysis and the Approach of this Dissertation

3.2 The Causality Analysis

3.3 The Interests-Balancing Analysis

3.4 The Utilitarian Analysis

3.5 Summarization

3.1 Current Theoretical Analysis and the Approach of this Dissertation

3.1.1 General Duty of Care Under German Law

Before the Supreme Court of Germany adopted the regime of Störerhaftung to deal with the ISPs' liability in third-party infringement, the traditional principle of general duty of care was applied by some of the German local courts.²³⁵ The "general duty of care" is a concept developed by Germany to test unlawful liability which is widely accepted by the legal systems influenced by German law.²³⁶ According to the concept of duty, the acts that indirectly infringe one of the protected interests should not automatically be recognized as unlawful unless the reasonable duty of care according to the standard accepted by the common society has been broken.²³⁷ The standard of the duty is of significant importance and the theory of general duty of care was developed to answer the question.

²³⁵ See Wenjie Liu, On the ISP' s Duty to Keep Safety, *Peking University Law Journal(中外法学)*, Vol.24, No.2(2012), pp.400-401.

²³⁶ See Janno Lahe, The Concept of General Duties of Care in the Law of Delict, *Juridica International*, IX/ 2014, p.108.

²³⁷ See Basil S Markesinis & Hannes Unberath, *German Law of Torts: A Comparative Treatise*, Hart Publishing, 2002, pp.85-86.

Although Germany is one of the representative countries with a feature of complicated statutory law, the concept of general duty of care was developed mainly by the explanation of the courts, which is actually also a remarkable feature of the whole German tort law. Accordingly, the duty of care should root from the continuing or potential danger.²³⁸ Based on that, the German courts developed the term “Verkehrssicherungspflicht”, which means that the entity that creates the risk that would influence the interests of others should be responsible to provide the prevention or protection.²³⁹ The concept of the general duty of care then leads to a significant extension of unlawful liability in Germany.²⁴⁰

The concept of general duty of care is statutorily based on Section 823 of the BGB, stating that the person that unlawfully injures other’s right is liable to make compensation, regard less of the fault or negligence. Similarly, it is suggested by the European Group on Tort Law in the Principles of European Tort Law that “*a duty to act positively to protect others... may exist if law so provides, or if the actor creates or controls a dangerous situation... or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point*” (Art. 4:103, Duty to Protect Others from Damage).²⁴¹

To be noticed, the general duty of care relies on an objective standard, and therefore, the specific person’ awareness of a relevant danger is not a prerequisite for there to be a violation of a duty of care.²⁴² While the concept itself as well as Section 823(2) of the BGB do not provide any definite explanation on the constructive requirements of the duty. As considered by the scholars, the duty of care as well as the corresponding precautions that should be taken by the entity are in direct ratio with the amount and likelihood of the potential damage and in inverse ratio with the cost of the preventing

²³⁸ See Basil S Markesinis & Hannes Unberath, *German Law of Torts: A Comparative Treatise*, Hart Publishing, 2002, p.86.

²³⁹ See Janno Lahe, The Concept of General Duties of Care in the Law of Delict, *Juridica International*, IX/ 2014, pp.110-111.

²⁴⁰ Ibid, p.110.

²⁴¹ See European Group on Tort Law, *Principles of European Tort Law: Text and Commentary*, SpringerWienNewYork, 2005, p.86.

²⁴² See Janno Lahe, The Concept of General Duties of Care in the Law of Delict, *Juridica International*, IX/ 2014, p.111.

measures.²⁴³ In addition, the duty of care does not require impossible protection of another person, meaning that the precautions taken should be subjectively and economically reasonable. While if a danger is substantially uncontrollable, it is contrary to a duty of care. Besides, the endangered person's ability and cost to avoid the danger should also be taken into consideration when it comes to the establish the duty of care.²⁴⁴

To be noticed, the Decision of the Federal Supreme Court in 2013 discussed the principle of no general monitoring and the duty of care.²⁴⁵ Accordingly, although the general duty of monitoring is not accepted by the legislation, it does not mean that there should be no monitoring at all. Instead, the ISPs should still be careful about their service as well as the practical effect. And if needed, they should also assume the duty of care by which to control the possible risk.²⁴⁶

3.1.2 The Standard of a Reasonable Person

In common law, there is also an objective standard to test the negligence as well as an appropriate duty of care of a given entity, which is known as “a reasonable person”, or “a reasonable man”.²⁴⁷ The reasonable person is “*a hypothetical person used as a legal standard to determine whether someone acted with negligence*”.²⁴⁸ As for the application of the standard, it should be taken into consideration the ordinary performance of a reasonable entity under the similar circumstances as the person under judgement. Therefore, the specific standard applied to various kinds of entities may be significantly different considering their particular roles or abilities.²⁴⁹

In practice, the plaintiff usually alleges some specific precaution failed to be assumed by the defendant. And the constructed reasonable person is established by the courts to determine which kind of duty the defendant should have paid if he or she is reasonable

²⁴³ See Janne Lahe, The Concept of General Duties of Care in the Law of Delict, *Juridica International*, IX/ 2014, p.111. The elements were cited from Raab by the author.

²⁴⁴ Ibid.

²⁴⁵ Decision of the Federal Supreme Court (Bundesgerichtshof) 15 August 2013 – Case No. I ZR 80/12.

²⁴⁶ See “Rapidshare III” , *IIC*, September 2014, Volume 45, Issue 6, pp.716-719.

²⁴⁷ See Keith N. Hylton, *Tort Law: A Modern Perspective*, Cambridge, 2016, p.102.

²⁴⁸ See Bryan A. Garner, etc., eds., *Black' s Law Dictionary*, West, 2009, p.1380.

²⁴⁹ See Elizabeth A. Martin, ed., *A Dictionary of Law* (Fifth Edition), Oxford University Press, 2003, p.409.

enough.²⁵⁰ Like the general duty of care in German law, the reasonable person standard is objective, meaning that the focus of the standard is not the specific feature of the defendant but the objective judgement.²⁵¹

In particular, based on the tradition of Utilitarian and the application of economic research in legal analysis, there have been abundant discussion from another perspective in describing the standard of a reasonable person as well as the appropriate duty of care, which is represented by the Hand Formula which was provided by Judge Learned Hand in *United States v. Carroll Towing Co.*²⁵² The Hand Formula is a comparison of three main elements, the probability, the injury and the burden, which would be applied to determine whether the liability on a given entity would be reasonable. The formula itself is clear and simple, and it highlights two important elements to be considered in determining negligence: the burden and the foreseeable loss. While practically speaking, it is difficult to provide numerical values for these factors, or the announced numerical values will fail to incorporate some of the elements of interest.²⁵³

3.1.3 The Theoretical Approach of This Dissertation

On the two ends of the scale of the balancing, are the need to protect copyright as well as the rationality to promote the progress of the Internet industry and to respect the users' rights including privacy and freedom. The tort law which defines the constructive requirements to hold an entity to obey the rules of conduct and to assume the corresponding liability is at the center of setting the ISPs' duty of care in third-party

²⁵⁰ See Keith N. Hylton, *Tort Law: A Modern Perspective*, Cambridge, 2016, pp.112-113.

²⁵¹ *Ibid.*, p.102; Bryan A. Garner, etc., eds., *Black's Law Dictionary*, West, 2009, p.1380.

²⁵² *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Discussing whether the owner of a barge could be found negligent for failing to prevent the barge from breaking away from its moorings, Learned Hand said that: "since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other words similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions." He then simplified the comparison of the elements into the formula.

²⁵³ See Keith N. Hylton, *Tort Law: A Modern Perspective*, Cambridge, 2016, p.113.

copyright infringement.²⁵⁴

As for this, two points need to be taken into consideration. On one hand, the ISPs' duty of care as well as the liability is not an independent part from the whole legal tradition and the established system. This is both the requirements of the fundamental principle of fairness and justice which means to deal with the similar issue with similar standard, as well as of the requirement of the law itself which inherently ask to adopt a perspective of systemization instead of fragmentation.

On the other hand, based on the systematic reference above, it should be seriously treated the specialty of the Internet as well as the scenario of online infringement. It is the fundamental values and the overall welfare that finally count, not the sclerotic compliance of the tort theory which was initially concluded from the experience ahead of the Internet era. To be noticed, the modification of the tort law as well as the progress of the tort theory of recent years have been focused on the specific provisions which impose different obligations on the legal entities mainly considering the particular scenarios instead of the abstract principles of intent and negligence.²⁵⁵

There have already been abundant discussions from the dogmatic perspective including the former chapter of this dissertation. While we could not find a consensus answer to what the ISPs' duty of care should be. In particular, the current research relies much more on the dogma of the tort theory which origins from the different environment of the Internet, but did not consider the specialty of the Internet. Based on the former discussion, this chapter is to locate the ISPs' duty of care in a more fundamental and extensive context, by which to provide a systematic and comprehensive basis for the confirmation of the ISPs' duty of care.

According to the traditional tort theory, represented by the *Caparo* Test, three elements should mainly be analyzed when it comes to the establishment of the duty of care, the

²⁵⁴ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.324. The author holds the idea that "copyright infringement is a tort and it is tort law that is therefore responsible for filling in overlooked gaps in the copyright edifice" .

²⁵⁵ Representatively, Chapter 4 to 11 of the Tort Law of China are the specific rules to deal with different kinds of circumstances, in addition to the general regulation of the first 3 chapters.

foreseeability, the proximity and the reasonableness.²⁵⁶ In contrast, the former two standards are more or less a consideration of the facts, while the standard of reasonableness is a judgment of values. As for the argument of reasonableness, there have been two main ways to offer the justification of a given subject, the deontology and the utilitarianism. The former perspective lay the justification on the compliance of the moral values, including fairness, justice, freedom, etc. And the later justify something by predicting the optimistic effect of its application. To be noticed, one of the most significant progress of the social science research of the recent years have been relying more on the later perspective, represented by empirical research and economic analysis. While the discussion from the perspective of deontology is still inevitable, not only because of the limitation of the statics to prove the reliable effect, but also the formidable persuasion power of the moral principle.

Taking both of the two perspectives of dogmatism and utilitarianism into consideration, as well as the elements generally discussed in the tort law to decide the duty of care of a given entity, this chapter tries to justify the ISPs' liability in the following parts, the foreseeability, the proximity, the fairness and the effect.

3.2 The Causality Analysis

3.2.1 Foreseeability

The test of foreseeability discusses whether the defendant could reasonably foresee the damage to the injured.²⁵⁷ To be noticed, the ability to foresee the damage is not based on that of the general public, but on the specific kind of entities the defendant belongs to. In other words, the judgment of the foreseeability is a professional evaluation.

As for the establishment of the ISPs' duty of care in copyright infringement, the foreseeability of the ISPs it of not too much doubt. Considering the serious situation of online infringement, as well as the same attribution of the legal and illegal works, if a

²⁵⁶ See Catherine Elliott & Frances Quinn, *Tort Law*, Pearson Longman, 2011, pp.21-25; Brendan Greene, Course Notes, *Tort Law*, Routledge,2012, p.4.

²⁵⁷ See Brendan Greene, Course Notes, *Tort Law*, Routledge,2012, p.4.

given service could be used to distribute the legal works and there are not enough measures to prevent the infringement, for sure there will be a foreseeability that it will be used for copyright infringement. Even the general users could have this kind of foreseeability, not to say the professional ISPs who have a better understanding of the function of their service.

To be noticed, what to be foreseen by the defendant is not the specific infringer and the specific damage. Otherwise, the mentality of the defendant will be intent, instead of negligence. Under this kind of situation, there is no need to talk about the duty of care, since the defendant should have already well known the specific situation to prevent and to stop. This is important for us to understand the duty of the ISPs. No matter it is reasonable for the ISPs to monitor the users' activity as a whole or not, there does be a general duty of for them to have a basic judgment of the application of their service. This will determine whether the service itself is a legal one or primarily an illegal one, for instance, a pirate website. If persuasive evidence could be shown that the percentage of illegal activities are much more than the legal ones, the ISPs will totally lose the position as an intermediary.

3.2.2 Proximity

Proximity discusses the relationship between the claimant and the defendant, by which to understand whether there are nearness and closeness between them.²⁵⁸ Different from the real property or the physical activities, whether there is a proximity on the Internet is not based on the real distance of the entities but should be considered whether a constructive close relationship could be established. As mentioned in the beginning, the overflow of copyright infringement online is technologically based on the service of provides by the ISPs, since it is impossible for the users themselves to develop the tools themselves to conduct the infringement. On the other hand, the infringed copyright owner could not find the direct infringer or to stop the infringement without the assistance of the ISPs, making them the actually closed entity to the copyright owner.

²⁵⁸ Catherine Elliott & Frances Quinn, *Tort Law*, Pearson Longman, 2011, p.23.

While the requirement of proximity does have some different aspects compared with the foreseeability, in particular when we apply them to the mere conduit and the hosting service. The fulfillment of a third-party infringement usually needs the technological support both from the access to the Internet as well as the specific platform for hosting or distributing. While in contrast, the mere conduit is more basic and extensive. Correspondingly, the ISPs providing this kind of service is in a closer relation to the direct infringement. Consequently, the injunction on the mere conduit will have a greater and irrelevant influence on the ISPs' business as well as the users' freedom. In a word, the standard of proximity is of significant importance when it comes to the recognition of neutrality of the service.

3.3 The Interests-Balancing Analysis

It is not very hard to pass the test of foreseeability and the proximity for the establishment of the ISPs' duty of care. While the most controversial dispute is whether it is fair for the ISPs to assume the given duty. Generally speaking, there are five kinds of entities involved in the online infringing activities,

- (1)The copyright owners, whose interests are to protect copyright online;
- (2)The ISPs, whose interests are to pay less duty and to increase the number of the users;
- (3)The users conducting the infringement, whose interests are to avoid the liability of copyright infringement, sometimes is to earn illegal remuneration;
- (4)The users getting the illegal works online, whose interests are to get more works freely or at a low cost;
- (5)The ordinary users, whose interests are to access the Internet by a lower cost and to protect the rights of privacy and the freedom of expression. To be noticed, it is also the users' interests to get more qualified legal works at a lower cost.

Although remaining as a controversial in legal theoretical circles, balancing is of notable importance in legal analysis.²⁵⁹ The appropriate approach facing with the complicated relationships is to deter the entities involved and their respective interests since there is always a trend to name one's private interest as a public one in the discussion to enlarge the voice.²⁶⁰ The conflicting interests above are mirrored in the current legislation, represented by the relevant EU directives,²⁶¹ as well as the explanation of the CJEU in the orders mentioned in the previous chapter. Besides, it is the social welfare as a whole to be considered, including the progress of the Internet industry, the prosperity of the culture, the rule of law and the freedom of the general public.

It is obvious that the ISPs' duty of care in copyright infringement is mainly in line with the copyright owners' interests, and it more or less conflicts with the interests of the other entities. Whether the duty is fair is then a balance of the copyright owners' interest with that of others'.²⁶²

3.3.1 Copyright Owners vs. Direct Infringers

What is often omitted is that the fundamental conflict in online copyright infringement is between the right holders and the direct infringers. It is important to emphasize this point again since the final aim of the duty of care is not to regulate the ISPs, but to ask the direct infringers for the compensation or to prevent the potential infringers from conducting the infringing activity.

The attribution of the Internet which empowers any independent user a destroying ability to cause serious copyright infringement could justify the strict legal treatment

²⁵⁹ See Christina Angelopoulos, Sketching the outline of a ghost/ the fair balance between copyright and fundamental rights in intermediary third party liability, *info*, Vol. 17 Iss 6, pp.77.

²⁶⁰ See Craig Joyce, Marshall Leaffer, Peter Jaszi, and Tyler T. Ocho, *Copyright Law*, Seventh Edition, LexisNexis, 2006, pp.51-52.

²⁶¹ See Eva Inés Obergfell & Alexander Thamer, (Non-)regulation of Online Platforms and Internet Intermediaries -the Facts: Context and Overview of the State of Play, *Journal of Intellectual Property Law & Practice*, 2017, Vol. 12, No. 5, p.436.

²⁶² See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, pp.325-326.

on the direct infringers, including an appropriate amount of compensation, the disclosure of the real identity if possible and even further special supervision and punitive damages when repeat infringement is conducted by the same Internet Users who could be proven to be of bad faith.

Correspondingly, when a specific infringement could be proven, it is justified to follow the notice and takedown procedure and there is no justification for the proven infringers to be immune. It is also fair for the ISPs to disclose the identification information to the copyright owners by which the later could pursue the reasonable compensation. For example, in the case *Recording Industry Ass'n. of America v. Verizon Internet Services*,²⁶³ it is confirmed by the US court that the Constitution does not provide protection on copyright infringement and the infringers could not refer to the protection on free speech or privacy to resist the disclosure of the essential information. Moreover, a compulsory legal requirement to apply the policy to deal with repeat infringers is also of rationality since when a willing infringers keep on repeating the infringement, it is justified to say that he or she ignores others' definite great loss and under this situation, the privacy and freedom online fall behind the need to protect others' legal interests.

Moreover, the comparison of the ISPs' interests with that of the direct infringers could also offer the justification for the judgment of the service as a whole. That is to say, if it could be proven that majority of the users of a given service are infringers or users directly benefit from the infringing activities, the service itself could be recognized as illegal and the ISPs could be liable for the willing blind eyes. For the services that are more easy to be used by the direct infringers and to cause more serious damages, it is reasonable for the ISPs to assume a higher standard of duty of care.

To be noticed, the injunction and liability on the direct infringers should also be proportional and for the substantial limitation on the users, the involvement of a judicial department is essential by which to prevent the abuse of the copyright owners as well as the ISPs. This is why the proposal by the French parliament in 2009 was initially

²⁶³ *Recording Industry Ass'n. of America v. Verizon Internet Services*, 2003 U.S. Dist. Lexis 681, 240 F. Supp. 2d 24 (D.D.C., Jan. 21, 2003), reversed, 351 F. 3d 1229 (D.C. Cir., Dec. 19, 2003) cert. denied 125 S.Ct. 309 (2004).

rejected by the Constitutional Council and was approved on condition that a judicial decision was essential for the suspension or termination of the users' account.²⁶⁴

3.3.2 Copyright Owners vs. ISPs

The direct bearers of the duty of care are the ISPs and thus it is needed to balance their interests with the effect of the duty on copyright protection. Generally speaking, the ISPs' interests is based on the increase of the flows through their services, regardless of the legality of the users' activity and even welcome the abundant of works available on their platform which are uploaded and downloaded by the users, unless it is amended by the requirement of the law. Based on the foreseeability and the proximity mentioned above, it is fair for them to make sure that their services are not illegally used and to provide the copyright owners a better circumstance to assert their rights.

When it comes to the ISPs' duty of care, the most frequently mentioned doubt is based on the so-called principle of network neutrality. Besides, it is also to solve the conflicts between the duty to protect or to enforce others' copyright and to conduct their own business at their own will.

3.3.2.1 The So-called Principle of Network Neutrality

The principle of network neutrality, or technology neutrality, is often mentioned when it comes to the liability of the ISPs. Meanwhile, it is often cited to provide relief to the ISPs.²⁶⁵ The principle is clearly regulated in the GDPR, Recital 15 of the Preamble, stating that “*the protection of natural persons should be technologically neutral and should not depend on the techniques used*”. While it has never been explicitly stipulated in the tort law, or the rules governing the ISPs' liability in copyright infringement.

²⁶⁴ See Kimberley Evans, *Online Copyright Infringement: Recent Cases Worldwide and Legislative Responses*, at: <http://dcc.com/services/litigation-dispute-resolution/online-copyright-infringement-recent-cases-worldwide-and-legislative-respon/>; For the background of the law, see Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement- A Non-Neutral Role for Network Intermediaries?* *Jurimetrics*, Vol. 49, No. 4, p.389.

²⁶⁵ See for example, Jin Wang, *Study on Copyright Infringement of ISP(网络服务提供者著作权侵权责任研究)*, IP Press(知识产权出版社), 2016, pp.115-116.

Besides, it is often mentioned that the principle is similar to the conclusion in the US case of *Sony Corp. of America v. Universal City Studios*,²⁶⁶ which is cited as the famous principle of substantial non-infringing uses. While the standard of Sony itself has been criticized and further modified by the courts in the following cases like Napster and Grokster. More importantly, the criteria of “substantial non-infringing uses” only means that the copyright owners could not hold the ISPs for liability merely based on the possibility of the equipment to be used to conduct the infringement. Never does it mean in reverse that the ISPs could definitely be free from any duty or liability that once their service has some positive function.

Although the principle of network neutrality has been frequently mentioned, there is actually no specific legal definition of it, nor has it been clearly defined by the commentators. Winston Maxwell and Marc Bourreau have concluded the three different meanings of the principle,

“Meaning 1: technical standards designed to limit negative externalities...should leave companies free to adopt whatever technology is most appropriate to achieve the result; Meaning 2: ...the same regulatory principles should apply regardless of the technology used... Meaning 3: ... regulators should refrain from using regulations as a means to push the market toward a particular structure”.²⁶⁷

Moreover, the authors also mentioned that Meaning 1 and Meaning 3 could overlap in practice. Both of them refer that the regulation should be expressed in the legal effect it wants to forbid or to support, not the specific technology to fulfill the legal effect. This is of significant importance when it comes to the application of the ISPs’ duty of care in the following chapter.

As for the possible conflict between the principle and the ISPs’ duty of care, it is the second meaning above to be noticed. From the context, it should be understood that the ISPs should be equally treated as other entities in the market, and different kinds of ISPs should also be equally treated. Nevertheless, it is obvious that both the DMCA,

²⁶⁶ *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

²⁶⁷ See Winston Maxwell & Marc Bourreau, Technology neutrality in Internet, telecoms and data protection regulation, *Hogan Lovells Global Media and Communications Quarterly*, 2014, p.19.

the E-Commerce Directive and the Chinese rule have imposed different requirements on the access, caching and the hosting. When we particularly consider the duty of the ISPs, it also seems like prejudiced treatment with traditional intermediaries, like the post offices or telephone companies to which the ISPs were compared at the beginning of their development.

However, the principle of fairness and justice does not mean the law should treat different entities in the same nominal way. It is the substantial justice, instead of the superficial equality that should be persuaded. Different technologies bring us different benefits and damages. The competition in the market will usually offer the advantageous ones to surpass others voluntarily, while the accompanying negative aspects could not be eliminated unless adjusted by the public interference. As for the technology neutrality, it should be noticed that the neutrality of the technology is not a transcendental principle, but a judgment which means the same technology may be prejudiced for different kinds of entities. There is no meaning of the neutrality of the technology itself, but the evaluation of its application.²⁶⁸ Under this situation, it is the balance of the interests that should be considered to be maintained, not the “neutrality” of the technology.

For the copyright owners, the ISPs and other kinds of communication tools are significantly different. Considering the attribution of the Internet in the speed in transmission, the extension of the influence, the aggregation of the potential infringers, etc., the same treatment of the ISPs with other kinds of intermediaries will lead to unfair results. Moreover, the ISPs is also not neutral for the copyright owners and the infringers: the former is significantly vulnerable and the later have the advantage provided by the ISPs. Correspondingly, the ISPs could not be recognized as neutral unless with the ISPs’ special treatment on the protection of copyright.

3.3.2.2 The Freedom to Conduct Business

Another notable argument against the ISPs’ duty of care is their freedom to conduct

²⁶⁸ See Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015,pp.275-278.

business, which is the basic requirement of the market economy and is justified by the fundamental rights as well as the specific declaration. For instance, it is clearly stipulated in Article 16 of the EU Charter of Fundamental Rights.

However, we are all aware that no freedom is absolute. Whether the duty of care on the ISPs is reasonable or not is determined by the comparison of the limited freedom, or the burden imposed by the duty of care, and the protected interests. It is the freedom for the ISPs to conduct the business, but not their freedom to create an advantageous environment for copyright infringement. Considering the principle of network neutrality, as well as the requirement of the market economy, the law should not be compulsorily prejudicial to any given kind of services. While it should be noticed that different kinds of services do will result in different influences on others' rights. The freedom of the entities majoring in "dangerous" services should not be equal to that of the comparatively safe ones. In other words, it is the ISPs' freedom to conduct any kinds of legal businesses, but not their freedom to create a vulnerable circumstance for the copyright.

Moreover, the ISPs' freedom also means that the duty of care should be appropriate, not to strain the possibility of the business. As for this, it is frequently mentioned by the supporters of the ISPs the significant benefits of the Internet, trying to argue for the ISPs' lower duty of care by the whole social welfare promoted by the Internet.²⁶⁹ While this kind of argument has a critical defect of strong power logic. No matter how much benefits do the ISPs bring to the society and the users, it is not a reliable excuse to do contributory assistance to the infringement. On one hand, the copyright owners should not suffer from the progress of the society. On the other hand, it is not that definite that the technological modification without the parallel richness of the content industry is real progress. Or at least it is not that perfect. There is no denying that duty of care will increase the ISPs' burden to conduct the business. While it is the users who enjoy the benefits of the services that should share the burden, instead of the copyright owners.

At the same time, the principle of freedom to conduct business does provide us with

²⁶⁹ See for example, Jie Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement*, Springer, 2018, pp.4-5.

some direction when we consider the ISPs' liability. Just as the requirement of the technology neutrality, the law and authority should not replace the entities to choose the final and exact measures to apply the legal principles, by which to provide the opportunities for the market entities themselves to explore the possibilities themselves.

3.3.2.3 The Possibility of the Duty

Another frequently mentioned issue of the imposing of the duty is the ability of the entity to assume the duty. As mentioned above, it is not hard for the ISPs to have a general knowledge of the infringing activities through their services. While it is impossible for the intermediaries to totally prevent the infringement, nor is it easy for them to have a knowledge of the specific infringing activity. This is often quoted as an immunity of the ISPs' liability, especially for the damage compensation.

However, it is of great difference whether the ISPs prefer to stand with the copyright owners to deal with the problem. There will always be some users to take the chance to conduct the infringing activity, while the ISPs' ability to deal with the problem is not a changeless dogma, but a flexible possibility. It is reasonable to say that, whether the ISPs could deal with the problem is determined by whether they want.

There is no denying that the big giants like Google and Facebook have both the technological and economic ability to take all the three kinds of measures to stop the specific infringing activity as well as to improve the ability to prevent the infringement. The possibility of the ISPs' duty of care is more often cited when we try to apply them to the small businesses. On one hand, their ability to assume the duty is assuredly limited, meaning that the duty reasonable for the giants may seem to be unfair for them; on the other hand, the same level of duty will create a heavier burden for the beginners, aggravating the monopoly of the giants.

The actual ability of different ISPs to assume the same duty is considered by the Proposal for a Directive on CDSM, imposing the duty in Article 13 to the ISPs that store and provide the public access to "large amounts of works". While as criticized by the comments, the amount that large enough to apply the duty is hard to decide.

To be noticed, the Internet industry naturally has a tendency of centralization, and the contribution of the legal duty on the competition should not be exaggerated. It is reasonable to take the comparatively shorter ability the up-rising ISPs into consideration in the judicial judges, while it is not a definite excuse for not taking the copyright protection into the cost of the beginning of a business. For instance, one of the main reasons that the current lawsuits and site closures have little influence on online copyright infringement is that the cost and requirement of running a website for infringing purpose is quite limited. The ability of a given beginner to control its users' infringing ability may be limited, while the convenience it provides to the infringement may be significant.

3.3.2.4 The Necessity of the Duty

It is reasonable to ask the ISPs to take some kind of duty to support the copyright owners, based on their contributory assistance to the infringement as well as their benefits from the increase of the users partially brought by the infringing materials. While one of the requirement to impose a given duty is its necessity. The justification of its application is not only based on its own benefits but also its comparative advantages in light with other possible measures.

For instance, the most extreme harm of infringing activity is that once it is done, the successive distribution, as well as the damage it costs will be out of control due to the speed and extension of the Internet. Correspondingly, the most functional response to deal with online infringement should be to prevent the initial infringing activity right at the beginning. From this perspective, the duty of the ISPs to prevent the infringing activity is a comparative necessity, though other considerations including the protection of privacy should limit its general application.

For another example, it is asserted that the preferable plan to promote the ISPs' involvement in online copyright protection is by self-regulation, or the initiative cooperation of the ISPs and the copyright owners.²⁷⁰ While it should be noticed that not all the copyright owners have the negotiation ability like the music corporations.

²⁷⁰ See Jie Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement*, Springer, 2018, p.238.

Without essential interference of the law, there would be no impetus for the ISPs to treat the common copyright owners in the same way with the experienced attorney representing the interests of their rich clients. Therefore, the legal requirement is still an inevitable necessity to promote the equal cooperation of the ISPs and all kinds of copyright owners.

3.3.3 Copyright Owners vs. General Users

The most controversial dispute over the ISPs' duty of care is caused by the conflicts of the interests of the copyright owners and that of the general users. On one hand, strong copyright protection will limit the public's availability of the works, leading to public opposing opinions. More directly, a strict duty of care is not only an obstacle to the free market of online works but also the users' other kinds of interests, which includes the right to privacy, personal data and the freedom of expression.

Article 15 of the E-Commerce Directive clearly forbids the general monitoring of the information through the services. Different from that, Article 521(m) of the DMCA only prohibit the ISPs' duty of monitoring it service or affirmatively seeking infringing activity. Similar to the DMCA, The Provisions on RDIN only denies the mandatory adaptation of the proactive examination of the users' information. In contrast, the DMCA and the Provisions on RDIN do not prohibit the application of the ISPs' proactive monitoring unless with the specific requirement of other regulations.

It is one thing to deny the ISPs' duty to monitor the users' activity, and it is another thing to explicitly forbid the compulsory of these kinds of duty. As for the former one, the main consideration maybe the ISPs' ability to assume the duty, both from the economic and the practical perspectives. This has already been analyzed above. As for the later, the main reason is related to the protection of the users' privacy and the freedom of expression. It is not only a safeguard measure against the abusing of the ISPs but also a countermeasure of authority power. While both the copyright and the users' rights have their constitutional foundation, and it is hard to compare these rights from a general and qualitative perspective. Therefore, a further analysis based on the

categorization is rational.

3.3.3.1 Copyright vs. Privacy and Personal Data

Generally speaking, the ISPs' duty of care may influence the users' privacy and data in two aspects. For one thing, in the process of the ISPs' assistance in the specific infringement, there will usually be the need to disclose the infringing users' identity. For the other thing, if it is stipulated as the ISPs' compulsory obligation to filter the users' activities, there will be significant concern about the ISPs' supervision.

As for the first concern, it has been analyzed above to balance the interests of the users and the infringers. There should be strict requirements for the disclosure of the users' information as well as the copyright owners' obligation to keep the users' privacy. While it is fair for the ISPs to provide the identification information once reliable evidence could have been found to prove the actual existence of the illegal activity.

The main concern is the influence on the general users' privacy.²⁷¹ This is both related to the collection of the users' identification, and the supervision of the users' activity. While it should be noticed that, the disclosure of the users' information is not equal to a system of real-name registration. The current situation is that without the ISPs' compulsory obligation to provide full and reliable identity information, the ISPs are still collecting the related information for safety or business reason.²⁷² It may be controversial to ask the ISPs to collect the users' information in order to prevent the anonymity of the infringers, while it is reasonable to ask the ISPs to provide as much as the information otherwise owned by them.

Moreover, whether the supervision of the users' information should be considered from a perspective of classification. For the service that is of general use for legal purposes or of indirect assistance to the infringing activity, it is unfair to ask the ISPs to be responsible for the infringement. While if there is persuasive evidence that the given service is widely used for illegal purpose, for instance, the P2P software, or the given

²⁷¹ See Luca Belli, End-to-End, Net Neutrality and Human Rights, on Luca Belli & Primavera De Filippi, eds., *Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet*, Springer, 2015, p.20.

²⁷² See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.90.

services are of significant and direct assistance to infringing activity, for instance, the platforms that could be used to distribute the works to a large number of unparticular users, it is then of notable rationality to ask the ISPs to adopt some kind of preventive measures to deal with online infringement. Under these situations, the users' privacy should not always be dominant when we consider the possibility of the measures. This could be justified by Paragraph 2, Article 8 of the EU Charter of Fundamental Rights.

To be noticed, some of the services naturally have a feature of publicity, meaning that the supervision for protecting copyright will not constitute substantial disclosure of the users' activity which is originally public to other users. For instance, the application of the filtering technology on the personal storage platforms may seem to be a significant threat to the users' privacy, while it is not the same situation if the technology is used on stream media platforms. From this perspective, the adoption of the proposed Directive on CDSM should be fairly treated and from the argument of this dissertation, the basic logic of it is quite reasonable.

3.3.3.2 Copyright vs. Freedom of Expression

The possible threats on the users' freedom of expression resulted from the ISPs' duty of care may be classified into three kinds. Firstly, it generally increases the possibility of the users' being confirmed when their activities are infringing. Correspondingly, the users will have to be more careful of the illegality of their activities and when the attribution of their activities is not that clear, they may prefer to adopt the activity to be immune from liability. Secondly, if it is strictly required by the law, the ISPs may prefer to download the users' potential infringing materials upon receiving the copyright owners' notices to avoid further damages compensation. In other words, the takedown procedure may be abused by the copyright owners or the ISPs.²⁷³ So is the injunctions.²⁷⁴ Thirdly, there is a possibility of using the filtering system for other commercial or

²⁷³ See Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 *Minn. J.L. Sci. & Tech.* (2008-2009), p.387; Aleksandra Kuczerawy, *Intermediary Liability & Freedom of Expression: Recent Developments in The EU Notice & Action Initiative*, *Computer Law & Security Review*, Volume 31, Issue 1, February 2015, p.46.

²⁷⁴ See Mark A. Lemley, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147 1998-1999, pp.199-209.

political purposes, which may constitute serious control on the users' freedom.

As for the first concern, it is actually not a threat to the freedom of expression resulted from the ISPs' duty of care, but the general problem brought by the copyright protection.²⁷⁵ Considering the public attitude to copyright protection and especially the serious situation of online copyright infringement, it is more or less a concern from imagination. It should be noticed that the users are the direct initiators of the uploading and distributing activities online. All the efforts of other entities, including the copyright owners, the public authorities as well as the ISPs, could not replace the users' self-conscious of copyright protection. As John Stuart Mill said, "*the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others*".²⁷⁶ There should be more education related to copyright protection including the users' rights protected by the limitations on copyright, as well as more free space provided by the fair use doctrine, while the users' initiative in guaranteeing the legality of the works distributed by them is of first and final measure to control online infringement. Of course, as Kembrew McLeod mentioned, sometimes it is not the problem of no freedom provided by the law, but the negligence of the public to use the intellectual property freely.²⁷⁷ It is the general users' obligation to protect their rights in practice by referring to the doctrine of fair use and other mechanisms limiting copyright.²⁷⁸

The second concern is practically the most common one related to ISPs' duty of care, especially when it comes to their obligation to delete the illegal works. Without appropriate procedural measures, the notice and takedown may be abused by the

²⁷⁵ See Mark A. Lemley, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147 (1998-1999), p.165.

²⁷⁶ See Stanford Encyclopedia of Philosophy Archive, at <https://plato.stanford.edu/archives/fall2016/entries/freedom-speech/>.

²⁷⁷ See Kembrew McLeod, *Freedom of Expression: Resistance and Repression in The age of Intellectual Property*, University of Minnesota Press, 2007, p.330.

²⁷⁸ There is no denying the current room for the public domain is not extended and flexible enough and especially in the Internet era and, see for example, William Patry, *How to Fix Copyright*, Oxford University Press, 2012, pp.131-140. In particular, at the level of EU, the legislative model of listed limitations on copyright is suggested to be added with a more general rule to provide the public with more freedom. The author of this dissertation is a strong supporter for extending the room of the fair use as well as limiting the extension of the copyright. However, to extend the room of the freedom is one thing, to respect the reasonable interests of the right holders is another. It is not an acceptable way to realize the fair interests by violating the law.

copyright owners or the competitors.²⁷⁹ While first and foremost, it should be kept mind that the ISPs are in line with the users when it comes to the blocking and deleting of the alleged infringing materials. It is not only due to the efforts that the ISPs have to take to receive and to deal with the right holder's notice, but also based on the relationship of the ISPs' interests with their consumer choices. Otherwise seriously compelled by the law, there is no impetus for the ISPs to apply the takedown procedure.

At the same time, the negative effort of the notice and takedown procedure does have appeared and should be considered when we think about the modification of the whole procedure. Fundamentally speaking, there is no impetus for the ISPs to abuse the procedure, and on the reverse, it is the ISPs as well as the users to be protected when it comes to the limitation of it. Therefore, the most important element to be considered is the reliability and accuracy of the notice sent by the copyright owners as well as their representatives. What should be guaranteed is not only the ownership of the copyrighted works which is infringed by the users but also the responsibility of the wrong blocking or deleting if ever. On the other hand, the subscribers should have full and convenient ways to respond to the notice. With corresponding feedback information, the users should have the right to recover the distribution of the works and the copyright owners should be responsible for the wrong notice. In summarization, the notice and takedown procedure may be some kind of threat to the users' freedom of expression, while the negative effect should not be exaggerated and could be overcome by appropriate procedural design.²⁸⁰

Last but not least, there is an attractive concern about the abusing of the filtering measures if adopted by the users. While it should be noticed that the most serious threat to the freedom of expression is always from the public authority, instead of the commercial entities like the ISPs.²⁸¹ Even without the impetus to protect copyright,

²⁷⁹ See Aleksandra Kuczerawy, Intermediary Liability & Freedom of Expression: Recent Developments in The EU Notice & Action Initiative, *Computer Law & Security Review*, Volume 31, Issue 1, February 2015, pp.48-49.

²⁸⁰ See Wenjie Liu, On the Duty to Keep Safety of the ISPs, *Peking University Law Journal(中外法学)*, Vol.24, No.2(2012), pp.406-407.

²⁸¹ *Ibid*, p.406. Accordingly, the core part of the freedom of expression is about the understanding and criticism of public affairs and people.

there is still abundant and plausible excuses for the powerful authorities to censor and to control the expression of the people. Besides, it is obvious that the level of freedom across the world is more or less in positive correlation with the degree of copyright protection, not on the opposite.²⁸² Both the freedom of expression and the copyright are civil interests owned by the general public, an irresponsible government will tend to violate both of them all together, instead of protecting one of them to suppress the other.

Same like privacy protection, the influence of the filtering technologies on the freedom of expression varies across different kinds of ISPs. It is totally unreasonable to ask the ISPs providing only private and secret services to apply the technologies.²⁸³ While the public expression of the civil entities should always be evaluated by others as well as the public authority by which to prevent and eliminate possible harms. The filtering systems applied to the ISPs providing these kinds of services only replace the manual and inefficient evaluation by automatic and effective technologies, bringing no further threat to the freedom. What should be significantly noticed is the control on the objective as well as the specific use of the technology, instead of denying its usage at all to refuse the significant benefits it may bring to copyright protection.

3.3.3.3 One Step More: Copyright to Promote Personality Protection

The conflict between the ISPs' duty of care and the users' right to privacy and the freedom of expression has been widely discussed by current research, while it is generally omitted the consistency of copyright protection and the personal interests.

For instance, the filtering system suggested by the Proposal of a Directive on CDSM is widely criticized to have violated the EU Charter of Fundamental Rights, especially Article 8 to protect personal data and Article 11 to protect freedom of expression and information.²⁸⁴ According to the Charter, both of these two articles are to protect the

²⁸² This could be empirically proven by the comparison of the lists by the Reporters without Borders regarding to the countries with pervasive Internet censorship and the degree of copyright protection of the listed countries.

²⁸³ According to the Proposal of a Directive on CDSM, the obligation is not imposed on the include private cloud storage services.

²⁸⁴ See Sophie Stalla-Bourdillon, etc., *An Academic Perspective on the Copyright Reform*, Computer Law & Security Review, 2016, p.2.

citizens' freedom. Although IP protection is shortly mentioned in Article 17, which lead to one kind of understanding that copyright protection is not that important compared to that of Article 8 and 11, it should be noticed that it does not mean that privacy and expression always take precedence. Compared to distributing the works without authorization and distorting the authorship or content of the expression without the permission of the authors, filtering of the dangerous services for a particularly limited aim is not that unbearable.

Furthermore, it should be noticed that, the works protected by copyright is also a kind of expression. Besides, although different legal systems have various understanding of the attribution of copyright, there is no denying that the originality of the works represents the special personality of the authors to a significant extent. To protect copyright is also to protect the freedom of the authors and the copyright owners,²⁸⁵ and it is particularly important in the era of self-media. A glancing review reveals that the standard of copyright protection and that of the freedom and privacy are always positively related, instead of the reverse. "*Freedoms of any kind can easily be lost without exercising them*". So is the copyright. There may be more space for fair use to protect the general users' interest, taking blind eyes to the common copyright infringement is not a preferable choice since it is against the fundamental principle that guarantees both of these two kinds of private rights: the rule of the law.

To be noticed, in the amended Proposal of a Directive on CDSM, it is asserted that the measures to enforce copyright online should be strictly limited to the objective.²⁸⁶ Moreover, the accuracy of the notice from the copyright owner is emphasized as well as the procedure of the counter notice.²⁸⁷ Besides, it should also be taken into consideration the judicial protection of the users' rights.²⁸⁸ And at the end, it is emphasized that automated blocking should be avoid when defining best practices.²⁸⁹ This means that not only the availability but also the function of the filtering system is

²⁸⁵ See Pamela Samuelson, Copyright and Freedom of Expression in Historical Perspective, 10 *J. Intell. Prop. L.* 319 (2002), p.319.

²⁸⁶ Recital 39, the amended Proposal of a Directive on CDSM.

²⁸⁷ Paragraph (2b), Article 13, the amended Proposal of a Directive on CDSM.

²⁸⁸ Recital (39a), the amended Proposal of a Directive on CDSM.

²⁸⁹ Paragraph 3, Article 13, the amended Proposal of a Directive on CDSM.

strictly limited by the proposal and from the perspective of this dissertation, it has already taken into consideration of the general users' interests.

3.4 The Utilitarian Analysis

Different from the approach of interests balancing, which is emphasized in this dissertation to specify the involved entities and their particular interests and then to balance the subject matters referring to the principles of fairness and justice, the utilitarian analysis adopts a more macro perspective which put the attention to the integral effect of a given mechanism and especially its influence on the social welfare, or in short “the greatest good for the greatest number”,²⁹⁰ instead of the specific interests of a particular entity. The value orientation is then not the implement of transcendental moral principles, but the maximization of the social welfare as a whole.

3.4.1 Copyright Protection and the Progress of the Internet Industry

From a utilitarian perspective, the most critical query about the ISPs' duty of care is the heavy burden on them that will stifle the progress of the Internet Industry as well as the application of some effective technologies, for instance, the P2P sharing files. To answer the query, two aspects are discussed as follows.

3.4.1.1 The Progress of the Internet Industry is not a Dominating Principle

The logic of the worry about the influence of copyright protection on the progress of the Internet is that, considering the abundant inevitable convenience and efficiency brought about by the progress and application of the Internet, it should keep in mind that any related policy will not constitute substantial and significant obstacle for the progress of the Internet industry.²⁹¹ And the implying premise here is that the Internet progress is the most important objective of our society. It is then related to the desired social welfare of the utilitarian analysis.

²⁹⁰ See Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011, p.4.

²⁹¹ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.86.

From the qualitative perspective, the benefits brought about by the Internet industry is not more precious than that by the copyright industry. Although there have been abundant technology and services involved in the Internet industry, the basic service provided to the users by the Internet is still receiving and sending information. There is no denying that except the communication between specific users which is not quite related to copyright protection, most of the valuable content received by the users via the Internet is provided by professional creators and are the subject matter of copyright protection. In other words, the Internet provides incomparable means for the mobility of the information, while the quality of the content is still a crucial aspect which could not be provided only with the progress of the Internet.

Although the appearance and progress of the Internet and especially the coming of the AI era has significantly saved the cost for the creation and especially the dissemination of the content, it should be kept in mind that the most important feature that determines the value of the content is still the originality or creativity. Although there has been different understanding about the creation of the works and the function of copyright protection, it is still the consensus of the society that the incentive for their creators or the corporations they belong is essential to most of the influential works on the market.

From the quantitative perspective, the same conclusion could be drawn. It is difficult to compare the contribution brought by the Internet industry and the copyright industry, especially considering the different economic structure of different countries and the overlap of the two industries.²⁹² While the statistics could still prove the balance of these two industries. For instance, US is the leading country in both of the two areas and accordingly, both of the two industries constitute 6 percent of the US economy around

²⁹² The Internet is increasingly being the dominating media for the distribution of the copyrighted works, and in some classification parts of these two industries are classified into the same category, see for instance, Norm Schriever, Ranking the Biggest Industries in the US Economy, at <https://bluewatercredit.com/ranking-biggest-industries-us-economy-surprise-1/>; US Bureau of Economic Analysis, GDP by Industry, at <https://bea.gov/iTable/iTable.cfm?reqid=51&step=51&isuri=1&5114=a&5102=1#reqid=51&step=51&isuri=1&5114=a&5102=1>. Accordingly, the fields of publishing, Internet publishing, broadcasting, media, sound recording, motion pictures, etc., are all classified into the category of information.

the year 2014, although the speed of the industry is in the lead.²⁹³

Another statistic from a micro perspective is about the things people do online, which could be used to prove the importance of the content to the Internet industry. For instance, it is discovered that the most common online activity online is watching YouTube,²⁹⁴ which is in close relationship with the content, instead of the usage of the Internet as mere conduits for the users.

3.4.1.2 Copyright is not at the Opposite Side of the Internet

The comparison of the value of the Internet Industry and that of the Copyright industry shows that the progress of the Internet is not that important as we may feel, and it is still essential to provide sufficient incentive for the creators. Another perspective to be noticed is that copyright is not just at the opposite side of the Internet.

On one hand, the progress of the Internet itself relies heavily on the protection of copyright. Although the giant ISPs are commonly sued in the copyright disputes, it is also to be noticed that they are the plaintiff of many lawsuits of which copyright infringement is the cause of the case. One of the most valuable subject matters of copyright protection in the Internet era is software, which is the basic technological reliance on which the Internet industry could develop. Furthermore, as classified by the US Bureau of Economic, the Internet has been one of the representative media for publishing,²⁹⁵ and the leading ISPs have long been providing online content themselves or benefitting from the content uploaded by the users. Therefore, both from the perspectives of technology and the content, copyright protection is inevitable to the progress of the Internet industry.

On the other hand, there do be true conflicts between the two branches, while the

²⁹³ See IIPA, *Copyright Industries in the U.S. Economy*, at <https://www.riaa.com/reports/copyright-industries/>, Stephen E. Siwek Economists Incorporated, *Measuring the U.S. Internet Sector*, at <http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>.

²⁹⁴ See McGillacuddy, *Top 10 Things Most People Do On the Internet*, at <https://www.thetoptens.com/things-people-do-internet/>.

²⁹⁵ See US Bureau of Economic Analysis, *GDP by Industry*, at <https://bea.gov/iTable/iTable.cfm?reqid=51&step=51&isuri=1&5114=a&5102=1#reqid=51&step=51&isuri=1&5114=a&5102=1>.

corresponding influence on the progress of the Internet is quite limited. The duty imposed on the ISPs are limited and considering the impetus and ability of the copyright owners to bring the lawsuits, the substantial burden is further relieved. Moreover, the progress of the Internet and related technology also provide the convenience for the ISPs to deal with online infringement, and the real question is whether the ISPs prefer to keep in pace with the trend. Although it has been worried since the beginning of the conflict between these two industries, there is no reasonable service proven to be stifled absolutely by the requirement of copyright protection. The most notable case maybe P2P software. While if we take a systematic perspective, this kind of service is not inevitable for the users or the society as a whole. Considering its significant damage to online copyright protection as well as the low cost to deal with the infringement, there is no reason to promote its barbaric growth on the scarification of copyright protection.

3.4.2 The Economical Way to Protect Copyright

The general definition of the negligence that relies on the analysis of the due care level, meaning that it is a comparison of the given individual's care with that of a due one. Differently, some of the economic analysis of the negligence relies on the principle that the proper stand of the care should be determined by the balance of the benefits of the care with the corresponding burden or the whole cost.²⁹⁶

Although this kind of economic analysis could not actually replace the interests balancing approach, what it doses reveal is that the measures designed to enforce copyright should be analyzed upon the comparison of the cost and effect, by which to find the economical way to protect copyright. As for this, the market instead of the government is in a better position to explore the best practice which should be respected and encouraged by the legislation. What the law should do is to establish the objective and standard of the regulation and to absorb the successful experience of the self-practice, instead of choosing the specific way for the ISPs and the copyright owners to

²⁹⁶ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.88; Stephen Perry, Torts, Rights and Risk, on John Oberdiek, ed., *Philosophical Foundations of the Law of Torts*, Oxford University Press, 2014, pp.40-44.

cooperate.

From this perspective, the problem of the safe harbor is that it could not predicate the progress of the technology, especially the significant influence on the copyright owners' liability to discover the infringement by a third party without the assistance of the ISPs. And it did not provide sufficient legal support for the copyright owners to argue with the ISPs to ask them to provide convenient circumstances for the application of more efficient and effective measures to prevent the users' infringement which is the fundamental response to common online infringement. To be noticed, although it has only been tens of years, the social as well as technological circumstances when the current rules were enacted has significantly changed and the current situation is obviously different from that.²⁹⁷

There is no denying that from a broader perspective, it is doubtful whether the copyright system set up over 3 centuries ago, although with continuing modification, is still the best mechanism to provide sufficient incentives for the creators and to collect essential interests for the right holders in an economical way.²⁹⁸ As mentioned above, these kinds of doubts about the justification of the copyright law are partially the deep foundation for the widespread and acceptance of online infringement. It is commonly complained that the current copyright law has already constituted redundant constraints on the sharing of culture and the freedom of recreation, as well as the facility of the public use. The further discussion of the ISPs' duty of care in this dissertation is predictable to bring more criticism from this perspective.

Nevertheless, it should be noticed that, the current operation of the human society is based on the clear delimitation of property rights, so is it the continuation of the creation and distribution of the books, music, motion pictures, software, etc. Although it is an

²⁹⁷ See *Communication from the EU Commission on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM (2016) 288 final, pp.7-8. For similar opinion, see Zhiwen Liang, *On the Model of Copyright Regulation on ISPs*, on *Legal Science(法律科学)*, Vol.2. 2017, p.100; William Patry, *How to Fix Copyright*, Oxford University Press, 2012, pp.2-6.

²⁹⁸ See for example, Mark A. Lemley, *IP in a World without Scarcity*, 90 *N.Y.U. L. Rev.* 2015, p.463 and p.504; See Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf, Foreword.

absolute political right of emphasizing the attribution of the works as human culture, there is no denying the essential incentive for the creators as well as their initial objective to earn personal interests. The prosperous of the human culture as well as everyone's benefits from it is for certain the aim of legal regulation, while before it comes the pantisocracy in which all the property belongs equally to everyone, there is no justification to give up the primary attribution of original works as private property, nor is it acceptable to fulfill the objective of so-called freedom and equality by sharing and enjoying others' original works without permission. Before the application of another useful mechanism to replace the incentive for the copyright owners, the current one should continue in spite of its significant imperfection.

From the perspective of the general public, it is easy to feel the freedom brought by the Internet and the constraint from copyright protection. On one hand, it is because of the different pricing mechanisms of the two industries. For most of the ISPs, their interests are primarily based on the user scale which is theoretically quite unlimited due to the abundant content provided or the daily use of the service. However, most of the works have their aiming readers, and the interests of the copyright owner could only rely on the specific sources. Therefore, the basic objective of the ISPs is to extend the broader boundary of the user scale, while that of the copyright owners is to guarantee that the limited readers should pay enough for their accessibility to the works. There are many other ways for the ISPs to get remunerated based on the user scale, while the same interest resources it not feasible for the copyright owners. To be noticed, for the ISPs who provide services of which the scale of the users is significantly limited, it is more common to adopt a system of user charge just like the content industry, which could also help us to understand the constraint brought by the copyright mechanism as a must. There do have been many additional ways for the copyright owners to get remuneration,²⁹⁹ represented for the reward system commonly used on the self-media platforms of China, while it still relies heavily on copyright protection since the basic guarantee is that the account of the given self-media is the only resources of the original works.

²⁹⁹ See for example, Adam D. Moore, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*, Transaction Publishers, 2001, p.47.

On the other hand, the disparate public feeling of the two industries is due to the different mechanism of their contribution to the public. The convenience brought by the ISPs is easy to be noticed since the main feature of the Internet is the convenience and efficiency brought to the common users. In other words, the benefit provided by the ISPs is instantaneous. Meanwhile, the duty imposed on the ISPs is logically transformed into their policy upon the users, and the corresponding disturbance is perceivable. On the contrary, it is comparatively harder to detect the contribution of the copyright mechanism from in the short term, so is the damage of the common infringement. Correspondingly, the duty imposed on the ISPs for the objective of protecting copyright is likely to be recognized as bothersome.

3.4.3 The Essential Complements to the Copyright Owner

Considering the significant benefit brought by the application of the Internet services, it is practically unacceptable to limit their progress for the purpose of copyright protection. While the accompanying online infringement is inevitable without sufficient legal regulation as well as the attention of the ISPs. Therefore, it is impossible to enjoy the progress of the Internet by the ISPs as well as the general public without influencing the interests of the copyright owners, and the applicable economic model here is not the Pareto improvement but *the Kaldor-Hicks improvement*.

According to the Pareto improvement, a change to the current situation would be acceptable when at least one individual or preference criterion is made better off without making any other one worse off.³⁰⁰ While in practice, the requirement is hard to fulfill since there will always be losses to given entities due to the application of a policy, although the benefits may be more considerable than the loss from a general perspective. Under this situation, the Pareto improvement is inapplicable and hence the Kaldor-Hicks improvement was put forward to deal with the problem. Accordingly, it is still an improvement if those made better off could compensate those that made worse off due

³⁰⁰ See Ann E. Cudd, Is Pareto Optimality a Criterion of Justice? *Social Theory and Practice* 22 (1):1-34 (1996), p.1. As the author mentioned, "the individuals who would be advantaged by these improvements might claim that it is only just to require them" . This is actually similar to the opinion that based on the ISPs' low duty of care on the progress of the Internet industry.

to the application of a given policy.³⁰¹ The Kaldor-Hicks improvement is thus quite suitable for the solution of the problem of online infringement.

The Internet services have shown enormous benefits to the general public as well as the ISPs themselves. While it also constitutes significant influence to the vulnerable entities involving the copyright owners. On that account, the continuation of the application of the Internet services could only be justified by the compensation to the copyright owners who are made worse off accordingly. Since other alternative mechanisms to provide interests as well as incentives to the ISPs are not possible to be established in the short term, the most practical way to fulfill the objective is to ask the ISPs as members of the beneficiaries as well as the intermediary of the copyright owners and the general public to assume the duty to deal with the infringement through their service which brings direct benefits to them. Moreover, if the loss of the copyright owners due to a given service is greater than the benefits brought accordingly, like that of the P2P service, the application of the service could not be justified to be an improvement from the perspective of the social welfare and it will be no problem for the strict control over the ISPs until the comparative damage could be reduced to an acceptable level.

3.4.4 Troubles Brought by Technology Should Be Solved Similarly

It is not a long time since we came to the information society, while the significant changes of the society as a whole, as well as the daily life of everyone is apparent enough to all of us. The rapidly changing technology as well as the human relations constitute remarkable challenges to many aspects of our society, and the principle of rule of law as well as the legal system are one of the most representative areas. Although there has been abundant understanding of the attribution of the law, there is no denying that the function of the legal system relies on the stability, predictability as well as the intercommunity of the rules, which is in direct conflict with the transformation of the

³⁰¹ See Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, Wiley-Blackwell, 2010, p.55; Klaus Mathis & Avishalom Tor, eds., *Nudging - Possibilities, Limitations and Applications in European Law and Economics*, Springer International, 2016, p.128.

information society. The problem of online infringement is the representative of this kind of confusion.

How to solve the problem? As the old Chinese saying goes, “*it is better for the doer to undo what he has done*”. Or in a more visual way, “*in order to unite the bell, the person who tied it is required*”.³⁰² The problem is brought the progress and application of the technology, and the right answer is also in a close relationship with that.³⁰³ The fundamental difficulty of online infringement is caused by the efficiency, extensiveness, decentralization and irreversibility of the information on the Internet, which is impossible to be responded by manual labor. The problem of the current mechanism to deal with online infringement is right here: trying to solve the problem brought by the technology in a man-powered way. Although it is not an absolute failure, the impossibility to solve the problem is predictable. With the coming of a more automatic society, for instance, the works “created” by AI, the current mechanism will further show its shortcoming.

It is not suggested by this dissertation to give up the current mechanism. To be honest, the innovative contribution provided by my research to the modification of the rules is quite limited. While it is emphasized at the end of the theoretical analysis that, one of the indispensable features of the better legal response to the problem brought by technology is right in the technology itself. That is, the modification of the current mechanism with a character of man-power should take into consideration the exploration and application of the countering technology to deal with online infringement,³⁰⁴ although there could be some shortcomings initially like the threat to users’ privacy and freedom. It is not reasonable to stop the application of the Internet

³⁰² Ruji Zhuo, Roll 23 of *Zhiyuelu*(指月录), A collection of the sayings of the Chan sect of Ancient China. The original meaning is that it need the one who tied the complicated knot to untie it.

³⁰³ To be noticed, it is not saying that all the problems brought by new technologies should and must be dealt with by developing constructive ways to engage with those technologies to the right holders, which was criticized by William Patry, see William Patry, *How to Fix Copyright*, Oxford University Press, 2012, p.235.

³⁰⁴ See Salil K. Mehra and Marketa Trimble, Secondary Liability of Internet Service Providers in the United States: General Principles and Fragmentation, on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, p.108.

for the consideration of copyright protection,³⁰⁵ so is it to give up the technological measures to prevent and stop online infringement in respect of the users' privacy and freedom, to which the threat brought by the limited application of the filtering and monitoring technology to protect copyright is quite insignificant compared to the abuse of the ISPs as well as the totalitarian governments. All in all, the legal response in a society driven by developed technology should not be isolated to the traditional measures, and it is a better choice to solve the problem brought by technology in a technological way.

3.5 Summarization

This Chapter establishes the theoretical outline of the ISPs' duty of care in third party copyright infringement. To be honest, although it could be proven that the content industry has lost significantly due to the current legislative mechanism, whether to impose a higher obligation on the ISP is still a choice of different policies to which not only the economic consideration is influential, but also the culture of different regions. Accordingly, there is actually no "right" or "wrong" choices, but "good" or "bad" ones.

To be noticed, the obligation suggested by this chapter is not to impose the whole burden to deal with online copyright infringement on the ISPs, which is the other extreme point in comparison with the current one. Moreover, it is neither suggested to solve the problem merely by the compulsory regulation of the law, especially considering the complicated relationships of different entities and the rapidly changing technological environment. The main consideration is that, to promote the formation of the best practice as well as to provide the court with logical and flexible legal resources, the modification of current mechanism should try to promote the cooperation of the

³⁰⁵ See Mark A. Lemley, IP in a World without Scarcity, *New York University Law Review*, May 2015, pp.508-510. Accordingly, IP owners should not be allowed to reach beyond suing infringers to shut down or modify the technology itself, and IP Laws should be reformed to give more room to new technologies, even if those technologies can be misused for infringement. From the perspective of this dissertation, the imperfection of new technologies should be tolerated. While this principle should be applied not only to the technologies which may bring benefits to other entities but damages to the rightholders of IP but also should be applicable when it comes to the application of measures to prevent online copyright infringement which may slightly influence the users' privacy and freedom.

ISPs and the right holders, by which to overcome the information asymmetry in protecting copyright online. The infringement is there, and it is not enough for the ISPs as the controller as well as the beneficiary to keep turn a blind eye. As described by Dr. C. J. Angelopoulos, the ISP should do “something more”,³⁰⁶ which is the duty of “care”.

³⁰⁶ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.280.

CHAPTER 4 SPECIFIC APPLICATION OF THE ISPS' DUTY OF CARE

(Application of ISP' s Duty of Care)

4.1 Duty of General Prevention

4.2 Duty of Assistance in Specific Infringement

4.3 Duty of Supervising Repeat infringers

4.4 Sanctions and Remedies to Enforce the Duty

4.5 Summarization

From the former chapter, it is obvious that the interests balanced during the imposition of the ISPs' duty of care are of delicate nuances. Correspondingly, whether the duty could bring about optimistic results will be significantly determined by the specific legal design as well as the reasonable practical application.

The ISPs' duty of care in copyright protection is classified into three parts: the duty of general prevention, the duty of assisting in specific infringement and the duty of supervising specific users. This classification is based on the timeline of the ISPs' care, instead of the current proficiency of different applications. Moreover, the compulsory effect of the duties on the ISPs is not only determined by the legal specification but also the corresponding liability in case the duty is omitted. As for this, whether and to what extent should the ISPs assume the liability of damage compensation is of critical influence. Besides, the administrative regulation in addition to the civil procedure based on the ISPs' duty of care should also be taken into consideration especially when it comes to the discussion of the problem under the circumstances in China.

This chapter will firstly discuss the specific application of the ISPs' duty of care and then the corresponding liability on the violators. To be noticed, both the DMCA of US and the E-commerce Directive adopt the legislative model of regulating the ISPs' obligation considering the specific category of the given ISP. In comparison, this

chapter is divided according to the clarification of different kind of duties. While it is still important to be noticed that different ISPs should assume corresponding level of duties, mainly depending on the relationship of the service provided and the infringing activities. As a basic principle, the ISP should assume a higher level of duty when the provided service has a more direct and close relationship with the duty, and when the income of the ISPs is more closely related to the infringing activities.³⁰⁷

4.1 Duty of General Prevention

First and foremost, it is argued in this dissertation that the ISPs should assume a duty of general prevention of copyright infringement. That is to say, the ISPs have a duty to evaluate the possibility of copyright infringement through their services and to take reasonable measures to keep the frequency and percentage of the infringing activity at an acceptable degree. Generally speaking, the ISPs that provide the service of storage and dissemination should assume this kind of proactive duty considering their direct assistance to the infringing activities by the users.

Therefore, if a given ISP could be recognized as mainly providing infringing works or acting as intermediary for infringing activities, it should directly be recognized as either direct infringer, inducing infringer or vicarious infringer, and the copyright owner could ask the ISP for the compensation to the damage regardless of the notice as a prepositive procedure or the immunity of the safe harbor. Moreover, even the main function of the ISP is to provide pure intermediary to the general users, there is a general duty of the ISP to control the possible illegal activities to a certain degree and if needed, to adopt preventive measures. What the law concerns are not only the subjective intent but also the objective effect. Considering the well-known situation of online infringement, if the general users could found the possibility to use the service to conduct infringing activities, there is no reliable basis to believe that the ISPs themselves as professional entities have no sense of the situation. Although the general knowledge does not

³⁰⁷ Dr. Martin Husovec did similar distinction which divide the intermediaries into two kinds, proximate and remote, “according to who can be exposed to notice-based liability without destroying the stability/benefits of the infrastructure”, see Martin Husovec, *Injunctions Against Intermediaries in the European Union*, Cambridge University Press, 2017, p.223.

definitely lead to damage compensation in a specific case, it should facilitate the ISPs to take certain measures to control the infringing activity.

4.1.1 Duty to Keep Neutral

The first and foremost duty of the ISPs is to keep as pure intermediaries. Otherwise, they could be recognized as direct infringers or inducing infringers according to the specific circumstances. A pure intermediary means that, on one hand, the technology itself should be neutral enough, not to be specially designed to conduct infringing activities like to circumvent the technological measures to protect the copyright; on the other hand, there should be no willing intent and special emphasis on the corresponding infringing activities. In other words, the ISPs should be neutral both from the technological perspective and from the practical perspective.

It is easier to be proven a technologically biased service, and the more common circumstance is that a given service with substantial none-infringing use is expressly or impliedly induced for infringing activities. For instance, in the *MGM Studios, Inc. v. Grokster, Ltd.*,³⁰⁸ the first feature claimed by the plaintiffs to justify the inducement intent of the defendant is that it asserted to provide the similar service like Napster. As mentioned in Chapter 2, the Napster is the defendant in a former US case which was sentenced to be responsible for vicarious infringement.³⁰⁹ By referring to Napster, the defendant in the latter case is particularly inducing the infringing use of the technology. In response, the supreme court held the idea that the rule on inducement of infringement applies in dealing with copyright infringement when sufficient evidence could prove the intent of the ISP to recommend the illegal use of the service.³¹⁰

It is also stipulated in the Provisions on RDIN about inducement liability. Accordingly,

³⁰⁸ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

³⁰⁹ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

³¹⁰ Furthermore, the court stated that “in addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory of course requires evidence of actual infringement by recipients of the device” . In a civil procedure against the ISP, the second requirement here is easy to prove and the main element for the construction of the inducement liability is the ISPs’ shown intent to provide convenience for infringing activities.

the ISP should be held liable for abetting the infringement once it induces or encourage the user's infringing activities by means of recommending technological supporting or bonus points.³¹¹ The Provisions on RDIN then listed the special elements to construct the ISPs' knowledge which could be recognized as their particular advertising or recommendation of the infringing materials.³¹² Although the asserted key point here is the construction of the knowledge, the true duty imposed on the ISPs is to ask them to keep both technologically and practically neutral between the copyright owners and the users.

To be noticed, according to the current version of the Proposal for a Directive on CDSM, the platforms itself instead of the direct uploaders of the copyrighted works should be recognized as conducting communication to the public. Accordingly, the obligation on the ISPs would be significantly improved and the distinction of the illegal websites like the Pirate Bay and the neutral platforms like Youtube would be obscure. However, these two kinds of ISPs are obviously different on the attitude to the direct infringement of the users.³¹³ Accordingly, it is suggested by this dissertation to adopt the legislative model of imposing a general duty of care on the ISPs instead of extending the scope of the right of communication to the public to promote the protection of online copyright, by which to leave the neutral providers like Youtube the possibility to be immune from the obligation once they have tried the best to prevent the infringement and the general benefits from the function of the service exceed the loss of the copyright owners.

³¹¹ Paragraph 2, Article 7, the Provisions on RDIN.

³¹² Moreover, as for the constructive knowledge of the ISPs, the elements listed in Article 9 of the Provisions on RDIN that should be considered include the popularity of the infringed works as well as the palpability of the infringing information, as well as the behavior of the ISP mainly focusing on the its interference with the infringing works. Furthermore, according to Article 10 of the Provisions on RDIN, the ISP should be recognized as knowing the infringement once it recommends the popular movies or TV series by various kinds of recommendation and provide the corresponding downloading or browsing. In addition, Article 12 stipulates that the court could recognize the ISP as knowing the infringement once it post the infringing content at notable places or has edited or recommended the content. Besides, this article also leaves the court with this kind of power when other kinds of obvious infringing content is provided while it refuses to adopt reasonable measures.

³¹³ See Jurriaan van Mil, *German BGH-Does YouTube Perform Acts of Communication to the Public?* at: <http://copyrightblog.kluweriplaw.com/2019/01/27/german-bgh-does-youtube-perform-acts-of-communication-to-the-public/>.

4.1.2 Duty to Adopt Preventive Measures

There are two aspects to be considered for an ISP to prevent copyright infringement in a general sense. On one hand, the ISPs should keep neutral both from the technological and the practical perspectives; on the other hand, the ISPs should take reasonable measures to prevent third-party infringement through their service. To provide a systematic standard of behaviors for the ISPs, the former is named as a kind of “duty” here, while if an ISP could be proven to be breaking the principle of neutrality, in most of the cases they will be considered as willingly contributing or inducing the direct infringement. From a strict sense, the legal basis for the ISP’s liability would be fault, instead of negligence or the breaking of the duty. The doubts around the ISPs’ duty is not at this passive sense, but the initiative sense meaning that whether the ISPs should take care of their users’ behavior through their service when they themselves are not willingly encouraging the infringement.

The ISPs’ active effort to prevent copyright infringement has been a controversial dispute since the beginning of the Internet era. Although the establishment of the safe harbor worldwide partially suspend the legal requirement of the ISPs’ duty, the related discussion and practice have been going on, which is described as “*a worldwide shift towards an active-preventative approach*”.³¹⁴ And the most attractive dispute recently is brought by the Proposal of a Directive on CDSM. Considering the balance of the interests of different involved entities, it is argued that there should be a certain level duty at this sense for the ISPs providing given services.

4.1.2.1 The Preventive Measure is not Equal to General Monitoring

It has been argued in the former chapter that a limited imposition of the duty to prevent copyright infringement is reasonable. While considering the burden of the ISPs as well as the influence of such kind of measures on the privacy and freedom of the general

³¹⁴ See Philippe Jougoux, The Role of Internet Intermediaries in Copyright Law Online Enforcement, on Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou & Thalia Prastitou, eds., *EU Internet Law: Regulation and Enforcement*, Springer International Publishing, 2017, p.275; Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法), China Legal Publishing House(中国法制出版社),2015, pp.252-259.

users, the application of the duty should be strictly limited.³¹⁵ Generally speaking, on one hand, which kind of measures should be taken is determined by the attribution of the given ISP. For instance, the ISPs that provide the users with convenient and direct assistance in infringing activities should be imposed heavier burden. On the other hand, it also should be taken into consideration the scale of the users. Correspondingly, the services that proven to be more attractive to infringing activities or the ISPs that have a large number of users which will significantly increase the possibility of the infringing activity as well as the damage to the copyright owners should be considered to take possible preventive measures. The proportionate legal burden on different kinds of ISPs have been significantly adopted by the amended Proposal of a Directive on CDSM.³¹⁶

To be noticed, it is the duty of the ISPs to have a general evaluation of the infringing activities on their platforms and to keep the infringing activities at an acceptable, but the preventive measures is not equal to general monitoring obligation which is excluded by Article 15 of the E-Commerce Directive.³¹⁷ On one hand, the ISPs providing access, caching as well as pure searching services should not be imposed the duty of monitoring due to both their technological features as well as their indirect contribution to the infringing activities. On the other hand, even for the ISPs providing hosting or storage services, it should not be their general obligation to monitor all the information through their service but should be limited to the open content uploaded and distributed by the users that may constitute significant influence on copyright protection.³¹⁸ In particular, even it is justified that the ISPs should take the limited measures of monitoring or filtering, what they need to do is only to provide purely the technological or manual assistance, and the works should be taken notice of should still be provided by the copyright owners.³¹⁹ In this sense, the key function of the ISPs preventive mechanism

³¹⁵ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.85-86.

³¹⁶ To be noticed, it is clearly stipulated in Paragraph 3 of Article 13 that, "*when defining best practices, special account shall be taken of ...the burden on SMEs remain appropriate*" .

³¹⁷ See "Rapidshare III" , *IIC*, September 2014, Volume 45, Issue 6, pp.716-719.

³¹⁸ See for example, Graeme B. Dinwoodie, A Comparative Analysis of the Secondary Liability of Online Service Providers on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, p.20.

³¹⁹ This kind of position is adopted by the Proposal for a Directive on CDSM which stipulates that "*rightholders should provide the necessary data to the services to allow them to identify their content when applying the measures*" .

is to be open to cooperation with the copyright owners, by which to save the searching cost. The ISPs should not keep blind eyes to the infringing activities, while the copyright owners should neither lie on the ISPs' independent efforts to enforce their rights.

In conclusion, it is not recommended in this dissertation to ask all the ISPs to take the duty of general monitoring. To follow the principle of technology neutrality, it is even not suggested to ask the given ISPs to adopt the filtering technologies. To be honest, even if the law would set this kind of compulsory requirement, whether the technologies adopted by the ISPs could work as well as the requirement of the legislators still depends on and should be judged by the courts in specific cases. What the legislators could do is to set the acceptable standard to separate a responsible ISP and a slack one, and to list the specific elements to judge the reasonability of the measures adopted by the ISPs, by which to provide the courts with more explicit directions. This kind of opinion has already been concluded in some of the judicial cases. For example, in the case *Jidong v. Qianjun*,³²⁰ the court held the opinion that, “although the ISPs do not have an obligation of supervising and examining whether the information on line in infringing, the do have an obligation of adopting initiative and reasonable measures to remind and prevent the infringement”.

4.1.2.2 To Filter or Not

Imposing a duty on the ISPs to keep an acceptable degree of online infringement on their platform or through their service is only a legislative technique. On one hand, it respects the business freedom of the ISPs; on the other hand, it more or less reconciles the conflicts between the legal interference and the intuition of the users who may be more sensitive to the public power's requirement that to the ISPs' best practice to follow the law. While to be honest, to fulfill the legal requirement of reasonable preventive measures, there are significantly limited choices for the ISPs and for the hosting ISPs which provide the users with convenient conditions to distribute the infringing works,

³²⁰ *Jidong v. Qianjun*, Dongcheng District People' Court of Beijing, (北京盛世骄阳文化传播有限公司与微软在线网络通讯技术(上海)有限公司侵害作品信息网络传播权纠纷一审, (2015) 东民(知)初字第 4876 号).

the application of filtering technologies is inevitable.³²¹ The controversial dispute around the legislation of the ISPs' duty of care is whether they should be compelled by the law to take technological measures.

The ISPs' taking preventive measures has already been partially mentioned by the current rules. For instance, according to 512(i)(1)(B) of the DMCA, the ISPs should accommodate and does not interfere with standard technical measures used by copyright owners to identify or protect copyrighted works. Here the "technical measures" means that, according to Section 512(i)(1), that has been developed based on the consensus of the right holders and the ISPs which should be applied to all the entities without discrimination. And the measures should not bring additional burden on the ISPs. It is of significant obviousness that the duty imposed on the ISPs is very low and it is the copyright owners to apply the strictly defined technical measures. From the practice of US, this article is not quite often quoted in the disputes and its force to promote the ISPs to take technologically preventive measures is quite limited.

The similar situation happens in China and EU. Accordingly, Paragraph 2, Article 8 of the Provisions on RDIN excludes the compulsory duty of the ISPs to examine the behaviors of the users. Although the reasonable and effective technical measures taken by the ISPs could provide the ISPs with an immunity from being recognized as being at fault according to the following paragraph, they are not commonly applied. There are other ways to be free from liability and comparatively speaking, to take preventive measures is the costliest one for the ISPs.

Compared to the DMCA and the rules of China, Article 15 of the E-Commerce Directive provides the ISPs with greater relief from preventive measures since it directly forbids the general obligation of these measures. The tradition set by the E-Commerce Directive as well as other ones is the institutional reason that when the

³²¹ For example, after the Proposal for a Directive of the European Parliament and of the Council on CDSM (amended and approved by the parliament), it is commented that "*the Parliament's version of Article 13 (366 for, 297 against) seeks to make all but the smallest internet platforms liable for any copyright infringements committed by their users. This law leaves sites and apps no choice but to install error-prone upload filters*", see Julia Reda, *European Parliament endorses upload filters and "link tax"*, at <https://juliareda.eu/2018/09/ep-endorses-upload-filters/>.

Proposal for a Directive on CDSM tries to impose the hosting platforms with a definite duty of prevention, it faces significant resistance.³²² However, from the argumentation above, the problem of Article 13 of the Proposal is not the fundamental position to ask the ISPs to assume the preventive duty, but the legislative technique. On one hand, the so-called “large-amount of works” is hard to define; on the other hand, it puts too much emphasis on the possibility of the content recognition measures. It seems to be biased to ISPs of different scales and replacing the ISPs to adopt the best practical choice.

Even so, the position of the Proposal for a Directive on CDSM is supported by this dissertation and it is the ISPs’ duty to be more careful about the infringing activities on their platforms and to be more open to cooperate with the copyright owners. It is of great certainty that the Internet society will keep going and the ISPs’ influence on other areas including the copyright industry as well as the independent authors’ lives. The burden and lost should not only be imposed on the creators, and it is the ISPs as well as the general users benefiting from the progress of the Internet that should pay out to deal with online infringement.³²³ Before the coming of an effective and widespread replacing mechanism of copyright protection, to ask the ISPs to assume more duty in preventing copyright infringement is an imperfect must.

Although the Proposal for a Directive on CDSM is criticized by the academic as well as the public for the ambiguity of the expression, mainly the so-called ISPs that store and provide to the public access to large amounts of works which are the entities to assume the duty, the approach adopted here is quite remarkable. That is, based on the general duty imposed on the ISPs to keep the infringing activity to a reasonable degree, which is omitted by the Proposal and is added by this dissertation, the legislation could further consider to directly impose the ISPs of a given kind which has been proven to be dangerous enough for online copyright infringement. Actually, changing from a general and flexible duty to specific written provisions is also the approach of the

³²² See Christina Angelopoulos, *On Online Platforms and the Commission’ s New Proposal for a Directive on Copyright in the Digital Single Market*, available at: <https://juliareda.eu/2017/03/study-article13-upload-surveillance/>, pp.34-38.

³²³ For detailed discussion, see 3.4.3 of this dissertation.

progress of the tort law.³²⁴

4.1.2.3 The Requirement for Undertaking the Duty

In the Proposal for a Directive on CDSM amended and approved by the parliament, the specific expression of the so-called “content recognition measures” was deleted. However, to fulfill the duty, similar technological measures may still be a must.³²⁵ Still and all, it is supported by this dissertation the basic position of the proposal. At the same time, it is equal to ask all the ISPs to assume the duty, while considering the specific services provided, what final measures are still to be considered in the given circumstances.³²⁶

The ISP for the users to store and to distribute the works mentioned in the Proposal for a Directive on CDSM is a notable kind, while the P2P sharing files may be a more attractive one. Considering the common use of this kind of services by the subscribers to conduct infringing activities, it is reasonable for the law to ask any entity to provide the service to assume the duty of adopting monitoring obligation, on condition that the users’ privacy should not be accordingly abused. Besides, it has also been analyzed that the possibility of monitoring the P2P sharing is easy and economical to fulfill.³²⁷ Therefore, the decision of the CJEU in the case of *Scarlet Extended SA v. SABAM*³²⁸ which eliminates the ISP providing P2P services to apply the filtering system should be further considered.

Besides, although the mechanism to ask the ISPs to assume the duty in China is criticized in the former chapter, the substantial rules set is partially reasonable. That is,

³²⁴ See Janno Lahe, The Concept of General Duties of Care in the Law of Delict, *Juridica International*, IX/ 2014, p.111.

³²⁵ See Julia Reda, *European Parliament endorses upload filters and “link tax”*, at <https://juliareda.eu/2018/09/ep-endorses-upload-filters/>.

³²⁶ There is no denying the whether it is reasonable to impose different specific obligations according to the business models, see Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015, pp.243-244.

³²⁷ Monitoring P2P is not technologically impossible or economically costly since the IP addresses of the infringing users are always apparent during the process of sharing, see David Kravets, *ISPs Now Monitoring for Copyright Infringement*, at <https://www.wired.com/2013/02/copyright-scofflaws-beware/>.

³²⁸ *Scarlet Extended SA v. SABAM*, Case C-70/10, see at Chapter 2 for details.

the ISPs that specializing in the providing the service for hosting and distributing the vulnerable kind of works like music and films, should be considered to take the initiative measures to control the infringement. Actually, this kind of position is also approved in the representative cases in China, which are discussed in Chapter 2. The justification for distinguishing the ISPs is that their service has a closer relationship to the direct infringement.³²⁹ And comparatively speaking, the ISPs that provide pure access, caching and information location services are fundamental structure of the information society and their income is less related to the infringing activities. At the same time, the relief of these ISPs from the duty of initiative supervision could limit the negative externality of the regulation, which could reduce the impact on the users' privacy and freedom as well as that of the whole society.

4.2 Duty of Assisting in Specific Infringement

One of the criticisms on China's Copyright law is that, upon introducing the mechanism of the safe harbor from the DMCA of US, it does not refer to the compensation system including punitive damages, and strict criminal punishment, both of which are of critical deterrent force to the direct infringers.³³⁰ In addition, the general users' anonymity reduces the possibility of the direct infringers' being found out to be responsible for the infringement.³³¹ The low possibility as well as the slight punishment significantly influence the legality of the users' behaviors and in reverse encourage online infringement brought by the independent users.

From the perspective of the ISPs' duty of care, the seriousness of the damage or punishment of the users is irrelevant. Despite so, it is of significant importance for the ISPs to provide expeditious and effective assistance when a given specific infringement is defined by the copyright owners. To be honest, due to the effect of the Internet, the damage caused by an easy infringing activity conducted by a separated user may be

³²⁹ See Martin Husovec, *Injunctions Against Intermediaries in the European Union*, Cambridge University Press, 2017, p.223.

³³⁰ See Guobin Cui, Reforming the System of Joint Liability of Internet Service Providers (网络服务商共同侵权制度之重塑), *Legal Research (法学研究)*, Vol.4, 2013, pp.150-151.

³³¹ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.157-158.

remarkable. Therefore, the ISPs' expeditious reaction to the notice sent by the copyright owners may be quite influential. Moreover, the ordinary compensation itself will constitute effective legal restraints on the direct infringers if their identity could be confirmed, to which the ISPs' effort is also essential. Therefore, the two main duties of the ISPs when a given infringement has been found by the copyright owner are to take care of the corresponding notice and to provide the information of the infringing users whereas needed.³³²

4.2.1 The Notice and takedown Procedure

The notice and takedown procedure has been at the heart of the ISP's duty as well as the liability since the era of the DMCA and the legislation of other areas adopting the similar mechanism. Although other measures including the preventive procedures are additionally emphasized in this dissertation, the function of notice and takedown is still extraordinarily relied on.

To begin with, when a qualified notice containing the information of the works as well as the evidence of the infringement, it could constitute persuasive requirement for the ISP to have an actual knowledge of the specific situation. If the ISP refuses to take the infringing works down, the legal basis for it to assume the joint liability would be the willing intent, especially for the loss enlarged after the notice. While without the duty to receive the notice and to deal with it diligently, it is impossible for the ISPs to evaluate the notice and thus to get the knowledge. Therefore, the legal basis for the ISPs to be jointly liable for the enlargement of the loss after the notice is not only the duty of care, but the duty is the starting line of the procedure and it is justified to say that the ISPs have a duty to follow the notice and takedown procedure.

In addition, although the procedure is named "notice and takedown", the possible reaction of the ISPs to deal with the infringing activities after receiving the notice is of course not limited to "taking down (the infringing materials)". Instead, the preferable

³³² *Ibid*, p.180.

measures may be various according to the specific circumstances.³³³ And the fundamental aim is to cut off the access to the infringing works by the public.

4.2.1.1 ISPs to Assume the Duty

According to the DMCA, the ISPs providing system caching, Information residing and information location tools that should assume the duty to take down or block access to the infringing materials upon qualified notification. The Regulation on RDIN of China have the similar regulations. While in the E-Commerce Directive, only the ISPs providing caching and hosting should assume the duty of removing the infringing information. To be noticed, both of the three laws provide stricter requirements for the caching ISPs to assume the duty. The main consideration is that these kinds of ISPs are more technologically neutral than the hosting ISPs and the main infringing activity was usually conducted through the originating ISPs.

The controversial question then comes to whether the ISPs providing searching or linking services should assume the duty to follow the notice and takedown procedure. On one hand, this kind of ISPs is usually the first accessed one when the general public try to find the works, including the infringing materials. Therefore, from the perspective of breaking off the link between the direct infringement and the access of the general users as well as the substantial damage to the copyright owners, the duty of this kind of ISPs is quite critical. In comparison, it also could extraordinarily save the cost of the copyright owners in searching and sending the notices, especially when we consider the situation of the related market which is usually dominated by limited ISPs.

While the ISPs majoring in searching tools are not the original platforms providing the convenience for the direct infringement and the searching result is usually shown automatically based on the technological algorithm of the ISP. In other words, the ISPs providing searching and linking service are in an accessory position compared to the hosting ISPs. Besides, it will be a heavier burden for the searching ISPs to assume the duty considering the huge amount of the searching results. Therefore, it is more accurate for the copyright owner to ask the ISPs providing the direct hosting and communicating

³³³ *Ibid*, pp.168-172.

services to take down the infringing service.

Moreover, the situation would be different if the ISP providing information location service itself is changing the sequence of the searching results or disseminating the works using the corresponding technologies. For example, with framed links, it is possible for the ISP to display the searching result in a detailed way, which may substantially replace the original platform to store the infringing works.³³⁴ Although the liability on the ISPs providing the links is controversial,³³⁵ it is reasonable for the copyright owner to ask the ISPs providing this kind of services to cut off the link, considering that it will constitute substantial replacement of the legal copy of the work. Besides, if the ISP is changing the technologically listed results due to the payment from the owner of the preferential link, it would be reasonable for it to assume the duty of blocking the link when it is found to be illegal.

Generally speaking, it is the ISPs providing storage, caching and searching service that should assume the duty of taking down the infringing works or cutting of the links to them. In comparison, the requirement for the latter two kinds of ISPs to assume the duty should be stricter. Once it is found that the works is uploaded online, the copyright owner should ask the ISPs providing the direct assistance to the infringement to assume the duty, by which to improve the efficiency and to reduce

4.2.2.2 Facilitated Ways to Receive the Notice

It is a matter of course for the ISPs to provide convenient ways for the copyright owners

³³⁴ See Guobin Cui, Framed Links regulated by the Copyright Law, on *Politics and Law (政治与法律)*, Vol.5, 2014, p.75.

³³⁵ See for example, Guobin Cui, Framed Links regulated by the Copyright Law, on *Politics and Law (政治与法律)*, Vol.5, 2014, pp.75-76; Emanuela Arezzo, Hyperlinks and Making Available Right in the European Union-What Future for the Internet After Svensson? *International Review of Intellectual Property and Competition Law*, August 2014, Volume 45, Issue 5, p.524; Cheng Lim Saw, Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty, *International Review of Intellectual Property and Competition Law*, June 2018, Volume 49, Issue 5, p.536. There have been many of recent cases regarding to the ISPs that provide the public with the full displaying of the works by searching and linking to the works on other platforms. For example, in the case *LETV v. Shichang*, (乐视网信息技术(北京)股份有限公司与上海视畅信息科技有限公司侵害作品信息网络传播权纠纷, (2016)京 0105 民初 19222 号), the defendant as an ISP providing such kind of service was asked to assume the liability of violating the copyright owner's right of communication to the public due to that it "had not expeditiously adopted the measures of deleting, shielding, cutting off the links, etc...had not assumed the duty of reasonable care" .

to send the complaining notice. For instance, according to Section 512(c)(2) of the DMCA, the limitations on liability established by it shall apply to an ISP only if the ISPs clearly publish their information for contact, as well as the concise direction of the procedure to send notice by the complaints.³³⁶

According to Article 9 of the RDIN, the court should judge whether the ISP has known the infringement taking into consideration whether it has provided the right holders with reasonable ways to send the notice and to deal with the notice in a proper way. According to this dissertation, this kind of judgement of the constructive knowledge is farfetched since the notice and takedown is not a kind of preventive measure and even with fulfillment of the duty, the ISP could not “have known the infringement” unless the notice arrives. While in practice, it does have significantly influenced the result of the case. For example, in the case *Jidong v. Qianjun*, the focus of the dispute is whether the defendant has provided the public with a facilitated way to send the notice.³³⁷

At the same time, to improve the accuracy and efficiency of the procedure, it should be the copyright owners’ obligation to send the qualified notice.³³⁸ In addition, the ISPs should have the freedom to design the specific method to receive the notice, on condition that the adopted way does not impose irreverent and extra burdens on the copyright owners. In comparison, the DMCA clearly listed the elements of a qualified notification. To be noticed, both physical and electronic signatures are acceptable according to the DMCA. The requirement is also mentioned in Article 14 of the Regulation on RDIN. Different from these two, the requirement of a qualified notice is not discussed in the E-Commerce Directive.³³⁹ And as commented, it is suggested to

³³⁶ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.164-165.

³³⁷ *Jidong v. Qianjun*, (北京盛世骄阳文化传播有限公司与微软在线网络通讯技术(上海)有限公司侵害作品信息网络传播权纠纷一审, (2015)东民(知)初字第 4876 号).

³³⁸ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.167-168.

³³⁹ See Aleksandra Kuczerawy, *Intermediary Liability & Freedom of Expression: Recent Developments in The EU Notice & Action Initiative*, *Computer Law & Security Review*, Volume 31, Issue 1, February 2015, p.55-56. Ioannis Revolidis, *Internet Intermediaries and Copyright Enforcement in the EU: In Search of a Balanced Approach*, on Marcelo Corrales, Mark Fenwick & Nikolaus Forgó, eds., *New Technology, Big Data and the Law*, Springer, 2017, pp.226-227. Furthermore, according to the last paper, “the lack of a coordinated and effective European “notice and take down” procedure has shifted the interest of the involved stakeholders to other potential enforcement remedies. Court injunctions against Internet intermediaries, especially in the field of copyright enforcement, have thus become rather popular” .

refer to the legislative model of DMCA with the advantages of certainty and clarity.³⁴⁰

Furthermore, the DMCA clearly stipulates the force of an unmatched notice in Section 512 (3)(B)(i), if the notice itself is not qualified, it should not be taken into consideration whether the ISP has actual knowledge of the infringement. While the limited exception is also mentioned in the following paragraph and the main point is to ask the ISPs to endure a minor defect of the notice without the qualified signature and to contact the claimant if possible to solve the problem.

Generally speaking, the content of the notice should be limited and the requirement of accuracy, especially the ownership of the copyrighted works should be guaranteed. To promote the efficiency and to save the cost, it is recommended to digitalize the procedure, including the form of the evidence.

4.2.2.3 Expediently Dealing with the Notice

From the perspective of the copyright owner, the best choice is to remove the infringing works as soon as the notice is received by the ISPs. While it is the reasonability of the burden on the ISPs as well as the guarantee of the accuracy of the notice that should be considered at the same time. The due procedure should take into the balance of the interests of the copyright owner as well as that of the users, as well as the efficiency of the mechanism.

As for the former consideration, it is also required by the DMCA and the Regulation of China that the ISPs should resend the notification to the users who conduct the complained activity. If the users decide to recover the works, they could start the reverse procedure by sending similar notifications to the ISPs. The complicated legal procedure required by the DMCA and the Regulation of China is to deal with the information asymmetry between the copyright owners and the complained users, by which to solve the problem of removing or disconnecting the legal content online. To be noticed, according to Section 512(f) of the DMCA, both the person that misrepresents the

³⁴⁰ See Graeme B. Dinwoodie, A Comparative Analysis of the Secondary Liability of Online Service Providers on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, pp.43-44.

infringing material or activity or the entity that misrepresents that material or activity was removed or disabled by mistake or misidentification should assume the liability for the corresponding damages by which to prevent abuse of the procedure. Similar regulation could be found in the Article 24 of the Regulation on RDIN of China.³⁴¹

The critical problem related to the ISPs' duty of care is then the extend of the ISPs' effort in dealing with the notice and the response. To be more premise, whether the duty of the ISP here should be a kind of substantial judgement or a formal one. The difference is that, if it is the ISP's substantial duty, it should be responsible for the block in the first step and also for the recovery of the link if the Internet user send the response notice. While if it is only a formal duty, what the ISP should to is only to overcome the information asymmetry between the copyright owners and the complained users, and it should not assume the liability from the false blocking or recovering.

According to Section 512(g)(1) of the DMCA, there is no general liability for taking down, meaning that once the requirement set by Section 512(g)(2)³⁴² of the DMCA is qualified, the ISP should not be liable for the loss due to the misrepresentation of the right holders. To be noticed, the requirements set by Section 512(g)(2) of the DMCA are merely formal instead of substantial ones, which ask the ISP to provide the information regarding to the notice, the counter notice as well as its removing or disabling the complained material. It is not specifically stated in the E-Commerce Directive or the Regulation on RDIN of China, while considering the role of the ISPs as intermediaries in the procedure, they should not be liable for the damage from the misrepresentation of the copyright owners or the users on condition that they have diligently assume the duty of checking the formal qualification of the notices.

As for the efficiency of the ISPs' dealing with the notice, it is the word "expeditiously" that is used by the DMCA and the E-Commerce Directive. A stricter expression is used

³⁴¹ To be noticed, according to Article 24 of the Regulation on RDIN, it is only the misrepresentation of the copyright owner that is regulated in the Regulation on RDIN. Comparatively speaking, the regulation of the DMCA than includes all the representation in the notice and the response procedures is more comprehensive.

³⁴² The Requirements set by Section 512(g)(2) of the DMCA are merely formal instead of substantial ones, which ask the ISP to provide the information regarding to the notice, the counter notice as well as its removing or disabling the complained material.

by the Regulation on RDIN, starting in Article 15 that the ISPs should “immediately” delete or block the complained works upon receiving the notification from the copyright owners. Similar regulation is stated in the response procedure. Upon receiving the response from the user that is asserted to be conducting the infringement, the ISPs under the regulation of China should “immediately” resume the deleted works. While Section 512(g)(2)(C) of the DMCA sets a period of 10 to 14 days for replacing the removed material unless the right holder has applied for the order from the court.

4.2.2 The Disclosure of the Infringer’s Information

The notice and takedown procedure only restrains the damage caused by the users’ infringement and the legal force to prevent as well as to deter the infringement is quite limited. This is partially the reason that with 20 years of applying the notice and takedown procedure, the infringing activities online are still common. Reflecting the current mechanism, it should be noticed that according to the traditional law, acting against the actual infringer would most commonly be conducted.³⁴³ Although the ISPs’ duty of care is emphasized by the general discussion as well as this dissertation, it should be noticed that “*no primary infringement has taken place, no accessory liability can exist*”.³⁴⁴

The negative effect of the Internet including online copyright infringement is extraordinarily determined by the anonymity of the users.³⁴⁵ To provide a substantial deterrent force on the users with an intent of online information, the anonymity paradox is the first obstacle.³⁴⁶ Therefore, as mentioned in Chapter 2, both the DMCA and the Regulation of China partially mentioned the ISPs’ duty of disclosing the infringing users’ information under certain circumstances. In comparison, the E-Commerce

³⁴³ See Federica Giovanella & Mélanie Dulong de Rosnay, Community wireless networks, intermediary liability and the McFadden CJEU Case, *Communications Law*, Vol. 22, No. 1, 2017, p.12; Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.155.

³⁴⁴ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.325.

³⁴⁵ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.157-159.

³⁴⁶ See Federica Giovanella & Mélanie Dulong de Rosnay, Community wireless networks, intermediary liability and the McFadden CJEU Case, *Communications Law*, Vol. 22, No. 1, 2017, p.12.

Directive itself does not provide any legal basis for the disclosure of the infringing users' information, although Paragraph 2, Article 15 of the Directive empower the member states to establish the mechanism. According to the related directives, it is generally allowed to disclose the users' information for the purpose of fighting copyright infringement.³⁴⁷

Comparatively speaking, the copyright owners are in a better position to find out the attribution of the works, and the ISPs themselves have better understanding of the users' information including that of the infringing users. There is no denying that the ISPs are the beneficiary party of the progress of the Internet, which is partially fulfilled by the increase of the users as well as the convenience and freedom provided by the anonymity situation online. Therefore, it is justified for the ISPs to offer the assistance in providing the information for the ISPs to find the infringers diligently. However, the duty of the ISPs to disclose the users' information conflicts directly with the user's privacy. Compared with the influence on the users' freedom expression by the false notice, abusing the information disclosure process may constitute more direct and irretrievable damage to the users. Accordingly, the circumstances for undertaking the duty should be strictly limited.³⁴⁸ To be noticed, in *Promusicae v. Telefonica*,³⁴⁹ the CJEU concluded opined that since personal data are specially protected by the EU Directives, any court order directed at an ISP to disclose the identities of alleged copyright infringers must be proportionate.³⁵⁰

4.2.2.1 ISPs to Assume the Duty

According to Article 13 of the Regulation on RDIN, the administrative authority could ask the ISP to provide the identification information, contact information and the Internet address of the users who are suspected to be infringers. Here is not mentioned which kind of ISPs should assume the duty. In addition, due to the attribution of the regulation as an administrative regulation, the judicial order issued by the courts to ask

³⁴⁷ See Jie Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement*, Springer, 2018, p.187.

³⁴⁸ Ibid, p.196.

³⁴⁹ *Promusicae v. Telefonica*, Case C-275/06.

³⁵⁰ Ibid.

the ISPs to provide this kind of information is not mentioned here.

Different from the Regulation of China, the DMCA stipulates the ISPs' duty to disclose the users' information in details. Moreover, the duty on the ISPs is not aimed to comply with the administrative supervision, but to provide the information needed by the copyright owners to confirm the direct infringing user and to bring about the civil lawsuits. While the responsible kind of ISPs is also not quite clear, resulting disputes in practice.³⁵¹ Since one of the requirements for the copyright owner to fulfill is to provide a copy of a notification described in subsection(c)(3)(A), it seems that the subpoena can only be issued to the later 3 kinds of ISPs according to Section 512 (h) of the DMCA, and the ISPs of the access are excluded.³⁵² Nevertheless, it has been confirmed in the case *Recording Industry Ass'n. of America v. Verizon Internet Services* that the intention of the Congress is to apply the subpoena to all the ISPs.³⁵³ Besides, under certain circumstances, it is only the ISPs providing access services that could provide the information of the infringing users with the resource locaters. Therefore, it is general the duty of all the kinds of ISPs to provide the assistance.

In the end, similar to the entities to assume the duty of dealing with the notice from the copyright owners, it is technologically and economically reasonable for the ISPs providing more direct assistance to the infringers to provide the corresponding information.

4.2.2.2 The Possibility to Assume the Duty

There may be many ways for the ISPs to provide the assistance to disclose the users' information, including referring to the hosted information, IP geolocation, advertising networks, payments, social media accounts, web bugs, tracking cookies and device metadata.³⁵⁴ While whether the given ISP could provide reliable and detailed

³⁵¹ See Jie Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement*, Springer, 2018, pp.180-181.

³⁵² *Ibid*, p.181.

³⁵³ *Recording Industry Ass'n. of America v. Verizon Internet Services*, 2003 U.S. Dist. Lexis 681, 240 F. Supp. 2d 24 (D.D.C., Jan. 21, 2003), reversed, 351 F. 3d 1229 (D.C. Cir., Dec. 19, 2003) cert. denied 125 S.Ct. 309 (2004).

³⁵⁴ See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.152-155.

information for confirming the specific infringing user is not a certainty. It is not only limited by the technology but also the ISPs' policy regarding the registration of the user. As mentioned above, it will be too bothersome for ordering the ISPs to adopt a general real-name system only aiming to protect copyright, although it is recommended by this dissertation to impose such a requirement for the repeat infringers later. Therefore, it is controversial that to what extent should the ISPs assume the duty of disclosing the infringing users' information.

Again, the duty on the ISPs to disclose the users' information is not regulated in the EU level. To be noticed, according to Article 13 of the amended Proposal of a Directive on CDSM, it is not the ISPs' obligation to search for the users' identification information for the purpose of copyright protection.

Although the Regulation of China has imposed such a duty on the ISPs, it only empowers the administrative authority to order the ISPs to provide the information of the users. The specific duty of the ISP as well as the legal result of the ISPs' inability are not clear. Different from the Regulation of China, the DMCA has stipulated the duty of the ISPs in a specific way, asking the ISP to provide the information as sufficient enough as better to the extent of its knowledge.³⁵⁵

It is clear that the DMCA requires the ISPs to follow the subpoena expeditiously, while to what extent the ISPs could offer the information is determined by its ordinary ability. In other words, the DMCA does not require the ISPs to inquiry the users' information in advance, and there will be no corresponding liability on the ISPs provided that they have tried the best to fulfill the duty. On one hand, it is reasonable to set the ISPs free from a compulsory obligation to provide the users' exact information out of their policy, considering the prevention from influencing the users' privacy and freedom. On the other hand, it should be noticed that now days increasingly more ISPs are trying to get the users' information for their own benefit. In many of the cases, if the ISPs do prefer to assist the copyright owners, it would not be impossible task to find the exact infringers.

³⁵⁵ Section 512(h)(3), the DMCA.

Besides, different from the US and EU, a real-name system has been implied in China for many of the ISPs. Although the direct object is not for copyright protection, it does provide convenience for the copyright owners to confirm the identity of the infringing users. Correspondingly, the ISPs should assume the duty to provide the sufficient information when it is ordered by the administrative authority or the courts. While if this kind of system is not yet adopted, it is confirmed by the courts that the ISP does not have an obligation to fulfill the disclosure.³⁵⁶

4.2.2.3 The Requirements to Disclose the Information

According to the DMCA, it is the United States district court that has the authority to send the subpoena to ask the ISPs for the identification information. Besides, the specific content of the subpoena is clearly stipulated thereby.³⁵⁷ Although it is not regulated in the E-Commerce Directive, but the entity to send the request is also limited in EU. That is to say, different from the notice in the notice, the right holders could not personally ask the ISPs to disclose the users' information. In comparison, there is no specific regulation on the requirement of the disclosure in China.³⁵⁸ Comparatively speaking, the limited authority to send the request for the disclosure of the information adopted by US and EU is more preferable. Although it is not the specific objective of the copyright law to protect the users' privacy, the due procedure should be respected from a legal systematic perspective.

To be noticed, under certain circumstances, it may be the ISPs themselves that upload the works online illegally, or at least they impliedly encourage the users' illegal activities by which to attract more users which is of important meaning to their income. For example, in the lawsuit that the major labels against *Grooveshark*, the defendant was found explicitly encouraging its employees to upload music to the service to stock

³⁵⁶ See for example, *Zhongwenzaixian v. Qisong*, Fujian High People's Court (北京中文在线数字出版股份有限公司与福建奇松信息技术发展有限公司侵害作品信息网络传播权纠纷二审民事判决书, (2015) 榕民终字第 1893 号). The plaintiff complained that the defendant as an ISP could not provide the real-name information of the infringing user and thus the ISP could not exempt itself from being recognized as the real uploader of the infringing materials. While both the court of the first instance and that of the second instance confirmed that due to the inexistence of the real-name system in this case, there was no obligation for the ISP to provide the real information of the infringing user.

³⁵⁷ Section 512(h)(2), the DMCA.

³⁵⁸ See Jie Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement*, Springer, 2018, p.196.

its catalogue. Similarly, *Zhongwenzaixian v. Wali*,³⁵⁹ the defendant also asserted that the infringing materials were uploaded by its users instead of the ISP himself. While the court found that the information of the user was not presented on the webpage of the software and the evidence provided by the ISP was not reliable.³⁶⁰ This is another reason that there should be the interference of the courts to ask the ISPs to disclose the information of the infringers. When a given infringing activity is found through their service, it is the ISP's duty to prove that it is the user instead of themselves that conduct the infringement.

4.3 Duty of Supervising Repeat Infringers

It is unreasonable as well as uneconomical to monitor the behavior of the users in a general way merely for the objective of protecting copyright. While if a given user has been confirmed as an infringer, especially when sufficient evidence shows that repeated infringing activities have been conducted, the situation is different. At this time, there will be sufficient justification for the ISPs to apply a specific policy to prevent the repeat infringement by the user and the ISPs' corresponding duty is thus appropriate.

In comparison, the EU Directive does not impose such a duty and leaves the space for the member states. The Provisions on RDIN has listed the reasonable measures against a user's repeat infringements adopted by the ISPs as one of the elements to consider whether the ISPs should have known the infringement.³⁶¹ It is therefore not could be

³⁵⁹ *Zhongwenzaixian v. Wali*, Dongcheng District People' s Court of Beijing (中文在线数字出版集团股份有限公司诉广东瓦力网络科技有限公司侵害作品信息网络传播权纠纷案, (2015) 东民(知)初字第 14289 号).

³⁶⁰ For similar judgements in China, see for example, *Zhongwenzaixian v. Zhangkuo*, Dongcheng District People' s Court of Beijing (中文在线数字出版集团股份有限公司与北京掌阔技术有限公司侵害作品信息网络传播权纠纷, (2015)东民(知)初字第 11657 号). The court held the opinion that the evidence provided by the defendant (which was an ISP) could not be used to deter the actual uploader of the infringing materials. Therefore, the ISP was asked to assume the liability of compensation; *Youtujia v. Zhijingshidai*, Shijingshan District People' s Court of Beijing (北京优图佳视影像网络科技有限公司诉北京智景时代科技有限公司侵害作品信息网络传播权纠纷案, (2015) 石民(知)初字第 392 号). The defendant asserted that the infringing photos were uploaded by the users while could not provide the information of the users and that the evidence showing that it was the users instead themselves that uploaded the works. Therefore, the court held the ISP for liability.

³⁶¹ According to Article 9 of the Provisions, the court should take into consideration the policy adopted by the ISP to deal with repeated infringers when deciding whether the ISP should have known the infringement.

recognized as a compulsory duty of the ISPs, especially not a required condition to acquire the protection of the safe harbor. In contrast, Section 512 (i)(1)(A) of the DMCA imposes a duty on the ISPs to implement a policy to deal with repeat infringers. And it is one of the compulsory conditions for the ISPs' eligibility of the limitations on liability. At the same time, as mentioned in Chapter 2, there have been controversial cases both in US and EU member states recently about the validity of the ISPs' policy to deal with repeat infringers. The courts' opinions offer additional explanations of the application of the duty.

4.3.1 Recognition of the Repeat Infringers

The first and foremost concern of such a policy is the recognition of repeat infringers. On one side, it is about the qualification of the entity to confirm the repeat infringers; on the other hand, it is also a question to define the so-called "repeat infringer".

In the US case of *EMI Christian Music Group, Inc. v. MP3tunes, LLC*³⁶², the circuit court vacated the district court's narrow definition of the repeated infringers, according to which only uploaders could be repeat infringers which eliminates the corresponding downloaders. Further, the circuit rejected the district's reliance on the infringer's state of mind, stating that only the objective and repeated infringing activities should be taken into consideration when judging the qualification of the ISPs. In addition, in the case of *BMG Rights Management v. Cox Communications*,³⁶³ the defendant's principal contention is that only the infringers accused by the judicial authority should be taken into consideration. While the Fourth Circuit rejected this contention, based on the ordinary meaning a repeat infringer. To be honest, if the so-called "repeat infringers" refer only to the entities held liable by the courts, the application of the policy will be significantly limited.

The ISP's attitude to the repeat infringement is also a notable element in China when it comes to the limitation of its liability.³⁶⁴ While in practice, the so-called repeated

³⁶² *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, No. 14-4369 (2d Cir. 2016).

³⁶³ *BMG Rights Management v. Cox Communications*, No. 16-1972 (4th Cir. 2018).

³⁶⁴ Article 9, the Provisions on RDIN.

infringement was explained in a broad way which would impose a high duty of care on the ISP. For example, in the case of *Qianjun v. The Forbidden City Film*, the same work was illegally uploaded by the same user once again after a related judicial judgement. The court of the second instance in this case asserted that, “the infringed work of film was the same, and so was the infringed right. Therefore, Qianjun (the defendant of the first instance and the appellant of the second instance, who was also the ISP in this case) should have known clearly the related work of film was uploaded without authorization.” Therefore, the ISP was held as at fault and was asked to be jointly liable.³⁶⁵

Under the current mechanism, there is no duty for the ISPs to adopt preventive measures. Therefore, the confirmation of the repeat infringer relies mainly on the notice of the copyright owners and thus the policy against repeat infringers is a successive procedure after the notice and takedown processes. Of course, there is no denying that the users held liable by the courts for multiple instances of copyright infringement should also be included in the repeat infringers.

With the application of the preventive measures suggested by this dissertation, there will be increasingly chances for the ISPs to find the users attempting to conduct the infringing activity. While the ISPs themselves still have no ability to tell the legality of the users’ behavior and the confirmation of the copyright owners is still needed. Besides, the effectiveness of the preventive measures means that the users attempting to conduct the infringing activity will be suspended thereby. Under this situation, it is not reasonable to recognize the users fails to fulfill the final infringing activities as repeat infringers. Therefore, even under the mechanism suggested by this dissertation, the so-called repeat infringer still refers to the user confirmed to have actually and repeatedly conducted the infringing activity by the notice of the copyright owners or the judgements by the courts.

4.3.2 The Effectiveness of the Policy

³⁶⁵ *Qianjun v. The Forbidden City Film*, (广州市千钧网络科技有限公司与北京紫禁城影业有限责任公司侵害作品信息网络传播权纠纷二审民事判决书, (2016)粤 73 民终 769 号).

The legal objective of such a policy is to impose sufficient resistance on the repeat infringer. Therefore, the effectiveness of the policy is of critical importance. For example, of all the reasons that Grooveshark which used to be a music streaming service was closed, the lack of an effective repeat infringer policy is one of the key element.³⁶⁶ Recently in the case of *BMG Rights Management v. Cox Communications*,³⁶⁷ the court supported the freedom of the ISP to adopt proper measures. However, the defendant was found to have applied a non-meaningful “policy” which was denied by the court.

But what is the standard to judge whether the policy adopted by a given ISP is effective or not? According to Section 512 (i)(1)(A) of the DMCA, there are actually three elements to be considered when it comes to the policy, that are the policy to terminate the accounts of those who are repeat infringers, the implement the policy and the announcement to the subscribers and users about the policy. Although it is unreasonable to say that once repeat infringement occurs, it means that the policy is ineffective, it should be strictly prohibited that the same user re-upload the same works which has already been asserted to be illegal.

4.4 Sanctions and Remedies to Enforce the Duty

The timely and appropriate remedy is the guarantee of the ISPs’ undertaking the duty of care. All of the three legal systems discussed in this dissertation have adopted two main legal remedies to guarantee the ISPs’ involvement in copyright protection, the injunction and the compensation to the damage. The difference of these two, as concluded before, is that “*injunctions may be issued against any intermediary, but an obligation to pay damages requires non-neutrality*”.³⁶⁸ In addition, the enforcement of copyright by administrative regulation in China relies on the corresponding legal force which is represented by the administrative penalty. Therefore, it is finally essential to

³⁶⁶ See Jonathan Bailey, How to Create a Repeat Infringer Policy, at <https://www.plagiarismtoday.com/2017/08/08/how-to-create-a-repeat-infringer-policy/>.

³⁶⁷ *BMG Rights Management v. Cox Communications*, No. 16-1972 (4th Cir. 2018).

³⁶⁸ See C. J. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Doctoral Thesis, University of Amsterdam, 2016, p.325.

discuss the sanctions and remedies to enforce the ISP's duty of care.

4.4.1 Injunction

4.4.1.1 Current Regulation on the Issue of the Injunction

The attractiveness of the remedy provided by the injunction lies on the fact that it can be ordered against intermediaries irrespective of any liability, namely even if the affected ISP would otherwise be protected by the safe harbor.³⁶⁹

Section 512(j)(1) of the DMCA provides the forms of the injunctions on the ISPs providing the conduit and other services, of which the forms are different and that on the conduit is comparatively limited. It also provides the conditions for the injunctive relief in Section 512(j)(2) and 512(j)(3). Accordingly, the injunction could only be issued following the notice unless it is needed to preserve the evidence thereby. It thus deals with the relation of the injunction sent by the court and the notice sent by the copyright owners, by which to prevent unnecessary dual procedures. Besides, the issue of the injunctive order should take into consideration the burden on the ISP(512(j)(1)(iii) and 512(j)(2)(A)), the magnitude of the harm suffered by the copyright owner without the injunction, the feasibility and effect of the injunction and the influence on non-infringing materials and the comparative advantage of the considered order.

The injunction imposed on the ISPs is not stipulated in the E-Commerce Directive in EU but in the Information Society Directive and the IP Enforcement Directive. According to Article 8(3) of the Information Society Directive, the member countries should guarantee the right of the copyright owner to apply for such an injunction. Similar regulation could be found in Article 11 of the IP Enforcement Directive.³⁷⁰ To be noticed, although the injunctions aim at the prohibition of the continuation of the

³⁶⁹ See Ioannis Revolidis, Internet Intermediaries and Copyright Enforcement in the EU: In Search of a Balanced Approach, on Marcelo Corrales, Mark Fenwick & Nikolaus Forgó, eds., *New Technology, Big Data and the Law*, Springer, 2017, p.227.

³⁷⁰ To be noticed, Article 11 of the IP Enforcement Directive refers to Article 44(1) TRIPs Agreement. Yet, it is said to be presenting a clear "TRIPs plus" element since the injunction is provided irrespective of the intent state of the infringer, see Irini Stamatoudi & Paul Torremans, eds., *EU Copyright Law: A Commentary*, Edward Elgar, 2014, p.619.

infringement, it is “logical to assume that they can be used as preventive injunctions”.³⁷¹

In comparison with the DMCA, the specific requirement and the form of the injunction is not specified listed here and is left to the choice of the member states.³⁷² Although the injunctions including website blocking ones have become commonplace in the member states, the harmonization is far from being achieved.³⁷³ Meanwhile, at the EU level, the blank is filled up by the orders of the CJEU. While the “Effectiveness”, “proportionality” and “balancing” test devised by the CJEU is criticized for lacking a central common thread and thus lead to detrimental influence on the free development of innovation.³⁷⁴

The Copyright Law and the Tort Law of China do not stipulate the injunction on the ISPs in particular, although Article 50 and 51 of the Copyright Law and Article 15 of the Tort Law provide the legal basis for the possible explanation. Article 50 of the Copyright Law stipulate the issue of the order to cease the infringing activity and to preserve the property, and article 51 of the Copyright Law stipulate the issue of the order to preserve the evidence of the infringement. Besides, both of the two kinds of orders are issued under strictly limited circumstances.³⁷⁵ Article 15 of the Tort Law lists eight measures to assume tort liability of which cessation of infringement, removal of obstruction and elimination of obstruction are three of them.³⁷⁶ This kind of measures could be applicable when the ISPs do not assume the duty stipulated in Article 36 of the Tort Law.

³⁷¹ See Irini Stamatoudi & Paul Torremans, eds., *EU Copyright Law: A Commentary*, Edward Elgar, 2014, p.619.

³⁷² According to Recital 59 of the Information Society Directive, “*the conditions and modalities relating to such injunctions should be left to the national law of the Member States*” ; according to Recital 23 of the IP Enforcement Directive, “*the conditions and procedures relating to such injunctions should be left to the national law of the Member States*” .

³⁷³ See Martin Husovec and Lisa van Dongen, Website Blocking, Injunctions and Beyond: A View On Harmonization from The Netherlands, *Journal of Intellectual Property Law & Practice*, 2017, Vol. 12, No.8, p.704.

³⁷⁴ See Ioannis Revolidis, Internet Intermediaries and Copyright Enforcement in the EU: In Search of a Balanced Approach, on Marcelo Corrales, Mark Fenwick & Nikolaus Forgó, eds., *New Technology, Big Data and the Law*, Springer, 2017, pp.243-244.

³⁷⁵ According to Paragraph 1 of Article 50, the copyright owner could apply for the order prevent the independent infringement; according to Paragraph 1 of Article 51, the copyright owner could apply for the order to preserve the evidence otherwise may be lost.

³⁷⁶ Theoretically speaking, the measures listed in Article 15 of the Tort Law of China are not all served to ask the legal entity to assume “tort liability” . As for the three measures mentioned above, it is more accurate to say that the legal basis for assuming the methods is the duty of prevention, instead of tort.

4.4.1.2 Injunctions to Enforce the ISPs' Duty of Care

As described by Martin Husovec and accepted by Ansgar Ohly, injunctions could be issued on the innocent intermediaries who are held accountable but not liable.³⁷⁷ Therefore, all the duties mentioned above could be enforced by the courts and the difference is that for the duty to assist in specific infringement.³⁷⁸ While as mentioned above, in a given infringing activities, there may be many different kinds of ISPs involved, which are divided by Martin Husovec as “proximate and remote” ones, and in this dissertation, the ISPs providing “direct and indirect” assistance to the infringement. It then should be noticed whether there should be different requirements for these kinds of ISPs to assume the duty, and if happens, whether there should be a sequence for the copyright owners to ask the injunction against them. Besides, it is not clearly regulated in the rules of China whether the notice and takedown procedure is a procedural prerequisite to apply for the injunctions.

It has been argued that the injunctions applied on the innocent ISPs it justified by their duty of care in copyright infringement.³⁷⁹ And the level of the duties is basically determined on the relationship of the services provided by the intermediaries and the activities conducted by the users. Although the injunction is different from the liability, it may still bring significant influences on the experience of the users and attractive burdens on the ISPs. Referring to the principle that the right and obligation should be compatible, the injunctions should be applied against different kinds of ISPs considering their contribution to the infringement as well as their benefits from the infringing activities. There is no denying that there will always be the ISPs providing access involved in an infringement, while this kind of ISPs are much more remote from

³⁷⁷ See Martin Husovec, *Injunctions Against Intermediaries in the European Union: Accountable but not Liable?* Cambridge University Press, 2017; Ansgar Ohly, The Broad Concept of “Communication to The Public” in Recent CJEU Judgments and The Liability of Intermediaries: Primary, Secondary or Unitary Liability? *Journal of Intellectual Property Law & Practice*, 2018, Vol.13, No.8, p.675.

³⁷⁸ As for the relationship of the duty and the injunction to enforce it, Jaani Riordan has a remarkable comment in which she takes the example of the duty of disclosing the wrongdoer' s information and the injunction to enforce it. Accordingly, “although it is common to speak of a ‘duty’ of disclosure, it is not a unitary obligation but comprises two distinct but related duties: one voluntarily assumed, the other imposed. t” . See Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, pp.183-184.

³⁷⁹ Jaani Riordan has concluded three kinds of justifications for injunctions against intermediaries, see Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford, 2016, p.100.

the direct infringing activities. On the other hand, the ISPs providing this kind of infrastructural services rely less on the infringement to get their incomes or to increase more users. At the same time, it is always economically efficient for the ISPs providing direct assistance to assume the task of blocking or delating, which will also bring less negative effect on the users' legal activities. Therefore, the application of the injunctions should strictly follow the principle of proximate cause.

The relationship between the notice and takedown procedure and the application of the injunctions should follow the same principle. As mentioned above, the basic function of the notice is to overcome the information asymmetry between the copyright owners and the ISPs: the former have better understanding of the condition of the works and the latter know more about the information of the infringing users. This kind of asymmetry could not be solved by the interference of the courts, meaning that even the copyright holders are entitled to apply for the issue of the injunction, it is still needed to ask the ISPs for the involvement. In other words, the issue of the injunction and the sending of the notice are actually assuming the same function. With the legal effect of the notice, mainly the threat of excluding the ISPs from the safe harbor and the liability of damage compensation, as well as its advantage of directly linking the right holders and the ISPs, the mechanism of setting the procedure as a prerequisite is meaningful.

Last but not least, it is commented that the scope of injunctions may differ depending on the jurisdiction. While the CJEU in *Scarlet v. SABAM and Netlog* has emphasized that it is not acceptable to issue an injunction asking the ISP to install a filtering system, even when under the circumstances of P2P sharing.³⁸⁰ While as mentioned above, although it is not recommended to impose an obligation of applying the filtering technologies in the legislation, the adoption of these kinds of measures should be promoted, especially on some dangerous services represented by the P2P software. Under this situation, it needs to be discussed whether is it acceptable for the courts to issue an injunction asking the ISPs to install the filtering technologies. As mentioned above, there is no specific duty on the ISPs to install the technologies, and there may

³⁸⁰ See Irini Stamatoudi & Paul Torremans, eds., *EU Copyright Law: A Commentary*, Edward Elgar, 2014, pp. 621-622. To be noticed, the author also mentioned that, filtering of some sites only is allowed.

be other representative ways to deal with the problem, including the manual checking and compensating to the loss of the copyright owners. Besides, the injunction is issued as an enforcement to promote the solution of the private disputes. Therefore, it is still suggested that the court should not issue an injunction directly asking the ISPs to adopt the filtering technologies.

4.4.2 Compensation for Damage

Due to the “innocent” role of the ISPs in third party copyright infringement, the injunction that needs no subjective fault to be issued is more commonly applied than the compensation to the damage in corresponding case. Nevertheless, the authority of the injunction in promoting the ISPs to assume the duty of care in copyright protection is quite limited, based on the fact that it would be better to wait than to act expeditiously. Only with the additional supplement of the compensation, which is the “real liability”, could it be improved the authority of the legal mechanism.

4.4.2.1 Current Regulation on the Liability of Compensation for Damages

Different from the injunction, the legal basis of damage compensation, or “monetary remedy” under the DMCA, is not the duty of care itself but the violation of the ISPs’ duty of care as well as the corresponding loss of the copyright owners. For instance, according to Article 13 of the IP Enforcement Directive, the order from the member states’ judicial authorities asking the infringer to pay the right holder damages should be limited to the situations when the entity knows or has reasonable possibility to know the involvement in the infringing activities. It is similarly stipulated in the Tort Law of China. Accordingly, the ISP should only be responsible for the damage in causal relationship with its negligence in dealing with the notice from the copyright owner, unless the ISP itself “knows” the specific infringement.³⁸¹ A constructive knowledge of the specific infringing activity is thus needed for the ISPs to assume the liability of

³⁸¹ Paragraph 2 and 3, Article 36, the Tort Law of China.

compensation for damages.³⁸²

4.4.2.2 Liability for Violation of the Duty of Care

The legal basis of damage compensation or the tort liability in a strict sense is limited to the entity's knowledge of the specific infringement.³⁸³ Therefore, the duty to assist in specific infringement will not directly lead to the ISPs' liability to compensate the damage of the copyright owners. While if the ISPs do not follow the requirement of the notice and takedown procedure, or the order of the courts to disclose the infringing users' information, the ISPs should be recognized as ignoring the infringement willingly and should be responsible for the enlarged damage to the copyright owner.

To be noticed, compared to the DMCA and the EU Directives, the Tort Law of China distinguishes the damage before the notice and that after, imposing the ISPs delaying in taking down the infringed materials the liability of compensation for the enlarged damage. Different from the Tort Law of China, following the notice and takedown procedure is a prerequisite for the ISPs to be protected by the safe harbor. Comparatively speaking, the mechanism of the DMCA is more powerful than that of the Tort Law of China, while the latter is more fair since the damage happens before the notice is in no relationship with the ISPs on condition that it has assumed the duty of general supervision.

More importantly, there may be situations when the ISPs are recognized to assume secondary liability. The application of the liability under current mechanism has been discussed above. From the perspective of this dissertation, the ignorance of the copyright owners' notice or the courts' injunctions should trigger the imposition of the damage compensation.³⁸⁴ Moreover, the ISPs should also be held liable when they violate the duty of general prevention and that of supervising repeat infringement. Different from the duty of assisting specific infringement which is a passive one, the

³⁸² See Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法), China Legal Publishing House(中国法制出版社), 2015, p.213.

³⁸³ Ibid, pp.212-213.

³⁸⁴ See Ansgar Ohly, The Broad Concept of "Communication to The Public" in Recent CJEU Judgments and The Liability of Intermediaries: Primary, Secondary or Unitary Liability? *Journal of Intellectual Property Law & Practice*, 2018, Vol.13, No.8, p.675.

duty of prevention is should be actively assumed by the ISPs and the violation itself could provide sufficient evidence for the ISPs' negligence. Under this situation, a constructive knowledge is established and the copyright owner could directly ask the ISPs to assume the secondary liability. Of course, the damage compensated by the ISPs should be calculated in line with the factual contribution of the ISPs,³⁸⁵ and the ISPs could further ask for compensation from the direct infringers. But there is no need for the copyright owner to prove that the ISPs have an actual and specific knowledge of the given infringing activity.

To be exact, if the infringement is found to be conducted by the repeat infringer. The effectiveness of the ISP's policy to deal with this kind of situation could be reasonably denied. Accordingly, it would be justified to ask the ISP to undertake joint liability with the direct infringer. Nevertheless, the ineffectiveness itself could not be recognized enough to justify the ISP's negligence of the duty which would certainly lead to the whole liability for damage compensation. To be precise, the policy to deal with repeat infringer is actually part of the whole measures the ISP could take to keep the general situation of its service as a litigate and acceptable level.³⁸⁶ Therefore, the effectiveness of the policy should be evaluated together with the ISP's whole efforts to realize the general prevention when the specific infringer in a given case is not a repeat one by which to determine whether the ISP should undertake the liability without specific knowledge of the infringement.

The most controversial problem then comes to the ISP's liability for violating the duty of general prevention. To be noticed, according to traditional tort theory, there is no need for the given entity to be aware of the specific infringed victim for it to be held liable for the negligence once the danger leads to the loss of the victim is proven to be

³⁸⁵ See Ansgar Ohly, The Broad Concept of "Communication to The Public" in Recent CJEU Judgments and The Liability of Intermediaries: Primary, Secondary or Unitary Liability? *Journal of Intellectual Property Law & Practice*, 2018, Vol.13, No.8, p.675.

³⁸⁶ According to Professor Graeme B. Dinwoodie, the disclosure of the infringing user' s information as a cooperative mechanism is also a kind of assistance in preventing unlawful conduct, see Graeme B. Dinwoodie, A Comparative Analysis of the Secondary Liability of Online Service Providers on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, p.72.

caused or contributed thereby.³⁸⁷ The reason to adopt different rules in the area of copyright infringement is both due to the legislative model of the DMCA and the balancing of different entities' interests which has been discussed in Chapter 3. Nevertheless, it has already been argued that the ISPs should play a more active role in dealing with online copyright infringement, by which to realize the real “neutrality” of the service. Correspondingly, in addition to the mechanism of finding the ISP's significantly intent contribution or inducement of the direct infringement, the serious situation of online infringement itself could be reasonably referred as the justification for the ISP's joint liability.

Last but not least, the ISP's liability purely based on the violation of general prevention should be limited to significantly limited situations, represented by the Pirate Bay. To tell the truth, the critical difference of basing the ISP's liability on its general duty of care and on the recolonization of the constructive intent which is an essential element of the constructive requirements of contributory liability or inducing liability is not the final result of the judgement, but is primarily the logic in the legislation and the explanation. It is not suggested by this dissertation to impose the liability for damage compensation on the ISPs merely for the limited online infringement of their users, like the current situation of Youtube. Instead, the principle of proportionality should be duly respected for the court to impose the liability on the ISP.

4.4.3 Administrative Penalty

As mentioned above, non-fulfilment of the AGCOM 's order may result in a fine in Italy,³⁸⁸ which is the example of the administrative penalty to the ISPs violating the duty of care. Nevertheless, it is not common in other countries to enforce copyright protection by administrative regulation to which the corresponding penalty is the guarantee. To be noticed, of all the three legal systems analyzed in the dissertation, the

³⁸⁷ See Xiangjun Kong, *Judicial Philosophy and Legal Methods in Network Copyright Protection*(网络著作权保护法律理念与方法),China Legal Publishing House(中国法制出版社),2015, p.203.

³⁸⁸ See Massimo Sterpi & Angela Tasillo, *Copyright litigation in Italy: Overview*, at [https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-011-3573?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

administrative regulation on copyright in China is the most remarkable one.³⁸⁹

Although the influence of administrative regulation on China is of significant importance which may even decide the fate of a given copyright industry, the justification of such kind of regulation is doubtful. As mentioned in the beginning, Ke Steven Wan discussed three concerns relating to administrative regulation of copyright infringement in China.³⁹⁰ To be honest, the fact behind the comparative advantage of administrative regulation is that the effective judicial protection of copyright has not been well established.³⁹¹ The heavy reliance on administrative regulation and the defect of the judicial protection in China has resulted in notable problems. Therefore, although it is emphasized in this dissertation to improve the ISPs' duty of care in copyright protection, it is not recommended to enlarge the application of the administrative penalty.

Besides, copyright is usually recognized as a private right worldwide or a civil right in China.³⁹² Accordingly, the fundamental objective of the liability mechanism should be to provide the copyright owner the recovery of the interests.³⁹³ However, considering the attribution of the right as private one, it should be the right holders themselves to take care of their own issue.³⁹⁴ It is appropriate for the administrative departments to deal with the pirate websites which intently distributes the infringing materials themselves or obviously encourages the infringement,³⁹⁵ while it is better for the courts

³⁸⁹ See Qian Wang, *The Course of Intellectual Property Law*(知识产权法教程), Renmin University of China Press(中国人民大学出版社), 2016, p.262.

³⁹⁰ See Ke Steven Wan, Internet Service Providers' Vicarious Liability Versus Regulation of Copyright Infringement in China, 2011 *U. Ill. JL Tech. & Pol' y*, pp.400-411.

³⁹¹ See Guobin Cui, Reforming the System of Joint Liability of Internet Service Providers (网络服务商共同侵权制度之重塑), *Legal Research* (法学研究), Vol.4, 2013, pp.149-151.

³⁹² According to Article 123 of the General Provisions of the Civil Law of the People's Republic of China, "*the parties to civil legal relations enjoy intellectual property rights in accordance with the law. Intellectual property rights are the proprietary rights enjoyed by right holders in accordance with the law in respect of the following objects:(1) works...*" .

³⁹³ See Wenjie Liu, On the Duty to Keep Safety of the ISPs, *Peking University Law Journal*(中外法学), Vol.24, No.2(2012), pp.402-405.

³⁹⁴ See Qian Wang, *The Course of Intellectual Property Law*(知识产权法教程), Renmin University of China Press(中国人民大学出版社), 2016, p.263.

³⁹⁵ In addition, the administrative authority is better to play a more flexible and coordinator role by which to promote the best practice, see for example, Salil K. Mehra and Marketa Trimble, Secondary Liability of Internet Service Providers in the United States: General Principles and Fragmentation, on Graeme B. Dinwoodie, ed., *Secondary Liability of Internet Service Providers*, Springer International Publishing, 2017, pp.106-107.

to deal with the cases in which the ISPs are not infringing the copyright themselves but abandon their duty of caring the copyright infringement through their service.

4.5 Summarization

From the perspective of this dissertation, the main duties of the ISPs could be classified into three kinds, the duty to generally prevent the infringement, the duty to assist the copyright owners in stopping the direct infringement and disclosing the infringers' information, and the duty of specific control on repeat infringement.

As one of the main innovative contribution of this dissertation, it is asserted that the ISP should play a more active role in dealing with the users' online infringement. In particular, the ISP should be imposed on a legal obligation to keep neutral actually and to have a general control of the infringing activities through their service. Thereby, the application of the filtering technologies should not be refused as a whole, but should be limited from the perspective of the purpose, the scope as well as the efficacy. Accordingly, the fundamental orientation of the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market is supported by this dissertation. At the same time, it is recommended to adopt the application of the duty of general prevention on the ISPs providing platforms instead of recognizing the service itself as communicating to the public.

CHAPTER 5 CONCLUSION

5.1 Primary Findings

Since the coming of the Internet era, there has been the problem of online copyright infringement, especially the ones conducted by the users of the ISPs in which the latter play the role of intermediaries instead of direct infringers. With the progress of the Internet, increasingly more kinds of subject matters protected by the copyright have been digitalized and distributed online, while the problem of online infringement is still pending to be solved. In the year 2011, it was reported that, “*during the past 10 years, the big music companies have usually jointed to sue their common enemy on the Internet: Napster, then Grokster, then LimeWire, and now the Grooveshark as a service provider of streaming media which asserts to have 35 million users*”.³⁹⁶ In the year 2015, the copyright owners finally won the war against Grooveshark, while more and more ISPs asserting to replace Grooveshark comes as soon as the judgement.

Although there have been many ways to deal with online copyright infringement, the focus is still on the regulation on the ISPs which are technologically needed for the spreading of online third-party copyright infringement. Led by the DMCA in US and soon adopted worldwide, the main mechanism related to the ISPs’ liability is the notice and takedown procedure, which constitutes the safe harbor for the ISPs as well as the prosperous development of the Internet Industry. While the ISPs’ passively waiting for the notice could not stop the flood of online copyright infringement. Therefore, the courts as well as the administrative in US, EU and China have been trying to overcome

³⁹⁶ See Tencent Technology, Disney and Warner sue The Online Music Service Provider Grooveshark for infringement, at: <http://www.techweb.com.cn/news/2011-12-15/1131752.shtml>.

the shortcoming of the notice and takedown procedure by limiting the prerequisites of the safe harbor or denying its application under extreme circumstances.

Comparatively speaking, US and EU rely much more on the civil procedures and the courts' judgements to impose the obligation on the ISPs. From the case study in Chapter 2, it could be found that the US courts prefer to follow the rules of the DMCA instead of relying more on their independent discretion in spite of its common law tradition. While by strictly approving the protection of the safe harbor, as well as by referring the rules of contributory liability, vicarious liability and inducement infringement, the US courts have been trying to prevent the ISPs from keeping blind eyes to their users' infringing activities. A similar trend could also be found in the judgement of the CJEU as well as that of the member states, recently represented by the broad explanation of the right of communication to the public. From the comparative perspective we have seen that the courts in China are also trying to overcome the problem of an absolute safe harbor. While the notable feature of regulation on online infringement is its heavy reliance on the companion-style administrative regulations which actually set a much higher level of duty on the ISPs.

To be noticed, although the liability on the ISPs in third-party copyright infringement have been based on different principles, the critical issue is the duty of care at the fundamental level. Although the recognition of the so-called "know" "should have known" "obviously know" "actually know", etc., have always been drawn as the key issues in different cases, it should be admitted that from the perspective of the copyright owners as well as the courts, it is complicated and even impossible task to go further into the subjective intent of the ISPs. Instead, the actually applied principle based on the kind of the services, the attribution of the involved works, the preventive measures, the policies to deal with repeat infringement, etc., is a kind of objective standard to which the ISPs should pay attention to.³⁹⁷ In one word, it has been the ISPs' duty of care from an objective perspective that has been and should be laid at the center of regulation the ISPs in online copyright infringement.

³⁹⁷ See Wenjie Liu, On the Duty to Keep Safety of the ISPs, *Peking University Law Journal(中外法学)*, Vol.24, No.2(2012), pp.408-409.

5.2 Main Suggestions

Based on the former findings, it is suggested in this dissertation to set the recognition of the ISPs' duty of care as the critical issue when it comes to their role in third-party copyright infringement as well as the corresponding liability. Referring to the general definition of the duty of care, the ISPs' duty of care means the objective obligation imposed by the law to deal with their users' infringing activities. The following questions are then, the justification of the ISP's duty of care from the theoretical perspective, and the specific application of the duty from the practical perspective. These two perspectives are discussed in Chapter 3 and Chapter 4 respectively.

According to the traditional tort law theory, a civil entity should be responsible for other's loss mainly based on its fault. Otherwise, people should not be imposed a liability due to the behavior of a third party. While the coming of the risk society as well as the relationship between the entity with the direct infringer have been modifying the traditional principle. As for this, there have been two representative legal theories to clarify the legal duty: the general duty of care under German law, and the reasonable person under common law. Based on the analysis of these two legal traditions, it is concluded that three main perspectives should be taken into consideration when it comes to the ISPs' duty of care in copyright infringement: the factual relationship, the interests balancing which is a micro perspective, as well as the utilitarian analysis from the macro perspective.

As for the causality, it is reasonable for the ISPs as professional entities to foresee the risk to copyright protection with the application of their services, especially under the current condition with common infringing activities brought by the Internet users. At the same time, there is also reliable proximity between the service provided by the ISPs and the infringing activities, considering that it would be technologically impossible for the users themselves to fulfill the infringement without the assistance of the service. As for the interests-balancing of the copyright owners as well as that of the ISPs, the infringing users and the general users, it is argued that it is fair for the ISPs as well as the infringing users as the beneficiary to assume the obligation. What should be

specifically taken care of is the interests of the legal users, including their privacy as well as the freedom of expression. However, a limited duty of care on the ISPs will not constitute unbearable bothersome on the users. In the end, according to the utilitarian analysis, the progress of the Internet industry is not as important as deciding the fate of the mechanisms, and according to the Kaldor-Hicks improvement, the ISPs as the beneficiary of the Internet industry should compensate for the corresponding loss of the copyright owners. Besides, the problem of online copyright infringement is brought by the progress of technology. Accordingly, the countermeasure to deal with the problem should not leave aside the technological assistance. Instead, it is asserted that the protection of copyright online should be promoted partially with the application of the technological progress. And this last point provides notable justification for the imposition of the duty to take preventive measures under essential circumstances.

Based on the theoretical analysis above, it is asserted in Chapter 4 that the ISPs should assume a systematic kind of duty in online copyright infringement: the duty of general prevention, the duty of assisting in specific infringement and the duty of supervising repeat infringers. As for the duty of general prevention, it is not equal to the duty of general supervision which would be an impossible task for the ISPs. However, the ISP does have a duty to keep neutral between the infringing users and the copyright owners. If a given kind of service is found to be seriously risky to copyright protection, the ISPs could only be protected by the safe harbor on condition that they have adopted reasonable preventive measures by which to abide by the so-called technology neutrality in a real way. Furthermore, once a given infringing activity is found on their platforms or through their services, it is the ISPs' reasonable duty to provide the copyright owners the possible assistance to stop the infringement and to deter the direct infringer. As for this, the principle of proximity should be followed, considering the theoretical analysis of causality as well as utilitarianism above. The copyright owners should follow the notice and takedown procedure as the prerequisite of bringing a lawsuit against the ISPs in courts, and the duty of providing the information of the infringers should also be imposed firstly on the ISPs that provide more direct assistance to the infringement. Moreover, it should be the ISPs' duty to supervise the behavior of the repeat infringers and the effect of the corresponding policy should be one of the

essential element to be considered whether the ISPs could be protected by the safe harbor.

5.3 Closing Remark

Like it or not, we have come into an era in which the human society as a whole as well as the daily life of every one of are driven, changed as well as challenged by the constantly advancing technologies. Everyone is equal in the eyes of the god, but it is not the same situation in the face of the technologies. The precious values of fairness, justice, equality and progress which are codified in the statutes and accommodated into our traditions are still remarkable nowadays, while the effective measures to realize the values are determined by the current circumstances instead of the doctrines of which the designers could not imagine the continuing changing of the technologies and the corresponding influence on the relationship of the legal entities.

The safe harbor is one of these doctrines, so are the principles of network neutrality and non-filtering. Based on these doctrines, the legal regime provides the ISPs a beneficial environment to develop, the general users a positive circumstance of online activities, and the copyright owners an impossible task to protect their rights in the digital era. Based on the recent controversial judgements of the CJEU and the EU Commission's Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, it is an appropriate opportunity to reflect the doctrines limiting the ISPs' duty of care as well as the application of the technological measures to deal with online infringement, by which to restore the disabled copyright law in the digital era.

Different from the mainstream, this dissertation points out emphatically the ISPs' duty of care in copyright infringement and especially the duty to actively adopt reasonable measures to prevent their users' infringing activity. In addition, the duty of assisting in specific infringement and that of supervising the repeat infringer are also included in the system of the ISPs duty of care. Therefore, a systematic framework featured by the ISPs' duty of care instead of the safe harbor is established in this dissertation. To provide

sufficient argument for the system, the theoretical basis and the application mechanism are deeply discussed in respective chapters. As for the theoretical basis, it is not only reasonable for the ISPs to assume a higher level of duty considering the balance of different entities' interests but also arguable from the perspective of promoting the social welfare as a whole. And as for the specific application of the ISPs' duty of care, the notice and takedown procedure is still of significant importance, but the methods to adopt reasonable preventive measures, to disclose the direct infringers' information as well as to apply an effective policy against repeat infringement are also necessary. In addition, the specific duties of the ISPs are guaranteed by the legal remedies in the respective forms of injunctions and damage compensation.

To be honest, the possible doubts about the argument of this dissertation is predictable by the author. For one thing, there may be concerns on the users' privacy and freedom of expression.³⁹⁸ For the other, the standard of the duty asserted in this dissertation could not be explicit enough to be applied indistinguishably in judicial practice.³⁹⁹ The author admits the reasonability of these concerns. However, the bothersome influence on the users is not inevitable based on the strictly limited application of the preventive measures as well as the corresponding remedy for the users. As for the uncertainty of the standard, on one hand, it could be practically overcome by the specific application methods discussed in the former chapter; and on the other hand, it is in line with the need to provide the courts a flexible legal basis to deal with complicated and baffling circumstances.

Of all the legal branches, the copyright law may be the most ridiculous one when it comes to the contrast of the legislation and the reality. "*To steal a book is an elegant offense*", this is not only the classic line from the works of Lu Xun, the most influential Chinese writer of the 20th century and the title of the monograph written by Professor William P. Alford from Harvard,⁴⁰⁰ but also the general public's attitudes toward the

³⁹⁸ See Christina Angelopoulos, *On Online Platforms and the Commission' s New Proposal for a Directive on Copyright in the Digital Single Market*, available at: <https://juliareda.eu/2017/03/study-article13-upload-surveillance/>, pp.38-40.

³⁹⁹ *Ibid*, p.47.

⁴⁰⁰ See William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford University Press, 1995, p.127.

copyright law worldwide. Everyone knows copyright the infringement but everyone does it. This is not the acceptable legal effect in other branches, whereas it continues in the practice of the copyright law. In face of the problem, there are actually two main kinds of solutions to be considered, the alternative measures replacing the current copyright law to collect revenues for the copyright owners,⁴⁰¹ and the strong enforcement of the current mechanism to realize the copyright in the Internet era. Although the former one should be carefully considered, it is not the research focus of this dissertation and there is no indication for the coming of such an alternative in the short term. While it should be taken into consideration that when we try to strengthen the ISPs' duty of care by which to effectively enforce the copyright, the using of the works should be strongly approved when it will not influence the substantial interests of the right holders but could benefit the users' freedom of expression and recreation should be strongly approved.

⁴⁰¹ See for example, Mark A. Lemley, IP in a World without Scarcity, 90 *N.Y.U. L. Rev.* 2015, pp.510-515; William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford Law And Politics, 2004, pp.8-10.

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Italy

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Germany

German Civil Code

US

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China⁴⁰²

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(2015)沪知民终字第 213 号	(2015) HuZhi Min Zhong No. 213

Cases of First Instance in 2017

(2017)京 0108 民初 17873 号	(2017) Jing 0108 Min Chu 17873
(2017)京 0101 民初 4847 号	(2017) Jing 0101 Min Chu 4847
(2017)津 0116 民初 1148 号	(2017) Jin 0116 Min Chu 1148
(2017)京 0102 民初 19828 号	(2017) Jing 0102 Min Chu No. 19828
(2017)京 0101 民初 5272 号	(2017) Jing 0101 Min Chu 5272
(2017)京 0107 民初 2148 号	(2017) Beijing 0107 Min Chu 2148

(2017)粤 0604 民初 13191 号 (2017) Guangdong 0604 Min Chu 13191
(2017)浙 8601 民初 3611 号 (2017) Zhe 8610 Min Chu 3611
(2016)京 0101 民初 7257 号 (2016) Beijing 0101 Min Chu 7257
(2017)京 0108 民初 28627 号 (2017) Beijing 0108 Min Chu 28627
(2016)京 0105 民初 52184 号 (2016) Beijing 0105 Min Chu 52184
(2016)粤 0106 民初 12011 号 (2016) Guangdong 0106 Min Chu 12011
(2017)沪 0112 民初 12124 号 (2017) Shanghai 0112 Min Chu 12124
(2017)浙 8601 民初 2297 号 (2017) Zhe 8601 Min Chu 2297
(2016)沪 0110 民初 20489 号 (2016) Shanghai 0110 Min Chu 20489
(2017)粤 0305 民初 4225 号 (2017) Guangdong 0305 Min Chu 4225
(2017)粤 0305 民初 785 号 (2017) Guangdong 0305 Min Chu 785
(2016)津 0116 民初 2031 号 (2016) Jin 0116 Min Chu 2031
(2017)津 0116 民初 404 号 (2017) Jin 0116 Min Chu 404
(2016)京 0101 民初 14581 号 (2016) Jing 0101 Min Chu 14581
(2016)京 0101 民初 689 号 (2016) Beijing 0101 Min Chu 689
(2016)粤 0105 民初 9017 号 (2016) Guangdong 0105 Min Chu 9017
(2016)沪 0104 民初 29305 号 (2016) Shanghai 0104 Min Chu 29305
(2016)京 0105 民初 19333 号 (2016) Beijing 0105 Min Chu 19333
(2016)京 0102 民初 22671 号 (2016) Beijing 0102 Min Chu 22671
(2016)沪 0107 民初 12049 号 (2016) Shanghai 0107 Min Chu 12049
(2016)沪 0115 民初 51864 号 (2016) Shanghai 0115 Min Chu 51864

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(2017)京 73 民终 2040 号 (2017) Jing 73 Min Zhong 2040
(2017)京 73 民终 1802 号 (2017) Jing 73 Min Zhong 1802

(2017)闽 02 民终 4147 号 (2017)Min 02 Min Zhong 4147
(2017)津 02 民终 5499 号 (2017) Jin 02 Min Zhonog 4499
(2017)京民终 336 号 (2017) Jing Min Zhonog 336
(2017)京 73 民终 959 号 (2017) Jing 73 Min Zhonog 959
(2017)津 02 民终 2774 号 (2017) Jin 02 Min Zhonog 2774
(2017)津 01 民终 2830 号 (2017) Jin 01 Min Zhonog 2830
(2016)京民终 248 号 (2016) Jing Min Zhonog 248
(2016)京 73 民终 941 号 (2016) Jing 73 Min Zhonog 941