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**Master's Thesis**

**A Comparative Study on  
Intermediary Liabilities for Copyright  
Infringement:  
Recommendation for Mongolia**

**서비스제공자의 저작권 관련 책임에  
관한 비교법적 연구:  
몽골을 위한 제안을 위하여**

**February 2019**

**Graduate School of Seoul National University  
Intellectual Property Law, Department of Law**

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## Abstract

# **A Comparative Study on Intermediary Liabilities for Copyright Infringement: Recommendation for Mongolia**

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This is such an extraordinary period in the history of humankind, giving nearly all people a self-thought that I would no longer live without Internet. It is undeniable to say that Internet gives us a bundle of chances and opportunities to engage directly in the creation of works and dissemination of knowledge. At the same time, it has become a home for variety of illegal and misappropriate conducts in a way that our previous generations could not even imagine. While at first it was the main concern how to proliferate the Internet as reachable as possible to many people, nowadays the main concerns towards Internet are how we could make Internet a safer environment for all of us, and how to strike a fair balance among legal interests of copyright holders, internet users and online intermediaries. Having noted that there are many other aspects affected by the misuse of Internet, including online defamation, misuse of personal information, cybercrimes, etc., this thesis highlights the issue of copyright infringement in the digital world, and aims to study the legal regime of intermediary liabilities for copyright infringement.

More narrowly, many countries have considered amending their copyright law as to include recent developments made to the copyright world with respect to online intermediaries' liabilities and responsibilities for copyright infringement. In addition, there have been varying viewpoints as to the usefulness of the adoption of statutory immunity for intermediary liabilities, and many literature studies have evaluated the effectiveness of notice and takedown procedures in relation to the conducts of online copyright infringement. Yet, there is no harmonization over these issues and many countries still face hurdles in the solution on finding a fair balance between the competing rights of copyright owners, intermediaries and

individuals. With respect to this global trend, this thesis aims at studying (1) *whether Mongolia needs to revise its current copyright law and adopt the limitation to online intermediaries' liabilities*; (2) *how it can learn and reflect other countries' experiences regarding online copyright infringement, namely from the U.S. and South Korean experiences*; and (3) *to what extent legal transplantation could be made to the current copyright system*. What is more, as Internet is more like borderless and online copyright infringement does not leave any country outside the flow, it is crucial to study different approaches of different countries addressing same particular issue. For the purpose of this thesis, it will offer an insight to the experience of the United States as a main representative country, and of the Republic of Korea, as a country with a mixed legal environment reflecting both the United States and European approaches, by mainly focusing on the legal framework of limitation of intermediary liabilities and statutory obligations as prerequisite condition to the limitation. Chapter 3 of the thesis provides a study of each country's legal framework and case studies in relation to the online intermediaries respectively.

The issue of intermediary liability arises because either of their own activities or the users' contents appeared on their platforms that prejudice the copyright holders' exclusive rights. Hence, it is worth to study the user-generated content from a copyright perspective and the legal characteristics of allegation of secondary liability. For this reason, Chapter 1 of the thesis will touch upon the concept of user-generated content from a copyright perspective and the Chapter 2 of the thesis will discuss the legal concept of secondary liability in brief. Chapter 5 of the thesis studies and analyzes the current copyright system of Mongolia and reveal some shortcomings regarding the current regulation as measure against online copyright infringement.

All in all, this thesis concludes that even though Mongolia has not yet faced with any challenging cases that arise a question of secondary liability of an internet intermediary for online copyright infringement, there is high prospect of the necessity of adopting a safe harbor regime in the near future. Furthermore,

along with the safe harbor regime, a clear and effective legal framework for the notice and takedown of unauthorized works is highly sought for consideration.

**Keyword:** user-generated content, secondary liability, online copyright infringement, internet intermediary, copyright limitations and exceptions, intellectual property

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# TABLE OF CONTENTS

## INTRODUCTION

### 1 GENERAL ASPECTS OF USER-GENERATED CONTENT

#### *1.1. The Notion of User-Generated Content*

##### 1.1.1. The Definition of a User and the User-Generated Content

##### 1.1.2. Types of User-Generated Content in the Copyright Context

#### *1.2. User's Right*

#### *1.3. The Current State of User-Generated Content in the Legal Context*

#### *1.4. Conclusion to the Chapter*

### 2 GENERAL ASPECTS OF INTERMEDIARY LIABILITIES

#### *2.1. Copyright Infringement*

##### 2.1.1. Direct and Indirect Infringement

##### 2.1.2. Indirect Infringement in the United States

###### *i) Vicarious Infringement*

###### *ii) Contributory Infringement*

###### *iii) Inducement Theory*

##### 2.1.3. Indirect Infringement in China

#### *2.2. Internet Intermediary*

#### *2.3. Secondary Liability of Internet Intermediaries*

### 3 A COMPARATIVE STUDY ON INTERMEDIARY LIABILITIES

#### *3.1. The Legal Framework of Intermediary Liabilities in the United States*

##### 3.1.1. The Necessity to Adopt the Digital Millennium Copyright Act (“DMCA”)

##### 3.1.2. Regulations of the DMCA

##### 3.1.3. Eligibility Requirements for Safe Harbor Protection

##### 3.1.4. UGC Service Provider's Safe Harbor under 512(c)

##### 3.1.5. Notable Cases

###### *i) Viacom Int'l, Inc. v. YouTube, Inc.*

###### *ii) Capitol Records, LLC v. Vimeo, LLC*

###### *iii) Lenz v. Universal Music Corp.*

iv) *BMG Rights Management LLC v. Cox Communications, Inc.*

3.1.6. Conclusion to the U.S. Part

3.2. *The Legal Framework of Intermediary Liabilities in Korea*

3.2.1. Statutory Regulations regarding Intermediary Liabilities for  
Copyright Infringement

3.2.2. Online Service Providers' Liability under the Korean Copyright  
Act

3.2.3. Government and Public Institutions in charge of Online Copyright  
Infringement

3.2.4. Notable Cases regarding the Online Service Providers' Liability

3.2.5. Conclusion to the Korean Part

#### 4 THE LEGAL FRAMEWORK OF ONLINE COPYRIGHT PROTECTION IN MONGOLIA

4.1. *Legal System of Mongolia and Copyright Protection*

4.1.1. The Mongolian Legal System

4.1.2. Intellectual Property Protection in Mongolia

4.1.3. Law of Mongolia on Copyright and Related Rights

4.1.4. Current Status of Enforcement of Copyright Protection

4.2. *Regulations regarding Internet Service Providers*

4.2.1. Under the Law on Copyright and Related Rights

4.2.2. General Terms and Conditions of Digital Content Service  
Regulation

4.3. *Secondary Liability Concept in Mongolia*

4.3.1. Under Civil Law

4.3.2. Under Criminal Law

4.4. *Conclusion to the Chapter*

#### 5 RESEARCH RESULT, RECOMMENDATION AND CONCLUSION

5.1. *Research Result*

5.1.1. Necessity of Devising a Regime of Intermediary Liability in the  
Mongolian Copyright System



## INTRODUCTION

### *The Research Context*

Online platforms and social networking sites open a door to many opportunities for the users of Internet to get benefited from their services. Most of enterprises have begun to choose social platforms for boosting their business and getting them familiar with customers through social media marketing, while journalists making news via shareable social media platform rather than traditional ones. People can access to a tremendous amount of information with the click of a mouse and share their contents in the blink of an eye. On another side, it creates a grey part where people can access, use, or otherwise take advantage of copyrighted materials for free of charge, without authorization of the right holder. As such, on the surface, the internet makes everything easier for users and harder for copyright holders. However, the users are also in a vulnerable position when it comes to the some mandatory participation of online service providers.

With the advent of shareable online platforms, various kind of works, whether breaching copyright or creating it, are born in every second. All of these works can be expressed, in general, under the term “user-generated content”. In a broader extent, the term “user-generated content” is used to describe any form of contents such as video, images, audio, text and other forms of media that was created or generated by consumers or end-users of an online system or service. Moreover, they can be in a form of explicit breach of copyright, or in an acceptable form subject to the copyright limitations and exceptions, or pure creation protectable under copyright, which starts complexity in the copyright law. Following these phenomenon on the digital environment, new complications regarding online service providers have arisen to the traditional copyright system, including legality of derivative works in digital form, whether online service providers are responsible for any liabilities, whether censorship is acceptable, legal consequences of takedown of user-generated contents or closedown of websites etc. Some countries have already made a lead movement on those issues and have been reforming their laws in order to keep the pace of technological development in the cyber world. However, despite the attempts to finding a solution to strike a fair

balance among competing and conflicting interests of users, copyright holders and intermediaries, there is no universally accepted approach on the digital copyright environment.

As the user-generated content becomes more advanced in the digital environment, it is no great surprise that there is an urgent need for regulation, not necessarily to be “perfect”, but to at least diminish infringements.

### *Limitation to Research Context*

Even though there are many other issues around the user-generated contents, this paper is limited to the copyright perspective of the user-generated content only and the liabilities of online service providers in the context of copyright law. It does not aim to cover other issues around the user-generated content, namely online defamation, hate speeches, child pornography, misuse of personal information, other misconducts, etc. that are regulated under the term “information” in general.

The Chapter 1 and 2 cover the general legal concept of the user-generated content and indirect copyright infringement and secondary liability respectively, and these chapters do not aim to evaluate and criticize the current state of legal regulation on those subjects, but rather to give an overview for the purpose of the latter chapters.

### *The Research Questions*

In this thesis, a comparative method will be adopted to give an answer to the research questions. For this purpose, this paper aims to offer an insight into how the United States and South Korea regulate the intermediaries’ liabilities and responsibilities for copyright infringement and to review notable cases in order to define the practical use of those regulations and procedures. As the technology outpace the law, current legal framework in both countries is facing with some criticisms for failing to provide a proportional measure to strike a fair balance among copyright participants. Therefore, this thesis will analyze those criticisms for further consideration for the recommendation for Mongolia.

The key research question to be explored in this thesis will be as follows: (1) *whether Mongolia needs to revise its current copyright law and adopt the limitation to online intermediaries’ liabilities*; (2) *how it can learn and reflect other*

*countries' experiences regarding online copyright infringement, namely from the U.S. and South Korean experiences; and (3) to what extent legal transplantation could be made to the current copyright system.*

In answering the research questions, this thesis will touch upon the concept of user-generated contents, the legal concept of indirect copyright infringement and secondary liabilities in the first two chapter. Chapter 3 reviews the United States' and South Korea's legal framework on the intermediary liabilities by analyzing their main laws in subject. Chapter 4 reveals the current situation of Mongolia regarding the online copyright infringement. Lastly, Chapter 5 summarizes the key finding and set forth answers and reflections on the research questions along with the recommendation of further study for the case of Mongolia.

This paper uses methods of literary review, case analysis and comparative analysis to develop reasonable comments and conclusions that lead to recommendation for Mongolia. The primary materials are reviewed as a basis for analyzing legislative instruments in each country and secondary materials including scholarly books, articles and reports are reviewed for the purpose of analyzing different views and criticism over this particular issue of intermediary liability on online copyright infringement.

# CHAPTER 1

## GENERAL ASPECTS OF USER-GENERATED CONTENT

*“The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who precedes us. We borrow and develop what they have done; not necessarily as parasites, but simply as the next generation. It is at the heart of what we know as progress.”*

Mr. Justice Hugh Laddie (1996)

### *1.1. The Notion of User-generated content (“UGC”)*

Since the emergence of Web 2.0<sup>1</sup> technologies, new phenomenon so-called user-generated content is introduced to the copyright system and users of Internet have started actively engaging in the creation of works and the dissemination of knowledge. For the sake of Internet and social networking platforms, seemingly infinite amount of information on the internet has become easily available to the users. This phenomenon gives users a title to be called as a content creator or generator, and raise a question of copyrightability over those user-generated contents. On the other side, users are often blamed for the copyright infringement in the online world.

Nowadays, users contribute to the creativity of digital world in a very active way by using giant social media and internet platforms. Facebook’s billions of users copy and paste photographs and texts countless times a day with no thought to the copyright consequences.<sup>2</sup> In 2016, YouTube users were uploading 400 hours of

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<sup>1</sup> “Web 2.0, term devised to differentiate the post-dotcom bubble World Wide Web with its emphasis on social networking, content generated by users, and cloud computing from that which came before.”, <https://www.britannica.com/topic/Web-2.0>; “Web 2.0, also called Participative (or Participatory) and Social Web, refers to World Wide Web websites that emphasize user-generated content, participatory culture and interoperability for end users.”, [https://en.wikipedia.org/wiki/Web\\_2.0](https://en.wikipedia.org/wiki/Web_2.0)

<sup>2</sup> Facebook reports that it had an average of 1.47 billion daily active users in June 2018. *Stats*, Facebook Newsroom, <http://newsroom.fb.com/company-info/> (last visited Sept. 10, 2018)

video content every minute, again, mostly with no thought to the copyright status of those videos.<sup>3</sup>

In the literature of copyright, users' interests are often discussed under the subject of limitations and exceptions to copyright. Limitations and exceptions to the copyright define the certain cases or conditions that justifies unpermitted use of a copyrighted work and set limits on the full scope of rights assigned to copyright owners. In the context of free use of copyrighted works, in 2005, Professor Lawrence Lessig, who has been described as the most "prominent and influential" copy-warrior in the intellectual, moral, and technological battle over the future of copyright<sup>4</sup>, described free culture as the opposite of "permission culture", in which the original creator/right-holder must give permission prior to the use of his work.<sup>5</sup> Moreover, he defends that ideas and expression must to some degree be free for the purpose of building a system of sufficient control to give artists enough incentive to produce, while leaving free as much as we can for others to build upon and create.<sup>6</sup>

As illustrated above in brief, the role and participation of users to the digital environment have emerged as a challenge to today's copyright status quo, and the lawmakers around the world have been seeking for a proportionate answer on striking a fair balance between the competing rights of copyright holders and users. First and foremost importantly, the study of activities of users and the features of user-generated contents is crucial for determining a wrongdoer in case of a copyright infringement case.

### *1.1.1. The Definition of a User and the User-Generated Content*

In a broader context, user-generated content is any form of content, such as images, videos, text and audio, that have been posted by users of online platforms such as

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<sup>3</sup> Google, *How Google fights Piracy*, pt. 21, 2016.

<sup>4</sup> Wong, Mary W.S. "Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?" *Vanderbilt Journal of Entertainment and Technology Law*, Vol. 11, Issue 4, pp. 1075-1139, 2009

<sup>5</sup> Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 2004, <http://www.free-culture.cc/freeculture.pdf>

<sup>6</sup> Lessig, Lawrence. *The Future of Ideas: The Fate of the Commons in a Connected World*, First Vintage Books Edition, November 2002.

social media and wikis.<sup>7</sup> The term itself does not have a fixed usage so far, and the phrases such as user-generated content, user-created content, consumer generated content or consumer created content, are used interchangeably<sup>8</sup>. That being said, from the reading of copyright literatures related to the user-generated content, I have noticed that the use of the term “user-generated content” is more universal than other terms. For avoidance of doubt, this paper will use the term “user-generated content” (“UGC”) in the latter chapters.

Defining UGC is a difficult task, since there is no widely accepted official definition. Generally, UGC is understood very broadly to include all content put online by users, whether it was created by them or not.<sup>9</sup> In the international scale, the Organization for Economic Cooperation and Development (“OECD”) defines “user-created content” (“UCC”) as to require a modicum of creativity. OECD in its report issued in 2007 has defined a user-created content as: (i) content made publicly available over the Internet, (ii) which reflects a “certain number of creative effort”, and (iii) which is “created outside of professional routine and practices”.<sup>10</sup> Based on the OECD’s definition, any content that is uploaded, posted, or generated in any forms over Internet could be fallen under the definition of user-created content as long as it reflects a certain number of creative effort and outside of professional routine and practices.

According to the OECD, it is useful to agree on the characteristics of user-created content<sup>11</sup> instead of providing a definition in one sentence. First of all, the work to be considered as UCC is to be published, in some context, on a publicly accessible website or on a page or a social networking site only accessible to a select group of

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<sup>7</sup> User-generated Content, [https://en.wikipedia.org/wiki/User-generated\\_content](https://en.wikipedia.org/wiki/User-generated_content)

<sup>8</sup> It is worthwhile to note that the difference between user-generated content and user-created content, which is limited to content that was actually created by users, requiring a certain amount of creativity, outside of professional routines and practices. See OECD Report. *Participative Web and User-Created Content*, 2007.

<sup>9</sup> Valcke, Peggy and Lenaerts, Marieke. “Who’s Author, Editor and Publisher in User-generated Content? Applying Traditional Media Concepts to UGC Providers”. *International Review of Law, Computers & Technology*, Vol. 24, No. 1, March 2010, <https://www.tandfonline.com/doi/pdf/10.1080/13600861003644533?needAccess=true>

<sup>10</sup> Participative web: User-Created Content, DSTI/ICCP/IE(2006)7/Final, OECD, <https://www.oecd.org/sti/38393115.pdf>

<sup>11</sup> OECD Report, 2007

people. Next, a certain amount of creative effort is to be put into creating work or adapting existing works to construct a new one. It means that merely copying a portion of television show and posting it to an online video website would not be considered UCC. Lastly, as proposed by OECD, UCC is generally created outside of professional routines and practices. However, along with the advancement of Internet platforms available for public expression, the last characteristic is becoming blurry as several platforms of UCC are now encouraging users to upload more and giving incentives for the works on the basis of accessibility and distribution to the public. Besides monetarization, professional companies or artists also use UCC platforms. Therefore, the definition and characteristics that define UCC is likely to evolve in time.

Therefore, it appears that the user-generated content is a broader concept, including the user-created content as defined by OECD within its meaning. The user-generated content covers both contents with a creativity effort considered as the original work and contents merely copied the source work.

As same as the term UGC, the definition of a user is also a broad one and it may refer to the different types of players engaging with cultural works in a variety of ways: readers of books, eBooks, and online journals; users of embedded-software and apps for smartphones; music fans who play songs on YouTube, subscribers to Spotify, or buyers on iTunes; viewers of live streams and renters and buyers of movies from platforms such as Amazon or Netflix.<sup>12</sup> Some commentators assert that the term “user” implies an illusory or unproductive distinction between different kinds of “publishers”, with the term “users” exclusively used to characterize publishers who operate on a much smaller scale than traditional mass-media or who operate for free.<sup>13</sup>

Using the copyrighted works available to them, users create a new content in different ways, including blogging, tweeting, editing, taking pictures, shooting

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<sup>12</sup> Okediji, Ruth, editor, and Elkin-Koren, Niva. Copyright in a Digital Ecosystem: A User-Rights Approach. *Copyright in a Age of Limitations and Exceptions*, 2015

<sup>13</sup> Kiss, Jemima. “The Trouble with “User” Generated Content”. *The Guardian*. London, January 2007, <https://www.theguardian.com/media/pda/2007/jan/03/thetroublewithusergenerate>

videos, writing software, composing music, reporting the news, and sharing pictures, news, and videos on social networks. In this context of users actively participating as a content creator, a user of copyright works might at the same time also be a creator, or even a copyright owner. More than this, not only do these contents contain a “healthy” information, but include undesirable contents such as hate speech, copyright infringements, defamation, pornography etc. The types of infringement by users tend to grow even more, and this issue further raises a question of who would be liable for such contents.

### *1.1.2. The Types of User-Generated Contents in the Copyright Context*

Generally speaking, there are possibly two types of UGC: “original UGC”, or UCC, and “derivative” UGC. By “original” means, the work is created by users and raise the same copyright issues as traditional original works so that requires same protection. However, derivative UGC works (such as fan fiction or a blog that incorporates some and all of a protected work) highlights a difficult copyright issues, *i.e.* whether such derivative works are acceptable uses permitted by the respective jurisdiction’s exceptions and limitations (sometimes referred to as “fair use”) or an unlawful infringement of the creator’s exclusive rights<sup>14</sup>. Since copyright protections vary from country to country and countries hold an authority to define their own regime for protection based on international norms, it becomes more complicated depending on the jurisdiction.

On the contrary to the view that any derivative works that cannot be protected by fair use or fair deal doctrine should be deemed as infringement, some scholars propose to expand the allowable use of raw materials first made by other without first obtaining their permission in the social networking world for user-generated content, particularly for those works without a commercial motive or substantial commercial impact<sup>15</sup>.

Applying the idea of transformative feature of derivative user-generated content aforementioned, in the copyright context, the derivative UGC can also be classified

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<sup>14</sup> OECD Report, 2007

<sup>15</sup> Jamar, SD. “Copyright Aspects of User-generated Content in the Internet Social Networking Context”. *Journal of Internet Law*, Vol. 16(5), 3, 2012.

into two: transformative and non-transformative.<sup>16</sup> Non-transformative UGC may include mere copy and paste of copyrighted materials, sharing of copyrighted materials by means of peer-to-peer sites, hyperlinking to the copyrighted materials etc. Contrary to this, as is the case with transformative UGC, it may require a thorough review and analysis on whether such use is permitted under the limitations and exceptions to the copyright. Furthermore, the uncertainty of the user-generated content unable to explicitly define whether it is copyrightable or not, gives a new challenge to the impact of takedown notice of online service providers to be applied on the user-generated contents<sup>17</sup>. In the same perspective as illustrated above, Daniel Gervais<sup>18</sup> proposed another classification of the user-generated content using different terms, including user-authored content, user-derived content, user-copied content and peer-to-peer user-generated content.

Having reviewed the variety of the user-generated content, Professor Sang Jo Jong, in his article<sup>19</sup>, has raised a question whether copyright owners were expected to engage in a fair use analysis prior to issuing a takedown notice regarding a user-generated content available on the Internet, and whether an online service provider would have to follow a takedown notice if the copyright owner and internet user had conflicting views on fair use. In some jurisdiction, for example in the US, the judge-made laws are considering to put a condition before copyright holders' to analyze the fair use in a good faith belief.<sup>20</sup> However, this issue of matter is still ongoing and controversial subject in the copyright regime to the online world.

## 1.2. User's rights

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<sup>16</sup> Jinho, Suh. "UCC (User-created Contents) and Fair Use in Korea – In light of "Son Dam-bi" Decision". *Seoul Law Journal*, Vol.53, No.3, Sep. 2012, pp. 729-758.

<sup>17</sup> See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 88 U.S.P.Q.2d 1629 (N.D. Cal. 2008)

<sup>18</sup> Gervais, Daniel. "The Tangled Web of User-Generated Content: Making Copyright Sense of User-Generated Content". *Vanderbilt J. of Ent. And Tech. Law*, Vol. 11:4:841, 2009.

<sup>19</sup> Jong, Sang Jo. "Fair Use: A Tale of Two Cities, Intellectual Property in Common Law and Civil Law", *Edward Elgar*, Northampton, 2013, pp. 176-194.

<sup>20</sup> See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 88 U.S.P.Q.2d 1629 (N.D. Cal. 2008)

The main and ultimate purpose of copyright is to promote the dissemination of knowledge to the public by keeping a golden balance between copyright holders' right and the public interest to access the knowledge. Therefore, under copyright protection, it gives an opportunity to access the copyrighted materials so that to create a new copyrighted material with some creative effort. The rise of user-generated content places individual users at the forefront of creative processes, strengthening the need to facilitate unlicensed use of creative materials. Our everyday lives are becoming more related to the contents made by users and disseminated through network for free. Now people search blogs for recommendation of delicious food places, read reviews of books they are interested in in advance, post their day-to-day lives on the platforms, share links to connected friends, and so on. This culture of networking puts a question before the copyright regime that what kind of rights or defenses users hold so as to generate contents.

*Copyright limitations and exceptions are not mere defense, but constitute legitimate user's rights*<sup>21</sup>

Under the long lasted copyright concept of limitations and exceptions to copyrighted works, users may relate their rights to use without authorization. In most cases, users exploit preexisting copyright works in order to generate their new ideas into it and furtherly, to create creative or productive use that may be also protected directly by copyright. In this context, the Supreme Court of Canada made a move to declare fair dealing as a user's right<sup>22</sup>:

*"[...] the fair dealing exceptions is perhaps more properly understood as an integral part of the Copyright Act than simply a defense. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right."*

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<sup>21</sup> Lambrecht, Maxime and Cabay, Julien. "Remix Allowed: Avenues for Copyright Reform Inspired by Canada". *Journal of Intellectual Property Law and Practice*, Vol.11, No.1, 2016, pp. 21-36

<sup>22</sup> Supreme Court of Canada, 'CCH Canadian Ltd', 2004 SCC 12, para. 48, *cited in* Lambrecht and Cabay, *id.*

Furthermore, the openness of internet platforms has normalized the noncommercial appropriation of other peoples' content as an act of communication and expression.<sup>23</sup> For example, many of these acts of appropriation would easily qualify as fair use in the US, many are arguable but not clear cut, and many are obviously not fair use.<sup>24</sup> Under the concept of fair user doctrine in the US and four factors to determine the fair use, courts in the US analyze whether the user's work in question is transformative or not in order to be a fair use. Transformative use is considered a cornerstone of fair use, and was widely recognized by courts and legislators, in both artistic and technological contexts.<sup>25</sup> For other countries, they also may fall under the limitations and exceptions to the copyright.

Elkin-Koren (2015) suggests that a user's right should be productive use of copyrighted materials, building on existing work to create a new creative content, putting works to new use, or adapting content for ongoing needs in order to encourage users' authorship. Therefore, he claims that users' right should foster more certainty by adding specific rights apart from fair use.

Recently, Canadian Copyright Act<sup>26</sup> introduced a non-commercial user-generated content exception to copyright infringement<sup>27</sup>. It states as follows in the Section 29.21 of the Act:

*“It is not infringement of copyright for an individual to use an existing works or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual – or, with the individual's authorization, a member of their household – to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if:*

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<sup>23</sup> Sag, Matthew. Internet Safe Harbors and the Transformation of Copyright Law. *93 Notre Dame L. Rev.*, 499, 2017

<sup>24</sup> Sag, *id.*

<sup>25</sup> Elkin-Koren, Niva, *supra n 12*. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569(1994); Perfect 10 v. Amazon.com, 508 F.3d 1146 (9<sup>th</sup> Cir. 2007); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014)

<sup>26</sup> Copyright Act of Canada (R.S.C., 1985, c. C-42), last amended on 19 June 2017, <https://laws-lois.justice.gc.ca/eng/acts/c-42/>

<sup>27</sup> Section 29.21, *The Canadian Copyright Modernization Act* (came into effect in November 2012)

- (a) *The use of, or the authorization to disseminate, the new work or other subject-matter is done solely for noncommercial purposes;*
- (b) *The source – and, if given in the source, the name of the author, performer, maker or broadcaster –of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;*
- (c) *The individual has reasonable grounds to believe that the existing work or subject-matter or copy of it, as the case may be, was not infringing copyright; and*
- (d) *The use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation of or potential exploitation of the existing work or other subject-matter – or copy of it – or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.”*

Today, Canadian copyright law is best known for having affirmatively adopted the view that exceptions are more properly regarded users’ rights, the incorporation of technological neutrality as a foundational principle of copyright law, and the affirmation of an expansive approach to fair dealing, which Canada’s High Court views as the most important users’ right. Canada remains the only country in the world where the highest court has positively (and repeatedly) affirmed the principle of users’ right within copyright law.<sup>28</sup>

At the international level, under international copyright treaties<sup>29</sup>, signatories are permitted to establish limitations and exceptions on the national level but are subject to the so-called “three-step test”: the “three-step test” requires that limitations and exceptions must be *i*) confined to special cases, *ii*) not in conflict with a normal exploitation of the work, and *iii*) of no reasonable prejudice to the legitimate interests of the author. Some countries prefer to adopt an unexhausted

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<sup>28</sup> Geist, Michael. “The Canadian Copyright Story: How Canada improbably became the world leader on users’ rights in copyright law”. *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017

<sup>29</sup> The Berne Convention for the Protection of Literary and Artistic Works (Article 9), WIPO Copyright Treaty (Article 10), WIPO Performances and Phonograms Treaty (Article 16), and Agreement on Trade-related Aspects of Intellectual Property Rights (Article 13)

list, while others choose to adopt a closed list for those limitations and exceptions. Therefore, as same as with difficulty in determining “fair use” or “fair dealing” for traditional copyrighted works, the complexity arises for UGC related copyrighted works and users’ right of use of copyrighted materials as well.

### *User’s right as a fundamental right*

The legal concept of the user’s right also includes freedom of expression, freedom of association and the right to privacy. In the copyright system to the online environment, these rights give a second thought for the implementation of any governmental or regulatory measures intended to restrict the user’s activities on the internet. From a historical perspective, freedom of expression and copyright protection share the same origin and they are interdependent with one other.<sup>30</sup> The copyright is originally the result of freedom of expression, and consequently, the copyright protect the forms of expression instead of ideas expressed, while freedom of expression focuses on the ideas to be expressed instead of the free choice of the forms for expressing ideas.<sup>31</sup> Having adhered the freedom of expression as fundamental right, many civil right communities stand against the excessive measures to be taken by online service providers on the user-generated content. For example, the Manila Principles on Intermediary Liability sets out safeguard for content restriction on the Internet with the goal of protecting users’ freedom of expression.<sup>32</sup>

As for the right to privacy, after the movement of the “right to be forgotten” initiated from the practice in the European Union and Argentina<sup>33</sup>, several

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<sup>30</sup> Guan, Wenwei. “Fair Dealing Doctrine Caught between Parody and UGC Exceptions: Hong Kong’s 2014 Copyright Amendment and Beyond”. *45 Hong Kong Law Journal*. 719, 2015

<sup>31</sup> Guan, *id.*

<sup>32</sup> See Manila Principles on Intermediary Liability, Intro, <https://www.manilaprinciples.org>. See Manila Principles on Intermediary Liability Background Paper (May 30, 2015), [https://www.eff.org/files/2015/07/08/manila\\_principles\\_background\\_paper.pdf](https://www.eff.org/files/2015/07/08/manila_principles_background_paper.pdf); Jyoti Panday, Carlos

Lara, Kyun Park, and Kelly Kim, Jurisdictional Analysis: Comparative Study Of Intermediary Liability Regimes Chile, Canada, India, South Korea, UK and USA in support of the Manila Principles on Intermediary Liability (July 1, 2015), [https://www.eff.org/files/2015/07/08/manila\\_principles\\_jurisdictional\\_analysis.pdf](https://www.eff.org/files/2015/07/08/manila_principles_jurisdictional_analysis.pdf)

<sup>33</sup> [https://en.wikipedia.org/wiki/Right\\_to\\_be\\_forgotten](https://en.wikipedia.org/wiki/Right_to_be_forgotten)

countries<sup>34</sup> have adopted this concept as a human right into their legal system, claiming that an individual has the right to have certain data deleted so that third person can no longer trace them. For example, the Court of Justice of the European Union ruled in the case *Google Spain SL, Google Inc. v. Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez* (2014) ruled that an Internet search engine operator is responsible for the processing that it carries out of personal information which appears on web pages published by third parties.<sup>35</sup>

As discussed above, it is clearly seen that as same as a copyright holder's exclusive right, a user's right is soundly protected under the law and relevant international human right agreements, and is certain that the user's right should be carefully considered in imposing any restriction on them. However, at the other end, there is no such thing as a right with no limitation.

### *1.3. Current State of User-Generated Content in the Legal Context*

First of all, in an international scale, through the ratification of the WIPO Copyright Treaty and the WIPO Performance and Phonogram Treaty (together, the WIPO Internet Treaties), both exclusive rights and limitations and exceptions have been clarified to apply to existing norms in the digital environment. This gives a legal ground to review and analyze today's user-centered activities on the online world from an existing copyright perspective of the offline world.

In a national scale, Canada has become first and only country to adopt the user-generated content exception within its copyright framework. Other countries, including Australia<sup>36</sup> and Hong Kong<sup>37</sup>, have been introduced parody<sup>38</sup> exception to

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<sup>34</sup> European Union, Spain, Germany, Argentina, United States, India, South Korea and China, [https://en.wikipedia.org/wiki/Right\\_to\\_be\\_forgotten](https://en.wikipedia.org/wiki/Right_to_be_forgotten)

<sup>35</sup> Streitfield, David. "European Court Lets Users Erase Records on Web", <https://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html>

<sup>36</sup> In 2006, the parody and satire exceptions were added under the Copyright Amendment Bill of Australia.

<sup>37</sup> In 2014, a new fair dealing exception that covers works for the purpose of "parody" was introduced.

<sup>38</sup> "A transformative use of a well-known work for the purposes of satirizing, ridiculing, critiquing, or commenting on the original work, as opposed to merely alluding to the original to draw attention to the later work.", Black's Law Dictionary.

their copyright law. Following the amendment made to the Canadian copyright system, an exception of user-generated content has been introduced to the consideration of the European Commission as well<sup>39</sup>. As for the US, the Supreme Court of the US in *Campbell v. Acuff-Rose Music, Inc.*<sup>40</sup> case, held that 2 Live Crew's commercial parody may be a fair use within the meaning of the US Copyright Act, and defined the importance of being transformative when the alleged works claims for a fair use doctrine. These efforts in various jurisdictions indicate that countries have started considering and welcoming the phenomenon of user-generated content in the participative and social web to their copyright frameworks.

However, for the time being, the reflection of the concept of user-generated content to the copyright legal framework is still a controversial subject among scholars and lawmakers due to its feature of uncertainty and possibly ability of having a broader meaning that may somewhat have a chilling effect on the copyright holders' exclusive rights. For example, in case of Hong Kong, the lawmakers of Hong Kong refused to adopt the non-commercial user-generated content exception after the reviewing Canada's adoption while acknowledging the works made for the purpose of parody be allowed as an exception. One of the main grounds of such refusal was that the user-generated content exception could not meet the requirement of "three-step" test under the relevant enshrined in the TRIPS Agreement, in particular the first criterion ie any limitation or exception should be confined to a certain special cases.<sup>41</sup>

#### *1.4. Conclusion to the Chapter*

Since the advent of Web 2.0 technologies, users have strengthened their status as an active player in the copyright world, both offline and online, along with copyright holders and online service providers. Users may often be opposed by the copyright holders for their activities on the internet. On the other side, their right to

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<sup>39</sup> Lambrecht, Maxime and Cabay, Julien. "Remix Allowed: Avenues for Copyright Reform Inspired by Canada". *Journal of Intellectual Property Law and Practice*, Vol.11, No.1, 2016, pp. 21-36

<sup>40</sup> *Campbell v. Acuff-Rose Music, Inc.*, 7 March 1994.

<sup>41</sup> Guan, *supra n.* 30.

the freedom of expression and their uses of the source work that are permitted by the copyright law have often been threatened by the online service providers' on-demand measures to protect the copyright holders' exclusive rights. Therefore, indeed, the users are in a critical position as same as the copyright holders and online service providers.

As discussed in the chapter, a user's right is in a tight connection with the copyright limitations and exceptions. According to the recent literatures, there is a tendency to consider the limitations and exceptions as a user's right as strong as the copyright holders' exclusive rights. Following the tendency and in connection with the various emergences of user-generated contents, many countries<sup>42</sup> have adopted an open-ended limitations and exceptions as same as the fair use in the US and several countries have considered to adopt the fair use doctrine. Another approach other countries<sup>43</sup> have adhered is to enlarge the current list of limitations and exceptions to the copyright by adding a new exception, i.e. non-commercial use-generated content and parody, satire, etc.

In addition, user's activities on the internet are not always protectable by copyright; it often happens to be a copyright infringement. To resolve online piracy, several countries have enforced the online copyright protection measure with the participation of online service providers, under which the online service providers are obliged to take certain measures to the copyright infringement including takedown notice. In case of explicit infringement such as mere reproduction of the source work, it could be effective. However, in case of transformative user-generated content, it is certain that the takedown notice upon the copyright holder's request without good faith could have an adverse effect towards the user's right to the freedom of expression.

In nutshell, the phenomenon of user-generated content has created various kinds of challenges to the copyright system to date.

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<sup>42</sup> South Korea, Singapore, Malaysia, Taiwan and Israel have adopted the open "fair use" exceptions.

<sup>43</sup> Australia and Ireland have proposed the adoption for consideration.

## CHAPTER 2

### GENERAL ASPECTS OF INTERMEDIARY LIABILITIES

#### *2.1. Copyright Infringement*

##### *2.1.1. Direct and Indirect Infringement in Copyright Law*

A good practice of copyright protection requires adopting an effective system for imposing legal liabilities for copyright infringement in an appropriate amount to ensure a copyright holder's exclusive rights and to prevent from further infringement. The prerequisite to the legal liability is an incident of infringement. Without infringement, there would be no liability. Therefore, before the discussion of the liability, at the outset, this chapter will touch upon the notion of copyright infringement.

In general terms, copyright provides an author with a tool to protect a work from being taken, used, and exploited by other without permission by granting them the exclusive right to produce, prepare derivative works, distribute copies by sale or other transfer of ownership, to perform and display it publicly and to authorize others to do so. If someone trespasses these exclusive rights held by the copyright owner without authorization or in a bad faith, such person may be called for the allegation of copyright direct infringement. In case of direct infringement, it is easier than indirect infringement to find the infringer and impose appropriate liability for his or her direct action or inaction of such infringement, provided that the infringed proves its ownership of the copyright and the wrongful action of the correspondent that caused direct infringement. Contrary, if there were another person or persons involved in the infringing activities, there would be a question of whether such person or persons would be liable for the infringement for their involvement to the infringing activities in any of ways of inducing, contributing, aiding and abetting, or otherwise influencing for the infringement.

Online service providers, or intermediaries, are vulnerable to infringement liability from at least four different sources:<sup>44</sup> the person creating the system may incorporate unauthorized copies of other people's work; similarly, those operating and maintaining the system may add unauthorized copies; subscribers may also upload infringing copies of works to a system; and infringing copies may be transmitted through the system. Hence, intermediaries may bear liabilities for both direct and indirect infringement subject to the characteristics and amount of involvement to the infringing activities.

In copyright law, liability for indirect infringement is usually sought when there are circumstances where it is impractical for the owners of intellectual property to enforce their rights against direct infringers, and the owners have sought remedies against other persons who they claimed were responsible for indirect infringement of their intellectual property rights.<sup>45</sup> Owing to these circumstances, the copyright holders choose to go after intermediaries reasoning that they would be liable for indirect infringement of their rights.

Copyright law has developed three separate doctrines for indirect infringement: vicarious infringement, contributory infringement and inducing infringement.<sup>46</sup> In general, liability for indirect infringement requires a showing of the third party's intent, knowledge, or control with respect to the direct infringement. In case of common law legal system, the doctrines of indirect infringement have been developed through various court decisions over years, while in civil law legal system, the concept of indirect legal system are found in a part of tort law under civil law for monetary damages or under criminal law in determining joint offenders. Terminology of vicarious, contributory and inducing infringement are used to denote the various types of indirect infringement.<sup>47</sup>

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<sup>44</sup> Rosenoer, Jonathan. *Cyberlaw: The Law of the Internet*. Springer-Verlog New York Inc., 1997, pp. 7

<sup>45</sup> Adams, Charles W. "Indirect Infringement from a Tort Law Perspective". *42 University of Richmond Law Review*, 635, 2008

<sup>46</sup> Adams, *id.*

<sup>47</sup> The term "vicarious infringement" and "contributory infringement" are used in the legal context of the United States. For other countries, similar terms are used to define the same concept, subject to the variation of translation.

### 2.1.2. Indirect Infringement in the United States

The U.S. Copyright Act does not expressly provide for indirect liability for inducing infringement of a copyright or contributing to infringement, whereas the Patent act defines contributory infringement and inducement of infringement.<sup>48</sup> Apart from liability for direct infringement that is imposed on a strict liability basis, liability for indirect infringement has generally required a showing of the third party's intent, knowledge, or control with respect to the direct infringement. The particular requirements for indirect infringement vary between patent, copyright and trademark law, and they appear to still be evolving in the case law.<sup>49</sup>

Indirect copyright infringement claims mostly arise in two contexts<sup>50</sup>. In the first context, the defendant has controlled premises where copyright infringement is occurring and received financial benefits from the copyright infringement. It is based on the extension of the agency principle of respondent superior and liability is imposed under the heading of vicarious copyright infringement. In the second context, the defendant either materially contributes to or induces copyright infringement by another person and the defendant knows of the infringement. Liability is imposed under the heading of contributory infringement.

#### i) Vicarious Infringement

Vicarious infringement, which is derived from the principle of respondent superior, requires involvement of another party. As such, a copyright owner who claims vicarious infringement must first establish that a third party has directly infringed upon his copyright.<sup>51</sup> Upon the proof of direct infringement by another, vicarious liability exists when (1) a defendant has the right and ability to supervise the infringing conduct, and (2) the defendant has an obvious and direct financial interest in the infringement.<sup>52</sup>

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<sup>48</sup> Flinn, Patrick J. "Chapter 7. Remedies in Copyright Cases". *Handbook of Intellectual Property Claims and Remedies*. Aspen Publishers, 1<sup>st</sup> Edition, 2019-1 Supplement

<sup>49</sup> Adams, Charles. W. "Indirect Infringement from a Tort Law Perspective", *42 U. Rich. L. Rev.* 635, 2008

<sup>50</sup> *Id.* at 50.

<sup>51</sup> Kim, Eugene C. "YouTube: Testing the Safe Harbors of Digital Copyright Law", *17 S. Cal. Interdisc. L. J.*, 139, 2007.

<sup>52</sup> Kim, *id.* See *Gordon v. Nextel Communs.*, 345 F.3d 922, 925 (6<sup>th</sup> Cir. 2003)

Neither knowledge nor participation is required in case of vicarious liability. The rule is that a defendant may be held liable for the actions of the primary infringer where the defendant has the right and ability to control the infringer's acts and receives a direct financial benefit from the infringement.<sup>53</sup> In common law system, especially in the United States, the application of vicarious and contributory infringement doctrines varies on a case-by-case basis, however, the main principle behind them has not shaken easily. For example, in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, the court concluded that “*even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.*”<sup>54</sup>

ii) *Contributory Infringement*

Contributory infringement, founded upon the premise that “one who directly contributes to another’s infringement should be held liable,” parallels the criminal act of aiding and abetting.<sup>55</sup> The doctrine of contributory copyright infringement originated in *Kalem Co. v. Harper Bros.*<sup>56</sup>, where the defendant produced a film version of the novel, Ben Hur, and then advertised and sold films to jobbers who infringed the plaintiff’s copyright by publicly exhibiting the films. Following the *Kalem*, the Second Circuit phrased the standard for contributory copyright infringement in *Gershwin*<sup>57</sup> as follows: “*traditionally, one who, with knowledge of the infringing activity, includes, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory infringer’*”. Numerous cases have quoted this language with approval.<sup>58</sup> The copyright owner is then required to establish that the defendant has knowledge of the infringing activity and induces, causes, or materially contributes to the infringing conduct.<sup>59</sup> The

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<sup>53</sup> Kim, *id.* See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 306 (2d Cir. 1962)

<sup>54</sup> Kim, *id.* See 443 F.2d 1159, 1162 (2d Cir. 1971)

<sup>55</sup> Kim, *id.*

<sup>56</sup> 222 U.S. 55, 63 (1917)

<sup>57</sup> *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1192 (2<sup>nd</sup> Cir. 1971)

<sup>58</sup> Kim, *id.* See *Napster II*, 239 F. 3d at 1023-24

<sup>59</sup> Kim, *id.*

aforementioned knowledge element is objective and fulfilled only when the defendant knows and has reason to know of the infringing activity.<sup>60</sup>

Also, as aforementioned, hence the doctrine of contributory infringement is not a black-and-white issue depending on the features of cases, it usually gives a work for courts to determine the intention, knowledge, contribution, or control with respect to the direct infringement. As such, in *Sony Corp. of America v. Universal City Studios*<sup>61</sup>, the Supreme Court framed the issue of the case as whether liability should be imposed because of Sony's sale of "equipment with constructive knowledge of the fact that its consumers may use that equipment to make unauthorized copies of copyright material." Even though, in a slight view, Sony's video tape recorder may be seen as contributing the direct infringement by making it available to reproduce the authorized copies, the Court held that the sale of copying equipment would not constitute contributory infringement if the equipment was either widely used for noninfringing purposes or was capable of substantial noninfringing uses.<sup>62</sup>

### *iii) Inducement Theory*

In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>63</sup>, a new theory of secondary infringement that creates liability for intentionally inducing copyright infringement was introduced. The case involved two peer-to-peer (P2P) software vendors, Grokster and StreamCast, which released free file sharing programs that did not require central servers for information storage. Defendants were sued by a group of copyright owners claiming both contributory and vicarious infringement of their copyrights. Defendant claimed that they could not be held liable for secondary infringement because their software programs were designed in such a way that the companies were entirely unable to acquire knowledge of any specific infringing actions. Relying on the decision in *Sony*, they also argued that their programs were capable of substantial noninfringing uses. However, the Court held that "one who

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<sup>60</sup> Kim, *id.*

<sup>61</sup> 464 U.S. 417 (1984) In *Sony*, Universal sued Sony for over its manufacture and sale of videocassette recorders, claiming that Sony was liable for contributing to the infringement of consumers who purchased VCRs and used them to tape television broadcasts.

<sup>62</sup> *Id.* supra note at 95, pp. 667

<sup>63</sup> 545 U.S. 913 (2005)

distributes a device with the object of promoting its use to infringing copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-part action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.”

In *A&M Records, Inc. v. Napster Inc.*<sup>64</sup>, the court held that Napster was liable for indirect copyright infringement, reasoning that Napster had the ability to limit copyright infringement in ways that videocassette recorder in *Sony* case do not. Napster had developed an online system for their users, which enabled the exchange of music files. Having reviewed the Napster's contribution to the direct infringement, the court concluded that Napster had actual knowledge of that specific infringing material was available using its system and could have used that knowledge to identify and block at least some of the infringing material.

Thus, the inducement rule was built not to penalize ordinary commerce in the form of legitimate product distribution, but to premise liability on intentional, culpable expression and behavior.<sup>65</sup>

### *2.1.3. Indirect Infringement in China*

The People's Republic China (“China”) is a representative of countries with civil law legal system. The Chinese legal system is in form much closer to the legal systems of continental Europe than to the common law, but also contains substantial elements borrowed from the Soviet Union and inherited from traditional Chinese law.<sup>66</sup> Also, China is a fast growing country in terms of technology development as well as online service providers except those based in the United States. Thus, it is worth to study how the concept of indirect infringement and secondary liability of China is reflected to their copyright legal system.

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<sup>64</sup> 239 F.3d 2004 (9<sup>th</sup> Cir. 2001)

<sup>65</sup> Kim, *id.*

<sup>66</sup> Clarke, Donald C. *The Chinese legal system*,  
<http://docs.law.gwu.edu/facweb/dclarke/public/chineselegalsystem.html>

In China, intellectual property rights are treated as a subfield of civil law, so some of the Chinese civil laws provide some guidance on indirect infringement.<sup>67</sup> In general, the Chinese legal system acknowledges the indirect infringement within its legal framework, and provided that: “*anyone who induces or contributes to intellectual property infringement by another is a co-infringer, that is, joint and severally liable along with the direct infringer*”<sup>68</sup> and “*one who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.*”<sup>69</sup> Article 36 of the Tort Law also specifically regulated indirect infringement liability for internet service providers, stating that “*where an internet service provider knows that one of its network users is infringing a civil right or interest of another person through the ISP’s network services, but where the ISP fails to take the necessary corrective measures, the ISP shall be jointly and severally liable with the network user for any additional harm that occurs as a result.*”

Having reviewed the main disputes regarding P2P services in indirect infringement jurisprudence in China, the courts of China mainly have considered the business model and features of P2P service that allows users to search, download, watch, listen to and burn songs, and concluded that proving knowledge of specific acts of direct infringement was unnecessary and not a critical element in finding indirect infringement liability. Instead of relying on the actual knowledge requirement, the courts have focused on the defendants’ ability to prevent from the direct infringement within their scope of business. Also, the courts have relied on the reasoning that the defendant should have known of their users’ infringing activities, therefore, it should be liable for the infringement.<sup>70</sup>

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<sup>67</sup> Cao, Yang. “Indirect Infringement of Intellectual Property in China”. *Queen Mary Journal of Intellectual Property*, Vol.6, No. 2, 2016, pp. 248-259

<sup>68</sup> Cao, *id.* See Article 148 of the “Opinions of the Supreme People’s Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People’s Republic of China (For Trial Implementation)”, 1988

<sup>69</sup> Cao, *id.* See Article 9 of the Chinese Tort Law

<sup>70</sup> Cao, *id.* See Shanghai Bushen Sound Music & Enter. Co. v. Kuro, Beijing No.2 Intermediate Court (Case No. Minchuzi 13739/2005), and Zhongqingwen v. Baidu, Beijing High court (Case No. Gaominzhongzi 2045/2014)

Furthermore, given the fact that the determination of contributory infringement is mostly subjective depending on the case, it appears that the courts in China likely to achieve different result in their review of whether contributory infringement is substituted or not. Even though in determination of contributory infringement courts often examine the knowledge of alleged defendant about the direct infringement, the laws of China does not provide any guidance on how to interpret the word “knowledge”. While “knowledge” within the meaning of Paragraph 3 of Article 36 of China’s Tort Law should include both “actual knowledge” and “has reasonable grounds to know”, Article 7 of the Interpretation of the Supreme People’s Court in Copyright Disputes, on the other hand, requires that network service providers have actual or constructive knowledge of infringing acts before they can be held indirectly liable.<sup>71</sup> Constructive knowledge is a concept that imputes knowledge based on facts from which a reasonable man would arrive at the relevant awareness<sup>72</sup>.

Besides those mentioned above, the courts in China uses the concept of “recklessly letting it happen” to impute constructive knowledge of infringement.<sup>73</sup> For example, the Shanghai No. 1 Intermediate Court, has stated that imposing an affirmative duty to supervise content posted on video-sharing websites is not an excessive burden. Where such a service provider specifically designs its website to allow massive uploading of video content but fails to take appropriate measures to prevent infringement the website provider will be held at fault.<sup>74</sup>

In a nutshell, there is no clear rule on the concept of indirect infringement in copyright in China and the courts tend to apply different rules and interpretations within the concept of unclear yet broader wordings under relevant laws and regulations, e.g. “knowledge”. Also, some courts decisions under which indirect infringement has found in relation to the business model of the infringer are being criticized for its harmful effect on economic and technical development.

## 2.2. *Internet Intermediary*

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<sup>71</sup> Cao, *id.*

<sup>72</sup> Cao, *id.*

<sup>73</sup> Cao, *id.*

<sup>74</sup> Cao, *id.*

Internet intermediary, in general, refers to a company that facilitates the use of the Internet. Another term used commonly is the “internet service provider”. The term ‘service provider’ (let alone ‘online service provider’ or ‘internet service provider’ or ‘ISP’, with which ‘OSP’ is sometimes used interchangeably more generally) has no consistent meaning across borders. Like ‘online service provider’, the term “internet intermediary” also lacks a single, common and consistent usage.<sup>75</sup> In the latter chapters, both terms will be used interchangeably, having a same meaning.

In the international level, the OECD has proposed a definition of “Internet intermediaries” and attempted to identify categories of Internet intermediaries. According to the OECD report<sup>76</sup>, “Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.”

Internet intermediaries come in all shapes and sizes, but may be ground into different categories depending on the role that they play in the online communication or transaction chain.<sup>77</sup> These varying roles are also frequently impact on the level if their involvement in the primary activity – ranging from being entirely passive middlemen, which simply provide the setting for the interactions, to those that take an active facilitatory role – which in turn is likely to have repercussions for liability<sup>78</sup>.

Within the context of the definition, the OECD proposed six types of Internet intermediaries as representatives as such, including<sup>79</sup>:

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<sup>75</sup> Dinwoodie, Graeme B. *Secondary Liability of Internet Service Providers*. Springer, 2017 <http://lps3.ebookcentral.proquest.com/libproxy.snu.ac.kr/lib/snulibrary-ebooks/detail.action?docID=4890744>.

<sup>76</sup> OECD, *The Economic and Social Role of Internet Intermediaries*, April 2010, <https://www.oecd.org/internet/ieconomy/44949023.pdf>

<sup>77</sup> Rowland, Diana, Lohl, Uta, and Charlesworth, Andrew. *Information Technology Law*. Routledge, 4<sup>th</sup> edition, 2012

<sup>78</sup> Rowland et al. *id.*

<sup>79</sup> OECD, 2010, *id.*

- i) Internet access and service providers (ISPs), e.g. *Verizon, Comcast, NTT, Internet Initiative Japan, BT, Free.fr* and mobile operators offering Internet access such as *Vodafone, Orange, T-mobile, MNT*
- ii) Data processing and web hosting providers, including domain name registrars, e.g. *Navisite, Akamai, OVN, Easyspace, Packspace, Register.com, Go Daddy, GMO Internet Inc.*
- iii) Internet search engines and portals, e.g. *Google, Yahoo, Baidu, Naver, MSN*
- iv) E-commerce intermediaries, where these platforms do not take title to the goods being sold, e.g. *Amazon, Ebay, Ali Baba, Priceline.com*
- v) Internet payment systems, e.g. *Visa, Paypal, MasterCard*
- vi) Participative networking platforms, which include Internet publishing and broadcasting that do not themselves create or own the content being published or broadcast, e.g. *Facebook, LinkedIn, YouTube, Ohmynews*

Providing a definition for Internet intermediaries and categorization is important to determine the type of infringement, whether direct or indirect, and the immunity for liabilities that may be alleged for them. That being said, it is also important to consider that categories are often not clear-cut as Internet intermediaries may play more than one role and deliver their own content or otherwise actively participate.

In terms of terminology, especially in the US and UK, the types of internet intermediaries are classified into four under the terms of “mere conduit<sup>80</sup>”, “caching<sup>81</sup>”, “hosting” and “linking” ISPs.

### 2.3. *Secondary Liability for Internet Intermediaries*

Originally, the concept of liability for intermediaries has been developed in connection with the fact that copyright holders could not chase after every single infringers of their works protected by copyright. Instead of suing the number of infringers, not only is it easy for copyright holders to identify an intermediary as

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<sup>80</sup> i.e. merely transmitting content originated by and designed for other parties.

<sup>81</sup> Caching is ubiquitous technical process whereby local copies of remote web pages are made by hosts when requested, in order to speed up delivery of those pages on subsequent request to speed up the Web for all users.

infringer of their rights, but also it would be strategic in terms of the intermediary's ability to restrain or cease the infringer's illegal conducts.

Secondary liability is liability that is imposed upon a defendant who did not directly commit the wrongdoing at issue, but whom the law nonetheless holds responsible for the injuries caused.<sup>82</sup> The issue of liability for infringement may raise in both civil and criminal law sphere, depending on the legal context of a country in question. As discussed in the previous section, legal liabilities are determined in a close connection with the type and amount of infringement caused. In criminal law, but also in civil law, liability is on the whole-fault based – that is, based on the guilty mind, or in civil law, intention or negligence, in contrast with strict liability.<sup>83</sup> This reflects the concern that it is unfair to attach liability or the stigma of being a criminal to an innocent person and anyone who could not have prevented the wrongdoing.<sup>84</sup> This is relevant to intermediaries, who often have no, or limited, awareness of the substance of, and control over, the communications or transactions that they are facilitating.<sup>85</sup>

International agreements currently do not address issues of secondary liability for infringement of intellectual property rights, and international consensus on this topic is limited at best, even among the major industrialized nations.<sup>86</sup> As the matters of intellectual property law is conceived as territorial in reach, each nation is free to create its own rules and levels of legal protection regarding intellectual property rights in the absence of a governing international agreement imposing specific obligations. National laws vary considerably regarding the availability and extent of secondary liability.<sup>87</sup>

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<sup>82</sup> Mark Bartholomew & John Tehranian. "The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law". *21 Berkeley Tech. L.J.* 1363, 1366 (2006).

<sup>83</sup> Rowland, Diana, Lohl, Uta, and Charlesworth, Andrew. *Information Technology La.* Routledge, 4<sup>th</sup> edition, 2012 pp.73

<sup>84</sup> Rowland et.al.

<sup>85</sup> Rowland et.al.

<sup>86</sup> Oswald, Lynda J. "International Issues in Secondary Liability for Intellectual Property Rights Infringement". *American Business Law Journal*, Volume 45, Issue 2

<sup>87</sup> Oswald, *id.*

Intermediary liability has become increasingly controversial in relation to the copyright material as a result of two developments: the rise in authorized downloading of digital music, film and video since the beginning of the peer-to-peer revolution; and the arrival of the Web 2.0 interacted user generated and mediated content sites such as eBay, YouTube, Facebook, etc.<sup>88</sup> In terms of copyright infringements incurred by copyright holders in the digital world, internet intermediaries make contribution, in some extent, to the cause of the copyright infringements by creating a home for such infringed actions, or enabling users within their system. However, response to the situation that was necessary at that time to facilitate the development of the nascent market for intermediaries<sup>89</sup>, the early cases mainly originated in the United States embraced the idea of giving immunity from liability – or in US terminology, “safe harbors”.

Internet service providers’ case for immunity from content liability around the world, which heavily informed the development of limited liability regimes such as the US copyright statute, the Digital Millennium Copyright Act, and the European Union’s E-Commerce Directive, rested mainly at the time on three factors:

- i) Lack of effective legal or actual control;
- ii) The inequity of imposing liability upon a mere intermediary (“shooting the messenger”), and
- iii) In Europe especially, consequences for the public interest if unlimited liability was, nonetheless, imposed.<sup>90</sup>

As a result, by the year 2000 or so, arguably a rough compromise had emerged in both Europe and the United States among the various stakeholders that internet service providers should in principle be guaranteed freedom from liability for content authored by third parties, so long as they were prepared to cooperate when asked to remove or block access to identified illegal or infringing content.<sup>91</sup> As such, immunity from liability, on the other hand, creates a burden of obligation for

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<sup>88</sup> Edwards, Lilian. *Role and Responsibility of Internet Intermediaries in the field of Copyright and Related Rights*, 2010

<sup>89</sup> Diana Rowland, Uta Lohl, Andrew Charlesworth. *Information Technology Law* (2012) pp. 70-99

<sup>90</sup> Edward, *id.*

<sup>91</sup> Edward, *id.*

internet intermediaries to prevent from, or stop any copyright infringements within their system upon request from a copyright holder. As for the internet intermediaries that act as a “mere conduit”, they are less likely to be called for any secondary liability unless they start the transmission or otherwise actively participate in the process of transmission of information. On the contrary, with respect to their neutrality, hosting intermediaries, peer-to-peer service providers or linking aggregators may have a high possibility of bearing any liability for their users’ direct infringement, in some cases, even for their direct infringement.

Until now, the peer-to-peer service providers have been found guilty for their services provided for their users of which activities on the Internet infringed the copyright holders’ rights. As determined by the OECD report, since the first emergence of litigation regarding the peer-to-peer service with a centralized index to all the files stored and available for upload on the various users’ individual computers (in the Napster case, as discussed below), second generation of the P2P service has developed with no centralized index as an attempt to escape from the actual or constructive knowledge over infringing conduct and for the defense of “no knowledge, no control”. The BitTorrent protocol has emerged as a third generation in which files are not shared as one file but instead divided into small parts (bits) which can be individually uploaded and downloaded, enabling hundreds of thousands of users to very efficiently share even large files such as HD movie and video files. The evolution of peer-to-peer intermediaries indicated that the more the law becomes harsh and severe on intermediaries, the more advanced the intermediaries becomes so as to release them from liability.

In response to the combat with copyright infringement in the Internet, some of countries, especially US and UK, pioneered to impose an obligation for intermediaries to cooperate against copyright infringements by taking range from sending warnings to users, to monitoring traffic to and from users, to slowing their traffic or denying individual users access to certain websites and at a last resort, entirely disconnecting the user from Internet access.

Model legal frameworks for Internet intermediaries has developed taking two different approaches: (i) “horizontal” regulation that deals with the liability of

intermediaries across all types of content, such as the E-Commerce Directive, or (ii) “vertical” regulation which lays down rules for special domains (copyright, protection of children, personal information data, counterfeiting, domain names, online gambling, etc.).<sup>92</sup> Both US and UK models have become global model regimes in this area.

The OECD, in a comprehensive report on online intermediary liability<sup>93</sup>, identified four different models for ISP co-operation: “notice and takedown”, “notice and notice”, “notice and disconnection” or graduated response, and “filtering”, which involves either (i) requiring ISPs to block access to websites implicated in copyright infringement, or (ii) examining Internet traffic in transit to subscribers of the ISP to see if it is infringing content (monitoring or deep packed inspection) which may then lead to certain traffic being filtered or blocked.<sup>94</sup>

Riordan (2016)<sup>95</sup> in his book, has grouped the monetary remedies for liability that are implemented for intermediaries, into four meaning: i) strict liability, ii) negligence-based liability, iii) knowledge based standard, and iv) immunity. As for non-monetary remedies, injunctive remedies include removal, notification, disclosure, blocking, de-indexing, asset-seizure and freezing and disconnection.

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<sup>92</sup> Edward, *id.*

<sup>93</sup> OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, 29 September 2010, para 205

<sup>94</sup> Edward, *id.*

<sup>95</sup> Riordian, Jaani. *The Liability of Internet Intermediaries*. Oxford University Press, 2016

# CHAPTER 3

## A COMPARATIVE STUDY ON INTERMEDIARY LIABILITIES

### *3.1. The legal framework of intermediary liabilities in the United States*

According to my library research, I find that the United States is the one of first countries where the legal regime for intermediary liabilities had introduced. Since the adoption of Digital Millennium Copyright Act (“DMCA”) under which internet service providers are officially exempted from direct or indirect liabilities of any copyright infringement by their users, subject to certain requirement for the exemption to be applied (“safe harbor”), many scholars have made researches on this subject from many different angles.

Together with the protection of the Section 230 of the Communications Decency Act (CDA) that provides obligations to take measures against illegal information such as defamation, the internet safe harbors under the DMCA have compelled the growth of social networking and other Web 2.0 businesses.<sup>96</sup> Some argue that the safe harbors give too much cover to online intermediaries and diminish their incentives to address online infringement and the safe harbors should be abolished or made more demanding.<sup>97</sup> For example, Lital Helman and Gideon Parchomovsky argue that safe harbor protection should be limited to those platforms that can show that they employed the best filtering technology available.<sup>98</sup>

In this Chapter, I examine the main importance of the DMCA regulations in the U.S. copyright system regarding intermediary liabilities for the user-generated content as well as recent criticism for further improvement based on relevant judicial decisions.

#### *3.1.1. The necessity to adopt the DMCA*

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<sup>96</sup> Lee, Edward. “Decoding the DMCA safe harbors”. *Columbia Journal of Law and the Arts*, Vol.233, 269, 2009

<sup>97</sup> Sag, Matthew. “Internet safe harbors and the transformation of Copyright Law”. *Notre Dame Law Review*, 93, 499, 2017

<sup>98</sup> Nilman, Lital & Parchomovsky, Gideon. “The Best Available Technology Standard”. *111 Colum. L. Rev.* 1194 (2011)

The DMCA was enacted in 1998 to protect the intellectual property rights of creative works available online in ways that promote the use of the Internet, both by content providers and users.<sup>99</sup> Title 2 of the DMCA, *The Online Copyright Infringement Liability Limitation Act* (“OCILLA”), created a new section, 17 U.S.C 512, entitled “*Limitation on Liability Relating to Material Online.*”<sup>100</sup> This section was a compromise between content owners and website operators that often were the unlicensed distributors of that content. This compromise gives content owners a mechanism to protect their copyrighted material through detailed take-down provisions. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities by shielding them from copyright liability if certain conditions are met.<sup>101</sup>

Historically, the DMCA was intended to shepherd copyright into the digital age, but it was drafted at a time when the full implications of digitization and the global interconnectedness of the internet could not have been fully anticipated.<sup>102</sup> In 1998, only forty-one percent of American households were connected to the internet, and an hour of television would take more than twenty-four hours to download, assuming you had the latest 56k modem.<sup>103</sup> Google was founded on September 4, 1998, less than two months before the DMCA was signed into law.<sup>104</sup> At that moment when adopting the DMCA, there were several controversial judicial decisions under which judges concluded different ruling for similar cases regarding online infringement.

Cases in 1990s, such as *Playboy Enterprises, Inc. v. Frena*<sup>105</sup> and *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*<sup>106</sup> suggested that online service

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<sup>99</sup> Robert P. Latham et al. “An Update on the Legal Implications of User-Generated content: Facebook, YouTube, Twitter and Instagram”.

<https://www.jw.com/wp-content/uploads/2016/05/2022.pdf>

<sup>100</sup> Robert, *id.*

<sup>101</sup> Robert, *id.*

<sup>102</sup> Robert, *id.*

<sup>103</sup> Fox, Susannah. “The Internet Circa 1998”. *Pew Res. Ctr*, June 21, 2007. “A file of 577 MB would take twenty-four hours to download on a 56k modem with dialup access.”

<sup>104</sup> Fitzpatrick, Alex. “Google used to be the company that did nothing but search”. *Time*, Sept. 4, 2014.

<sup>105</sup> 839 F. Supp. 1552 (M.D. Fla. 1993)

providers, such as internet bulletin boards, would be held directly for unlawful material posted by their users. However, other cases, such as *Religious Technology Center v. Netcom Online Communication Services, Inc. (Netcom)*<sup>107</sup> and *CoStar group, Inc. v. LoopNet, Inc. (CoStar)*<sup>108</sup>, persuasively reached the opposite conclusion. In *Netcom*, the district court held that the defendant internet service provider was not liable for the automatic reproduction of a copyrighted work by its computer system. The court refused to impose direct liability on the service provider, reasoning that “*although the copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.*” In *CoStar*, the Fourth Circuit likewise explained that direct copyright infringement required more than “*mere ownership of a machine used by other to make illegal copies.*”

Besides that abovementioned contracting judicial decisions regarding online service providers, there was also the possibility of contributory and vicarious liability under copyright law principles. Under the principle of contributory copyright infringement, a service provider could be held responsible for user infringement if it had knowledge of, and made a material contribution, to a user’s infringement.<sup>109</sup> Under the principle of vicarious liability, a service provider that had the right and ability to supervise infringing conduct and a direct financial interest in the infringing activity would also be liable.<sup>110</sup> The existences of these two principles of secondary liabilities have had the liability for online intermediaries even more complicated.

Therefore, at the time of adoption of the DMCA, there was a strong demand coming from internet and online service providers to ensure their activities, at least to provide a general guideline for such kind of infringements. Eventually, U.S. Congress enacted a patchwork of reforms, concessions, and incentives tailored to the interest of major participants.<sup>111</sup> U.S. Congress sought to preserve strong

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<sup>106</sup> 982 F. Supp, 503 (N. D. Ohio)

<sup>107</sup> 907 F. Supp. 1361 (N.D. Cal. 1995)

<sup>108</sup> 373 F.3d 544, 550 (4<sup>th</sup> Cir. 2004)

<sup>109</sup> Matthew, *id.*

<sup>110</sup> Matthew, *id.*

<sup>111</sup> Matthew, *id.*

incentives for service providers and copyright owners to cooperate in dealing with online infringement.<sup>112</sup> To achieve this balance, internet and online service providers were given significant relief from prospective copyright liability under a set of provisions that are conventionally known as the DMCA safe harbors.<sup>113</sup>

### 3.1.2. Regulations of the DMCA

The DMCA safe harbors protect small blogs and large commercial enterprises alike. Amazon (crowd-sourced reviews), AT&T (internet access), Bing (search), Comcast (internet access), Facebook (social network), Flickr (photo sharing), Foursquare (social networking), Google (search), Instagram (photography-centered social networking), LinkedIn (social networking), Reddit (social news and commentary), Twitter (social networking), Wikipedia (crowd-sourced encyclopedia), YouTube (video sharing), and Yelp (crowd-sourced reviews) all rely on the DMCA safe harbors to avoid liability for acts of copyright infringement committed by their users.<sup>114</sup>

The legislation for the DMCA safe harbors has not been amended since 1998, despite significant developments in technology since that time (Google, Facebook, peer-to-peer file-sharing, YouTube and other user-generated content sites all post-date the development of the DMCA provisions, and arguably owe some part of their existence and growth to those safe harbours).<sup>115</sup>

The section 512 of the DMCA creates four limitations on liability for copyright infringement by an internet/online service provider (ISP, or OSP) based on the following categories of conduct by the ISP:

- 1) Transitory digital network communications, applies to transmission and routing activities;
- 2) System caching, applies to temporary intermediate storage during transmission;

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<sup>112</sup> Matthew, *id.*

<sup>113</sup> Matthew, *id.*

<sup>114</sup> Matthew, *id.*

<sup>115</sup> Weatherall, Kimberlee. "Internet Intermediaries and Copyright – A 2018 Update", at <http://www.digital.org.au/sites/digital.org.au/files/documents/Weatherall%20on%20Internet%20Intermediaries%20and%20Copyright%20-%20Update%20Final.pdf>

- 3) Information residing on systems at the direction of users, applies to user-directed storage of material on a system;
- 4) Information location tools, applies to directories, indexes, references, pointers and hypertext links including search engines.

Of the four distinct DMCA safe harbors that prevent user-induced copyright liability, the most significant and controversial is the section 512 (c) safe harbor for infringement claims that arise “*by reason of storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.*”<sup>116</sup> In other words, any entity that facilitates the creation or distribution of user-generated content will qualify as an online service provider in relation to the user-generated content.<sup>117</sup> It indicates that in the case the safe harbors under DMCA were absent in the copyright regime, there would have been a limitless number of potential claims against online service providers, including giant companies like Facebook, YouTube, etc., based on copyright law’s murky doctrines of secondary liabilities.

### *3.1.3. Eligibility requirements for safe harbor protection*

The DMCA imposes strict requirements in order to qualify for the liability protection of the safe harbors.<sup>118</sup> To be eligible for these safe harbors, one must first qualify as a service provider. Service provider is defined differently depending on the applicable safe harbor protection. Pursuant to 512(k)(1)(a), the term “*service provider*” as used in the 512(a) safe harbor provisions means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of a material of the user’s choosing, without modification to the content of the material as sent or received. Section 512(k)(1)(b) defined a “*service provider*” as a provider of online services or network access, or the operator of facilities therefore, and includes an entity described in Section 512(k)(1)(a). This definition applied to the 512(b) to (d) safe harbors.

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<sup>116</sup> Weatherall, *id.*

<sup>117</sup> Weatherall, *id.*

<sup>118</sup> Matthew, *id.*

If an entity meets the definition of “*service provider*”, it must then meet two overall conditions under 512(i) to be eligible for safe harbor protection; (a) termination policy; and (b) accommodation of standard technical measures.

As for the first condition to enable safe harbor protection for a service provider, the service provider must adopt and reasonably implement a termination policy for the accounts of subscribers who are repeat copyright infringers, and it must inform its subscribers and account holders of said policy.

In the case *Perfect 10., Inc. v. Ccbill LLC (Perfect 10)*<sup>119</sup> court held that a service provider “reasonably implements” a termination policy if (1) it has a working notification system, (2) a procedure for dealing with DMCA-compliant notifications, and (3) it does not actively prevent copyright owners from collection information needed is issue to such notifications.

Secondly, the service provider must also accommodate and not interfere with “standard technical measures”, which means technical measure that are used by copyrights owners to identify or protect copyrighted works and

- 1) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standard processes,
- 2) are available to any person on reasonable and nondiscriminatory terms,
- 3) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

Safe harbor protection is also contingent upon appointing a designated agent to receive takedown notices from copyright owners.<sup>120</sup>

#### *3.1.4. The UGC service provider safe harbor under section 512(c)*

The UGC service providers typically invoke the protection provided by the 512(c) safe harbor. This subsection affords safe harbor from liability for copyright infringement by reason of the storage at the direction of a user of material that

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<sup>119</sup> 488 F. 3d 1102 (2007)

<sup>120</sup> DMCA §512(c)(1)(c), (d)3

resides on a system or network controlled or operated by or for the service provider.<sup>121</sup> To qualify for this protection, UGC service providers must meet the general eligibility requirement discussed above, as well as the following eligibility requirement specific to 512(c):

- 1) The service provider must not have actual knowledge of infringing activity;
- 2) In the absence of actual knowledge, the service provider must not be aware of facts or circumstances from which infringing activity is apparent;
- 3) Upon obtaining actual knowledge or awareness, the service provider must act expeditiously to remove or disable access to the infringing material;
- 4) The service provider cannot receive a financial benefit directly attributable to infringing activity, when the service provider has the right and ability to control such activity;
- 5) Upon proper notification of claimed infringement, the service provider must respond expeditiously to remove or disable to infringing materials;
- 6) The service provider must have designated an agent to receive DMCA notices and provided the requisite contact information on its website and to the Copyright Office.

The DMCA generally does not require affirmative monitoring. Although affirmative monitoring may be required if such monitoring became a standard technical measure, such measures must be developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process, and there is little incentive for the service providers to develop such a broad consensus. Thus, as commentators have suggested, it seems unlikely that the need for any affirmative monitoring will be necessary by UGC service providers.

But once a UGC provider becomes aware of a red flag, it may lose liability protection if it fails to take appropriate action. This is the most significant safe harbor requirement in the DMCA. For a platform to remain eligible for the User

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<sup>121</sup> Matthew, *id.*

Directed Content or Information Location Tools safe harbor it must avoid both actual knowledge and red flag knowledge of specific acts of infringement.<sup>122</sup>

Notice-takedown process under Section 512(c)

Although the DMCA imposes strict eligibility requirements on service providers, it also imposes duties on copyright holders, the most important of which are the procedures for notifying a service provider about infringing material. A UGC service provider will not lose safe harbor protection for failing to respond expeditiously to remove or disable access to infringing material unless the copyright holder has issues a proper notification pursuant to the requirement contained in section 512(c). Under the DMCA, a proper notification must:

- 1) be a written communication;
- 2) be provided to the designated agent of the service provider; and
- 3) include substantially the following:
  - i. physical or electronic signature of person authorized to act on behalf of the copyright owner;
  - ii. identification of the copyrighted work claimed to have been infringed or, if multiple copyrighted works are on a single online site, a representative list of such works;
  - iii. identification of the infringing material that is to be removed or disabled and information reasonably sufficient to permit the service provider to locate the material;
  - iv. information sufficient for the service provider to contact the complaining party;
  - v. a statement that the complaining party has a good faith belief that use of the material is not authorized by the copyright owner, its agent, or the law; and
  - vi. a statement that the notification is accurate and under penalty of perjury the complaining party is authorized to act on behalf of the copyright owner.

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<sup>122</sup> DMCA §512(c)(1)(A)(i)-(iii), (d)(A)-(B)

Once proper notification is given, the service provider must move expeditiously to remove the infringing material. Section 512(g) protects service providers from liability for disabling access to or removing material or activity in good faith based upon an infringement claim by the copyright holder or based upon facts and circumstances from which infringing activity is apparent, regardless of whether the material is ultimately determined to be infringing.

To be entitled to this protection, the service provider must comply with the notification procedures set forth in section 512(g), which requires the service provider to:

- 1) promptly take reasonable steps to notify the subscriber that it has removed or disabled access to the material;
- 2) upon receipt of a counter notification, promptly provide the person who provided the notification with a copy of the counter notification, and inform the person that it will replace the removed material or cease disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

### *3.1.5. Notable Cases*

The Second Circuit of the United States Court of Appeals interpreted the DMCA's safe harbor provisions in *Viacom* below and applied that interpretation in *Capitol Records* as discussed below. These two cases have challenged the application of section 512(c) of the DMCA. As determined above, under the section 512(c) of the DMCA set certain requirements for specific service providers. The section 512(c)'s safe harbor protection will apply only if the service provider: (1) does not have actual knowledge that the material is infringing, (2) is not aware of facts or circumstances from which infringing activity is apparent, (3) acts expeditiously to remove or disable access to the infringing material after acquiring actual

knowledge, and (4) does not receive financial benefit from the infringing activity where the service provider has the right and ability to control such activity.

i) *Viacom Int'l, Inc. v. YouTube, Inc.* (“*Viacom*”)<sup>123</sup>

This is an important court decision in relation to the eligibility requirement of a service provider under Section 512(c) having an actual or apparent knowledge of copyright infringement by its user. This decision is issued in 2012 and included that even in the face of general awareness of widespread infringement, platforms are not required to any action to detect or discourage infringement unless and until they acquire knowledge of specific and identifiable infringements. Through the adoption of this decision, the difference between knowledge of specific acts of infringement and a general awareness of infringement was clearly illustrated.

In *Viacom*, a group of plaintiffs including Viacom, various Viacom affiliates, and the Premier League (an English soccer play) filed a class action against YouTube for copyright infringement on behalf of all copyright owners whose materials was copied, stored, displayed, or performed on YouTube without authorization.<sup>124</sup>

In its summary judgment submission, *Viacom* opined that *YouTube* not only was generally aware of, but welcomed, copyright-infringing work being uploaded on their website. Moreover, it argued that such knowledge of infringement themselves constituted facts or circumstances from which specific infringing activity was apparent, and should have unable YouTube for safe harbor exception. However, both the district court and the court of appeals rejected *Viacom*'s argument and held that only “knowledge of specific and identifiable infringements” would take the defendant outside the protection of the safe harbors.<sup>125</sup> This decision also highlights that the service provider does not need to take action with respect to any individual post until it receives a takedown requested directed to that particular post or otherwise become aware that the post is unauthorized.<sup>126</sup>

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<sup>123</sup> 676 F.3d 19 (2d Cir. 2012)

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Sag, Matthew. “Internet safe harbors and the transformation of Copyright Law”. *Notre Dame Law Review*, 93, 499, 2017

In addition, the plaintiffs argued that YouTube was willfully blind to specific instances of infringement and, therefore, should be disqualified from safe harbor protection. In this regards, the Second Circuit held that willful blindness can disqualify a service provider, but the provider must be turning a blind eye to specific and identifiable instances of infringement, not failing to make inquiries in the face of general awareness that some activities is infringing.

The findings in this decision not only secures internet and online providers' service in an important way, but also promotes the users' freedom to engage in the internet environment. However, it gives some pressure to copyright holders by putting the obligation to notify to them.

ii) *Capitol Records, LLC v. Vimeo, LLC* (“*Capitol Records*”)<sup>127</sup>

In *Capital records*, Capital Records, Virgin Records, and various subsidiaries of EMI Music sued Vimeo, an online video sharing website, for copyright infringement for hosting videos containing copyright protected sound recordings without the copyright holders' permission.<sup>128</sup> The suit, filed on December 10, 2009, alleged copyright infringement involving 199 user-created videos containing sound recordings to which plaintiffs owned the right to.<sup>129</sup>

The District Court granted Vimeo's motion for summary judgment for 162 of the 199 videos, holding that the DMCA's safe harbor protections applied to those videos while denying summary judgment for the remaining thirty-seven. After the District Court, Vimeo moved for reconsideration and certification for interlocutory appeal, and asked the court to certify for interlocutory appeal whether a service provider's mere viewing of a user-generated video containing third-party copyrighted music automatically gives rise to a tribal issue of fact as to the service provider's knowledge of infringement under the DMCA. The court modified Vimeo's question that whether, under *Viacom v. YouTube*, a service provider's viewing of a user-generated video containing all or virtually all of a recognizable, copyrighted song may establish facts or circumstances giving rise to red flag

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<sup>127</sup> 826 F.3d 78 (2<sup>nd</sup> Cir. 2016)

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

knowledge of infringement. In *Viacom*, the Second Circuit held that “the difference between actual and red flag knowledge is not between specific and generalized knowledge, but instead between subjective and objective standard. In other words, the actual knowledge provision turns on whether the provider actually or subjectively knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement objectively obvious to a reasonable person.”<sup>130</sup> Based on the *Viacom*, the court in *Capital Records* held that a reasonable person is someone without specialized knowledge or expertise in music or copyright laws. Using the obvious reasonable person standard, the court held that a Vimeo employee merely viewing a video, containing all or virtually all, of a copyrighted, recognizable song would be insufficient. Therefore, the court held that summary judgment should be granted in favor of Vimeo unless Plaintiffs could prove that Vimeo personal had red flag or actual knowledge of infringement.

As determined above, in both *Viacom* and *Capitol Records*, the Second Circuit held that an internet service provider is disqualified from safe harbor protection only when it has actual or red flag knowledge of specific acts of infringement. As such, the courts in both cases have defined the concept of actual and red flag knowledge too broad that copyright holders nearly cannot challenge disqualification of safe harbor against service providers.

iii) *Lenz v. Universal Music Corp.* (“*Lenz*”)<sup>131</sup>

Under the *Lenz* case, the notice-takedown procedure of the Article 512 had been challenged, and indicated that there would be threat of takedown procedure for user-generated contents that fall under the fair use as permitted by copyright law. As such, it is an important test case on the relationship between the DMCA takedown procedures and fair use. On February 7, 2007, Stephanie Lenz uploaded a twenty-nine second home video capturing his girl dancing in the family’s kitchen to the song Let’s go crazy by Prince. At that time, Universal Music Corporation

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<sup>130</sup> *Viacom Int’l*, 676 F.3d

<sup>131</sup> 572 F.Supp. 2d 1150, 1152 (N.D.Cal.2008); 801 F.3d 1126, 1132 (9<sup>th</sup> Cir. 2015) 815 F.3d 1145, 1151 (9<sup>th</sup> Cir.2016)

administered the relevant copyrights on behalf of Prince. Universal issued a DMCA takedown notice to YouTube on June 4, 2007.<sup>132</sup> YouTube removed the Video the following day. Lenz issued a counter notification, and her video was eventually restored some six weeks later.<sup>133</sup> The video was considerably short and basically, it was focused on the reaction of a child to the song. From the side of Universal, they asserted that they had “a good faith belief that the above-described activity in not authorized by the copyright owner, its agent, or the law”, which is questionable in terms of fair use doctrine.

The district court in *Lenz* held, in denying a motion to dismiss, that an allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine was sufficient to state a misrepresentation claim pursuant to the section 512(f)<sup>134</sup> of the DMCA.<sup>135</sup> On appeal to the Ninth Circuit, Universal argued that it was under no obligation to consider fair use before issuing a takedown notice. Moreover, Universal argued that as long as it did not actually know that the video was fair use, it had a good faith belief that the video was not authorized by law. In terms of the argument raised by Universal, the Ninth Circuit held that “Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use.” The court also said that “because 17 U.S.C. §107 created a type of non-infringing use, fair use is authorized by the law and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).” Additionally, the Ninth Circuit’s original opinion in *Lenz* emphasized that a consideration of the application of fair use did not require a full investigation into

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<sup>132</sup> 572 F.Supp. 2d 1150, 1152 (N.D.Cal.2008)

<sup>133</sup> *Id.*

<sup>134</sup> **512 (f) MISREPRESENTATIONS.**—Any person who knowingly materially misrepresents under this section—(1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

<sup>135</sup> *Id.*

the merits of a defendant’s potential fair use claim, however, the court amended its opinion in early 2016 and deleted the relevant language.<sup>136</sup> The amended opinion retained the text noting that the court will not second-guess a copyright holder’s subjective good faith belief in the absence of fair use, but the court also warned that “a copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to §512(f) liability.”

Post-Lenz, it seems clear that some consideration of fair use is required before a takedown notice can be issued, but that such consideration does not need to be objectively reasonable.<sup>137</sup> However, there is little clarity on how much consideration of fair use is required before issuing a takedown.<sup>138</sup>

iv) BMG Rights Management (US) LLC v. Cox Communications, Inc.<sup>139</sup>

This is the most recent case regarding the peer-to-peer file transfer protocol, decided on February 1, 2018 by the U.S. Supreme Court. In this case, BMG Rights Management (US) LLC (“BMG”), a holder of copyrights in numerous musical compositions, brought action against internet service provider under Digital Millennium Copyright Act, seeking to hold provider contributorily and vicariously liable for infringing activity of its internet users who uploaded and downloaded copyright musical works on peer-to-peer file sharing network.

Cox Communications, Inc. (“Cox”) is a conduit internet service provider, providing approximately 4.5 million subscribers with high-speed Internet access

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<sup>136</sup> See *Lenz v. Universal Music Corp.*, 801F.3d 1126, 1135 (9<sup>th</sup> Cir. 2015), 815 F.3d 1145 (9<sup>th</sup> Cir. 2016) cited in Sag, Matthew. “Internet Safe Harbors and the Transformation of Copyright Law”. *Notre Dame Law Review*, 93, 499, 2017

<sup>137</sup> Sag, Matthew. “Internet Safe Harbors and the Transformation of Copyright Law”. *Notre Dame Law Review*, 93, 499, 2017

<sup>138</sup> Kaveh Waddell, *How a Dancing Baby Video Just Made It Harder To Remove YouTube Content*, The Atlantic (Sep. 14, 2015), <http://www.theatlantic.com/politics/archive/2015/09/how-a-dancing-baby-video-just-made-it-harder-to-remove-youtube-content/458355/>; [https://www.eff.org/files/2015/09/14/lenz\\_ca\\_9\\_decision.pdf](https://www.eff.org/files/2015/09/14/lenz_ca_9_decision.pdf) “[...We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a tribal issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law.]”

<sup>139</sup> 881 F.3d 293 (4<sup>th</sup> Cir. 2018)

for a monthly fee. Some of Cox's subscribers shared and received copyright files, including music files, using a technology known as BitTorrent. As a conduit ISP, Cox only provides Internet access to its subscribers. Cox does not create or sell software that operates using the BitTorrent protocol, store copyright-infringing material on its own computer servers, or control what its subscribers store on their personal computers. To protect itself from liability, Cox created only a very limited automated system to process notifications of alleged infringement received from copyright owners. Cox's automated system rests on a thirteen-strike policy that determines the action to be taken based on how many notices Cox has previously received regarding the infringement by a particular subscriber.

BMG hired Rightscorp, Inc., which monitors BitTorrent activity to determine when infringers share its clients' copyrighted works. Due to the fact that Cox blacklisted Rightscorp before it was hired by BMG, Cox did not view a single one of the millions of notices that Rightscorp sent to Cox on BMG's behalf.

In this case, several concepts under the DMCA have been re-interpreted. Firstly, the Court in this case reviewed the requisite requirements of safe harbors under the DMCA. According to the Article 512 of the DMCA, to fall within safe harbor, Cox must show that it meets threshold requirement, common to all safe harbors, that it has "adopted and reasonably implemented ... a policy that provides for the circumstances of subscribers ... who are repeat infringers." In this regards, the Court held that DMCA safe harbor requirement is not limited to adjudicated infringers and the Cox failed to implement its repeat infringer policy in any consistent or meaningful way. Hence, the Cox was not entitled to a statutory safe harbor defense for not complying with prerequisite conditions of implementing a sound policy for repeat infringers.

Secondly, the Court reinterpreted the contributory and vicarious liability doctrines in the context of Cox activities. In this regards, the Court held that the fact that provider's technology could be substantially employed for a noninfringing use did not immunize it from liability for contributory copyright infringement. Furthermore, the Court held that jury instruction improperly permitted jury to provider liable for contributory infringement on the basis of negligence. Therefore, it concluded that

negligence does not suffice to prove contributory infringement. According to the interpretation of the Supreme Court, the actual knowledge or willful blindness is required for contributory copyright infringement and it cannot be found under a negligence theory.

Cox argued that it cannot be held liable for contributory copyright infringement because its technology is capable of substantial noninfringing use, based on *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). In *Sony*, the Supreme Court held that because a VCR was capable of commercially significant noninfringing uses, its manufacturer, Sony, could not be held contributory liable for distribution of the VCR. However, the Court, contrary to Cox's argument held that the fact its technology can be substantially employed for a noninfringing use does not immunize it from liability for contributory copyright infringement. In reasoning, the Court presumed the defendant intention of a sale with the expectation that it would be used to infringe. In this sense, the Supreme Court reasoned that the district court erred in charging the jury that Cox could be found liable for contributory infringement if it knew or should have known of such infringing activity. Therefore, it remanded for a new trial.

### *3.1.6. Conclusion to the US part*

This section has reviewed the section 512 of the DMCA as well as practical interpretation and application of the provisions under the case law. Under the sections 512(c) regarding hosting intermediary and 512(d) regarding information location tool intermediary, certain conditions are set in order to be qualified under safe harbor from monetary or injunctive relief for the copyright infringement by others, which includes (i) no actual knowledge of the infringement, (ii) no direct financial benefit, and (iii) expeditious action to remove or disable the alleged material or activity. As for hosting intermediaries, the law requires them to appoint a designated agent in charge of managing notices under the section 512 of the DMCA. Generally speaking, the US has been implementing under the DMCA a "notice and takedown" and in case of counter-notification, "notice-takedown and replacement-within-10 days or claim-to-court" procedures for the online piracy.

Upon the review of notable court cases determining the provisions in complex and importance, it can be seen that the courts in the US have interpreted the requirement of having an actual knowledge in a broader context as favorable for intermediaries. Since the DMCA provisions in question contain some of subjective and uncertain terms including “knowledge”, “good faith belief”, and “...is not authorized by the copyright owner, its agent or the law - meaning fair use by law” etc., it might be no great surprise to conclude that the DMCA is being favorable for intermediaries compared to other two participants, the copyright owner and the user. Particularly, since the court interpretation in *Lenz* case in 2015 under which it stated the fair use should be considered before making request to take down, the copyright holders happens to be in a vulnerable position not to make a take-down notice, preventing from the likely monetary liabilities if it fails.

### *3.2. The Legal Framework of Intermediary Liabilities in South Korea*

The Republic of Korea (South Korea) is broadly recognized as a global leader in the online revolution and smart technologies and has been long recorded as one of the highest Internet penetration rates<sup>140</sup> in the world. In addition to having this high rate on internet usage, South Korea has encountered with new types of online copyright infringements, and recently has taken several key reforms to its copyright law regime, especially dealing with online copyright protection. The study shows that the numbers of digital copyright forensic investigation<sup>141</sup> support cases had steadily increased from 94 cases in 2010 to 291 cases in 2011, 323 cases in 2012 and 372 cases in 2013. Also, correction recommendations to online service providers (“OSPs”) that distribute illegal reproductions, given by the Korea Copyright Commission, has increased gradually over years; 85,085 recommendations in 2010, followed by 107,724, 250,039, and 170,867 in 2011,

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<sup>140</sup> As of 2018, Korea has a population of 51,164,435 and in December, 2017, it is recorded 47,353,649 users, showing 92.6% penetration, per IWS. (see at <https://www.internetworldstats.com/asia.htm#kr> )

<sup>141</sup> Digital copyright forensics investigates digital storage devices of companies or individuals that make profits by illegally distributing or using digital works protected under the Korean Copyright Act without the authorization of copyright owners. *See*, 2013 Annual Report on Copyright in Korea by the Ministry of Culture, Sports and Tourism and Korea Copyright Commission.

2012 and 2013, respectively.<sup>142</sup> The number of cases recorded is in its gradual increase, and it indicates proliferation of the public's active engagement to the flow of information on the Internet and the importance of legal regulations to this emerging phenomenon.

In a brief summary, the Korean Government has made significant reforms to its Copyright Act, including the introduction of general fair use provisions along with former long list of limitations and exceptions and certain limitation of liabilities and responsibilities for online service providers in regards of online copyright infringement. These reforms are worth studying in terms of modern user-generated content aspects as they put the users' right to the edge, by giving opportunities in the context of fair use and challenging their contents in terms of copyright holders' request for online service providers to takedown alleged contents. Furthermore, it raises a question of how effectively the users' right and the copyright holders' legitimate interest should be balanced and what kind of participation the online service providers could hold.

### *3.1.1. Statutory Regulations regarding Intermediary Liabilities for Copyright Infringement*

Following occasional emergence of litigations challenging whether online service providers, or intermediaries, would be responsible for any damages incurred by a third party's misconduct in the online network (*cases to be discussed below*), the Korean government has made a lot of efforts to regulate this on-demand situation challenging both users' right and authorized parties', especially copyright holders', legal interest. It cannot go wrong if someone says South Korea is one of those leading countries in terms of providing internet services to the public and is one of first Asian countries adopting specific regulations in relation to online service providers' activities through several legal regulations. However, not only have these efforts been required by cases arisen before courts in Korea, but also there has been certain influence that has come from Korean bilateral agreements made

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<sup>142</sup> *Id.*

with the United States<sup>143</sup> and the European Union<sup>144</sup>. European Union (the “EU”) Directive 2000/31/EC Section 4 “Liability of Intermediary Service Providers” was almost exactly produced verbatim in the Intellectual Property Chapter of the Korea-EU FTA, and the intellectual property chapter of the Korea-US FTA adopted the structure of DMCA safe harbor provisions.<sup>145</sup> Even though intellectual property law provides so-called territorial protection, mainly providing a different set of regulations from country to country basis, due to the proliferation of bilateral agreements recent years, e.g. free trade agreements, protections over intellectual property rights have become more common among countries with slightly differences depending on the legal system of origin country.

There are several statutes within Korean legal framework, regulating issues concerned the liabilities of online service providers, particularly as follows:

- Copyright Act, last amended by Act No. 14634 on 31 March 2017 (hereinafter, the “KCA”);
- Enforcement Decree of the Copyright Act;
- Act on the Consumer Protection in Electronic Commerce, etc., last amended by Act No. 14142 on 19 March 2016;
- Public Official Election Act, last amended by Act No. 14838 on 26 July, 2017;

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<sup>143</sup> The U.S – Korea Free Trade Agreement (Korea-US FTA) entered into force on March 15, 2012. *See* Chapter 18 of the U.S.-Korea FTA, available at: [http://www.wipo.int/edocs/trtdocs/en/kr-us/trt\\_kr\\_us.pdf](http://www.wipo.int/edocs/trtdocs/en/kr-us/trt_kr_us.pdf). Before the Korea-US FTA entering into act in 2012, consequent amendments were made to the Copyright Act from 2006 and 2009 during respected negotiations between the U.S. and Korean governments. One of main changes was the regulation related to online service providers.

<sup>144</sup> The EU-South Korea Free Trade Agreement (Korea-EU FTA) was signed on 15 October 2009. It has been provisionally applied since July 2011 and was formally ratified in 13 December 2015, after having been ratified by all signatories. *See* Article 10.62 “Liability of online service providers”.

<sup>145</sup> Wilmap Project, Country section of South Korea, <https://wilmap.law.stanford.edu/entries/copyright-act-last-amended-act-no-12137>. The World Intermediary Liability Map (WILMap) is a detailed English-language resource hosted at Stanford CIS and comprised of case law, statutes, and proposed laws related to intermediary liability worldwide.

- Act on Promotion of Information and Communications Network Utilization and Information Protection, etc., last amended by Act No. 14080 on 22 March 2016;
- Act on Protection of Children and Juveniles against Sexual Offences, last amended by Act No. 14236 on 29 May 2016;
- Telecommunications Business Act, last amended by Act No. 14113 on 30 March 2017.

These statutes grant online service providers, or information communications network service providers, the general obligation to take actions, within their capacity, against any misuse or inappropriate use of information communications networks service, which could breach, or otherwise impact adversely, one's legal right and legitimate interest. Those obligations can be classified, according to their characteristics, into different set of obligations. For example, while the KCA deals with the copyright infringements in information and communications networks, other statutes generally impose online service providers the obligation of cooperating with specific state or public authorities on the actions against defamation, misuse of personal information, the circulation of illegal information in violation of a certain law or infringing upon one's right, obscene materials, any materials regarding children and juveniles sexual offences, etc.

Among these statutes as listed above, the KCA provides a comprehensive set of regulations covering limitations and responsibilities of online service providers ("OSPs") in relation to the copyright infringements. Historically, the first KCA enacted in 1957 was composed of five chapters and provided that the purpose of the Act is to protect an author of an academic or artistic work and promote the national culture.<sup>146</sup> Since its enactment in 1957, the KCA has undergone amendment 26 times, including full amendments in 1986 and 2006, to proactively accommodate and respond to the advancement of digital technology, the changing

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<sup>146</sup>Korea Copyright Commission, "Introduction to the Korean Copyright System".  
<https://www.copyright.or.kr/information-materials/publication/researchreport/download.do?brdctsnno=38786&brdctsfilenno=10051>

environment for using copyrighted works, and international trends of copyright protection.<sup>147</sup>

According to the latest version of the KCA as of 2017, it is stated that the purpose of the KCA is “*to protect the rights of authors and the right of neighboring on them and to promote fair use of works in order to contribute to the improvement and development of culture and related industries.*” It explicitly shows that how importance it is to find a balance between restriction and allowance on the use of copyrighted works, which is still an unsettled subject of copyright law regime. In compliance with its purpose of the KCA, it provides a provision of fair use of works<sup>148</sup> in order to give others a lawful right to use a copyright work to the extent allowed by law, and it also gives a responsible for certain types of OSPs for infringed material in order to protect a copyright holder’s right and build the fair practice within society.

However, there are some critics on the balance under the KCA, alleging that the KCA’s regulations on OSPs are too strict and it may render negative consequences for freedom of expression in the online space. The law often attracts widespread criticism from journalists and civil society for violating freedom of expression. For example, in recent years, the international human rights community is actively marching for freedom of expression, claiming that the freedom of expression includes a right to Internet access. The 2011 Joint Declaration on a freedom of expression and the Internet included that “*giving effect to the right to freedom of expression imposes on States an obligation to promote universal access to the Internet.*”<sup>149</sup> As such, the 2011 Joint Declaration of the Special International Mandates on Freedom of Expression states that “*denying individuals the right to access the Internet as a punishment is an extreme measure, which could be justified only where less restrictive measures are not available and where ordered by a court, taking into account the impact of this measure on the enjoyment of human rights.*”<sup>150</sup> The special mandates also cautioned that “*mandatory blocking of entire*

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<sup>147</sup> Korean Copyright Commission, *id.*

<sup>148</sup> See Article 35-2 (Fair Use of Works, etc.) of the KCA

<sup>149</sup> Adopted on June 1, 2011, clause 6(a), <http://www.osce.org/fom/78309>

<sup>150</sup> KCA, clause 6(c)

*websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.”<sup>151</sup>*

On the basis of above views, an immediate takedown action of online service providers as required by the Korean Copyright Act and the Ministry’s effective participation regarding the suspension of accounts subject to repeated infringement, receives some criticism.

According to the Preamble of the TRIPS Agreement, it is stated that while protection of intellectual property rights is justified to encourage innovations that often require costly research and development efforts, it should also be balanced against the need for dissemination of information. Moreover, excessive intellectual property protection in extent and duration may retard free flow of information and ultimately impede development of industries, science, and even culture and art. I will examine in this section the intermediary liability issues of South Korea for copyright infringement in context of user-generated contents. As mentioned earlier, intermediary liabilities in general are a broader concept including intermediary liabilities in defamation, obscene material, child abuse material, circulation of illegal information, misuse of personal information and copyright infringement throughout information communications networks. Within the extent of research purpose, I will concentrate on a part of it, which connects to the online copyright infringement.

### *3.1.2. Online Service Providers’ Liability under The KCA*

According to the latest version of the KCA as amended in 2017, it provides “safe harbor” for online service providers<sup>152</sup> from a third party’s infringement provided

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<sup>151</sup> KCA, clause 3(a)

<sup>152</sup> Article 2 (Definitions) Section 30 of the KCA: The term “online service provider” means either of the following persons:

(a) A person who transmits, designates a route of, or provides connection to the works, etc. selected by users to deliver such works, etc. without any modification of their

that they meet certain conditions as classified and defined under the Article 102 of the KCA. Also, it imposes certain obligations for both general and special type of OSPs in terms of illegal materials on the Internet and noncompliance of those obligations would be subject to an administrative fine, under Article 142 of the KCA. Compared to other countries' regulations, the KCA contains broader regulations with respect to the intermediary liabilities, namely including "safe harbor", "no general obligation to monitor", "on-demand notice - takedown system", "technological measures to block", and "three-strike rule".

The Article 102 of the KCA states that even copyright or other rights protected pursuant to the KCA are infringed in relation to any of the activities of OSPs, including four specific activities, an OSP shall not be responsible for such infringement, where he or she meets all of the requirements specifically assigned to him or her. Please refer to the table below.

Activities of OSP	Requirements
<p><b>An act of transmitting, routing or providing connections for works, etc. (mere conduit)</b></p>	<p>(a) Where an OSP has not initiated the transmission of works, etc.;</p> <p>(b) Where an OSP has not selected works, etc. or the recipients thereof;</p> <p>(c) Where an OSP has adopted and reasonably implemented a policy that provides for termination of the accounts of persons who repeatedly infringe on copyright or other rights protected pursuant to this Act;</p> <p>(d) Where an OSP has accommodated and has not interfered with standard technical measures used by the</p>

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content through the information and communications networks between the points designated by users;

- (b) A person who provides the services to allow users to access the information and communications networks or reproduce or interactively transmit the works, etc. through the information and communications network, or who provides or operates facilities therefor.

	holder of right that are designated to identify and protect works, etc. and meet the conditions <sup>153</sup> under Presidential Decree.
<b>An act of storing works, etc. transmitted at the request of service users in an automatic, mediating or temporary manner (caching)</b>	<p>(a) Where the requirements under the items of subparagraph 1(a) are all met (for an act of transmitting, routing or providing connections for works, etc.);</p> <p>(b) Where an OSP has not modified such works, etc.;</p> <p>(c) If any condition exists to access such works, etc. provided, where the access to temporarily stored works, etc. is permitted to users who have complied with such condition;</p> <p>(d) Where an OSP has complied with the rules on updating works, etc. that are determined by a person who reproduces or interactively transmits works, etc. (hereinafter referred to as "interactive transmitter or reproducer") under data communications protocol for computers or information and communications networks generally recognized in the industry; provided, that this shall not apply where an interactive transmitter or reproducer has determined rules on updating for the purposes of unreasonably restricting such storage;</p> <p>(e) Where an OSP has not interfered with the use of technologies generally recognized within such industry, which are applied to obtain information on the use of works, etc. at the originating site of the works, etc.;</p>

<sup>153</sup> Article 39-3 (Standard Technological Measures) of the Enforcement Decree of the Copyright Act (the "Presidential Decree"): "Conditions prescribed by Presidential Decree" in Article 102(1) 1 (D) of the Act means the following conditions:

- (1) Measures shall be determined openly and voluntarily by agreement between the holder of author's economic right and the OSP;
- (2) Reasonable and nondiscriminatory use shall be possible;
- (3) Measures shall not impose substantial expenses upon the OSP or put substantial burden on the system or information communications network of the OSP in connection with the provision of the online services.

	(f) Where an OSP immediately removed or disabled access to the works, etc. when an OSP is required to suspend reproduction or interactive.
<b>An act of storing works, etc. in the computer of an OSP at the request of a reproducer or interactive transmitter (hosting)</b>	<p>(a) Where the requirements under the items of subparagraph 1(a) above are all met (for an act of transmitting, routing or providing connections for works, etc.);</p> <p>(b) When an OSP has the right and ability to control the infringing activity, where he or she has not obtained any financial benefits directly attributable to the infringing activity;</p> <p>(c) When an OSP actually becomes aware of infringement or obtains actual knowledge of the fact or circumstances that infringement is evident through the request, etc. to suspend reproduction or interactive transmission under Article 103(1), where he/she has immediately suspended the reproduction or interactive transmission of such works, etc.;</p> <p>(d) Where an OSP has designated and announced a person to receive demand to suspend reproduction or interactive transmission pursuant to Article 103(4).</p>
<b>An act of allowing users to know the location of works, etc. on information and networks or connecting them thereto through information search tools (information search tool)</b>	<p>(a) Where the requirements under subparagraph 1(a) are met (for an act of transmitting, routing or providing connections for works, etc.);</p> <p>(b) When an OSP has the right and ability to control the infringing activity, where he or she has not obtained any financial benefits directly attributable to the infringing activity;</p> <p>(c) Where an OSP has designated and announced a person to receive demand to suspend reproduction or interactive transmission pursuant to Article 103(4).</p>

### **General “safe harbor”**

According to the Article 102 of the KCA, it provides safe harbor for OSPs from copyright infringement by classifying their activities into four types, including (1) mere conduit, (2) caching, (3) hosting, and (4) information location tools and providing certain requirements to meet for each type of activities. Besides than this, an important safe harbor granted to OSPs who are technically impossible to take measures is reflected in the section 2 of the Article 102 of the KCA, and it exempts such OSPs from any liability for the infringement of copyright or other rights, notwithstanding the requirements to be met. The Article 102 also contains in its section 3 that OSPs do not have any general obligation to monitor any infringement or actively investigate such infringement.

### **On-demand notice and takedown system**

The Article 103 of the KCA determines the procedure for making a demand to suspend the reproduction or interactive transmission of works and taking actions by OSPs. According to the notice and takedown system contemplated by the Article 103, the OSPs have the obligation to suspend the reproduction or interactive transmission upon request. If the reproducer or interactive transmitter, upon receipt of notification by the OSP, vindicates that his or her reproduction or interactive transmission is made with legitimate authority, and demands a resumption of such reproduction or interactive transmission, the OSP shall notify the claimant to the right of the fact of demanding a resumption and the scheduled date of resumption, and shall have the reproduction or interactive resumed on the said scheduled date unless the claimant to the rights notifies the OSP before the scheduled date of resumption, of the fact date he or she filed a lawsuit against the act of infringement or reproducer or interactive transmitter.

As such, under the KCA, the OSPs participate in suspension of reproduction or interactive transmission passively. By passively means the OSPs are not in the position of deciding whether to suspend or not or whether such request is reasonable or not, but it holds an obligation to act as accordingly as it is demanded by alleged parties.

Another requirement regarding the notice and takedown system under the KCA is that it imposes an obligation for the OSPs to make an announcement, by designating the person who is demanded to suspend or to resume the reproduction or interactive transmission, so as to have the users of facilities or services of the provider know with ease.<sup>154</sup> By completing this requirement of announcement and respective action of suspending or resuming alleged reproduction or interactive transmission, the OSPs are exempted from the liability for the infringement on third parties' copyright and other rights protected under the KCA, and the liability for the losses incurred to the reproducer or interactive transmitter.

### **Technological measures to block illegal forwarding of works**

The Article 104 of the KCA imposes a special obligation to take measure to block illegal forwarding of works upon the request from the holder of the right for the OSPs of special type. The OSPs of special type is the online service provider who aims principally at enabling interactive transmission of works by using computers between other persons. The main representor of such type would be any online providers using Peer-to-Peer ("P2P") sharing technologies. As prescribed by the Presidential Decree, necessary measure means as follows:

- (1) Technical measures capable of identifying the work, etc. by comparing the title, characteristics of work, etc.;
- (2) Measures of limiting search or transmission to cut off illegal forwarding off work, etc. that came to be recognized pursuant to the above paragraph;
- (3) Where the illegal forwarder of the relevant works, etc. is identifiable, the dispatch of warning sign wording to the interactive transmitter of the work, etc. requesting for prohibition of infringement on the copyright.

Noncompliance of the above measures shall be subject to a civil fine not exceeding 30 million won under the Article 142 (1) of the KCA.

### **Three-Strike Rule (or Graduated Response)**

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<sup>154</sup> Section 4 of the Article 103 of the KCA

The Article 133 (Collection, Destruction and Deletion of Illegal Copies), the Article 133-2 (Orders, etc. for Deletion of Illegal Copies, etc. through Information and Communications Network), and the Article 133-3 (Recommendation of Correction, etc.) respectively grant respective officials<sup>155</sup> and OSPs a legal possibility to delete illegal copies of the copyrighted works by giving warnings to a respective reproducer or interactive transmitter. Where a copy or information which infringes on copyright or other rights protected under the KCA, or a program or information which circumvents technological protection measures is interactively transmitted through information and communications network, the Minister of Culture, Sports and Tourism may order an OSP to take the measures of giving warnings to reproducers and interactive transmitters of illegal reproductions, etc. and deletion or suspension of interactive transmission of illegal reproductions, etc.

The law also grants that where any reproducer and interactive transmitter who receives warnings three times or more interactively transmits illegal reproductions, the Minister of Culture, Sports and Tourism may order an OSP to suspend an account of the relevant reproducer or interactive transmitter within a fixed period of up to six months. Same procedure of suspension also applies to bulletin board service.

#### **Safe harbor of OSPs from illegal information, defamation, etc.**

Besides the KCA, Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (the “ICNA”), last amended by Act No. 14080 on March 22, 2016 imposes an obligation for OSPs (in the law context, it uses a term of “information communications service provider”) to suspend the circulation of certain information at request.

The ICNA aims to develop an environment in which people can utilize information and communications networks in a healthier and safer way by protecting personal

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<sup>155</sup> Under the Article 133, the Minister of Culture, Sports and Tourism, the Special Metropolitan City Mayor, a Metropolitan City Mayor, a Do Governor and a Special Self-Governing Province Governor or the head of a Si/Gun/Gu may have the relevant public officials collect, destroy or delete illegal copies pursuant to the procedures and methods.

information of people using information and communications service.<sup>156</sup> Different from the Copyright Act, the ICNA focuses on a general broad concept of information that is circulated through information and communications network and prohibits any misuse or defamation or offense uses that breach a person's rights in any way. In line with its purpose, paragraphs (1) and (2) of the Article 44-2 (Request to Delete Information), the ICNA provide that, when a person requests certain information to be deleted as it infringes upon the person's right, the service provider shall immediately delete, temporarily block up to 30 days, or take any other necessary measure on the information. According to the paragraph (6) of the Article 44-2 of the ICNA, the service provider may reduce or be exempted from liability by taking necessary measures set forth in paragraph 2. Also, under Article 44-7 sets out the power of Korea Communications Commission to order service providers to reject, suspend, or restrict processing of illegal information ranging from obscene or defamatory information to information aiming at aiding or abetting any crime. Failure of such order shall be subject to a punishment of imprisonment or a fine.

Some scholars criticize the above provisions under the INCA for its strict obligations imposed to OSPs to delete information or take temporary suspension measures as prerequisites of exemption from liability, saying that what Korea has is not an intermediary liability exemption regime but intermediary liability imposition regime.<sup>157</sup> In addition, the Constitutional Court of Korea<sup>158</sup> concluded that those provisions were not in conflict with the Constitution of Korea. In the ruling, the Constitutional Court reasoned that "*the instant provisions are purported to prevent indiscriminate circulation of the information defaming or infringing privacy and other rights of another, and therefore have a legitimate purpose. ...Temporary blocking of the circulation or diffusion of the information that has the*

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<sup>156</sup> See Article 1 of the INCA

<sup>157</sup> See Park, Kyung-Shin. "Intermediary Liability – Not Just Backward but Going Back." *NoC Online Intermediaries Case Studies Series*, 2015

<sup>158</sup> Case No. 2018Hun-ma88 on 31 May 2012 by the Constitutional Court of Korea

*possibility of such infringement is an appropriate means to accomplish the purpose.*<sup>159</sup>

### *3.1.3. Government and Public Institutions in charge of Online Copyright Infringement*

In relation to the enforcement of copyright policies in Korea, the Ministry of Culture, Sports and Tourism (hereinafter the “MCST”) is in charge of, and since its establishment in 1987, it has developed many copyright policies and implemented a wide range of activities related to copyright protection. The MCST currently has three copyright-related divisions (Copyright Policy Division, Copyright Protection Division, and Copyright Industry Division) and Culture and Trade Team. The Copyright Protection Division has 5 regional offices in major cities of Korea (Seoul, Busan, Sejong, Gwangju, and Daegu), where the copyright special judicial police officers are assigned, the copyright special judicial police officers’ major responsibility is as follows in general, subject to further discussion in detail below:

- Crackdown on distribution of illegal reproductions online/offline;
- Support for the operation of the Korean Copyright Protection Agency;
- Ordering suspension of online transmission of illegal reproduction or their deletion and imposing fines and taking other appropriate measures;
- Support for the development and operation of illegal reproduction tracking and management system etc.

Besides than the Copyright Protection Division subordinated to the MCST, there are two public organizations, Korea Copyright Commission and Korean Copyright Protection Agency, respectively in charge of online copyright protection issues as reflected in the KCA. The Korea Copyright Commission (hereinafter “KCC”)<sup>160</sup> holds function of, among other main functions, supporting for formulation of policies of technological protection measures and rights management information<sup>161</sup>. As for the Korean Copyright Protection Agency, it was established in September 2016 by merging the Department of Promotion of Fair Use of the

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<sup>159</sup> *Id.*

<sup>160</sup> KCA §112 <https://www.copyright.or.kr/eng/main.do>

<sup>161</sup> KCA §113.7 <https://www.kcopa.or.kr/>

Korea Copyright Commission and the Copyright Protection Center.<sup>162</sup> The main functions of the Korean Copyright Protection Agency are as follows:

- Support for formulation and enforcement of policies on copyright protection;
- Investigation into the state of copyright infringement and writing of statistics;
- Research into and development of copyright protection technology;
- Investigation into and support for cracking down on copyright infringement;
- Deliberation on corrective orders by the MCST Minister in accordance with Article 133 of the KCA;
- Issuance of recommendations for correction for online service providers of illegal reproductions and requesting the MCST Minister to issue corrective orders in accordance with Article 133 of the KCA.

#### *3.1.4. Notable Cases regarding the OSP's liabilities*

Adopting a law is one thing; however, the most important part would be how to use it in a real life situation. Depending on how it is applied for the real case, the interpretation of such law at a court plays an important role for further use of those regulations provided by such law. The role of the court contributes a lot to take successfully root in the case law. Even for countries that has the civil law legal system, once the highest court interprets a law and applies it to a case, such interpretation tends to have a continuous effect on further cases for the time being until another interpretation is to be made by the highest court of such country. As discussed above, the Korean Government has made a substantial number of efforts in order to provide policies for preventing from copyright infringement on the Internet and developing a healthier and safer environment for both copyright holders, users and intermediaries, even though there are still some critics on those policies. Adding to the critics around the intermediary liabilities, there is a controversial situation when it comes to its application at courts.

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<sup>162</sup> Korea Copyright Commission, *Introduction to the Korean Copyright System*.

First of all, prior to start discussing the liability of intermediaries, it is necessary to examine how the legal framework for secondary or indirect liability is established with the Korean legal system. This is important because in case of OSP related cases, the courts usually determine whether there would be a direct or indirect liability for OSPs for other person's direct infringement.

*i) Secondary Liability in Korean Case Law*

There has been no clear line in Korea distinguishing between direct liability and indirect liability.<sup>163</sup> There was much controversy over the matter of which provision should provide the positive legal standard for copyright owners suing an ISP, because the KCA provides only negative legal ground for OSP Immunity.<sup>164</sup>

The Korean courts usually refer to the Article 760 of the Civil Code of Korea when determining a secondary liability in question. The Article 760 titled *Liability for Joint Tortfeasors* states that (1) if two or more persons have by their joint unlawful acts caused damages to another, they shall be jointly and severally liable to make compensation for such damages; (2) if it is impossible to ascertain which of the participants, albeit not joint, has caused the damages; and (3) the abettor or aider shall be considered as a joint tortfeasor.

Historically, this article so viewed as a legal ground for indirect liability has been applied to cases related to tort damages and cases related to copyright infringement to which online service providers were related to the certain extent. With respect of tort damages, the Supreme Court of Korea ruled in its decision 2008Da53812 that online service provider who manages Naver, Daum, Nate, Cyworld and Yahoo Korea, is responsible for tort damage claimed by the plaintiff who is alleged of deserting his pregnant girlfriend and consequently causing her to suicide herself under the Article 760. The news articles regarding the fact went viral throughout the portal and the provider did not delete respective articles upon the plaintiff's request. Therefore, the court concluded that the provider was aiding and abetting of the damages caused to the plaintiff with his reluctant actions.

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<sup>163</sup> Park, Jung-Seok. "The Prospect for ISP's Liability in UGC-related Cases in Korea". *Journal of Korean Law*, Vol.7, No.1, 2007

<sup>164</sup> *Id.*

As for cases related to the copyright infringement, the first case which dealt with OSP's copyright liability in Korea was the case of *Cocktail Corporation v. Chung-Ang University* (Cocktail case) decided by Seoul District Court on December 3, 1999, Case No. 98Ga111554.<sup>165</sup> The Case was decided prior to the introduction of Article 102 of the KCA. The Plaintiff Cocktail Corporation, which manufactures and sells computer programs, made a program called as "Cocktail 98", a multimedia tool, on August 16, 1997 and was the copyright holders, registered in the Korea Software Copyright Committee. On October 18, 1998, "A" uploaded the title "Cocktail" with an explanation "this is Cocktail, multimedia tool" in a data board of the Chung-Ang University's homepage.

Under the Cocktail Case, the court determined whether OSP was jointly liable for copyright violation of direct infringers. The court held that "*direct attributors, not a third person, should take responsibility on illegal behavior. However, the third person should be exceptionally responsible for it only if he has any relationship with the infringed behavior or the conduct, even if he did not directly conduct the behavior nor assist nor incite joint illegal behavior.*" Also, the court ruled that "*in case the third person directly caused the behavior or, already noticed the infringed work or the behavior but neglected it, and he had an ability to control the behavior and made a fortune directly from the behavior, the responsibility should be accepted by judgement considering structure, from and scope of service and the behavior's accuracy.*" In ruling as such, however, the court acknowledged the concept of secondary liability, but it did not suggest any statutory provision on which the rule was based.<sup>166</sup>

But, a series of decisions about Soribada (*as below*) more clarified which provision in Korea's many statutes could be best-related to OSP secondary liability.<sup>167</sup>

After the Cocktail case and the introduction of Article 102 of the Copyright Act, the Korean courts had handled several cases related to Soribada Service Providers

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<sup>165</sup> Lee, Gyooho. "Recent Development in Online and Offline Copyright Infringement Liability in the Digital Environment: An Overview of Korean Case Law". *Content Property Law and Policy Review* 2. November, 2001, pp. 7-42.

<sup>166</sup> Lee, Gyooho, *id.*

<sup>167</sup> *Id.*

as initiated by EMI Music Korea Ltd. et al. (Soribada case)<sup>168</sup>. The Soribada case was a notable case in terms of OSP's liability. According to the judgments made by the Supreme Court of Korea in those cases, section 3 of the Article 760 of the Korean Civil Code is determined as the statutory ground for OSP secondary liability.

Soribada was the first Korean peer-to-peer file sharing service, launched in 2000 by Sean Yang as a Napster clone. Even after consequent legal claims against the Soribada starting from 2002 until 2007, it remains the most widely used P2P system in Korea and the most recent version of Soribada is now Soribada 6. Currently Soribada 6.0 is the third P2P service in the world that has become commercialized.<sup>169</sup>

Under Case No. 2005Da11626, the Supreme Court of Korea on January 25, 2007

At time of above judgement, Soribada service providers developed and distributed their Soribada program without charging any fee, and enabled its users to access the information about other users while operating its server. In the case, monopolistic licensees of foreign phonogram producers such as EMI Music Korea Ltd. and BMG Music Entertainment Korea Inc, and 8 domestic phonogram producers sought provisional disposition to prohibit Soribada service providers from infringing their neighboring right. Under the judgment<sup>170</sup>, the court ruled that *“the behavior assisting the violation of reproduction right is any behavior that enables other’s violation of the right including assistance by general negligence as well as by dolus eventualis. Assistance by negligence refers to violating the duty of due care that one should not help violation of another’s reproduction right. In terms of the said behavior assisting violation, the aider does not need to definitely recognize who committed the violation, or when, where and for whom it was committed.”* Moreover, the court ruled that *“Soribada service provider developed and distributed the program without charging any fee, and enabled its users to*

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<sup>168</sup> There were a series of court decision regarding Sora-bada P2P programs, generating from 1.0 version up until 5.0 version.

<sup>169</sup> See <https://en.wikipedia.org/wiki/Soribada>

<sup>170</sup> Excerpts from Lee, Gyooho. “Recent Development in Online and Offline Copyright Infringement Liabilities in the Digital Environment: An Overview of Korean Case Law”. *Content Property Law and Policy Review* 2, Nov. 2011, pp. 7-42

*access information about other users while operating its server. By doing so, it enabled its users to easily exchange and reproduce MPEG-1 Audio Layer-3 file transformed from CD through P2P. As a result, it bears assisting liability of copyright infringement by violating the neighboring right of the infringed.”*

*Under Case No. 2005Da872, the Supreme Court of Korea on December 14, 2007*

In the judgement above, the Soribada were accused of violation of the reproduction right of a copyright holder. In relation to the Soribada’s activities of developing Soribada program and sharing MP3 files among its users, the court held that “*a behavior that assists the violation of a copyright holder’s reproduction right refers to every act that enables others to violate that right, including assistance by dolus eventualis.*” Accordingly, the Soribada administrators are held to be criminally liable for supporting of the infringement.

*ii) Technological Measures under Article 103(2) in Korean Case Law*

Under section 2 of the Article 10 of the KCA, an online service provider’s liability shall be exempted when it is technically impossible to prevent or suspend the relevant reproduction or transmission. Whereas the Article 104 of the KCA imposes the duty to accommodate technological measure in case of OSPs of special types, including peer-to-peer program.

The Korean courts have applied the requirement of implementing technological measures to prevent the copyright infringement narrowly. As for a filtering measures utilizing hash values and a use of banned key word lists are not recognized by the Supreme Court of Korea, reasoning that those measures were not state of the art measures available and did not work properly<sup>171</sup>.

After Soribada 3.0 which is challenged by the courts and has been shut down, Soribada 5.0, a P2P Model was launched. In Soribada 5, the defendants abolished the central server as in the previous versions and voluntarily accommodated technological measures, audio fingerprinting and greenfile system. Under the Seoul

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<sup>171</sup> Supreme court 2011Do1435 on Sep. 26, 2013; Seoul High Court on October 10, 2007, Case No. 2006La1245

High Court Decision<sup>172</sup>, while acknowledging that an online service provider may not be held liable if it was technically impossible to stop the infringement, the court ruled that passive filtering method as well as the greenfile system employed by the administrators of Soribada 5.0 service cannot be considered the technical arrangements required by law to stop the infringement. The court rigidly required that P2P service providers or P2P software providers should and, at least in the court's opinion, could adopt the so-called positive filtering system (system having only legal music files, which are supplied from license contracts with copyright owners or the like, distributed on P2P networks)<sup>173</sup>.

*iii) Fair use and OSP's improper Takedown Notice in Korean Case Law*

Case No. 2010Na35260 under which a father who made a short video clip of his 5-year-old daughter dancing in a popular song and uploaded it to his Naver blog (so-called Son Dam-bi Case), is crucial for that it raises question on both fair use of copyrighted works and the OSP's takedown notice within the Korean legal system. It is clearly seen that today's information flow on the Internet is now hugely connected to user's generated contents as the Internet makes an agony environment for the users.

In Son Dam-bi case, the plaintiff was Chung-Hyun Woo whereas the defendant was the Korea Music Copyright Association (KOMCA) and NHN Inc. The plaintiff posted the 53 second-long motion picture on his blog operated NHN Inc. KOMCA asked NHN Inc. for the take-down of the UGC file. So, the plaintiff sought a declaratory judgement that he did not violate copyright collectively managed by KOMCA. The plaintiff brought a lawsuit against the defendant, arguing that the defendant should pay damages to the plaintiff due to the defendant's request to suspend the reproduction and transmission of works, which the plaintiff alleged was made without any legitimate right and sought damages of 5,000,000 KRW from KOMCA and NHN respectively. In this case, the Article 28

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<sup>172</sup> Seoul High Court Decision 2006Ra1245 delivered on Oct. 10, 2007

<sup>173</sup> *Id.*

(Quotation from a work already made public) and Article 103 (6)<sup>174</sup> regarding the takedown action of a OSP were applied as legal grounds of the ruling that the defendants were liable for damages due to its improper takedown activity.

The court in Son Dam-bi case opined that the plaintiff did not violate copyright collectively managed by KOMCA, relying on Article 28 of the KCA. The court also held that *“Article 28 of the KCA prescribes that a work already made public can be quoted within a reasonable limit for news reporting, criticism, education and research etc. and compatible with fair practice. Whether a work already made public was quoted within a reasonable limit for news reporting, criticism, education and research etc. and compatible with fair practice should be determined by the court while the court takes into account the purpose of quotation, the characteristics of the copyrighted material, the contents and portion quoted, the method and form by which the copyright material was quoted, the general perception of readers, and the probability of substitution for the demand on the original work.”* Korean High Court affirmed a lower court ruling that the 53 seconds long video clip constitutes a fair use, and ordered KOMCA to pay the plaintiff damages for unjustly requesting a takedown under the notice-and-take down system.

This case is an illustrative case that every user-generated contents underlying on the copyright works cannot be considered as infringement in the shield of fair use provisions and every OSP takedown activity upon request by a copyright holder cannot be corrected in case of such kind of user-generated contents.<sup>175</sup> Not directly, but this case could also be a sign of that immediate or on-demand request of takedown can hinder the creativity of users on the Internet and cause a negative impact on the freedom of expression of internet users.

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<sup>174</sup> Article 103(6) of the Copyright Act, “any person who demands; without legitimate authority, the suspension or resumption of the reproduction or transmission of relevant works, etc. under paragraph (1) and (3) shall make a compensation for any losses incurred thereby.

<sup>175</sup> Jong, Sang Jo. “Fair Use: A Tale of Two Cities, Intellectual Property in Common Law and Civil Law”, *Edward Elgar*, Northampton, 2013, pp. 176-194.

### *3.2.5. Conclusion to the Korean Part*

This Section 3.2 has studied the legal framework of Korea regarding the “Limitation on Liability of Online Service Providers” based on the Korea Copyright Act. Although the title of the section named limitation of liability of online service providers, this section of the KCA sets a number of conditions to be met by online service providers in order to be get qualified by the limitation of liabilities. Historically, as same as it is in the US, with the advanced and fast development of internet broadband infrastructure in Korea, there was a social need to provide a legal regulation regarding the limitation of liabilities of OSPs due to the emergence of litigations claiming for damages in relation to the services provided by the OSPs. Besides that, there were some demand from the US and EU under free trade bilateral agreements with Korea.

In terms of legal construction, as same as US, the Korean legal system regulates the limitation of liabilities of the OSPs regarding online copyright infringement under the KCA separately from other infringements regarding the information in general.

The KCA has created a version of the US safe harbor system extended by the “three-strike rule”, as known as “graduated response”. Although most of parts of provisions are assimilated with the US safe harbor provisions, the Korean version set an additional condition of adopting and implementing a policy for termination of the accounts of person who repeatedly infringe on copyright and other rights, for all of four types of activities of the OSPs as a precondition to be considered before qualifying safe harbor. This requirement is connected with the provisions of Article 133-2 and 133-3 of the KCA under which the legal grounds of three-strike rule has set. Besides that, the KCA contains some additional obligations that are not provided within the US safe harbor regime. For example, OSPs of special types are required to implement technical measures to block the illegal transmission of the copyright works within their routes. Also, in case of notice and take down procedures, the OSPs are obliged to make an announcement about the incident for ensuring the public knowledge about such incident.

Some of scholars as well as civil communities have criticized the current KCA provisions for being “too strict” and having high possibility to chill the freedom of expression in the society. In addition, termination of the alleged accounts without the court review has often criticized. However, it has also been concluded that “three strikes” has a number of connected advantages for right holders as well.<sup>176</sup>

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<sup>176</sup> Edwards, Lilian. “Roles and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights”, 2010, [http://www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediaries\\_final.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf)

# CHAPTER 4

## THE LEGAL FRAMEWORK OF ONLINE COPYRIGHT PROTECTION IN MONGOLIA

### 4.1. *Legal System of Mongolia and Copyright Protection*

Mongolia is a landlocked country, sandwiched between China to the south and Russia to the north. At a land area of 1.5 million square meters, Mongolia is the 18<sup>th</sup> largest country and the most sparsely populated unitary sovereign state in the world with a population of around 3 million.<sup>177</sup> After almost seven decades of Communist rule under pressure from the Soviet Union, Mongolia formally transitioned from a central-planned economy to a free-market economy by adopting its new democratic Constitution on 13 January 1992. After the adoption of the Constitution and the active engagement in international cooperation, Mongolia has reformed its laws and regulations in consistent with international norms and standards, and this was a start of modern legal system of Mongolia after the communist legal system.

#### 4.1.1. *The Mongolian Legal System*

On the basis of the Constitution came into force in 12 February 1992, Mongolia has built a civil law legal system primarily based on the continental or Romano-Germanic tradition. Many of laws, including the Civil Code of Mongolia<sup>178</sup>, modeled the German laws and regulations by adopting their main legal concepts. However, due to the fact that several multilateral agencies and academics from various countries have been involved in the drafting of laws, the Mongolian legal system has been influenced by both civil and common law legal systems<sup>179</sup> to some extent, having some inconsistencies among laws and legislative acts in terms of concepts and legal terminology. However, it does not necessarily mean that

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<sup>177</sup> <https://en.wikipedia.org/wiki/Mongolia>

<sup>178</sup> Civil Code of Mongolia was adopted in 2002.

<sup>179</sup> According to some scholar, Mongolia is determined having a hybrid Civil Law-Common Law system of jurisprudence.

<https://www.privacyshield.gov/article?id=Mongolia-Transparency-of-the-Regulatory-System>

Mongolia accepts the core features of common law legal system. For example, as for the judicial practices in Mongolia, in 2012, the Parliament of Mongolia enacted a provision to the Law on Courts of Mongolia<sup>180</sup> regarding the power of the Supreme Court to interpret other laws except for the Constitution in a way of deciding a certain case at hand and to make a public release in a timely manner<sup>181</sup>. Prior to the adoption of the provision above, the Supreme Court, within its constitutional power, used to issue a separate resolution on certain provisions of a law by giving an abstract, official interpretation, not based on a real case.<sup>182</sup> However, the Constitutional Court of Mongolia abolished the provision under which it allowed the Supreme Court to make an official interpretation of a law in a way of deciding certain case, and concluded that the provision as such was in conflict of the Constitution of Mongolia. Therefore, the Mongolia legal system does not recognize judge interpretation, or judge made law (precedents), as a source of law (no *stare decisis*).

#### 4.1.2. Intellectual Property Protection

Under the Constitution, providing that “*the State shall recognize any forms of public and private properties and shall protect the rights of an owner by law*”<sup>183</sup>, Mongolia supports intellectual property rights, and as a member of the World Intellectual Property Office (WIPO)<sup>184</sup>, has signed and ratified most relevant treaties and conventions<sup>185</sup>, including the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights.

According to the Article 10 of the Constitution, the international treaties to which Mongolia is a party becomes effective as domestic legislation upon the entry into force of the laws on their ratification or accession. Moreover, it is stated that

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<sup>180</sup> The Law of Courts on Mongolia was adopted on 07 March 2012 under judicial reform laws.

<sup>181</sup> Article 17.3.1 of the Law of Mongolia on Courts, which is abolished by the Constitutional Court Decision dated 30 October 2015.

<sup>182</sup> Article 50.1.4 of the Constitution of Mongolia, the Supreme Court of Mongolia shall have the power to provide official interpretations for correct application of all other laws except for the Constitution.

<sup>183</sup> Article 5.2 of the Constitution of Mongolia

<sup>184</sup> Mongolia accessed to the WIPO Convention on November 28, 1978.

<sup>185</sup> See <http://www.wipo.int/wipolex/en/profile.jsp?code=MN>

Mongolia shall fulfill in good faith its obligations under international treaties to which it is a party.

Apart from international treaties, intellectual property rights are granted through three main legislations: the Patent Law of Mongolia last amended on September 1, 2016, the Trademarks and Geographical Indications last amended on June 10, 2010 and the Law on Copyright and Related Rights last amended on May 18, 2017. Besides, there are several laws that contains provisions regarding intellectual property, including Law on Technology Transfer (1998), Law of Mongolia on Competition (2010), Law of Mongolia on Telecommunications (1995), Consumer Protection Law of Mongolia (1991), etc.

#### *4.1.3. Law on Copyright Right and Related Rights*

The Law of Mongolia on Copyright was enacted in 1993 and its revision approved as Law on Copyright and Related Rights (“MCA”) in January 2006 in order to incorporate requirements under international treaties Mongolia is a party, the Constitution and the Civil Code of Mongolia. To date, the MCA has been amended three times since 2006, however, those amendments were not relevant to the concept of copyright, rather terminological changes.

Under MCA, the “work” is considered as a result of an author’s (intellectual) creative activities in the literary, scientific or artistic domain, irrespective of their content, intended use, form of its expression and its value.<sup>186</sup> For copyright to subsist in a work it has to be an original intellectual creation. In addition, According to the MCA, those works subject to copyright shall be created in written, verbal, graphic and other tangible forms regardless of whether they were published or not.<sup>187</sup>

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<sup>186</sup> Article 6.1 of the MCA “*Зохиогчийн эрхийн бүтээлд агуулга, зориулалт, үнэ цэнэ, ач холбогдол, илэрхийллийн аргаасаа үл шалтгаалан зохиогчийн оюуны бүтээлч үйл ажиллагааны үр дүнд бий болсон шинжлэх ухаан, утга зохиол, урлагийн бүтээлийг тооцно.*”

<sup>187</sup> Article 6.2 of the MCA “*Зохиогчийн эрхийн бүтээлийг нийтлэгдсэн эсэхээс үл шалтгаалан бичмэл, аман, зурмал болон бусад биет хэлбэрээр бүтээсэн байна.*”

Furthermore, under the MCA, the following works shall be subject to copyright<sup>188</sup>:

- i) All types of scientific and literary works whether in verbal or written form, including computer program;
- ii) All types of musical works whether with or without lyrics;
- iii) All types of works of fine art;
- iv) Works of decorative, applied and theatrical arts;
- v) Works of architecture and sculptures;
- vi) All types of choreographic works, works of contortionists and pantomime;
- vii) All types of plays and musical works created for the stage art;
- viii) All types of photographic works and works created for the stage art;
- ix) Audiovisual works;
- x) Derivative works;
- xi) Glossaries, references, compilations and databases that are considered to be an intellectual work by its structure and content and have been created through creative activities such as selection and placement materials;
- xii) Derivative works based on the works of folklore.

Under the MCA, there are some types of works excluded from copyright protection as follows<sup>189</sup>:

- i) Texts of laws and other legal acts;
- ii) Administrative decisions and official documents of legal entities and organizations;
- iii) Court decisions, resolutions, judge's decrees, other documents and speeches delivered during court hearings;
- iv) Translation of documents specified in subsections i) to iii) above;
- v) Coats of arms, banners, flags, awards, orders and medals;
- vi) Any news or information with facts and figures for the purpose of reporting the current events and results thereof;
- vii) Works of folklore and national traditions;

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<sup>188</sup> Article 7.1 of the MCA

<sup>189</sup> Article 8.1 of the MCA

viii) Any ideas, methods, procedures, scientific discoveries and mathematical concepts.

As same as most countries, the MCA reflects two sets of interests that are generally referred to as economic and moral rights. Above all, according to the MCA, authors enjoy moral rights, including right of authorship, right of name, right to demand recognition of his authorship of the work and right of integrity, and moral rights cannot be transferred to others.<sup>190</sup> Moreover, economic rights under the MCA give the copyright holders power of right of reproduction, right to publication, right of distribution, right of adaptation of a work into derivative work and right of rental.<sup>191</sup> The MCA also covers sui generis rights and related rights that are rights of performers, phonogram producers, film producers and broadcasting organizations.

Normal exploitation of the work occurs when an author is expected to exploit their work and receive a fee in return, under a reasonable manner. According to the Berne Convention, some materials may be allowed to be used in certain ways if they are of minor importance, under the rules of national law. The Berne Convention determines a three-step test for the exceptions of the rights. The first step requires that exceptions should be confined with certain special cases, the second step requires that exceptions be not in conflict with a normal exploitation of a works, and the third step requires that exceptions do not unreasonably prejudice the legitimate interests of the author. The limitations and exceptions of the MCA complies the requirements of the three-step test under the Berne Convention.

In consistence with the Berne Convention, the MCA provides limitations and exceptions of copyright as follows<sup>192</sup>, subject to the condition that the name of the author and source be mentioned:

- i) To quote from published works in order to prepare press review;
- ii) To quote from published works for research, criticism and information;

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<sup>190</sup> Article 11 of the MCA

<sup>191</sup> Article 12.2 of the MCA

<sup>192</sup> Article 24 of the MCA

- iii) To reproduce parts of the works used in the archives, museums and libraries;
- iv) To publish or broadcast works on current economic, political and religious issues, which were published in press, broadcast through media;
- v) To publish speeches and presentations delivered at meetings and conferences for the purpose of information;
- vi) To publish works of architecture, fine arts and photography located in public places in order to show the surrounding areas of events while reporting the events to the public;
- vii) To use works for the visually impaired and people with hearing problems;
- viii) To reproduce works for private use;
- ix) To reproduce works for criminal, civil and administrative procedures.

Under the MCA, the use of works subject to limitations and exceptions as mentioned before, such use needs to be not in contradiction with the normal exploitation of published works and not against the legal interest of the copyright holder.<sup>193</sup> Moreover, the following three conditions shall be considered in determining the limitations and exceptions: the purpose of work whether to be for profit or not for profit, the extent of use and the importance of the used parts, and the value of the work and the effect of the used part on the market.

As for the general regulations of the copyright protection in Mongolia, they are in line with the minimum requirements for copyright protection as specified by international treaties on copyright, although some of regulations lack in today's fast growth of digital technology and it mostly likely to fail in suggesting an appropriate legal measure in case of potential online copyright infringements.

#### *4.1.4. Current Status of Enforcement of Online Copyright Protection*

In Mongolia, intellectual property law is the youngest among other fields of law and is at its development. With the rapid development of the digital technology, the

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<sup>193</sup> Article 24.1 of the MCA

extensive use of copyrighted works without authorization of the copyright holder on websites, blogs, social networking platforms, are becoming a serious issue.

As discussed in the previous section, the legal framework of intellectual property protection is well developed, however, there are some difficulties in implementing and enforcing phase. The recent efforts to protect IPRs cannot be ignored, but the theft or other illegal conducts of IP requires more measures from both parties, including government authorities in charge of. According to the survey conducted by the Intellectual Property Organization of Mongolia (IPOM), during last 7 years, it is recorded that the number of copyright infringement was 86 for 2010, 236 for 2011, 69 for 2012, 154 for 2013, 266 for 2014, 234 for 2015 and 263 for 2016, respectively. If we classify copyright infringements by two categories, works of science, literature and art, and digital environment, the number of copyright infringements is showed as follows:<sup>194</sup>



■ Cases of scientific, literature and art works      ■ Infringements on the Internet

From the survey, deviation of cases regarding works of science, literature and art is being assorted, yet the number of online copyright infringement is gradually

<sup>194</sup> Evaluation Report on Law Implementation: Law on Copyright and Related Rights, National Legal Center, February 2017, available at: [http://nli.gov.mn/pdf/heregjiltiin\\_ur\\_dagavar\\_tootsoh.pdf](http://nli.gov.mn/pdf/heregjiltiin_ur_dagavar_tootsoh.pdf)

increasing over years. As for the cases settled by court, the statistics<sup>195</sup> shows that the number of cases settled by court in last seven years until 2017 had averaged two in a year. According to the interview<sup>196</sup> made with authors, artists and right holders, they explained the reason of being reluctant to approach to the courts that legal authorities in every stage did not care copyright infringement and it was a burden for them to prove the amount of damages incurred in relation to the infringement, as they required to determine the amount of damages before submitting to a claim to a court, which was mostly impossible, especially in case of online infringements. Therefore, almost all of copyright infringements are settled or otherwise closed in the pre-court stage.

Moreover, some scholars argue that the key to better protection in Mongolia is to raise awareness of the importance of intellectual property among entire population,<sup>197</sup> which is true in my opinion. Almost majority of people shares each other books, movies, links of foreign websites including pirated material, copy and reflect other's materials available on the Internet to their own sites, etc. without any respect for the copyright holder's creative activity and sweat of broth. The further threat of this phenomenon is that people start thinking about explicit copyright infringements as if nothing is wrong. Still, many seem to hold the mistaken belief that information accessed through the Internet is free for the taking.

The recent case regarding the copyright infringement on the Internet has been happened during New Year holidays of 2018. A Mongolian comedy production put their work, called "Thank you, Mother" on the paid IPTV channel. However, not long after it was released on that IPTV channel, some users of Facebook posted the copies of the work for free and distributed it over the Internet. No person is charged and the copyright holders remained uncompensated.

Unlike South Korea, in Mongolia, the social networking sites as same as *Daum*, *Cyworld*, *Kakao Story* etc. are not proliferated, and the majority of population has

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<sup>195</sup> Information of Court Research, Information and Training Center, as of February 2017

<sup>196</sup> *Id.*

<sup>197</sup> <http://lehmanlaw.mn/blog/intellectual-property-protection-in-mongolia/>

been using a foreign social networking sites, dominantly Facebook<sup>198</sup>, Twitter and Instagram. Since those sites are foreign based, it makes hard to track down the infringing materials in a short period of time. These situations show that online copyright infringement is knocking the door, however, yet we are not prepared for preventing and stopping them.

#### *4.2. Regulations regarding Internet Service Providers*

##### *4.2.1. Under the Law on Copyright and Related Rights*

Article 25 of the MCA provides provisions regarding copyright protection in the Internet. In the text, it provides as follows:

- i) An internet service provider<sup>199</sup> shall be obliged to prevent any copyright violation in websites hosted on its own server and provide authors and right holders with the possibility to enforce their rights.
- ii) An internet service provider shall facilitate the receipt of reports on violations of copyrights and related rights and shall be obliged to close the website in question as soon as such violation is reported.
- iii) A judge or a state inspector shall impose liabilities specified in the Law on Infringements, which failed to perform its duties provided above.
- iv) The court shall resolve disputes relating to closing down of websites.

According to the MCA, a breach of provisions of the MCA shall be subject to a fine or criminal punishment under the Law on Infringement and the Criminal Code of Mongolia<sup>200</sup>.

Having reviewed the above provisions, the MCA is likely to be the law that provides the strongest yet uncertain measures on the copyright infringement using

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<sup>198</sup> As of December 2017, roughly 2,000,000 Internet users with 64.1% penetration, per IWS, and 1,900,000 Facebook subscribers with 60.9% penetration, available at <https://www.internetworldstats.com/asia.htm>

<sup>199</sup> The MCA does not provide a definition on the term “internet service provider”.

<sup>200</sup> The Law on Infringement was adopted in May 11, 2017. Under the Article 8.3 of the Law on Infringement, in case of copyright infringement not substituting criminal conduct, it shall be a monetary fine of app. USD 250 for an individual and USD 2,500 for a legal entity, with of confiscation of property or close down of business activities. If the breach substitutes a crime, it shall be subject to a fine ranging from USD 200 to USD 2,500, or community services up until 420 hours, or a restriction on freedom of travel up to one year, taking into consideration of characteristics of criminal conduct.

Internet. It gives internet service providers an authority of an immediate closedown of the alleged websites for copyright infringement. Moreover, it has not yet determined who and on what conditions could make a request for such closedown.

As discussed in the previous chapters, countries including the United States, Korea, the European Union, Canada, etc., have acknowledged the limitations of liabilities for online service providers on certain conditions. On contrary, the MCA gives the obligations for internet service providers, subject to a fine or penalty under respective laws under its main law of copyright and related rights.

However, in the electronic library of court decisions<sup>201</sup> since 2011<sup>202</sup>, there is no case recorded applying the Article 25 of the MCA to date.

#### *4.2.2. Under the General Terms and Conditions of Digital Content Service Regulation*

Besides the MCA, the Communications Regulatory Committee of Mongolia adopted a regulation named “General terms and conditions of digital content service regulation” as revised on 23 October 2015 by its Resolution No. 60 (“Digital Content Regulation”). The purpose of this regulation is not to distribute illegal contents and improve ethics and responsibility of the public regarding public comments. As defined by the regulation, the “content” means sign, signal, text, sound, voice, video and all types of news and information converted to digital mode, that are distributed through the communications network, however, exclusive of electronic emails, spam emails and other individual communications such as telephone conversation, facsimile, IP telephone conversation etc.<sup>203</sup>

Even though there is no legal definition for the term “internet service provider”, the Digital Content Regulation uses a term of “content provider” and defined it as a

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<sup>201</sup> [www.shuukh.mn](http://www.shuukh.mn), an official website for court decisions of Mongolia.

<sup>202</sup> “Electronic Library of Court Decisions as accessible to shuukh.mn, was initiated on 15 April 2010 for the purpose of ensuring openness and transparency of courts. This library contains all the court decisions including those of first instance court, appellate court and Supreme Court of Mongolia, and all decisions except for court decisions subject to confidential information regarding individual, corporate and state are downloadable.”, <http://old.shuukh.mn/>, main page of the website

<sup>203</sup> Article 2.1 of the Digital Content Regulation

“legal entity that collects contents from various types of resources for the propose of re-use or re-sale, and provides contents aimed for conversion, adjustment and sale through its own equipment and software in order to distribute them through a service provider’s network or Internet network.”<sup>204</sup> According to the Article 15.16.3 of the Law on Special Licenses, the Communications Regulatory Committee is entitled to grant license for carrying out activities regarding content service business. The Communications Regulatory Committee grants two kinds of licenses, including “A” type license of establishing information and communications network and infrastructure, and “B” type license of internet service provider for retail service providers who provide internet service to end uses such as households and organizations.

Having reviewed the above regulations, the terms used in secondary regulations that are adopted under main laws, are not compatible with each other and even the main laws do not provide a general definition on specific terms such as internet service provider. It creates a hindrance for determining general concept on internet service providers itself.

Under the Digital Content Regulation, it is prohibited to create, distribute or advertise illegal contents that are in breach of specific laws of Mongolia, including the Criminal Code, the Law against Pornography, Law against Human Trafficking, the Law against Drugs, the Law on Advertisement, the Law on Copyright and Related Rights, the Law on Alcoholism, the Law on Protection of Children’s Rights, the Law on Parliament Election, and the Law on National Security.<sup>205</sup> A content provider is obliged to supervise whether there is a breach of illegal content, and in case of the breach, it is required to ensure technical measures to prevent and stop the breach immediately.<sup>206</sup> However, as same as the MCA, the Digital Content Regulation does not provide any sound requirements regarding procedures for notice of copyright infringements.

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<sup>204</sup> Article 2.2 of the Digital Content Regulation

<sup>205</sup> Article 4.1 of the Digital Content Regulation

<sup>206</sup> Article 5.2 and 5.3 of the Digital Content Regulation

As for content providers who manage their services by enabling users to leave comments, or upload their contents on the content provider's platform, they are required to implement following measures:

- i) Using a filter system of banned words as determined by the Communications Regulatory Committee;
- ii) Allowing users who agreed to use the service according to the terms and conditions in compliance with relevant laws and regulations of Mongolia, to create a content on the platform;
- iii) Enabling users to express their opinion if they consider other user's content is illegal or against public order and applying procedures to delete them depending on the number of requests received;
- iv) Placing users' IP address in full on the top of the contents they created;
- v) Deleting contents that breach the requirement of the article 4 (a list of contents that are considered illegal);
- vi) Enabling users to log in with their chosen name and email address and to leave a comment;
- vii) Log-in information shall be kept at least for 6 months;
- viii) Administration of website shall be able to resolve issues regarding comments without delay, within 24 hours after receipts of requests and proposals.
- ix) A warning notice shall be placed on the top of commenting section as visible as possible for users. For example, it may say "*Please consider legal and ethical norms before you leave a comment. Please note that your comment would be deleted in case of any incompliance with relevant norms*".
- x) Procedure for deletion of illegal comments must be determined.

Moreover, news and information web sites are not allowed to link to other websites in the following case:

- i) Information that violates relevant law and aims to distribute illegal materials;
- ii) Information that violates copyright or causes to violate;

- iii) Information that misleads readers even though it does not contain illegal information;
- iv) Framing can be only used to optimize the organization of own website, but it is prohibited to put other's content directly.

In case of incompliance of the above requirements, access to the website from Mongolia may be limited or blocked by the Communications Regulatory Committee.<sup>207</sup> Within the Digital Content Regulation, the Communications Regulatory Committee may make an inspection upon a request or complaint from users or organizations. According to the statistics as of the first quarter of 2016, total of 214 websites were closed down due to the violation of Law on Copyright and Related Rights, Law on Pornography, Law on Protection of Children's Rights, Law on Advertisement, Criminal Code, Law on Competition, Law on Consumer Protection and other relevant statutory regulations.<sup>208</sup> However, there is a continuous cycle in which a website whose domain name being shut down, reopens and post copyrighted contents under a new domain name. Now that there is no official law on domain name registration, this situation makes even more difficult to combat with online piracies<sup>209</sup>. In this regards, there is no record of court litigations regarding the closedown of websites.

Due to the fact that there is no main law that gives the authority to take measures such as close down the service of online service providers and the regulation adopted by the government authority is unclear in terms of procedure, there are several misuses or illegal closedowns happening in the course of implementation. For example, on 4 July 2014, the Communications Regulatory Commission blocked a website, [www.amjilt.com](http://www.amjilt.com), based on the informal request made by an official from the Communications Regulatory Commission to the portal management department to remove a critical investigative article mentioned the Prime Minister of Mongolia. Following that, the Communications Regulatory

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<sup>207</sup> Article 6.9 of the Digital Content Regulation

<sup>208</sup> Northeast Asia Copyright Issues in a Digital age: Comparative Studies on Copyright Laws and Policies of China, Mongolia, Russia and Korea, November 2016

<sup>209</sup> However, the Parliament of Mongolia has directed the Government to draft unified regulations under which it provides all matters regarding registration, possession and exploitation of domain names in an effective manner.

Commission put the website on the list of domains which are blocked for violation of intellectual property rights, without any proper notice or warning to the website<sup>210</sup>.

The above incident indicates that an uncertain, unclear regulation that does not based on a law, can threat the user's freedom of expression as well as journalism, also known as the fourth governance, and consequently, put on an adverse effect on the balance of legitimate interest of interested parties. According to the Manila Principles drafted and indorsed by civil society groups from around the world, under its first principle, it declares that any rules governing intermediary liability provided by laws, which must be precise, clear, and accessible. Even as is it required by the rule of law rules, any measures that are aimed to restrict on one's right and legitimate interest must be on the basis of a particular law which provides a clear, unambiguous procedures on the implementation.

#### *4.3. Secondary Liability in Mongolia*

In Mongolia, copyright law is considered as a part of civil law, and copyright holders' rights are secured under respective copyright regulations, the Civil Code as well as the Law on Civil Procedure. Therefore, authors and copyright holders have a right to claim against infringement of copyright and related rights under the Civil Code and respective copyright regulations and demand compensation for losses and damages caused, regardless of administrative or criminal punishment imposed in relation to the breach.

##### *4.3.1. Under Civil Law*

Liability under the Civil Code aims to compensate actual damages incurred by a person in relation to other's wrongful action.<sup>211</sup> Unlike common law legal system, the concept of punitive damage is not determined by the Civil Code. According to the Civil Code, claim for damage compensation must be limited to the extent of

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<sup>210</sup> OSCE media freedom representative in Mongolia concerned blocking of news websites in

Mongolia, 10 July 2014, available at: <https://www.osce.org/fom/121076>

<sup>211</sup> Article 209 of the Civil Code of Mongolia

actual damage and loss suffered. The amount of loss or damage must be determined by the loss or damage itself, including losses of potential profit.

The Article 497 of the Civil Code regulates general grounds of liability for damages. According to the Article 497, a person who caused damages to other's right, life, health, dignity, business reputation or property deliberately or due to negligent action or inaction, are obliged to compensate the damages caused. If several person participated to the cause of damage, they shall be jointly liable for the damages and in this case, except for the direct infringer, persons who urged to, assisted, and benefited shall share the responsibility<sup>212</sup>. This Article 497 of the Civil Code implies the possibility of indirect liabilities of aider and abettor under civil law claims.

Even though there is no court decision recorded in relation to the liability of internet service provider, the civil courts is very likely to apply the Article 497 of the Civil Code when determining the liability of internet service providers on the online copyright infringement caused by their users. Although section 2 of the Article 497 states that "if the person proves that the damages did not occur as a result of his or her own fault, he or she shall be released from liability for the damages except as provided by law", it is unforeseeable how the courts would determine the amount of fault, or wrongful action, on a case-to-case basis.

Even though there is no clear, certain definition of liabilities, some laws other than the Civil Code and some provisions under the tort law section of the Civil Code acknowledge the concept of vicarious liability in certain cases under the theory of employer-and-employee relationship. For example, under the Law on Promotion of Gender Equality, if an employee breaches a provision of the law while performing the duties stipulate in the labor agreement or the terms of agreement of the position, and the breach involves damages to others, the employer shall be responsible under the Article 498.1 and 498.2 of the Civil Code of Mongolia for reimbursement of the damages incurred.

#### *4.3.2. Under Criminal Law*

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<sup>212</sup> Article 497.3 of the Civil Code of Mongolia

In the Criminal Code of Mongolia, a person who organizes, aids or abets in the commission of a crime is treated the same as a principal offender and together with the principal offender, is considered as joint offenders of the crime.<sup>213</sup> Such a joint commission requires joint intention of principal and aider or abettor offenders for the commission of crime, whether by advance negotiation or intended conducts without advance negotiation. Therefore, taking into consideration the intention of joint offenders, internet service offenders may be released from criminal liability for direct infringement by its users, however, it cannot affect internet service offenders' direct liability for their own actions or inactions as provided by laws.

#### *4.4. Conclusion to the Chapter*

This chapter studies the legal framework of Mongolia in general and mainly focuses on the Law on Copyright and Related Rights and the Digital Content Regulation adopted by the Communications Regulatory Committee of Mongolia. In addition, it seeks to reveal the implementation and enforcement of those regulations in practice. It appears that Mongolia has adhered "horizontal" regulation that deals with the all types of contents unlike the US and Korea's vertical regulation. However, the legal ground of such "horizontal" regulation is not rooted in the law to be adopted by the Parliament of Mongolia subject to entire implementation throughout the country. Instead, it is regulated by the Digital Content Regulation which is adopted by the government agency. Therefore, from a legal principle, it is incompliance with the rule of law, and only makes uncertainty for implementation.

According to the research above regarding the online service provider's liability and the limitation in the context of Mongolia, it shows the effective and proper mechanism in addressing today's conflict issues on the Internet lacks and in a great need for revision.

First of all, there is no harmonization between laws and secondary regulations. Due to the uncertainty of the legal construction, it has developed the system where both copyright holders', users' and online service providers' legal interests would be

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<sup>213</sup> Article 3.1 of the Criminal Code of Mongolia of 2017

adversely impacted. While the main law on the copyright issues sets forth an obligation for internet service providers to adopt a procedure of receiving a notice regarding the copyright infringement and to close down websites that is alleged for the infringement. In addition, internet service providers are obliged to ensure that any copyright infringement appears on the websites within their server. Failure of compliance with both of these obligations is subject to the statutory penalty on the Law on Infringement. Yet, the Digital Content Regulation appears only to regulate the activities of websites that can have a full control on the user's content, under the term of "content provider". Therefore, it is indeed no correlation between these two regulations in terms of legal aims. It indicates that current copyright protection regarding online piracy in Mongolia requires an in-depth study on this subject and an effective and proper mechanism, more importantly, a clarification on the legal construction.

Secondly, within the legal framework of Mongolia, there is no "safe harbor" for intermediaries. Instead, the law imposes an obligation for internet service providers to be liable for all the illegal websites within their system. Due to the lack of certainty, it is also unclear what the legal meaning of "internet service provider" is, and the law only regulate the relationship between internet service provider and the websites. In addition, there is no united domain regulation in Mongolia, which makes a continuous cycle of copyright infringement. The websites that are closed down by the internet service providers or whose access is disabled from Mongolia, often opens another website under a slightly different name. It makes the policy ineffective.

Thirdly, under the Digital Content Regulation, which basically regulates the activities of websites or webpages that allow users to leave comments or links to the infringing materials, the Communications Regulatory Committee may restrict or block the access from Mongolia if the websites fail to comply with obligations not to allow illegal information, linking, or users' comments within their system. Websites itself may close down the user's account through which any illegal conducts has been tracked in consideration of numbers of the warnings. The legal procedure of sending and receiving a notice is not defined by the regulation.

In conclusion, for the avoidance of adverse impacts on the copyright protection in the digital network environment due to the uncertainty of law, the Law of Mongolia on Copyright and Related Rights and the Digital Content Regulation of the CRC should be reconsidered with an in-depth study and the proportionate evaluation on the society demand.

# CHAPTER 5

## RESEARCH RESULT, RECOMMENDATION AND CONCLUSION

*Only one thing is impossible for God: to find any sense in any copyright law on the planet.*

*Mark Twain, Mark Twain's Notebook (1902-1903)*

### 5.1. Research Result

#### *5.1.1. Necessity of devising a regime of intermediary liability in the Mongolian copyright system*

Modern copyright law is always being challenged by the fast development of Internet-based technologies in various forms. In the digital environment, internet service providers have become a key player among content owners and copyright holders as an intermediary in a pleasant or an unlikeable way. The answer for this increasing role of internet service providers in copyright context was the adoption of limitation of liability conditioned by the notice and takedown scheme. Now, the U.S. initiated safe harbor regime for online copyright infringement has been embraced by a number of countries including both developed and developing countries.

Not just as limited to countries only, a number of international instruments has encouraged the adoption of such limitation and recommended to accept it as a high principle for Internet governance. For example, the OECD issued "Recommendation of the Council on Principles for Internet Policy Making"<sup>214</sup> and recommended that, in developing or revising their policies for the Internet Economy, the Members<sup>215</sup> should consider the limitation of intermediary liabilities

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<sup>214</sup> OECD Legal Instruments, OECD/Legal/0387, 13 November 2011  
<https://legalinstruments.oecd.org/en/instruments/270>

<sup>215</sup> The OECD consists of 36 member countries from North and South America to Europe and Asia-Pacific, including many of the world's most advanced countries but also emerging countries like Mexico, Chile and Turkey.  
<http://www.oecd.org/about/membersandpartners/#d.en.194378>

as a high level principle.<sup>216</sup> It further states that limitations play an important role in promoting innovation and creativity, the free flow of information, and in providing the incentives for co-operation between stakeholders. Moreover, the 2011 Joint Declaration of the Three Special Rapporteurs for Freedom of Expression apparently contains statements, suggesting an ongoing search for a global regime for intermediary liability.<sup>217</sup> After reinforcing the mere conduit principle, the Declaration suggests liability limitations even for other intermediaries including hosting providers, search engines and those enabling financial transactions.<sup>218</sup> Non-government, civil organizations have also suggested to shield intermediaries from liability for third-party contents by law.<sup>219</sup>

Therefore, it is undeniable to say that other countries where such safe harbor scheme has not yet introduced, should at least consider its necessity in their legal and socio-economic context and weigh potential importance in implementing an effective mechanism for copyright protection. Having discussed the legal and regulatory framework of current copyright system in Mongolia and potential risks of legal actions unreasonably against internet service providers, there comes the reasons why a limitation of liability regime for internet service providers is being recommended as a desirable mechanism for the purpose of copyright law. Following is a discussion on the grounds for Mongolia to consider the practice.

*i. The regime of intermediary liability in Mongolia on an international scale of global trend*

Even though the regime of intermediary liability and limitation to the liability are no part of any international intellectual property agreements or international treaties, the introduction of regulations designated to internet service providers, especially the limitation of intermediary liability for copyright infringement, has

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<sup>216</sup> Id. OECD, I, Principle 12 (Limit Intermediary Liability)

<sup>217</sup> Frosio, Giancarlo F. “Internet Intermediary Liability: WILMap Theory and Trends”, *Indian Journal of Law and Technology*, 2017

<sup>218</sup> Frosio, id.

<sup>219</sup> The Manila Principles on Intermediary Liability, Ver. 1.0, 3 May 2015, [https://www.eff.org/files/2015/07/08/manila\\_principles\\_background\\_paper.pdf](https://www.eff.org/files/2015/07/08/manila_principles_background_paper.pdf)

been welcomed by many countries.<sup>220</sup> Globally, regimes for intermediaries may be divided into three main categories, namely i) strict liability, ii) complete immunity, and iii) safe harbor and notice based liability.<sup>221</sup> As to-be most extreme approach, a strict liability regime would impose unconditional liability on the intermediaries for the illegality of content uploaded by third parties and would de facto require the intermediary to police the contents, whereas complete immunity allows intermediaries to continue hosting, transmitting or otherwise processing even information that has been adjudicated as violating the law.<sup>222</sup> As a middle ground between two approaches, many countries provide safe harbors to intermediaries, creating conditional immunity for the intermediary, typically establishing obligations or potential liability once an intermediary gains knowledge of unlawful content.<sup>223</sup>

As studied in the Chapter 3, both the United States and South Korea have been implementing a conditional safe harbor regime for internet intermediaries. Under the safe harbor regime implemented by two countries, it requires that the intermediary must not interfere in the selection of or the transmission of user content, and the immunity is limited based on timely action by the intermediary for the removal of content once it learns of the unlawful content based on the notice and takedown procedure.

As to the Mongolian current copyright law, there is no provision declaring any immunity for internet intermediaries from liability for copyright infringement. Instead, it provides in the Article 25 of the Copyright Act that internet service providers be obliged to prevent any copyright violation in websites hosted on its

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<sup>220</sup> Seng, Dania. "The State of the Disordant Union: An Empirical Analysis of DMCA Takedown Notices". *Virginia Journal of Law and Technology*, Vol. 18, No. 03, Summer, 2014

<sup>221</sup> *The Right to be Forgotten and Blocking Orders under the American Convention: Emerging Issues in Intermediary Liability and Human rights*, Intermediary Liability and Human Rights Policy Practicum, 2017, <https://law.stanford.edu/publications/the-right-to-be-forgotten-and-blocking-orders-under-the-american-convention-emerging-issues-in-intermediary-liability-and-human-rights/>; In the Manila Principles on Intermediary Liability Background Paper, it defines similarly that there are three general approaches to intermediary liability, including expansive protection against liability, conditional immunity from liability, and primary liability for third-party context.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

own server and provide authors and right holders with the possibility to enforce their rights. Further, it allows internet service providers to close the websites in question as soon as such violation is reported. Although there is no legal definition for the term “internet service providers”, within the legal verbatim context aforementioned, the term “internet service providers” used in the Article 25 is likely to refer to only internet service providers that give access to Internet neutrally, owing to the legal wording “websites hosted on its own server”.

Having reviewed the current regulations within the Copyright Act of Mongolia, it can be concluded that the regime of intermediary liability in Mongolia is near to “strict liability” regime, on account of the imposition of a general obligation for internet service providers to prevent any copyright violation in websites hosted on its own server. Despite that the Act does not manifestly outline that internet service provider would be liable for illegal contents of a third party, it makes an indirect statutory obligation to police the websites and close them down upon the request from the authors or rights holders. As specified in the Chapter 4, the current regulations regarding internet service providers under the Copyright Act are uncertain in terms of to whom it would be relevant, and harsh for both internet service providers whatever it means and website owners. Therefore, it certainly needs to be considered for revision in whole.

*ii. Risk of legal action against internet service providers for a third party's direct copyright infringement*

In Mongolia, there has been no systematic rules on the issue of indirect liability for copyright infringement in legislation. As defined in the Chapter 4, the Copyright Act of Mongolia does not contain a concept of indirect copyright infringement. However, as a subpart of civil law, liability for indirect copyright infringement can be sought under relevant provisions of the Civil Code of Mongolia and the Criminal Code of Mongolia. The Article 497.3 of the Civil Code states that if several person participated to the cause of damage, they shall be jointly liable for the damages and in this case, except for the direct infringer, persons who urged to, assisted, and deliberately benefited from outcome shall share the responsibility. Under the Criminal Code of Mongolia (article 3), a person who intentionally aided

and abetted to the criminal offence shall be considered as aider and abettor, therefore, jointly liable. Unlike civil law, criminal law requires strict characteristics of advance intention to the primary offense.

As it may be same in other jurisdictions, the legal concept of indirect, or secondary, liability is not well explained or understood, and tends to vary on a case by case basis. In generally speaking, there is a legal possibility of building a legal ground to claim against internet service providers for indirect copyright infringement. However, at the stage of application by court, substantial uncertainty can be found. For example, the Civil Code provides joint liability for joint infringement, implying that any person who incites or assists another to commit a tort is the joint tortfeasor. Yet, there is no clear rule how to define the joint conduct and what will be threshold one being considered as jointfeasor, from the beginning or in the result.

If a person brought a legal action against an internet service provider, alleging it for indirect copyright infringement, the indirect infringement would be mostly contributory infringement. As for vicarious infringement, it cannot be directly or easily applied for the case of internet service providers, because the tort law regime in the Civil Code of Mongolia is strictly restrained as to be applicable for employer and employee relationship or under certain conditions specifically determined by law. Different from common law legal system, it is required to have a legal ground clearly determined before submitting any claim to the court. Except for a potential claim against internet service providers under a tort law doctrine, according to the Article 25 of the Copyright Act, internet service providers would be subject to administrative fines for not fulfilling their obligations to prevent from any copyright infringement and to close alleged websites upon request.

Having reviewed the legal grounds as discussed above, the risk of legal action against internet service providers for indirect copyright infringement could be anticipated and foreseeable within the current Mongolian legal framework. Apparently, online intermediaries are likely to be involved in legal action against direct or indirect copyright infringement regardless of their actual connection with the primary infringing action. Also, a court may find an online intermediary liable for indirect copyright infringement on the basis that it has encouraged or allowed

illegal content on their system regardless of its actual connection or intention, under a murky doctrine of secondary infringement.

With the advent of technologies enabling easy copy and dissemination of works in various forms, Internet users are now capable of conducting severe copyright infringement. As for copyright holders, it is not an easy task to locate the infringers or to get compensated from them. Even though there is no case recorded in Mongolia, of claiming against internet service providers, it is undeniable that there would be cases in near future just as same in the other jurisdictions. As such, a lack of certainty of intermediary liability in current legislation will inevitably decrease their incentives for utilizing new technology and participating e-businesses. What is more, this may cause a negative impact on the progress of science and on economic development in Mongolia.

Therefore, the copyright law of Mongolia should introduce concrete and detailed provisions to construct a comprehensive indirect liability for online copyright infringement<sup>224</sup> as well as to grant a certain limitation of liability for both internet service providers who conduct a mere connectivity and those who host user-generated contents without actual or constructive knowledge, for avoidance of unreasonable threat of liability that will ultimately hinder the proliferation of new technologies and internet intermediary businesses.

#### *5.1.2. Advantages over disadvantages of adopting a conditional immunity regime for internet service providers*

As discussed in the previous sections, safe harbor for internet intermediaries initiated by the U.S. has played an important role by assuring efficiency of internet services and has contributed to the improvement of variety of services in the digital environment. For certain, it has stroked a balance between protecting rights of

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<sup>224</sup> Nevertheless, it is important to note that the absence of safe harbors does not imply that internet service providers are always liable for indirect infringement, and the existence of safe harbors does not mean that internet service providers will be refrained from liability no matter what. In fact, the determination of being liable will be correspondent to the secondary liability theories in both cases. However, the importance of safe harbor is that it declares or re-guarantees that internet service providers with certain characteristics would be exempted from liability under some conditions.

copyright holders and promoting technology development in an efficient style of legal construction. By starting from the concept that most of internet service providers could be seen as “common carriers akin to the portal service and phone companies which carry no liability for content carried but do owe duties of confidentiality” (Lilian, 2010<sup>225</sup>), the concept of a mere conduit principle for ISPs has reconsidered and expanded its scope as to include other internet service providers under certain conditions. All of those efforts in the beginning insulated internet service providers from unreasonable, full liability for third party content, and consequently, their emergent businesses have proliferated.

According to an empirical study conducted by Oxira by request of Google, it suggested that a regime with clearly defined requirements for compliance and low associated compliance costs could increase start-up success rates for intermediaries by between 4% and 24%.<sup>226</sup> Furthermore, the result shows that intermediary start-ups are likely to be held back if the intermediary indirect liability regime is not clear on entails complex compliance requirements.

On the other side, as for copyright owners, a conditional immunity regime will provide an efficient remedy without incurring substantial litigation fees, owing to the cooperation with internet service providers against online piracy. However, the whole system of safe harbor has often been criticized for its potential chilling effects on users’ rights. Nonetheless, users nowadays are not just a mere reproducer or transmitter of a copyright work, but they act as a legal content holder equal to a copyright holder. Without neglecting negative effects on users’ right, the latter section will discuss some issues needs to be considered.

Therefore, taking into consideration the potential economic incentives for all stakeholders, as for countries like Mongolia where internet intermediary business has not yet well developed but highly anticipated in near future, it is important to

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<sup>225</sup> Edwards, Lilian. *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, 2010

<sup>226</sup> The Economic Impact of Safe Harbor on Internet Intermediary Start-ups, <https://www.oxera.com/wp-content/uploads/2018/07/The-economic-impact-of-safe-harbours-on-Internet-intermediary-start-ups.pdf.pdf>

consider adopting an effective and compatible conditional immunity scheme for internet service providers.

## 5.2. Recommendation

### *i. Adoption of Vertical Approach*

As the current status of Mongolian copyright system regarding online copyright infringement is discussed in the previous chapter, the current copyright regulations have its limitation to an effective and proper mechanism for online intermediaries in the context of copyright infringement and lack of related policies at such need. Aforementioned in the section 5.1, adopting a conditional immunity schemes as being implemented in the United States and South Korea, is prospected to have a certain number of advantages for stakeholders of copyright relations if such practice is adopted in the country. Moreover, as it has been recommended by a number of international organizations and civil communities, the adoption of a safe harbor regime will definitely expand the scope of copyright regulations in Mongolia to the cases in digital environment so that it can keep its pace with copyright law development in the world.

As aforementioned, the grant of a proportional immunity for online intermediaries secures the growth and development of online intermediaries and implements an effective protection against online piracy under a notice and take down regime. On top of this, legal development is perpetual. Although any cases regarding online intermediaries have not been recorded in Mongolia, the introduction of this practice can be a good preparation for Mongolia in effectively regulating online copyright infringement and finding a fair balance between stakeholders of copyright in the digital world. For doing so, first thing we have to do is to determine a way of constructing an efficient legal system.

According the research conducted by Lilian (2010), also discussed in the previous chapters, there are two different approaches for the development of legal framework of internet intermediaries, including (i) “horizontal” regulation that deals with the liability of intermediaries across all types of content, such as the E-Commerce Directive, and (ii) “vertical” regulation which lays down rules for

special domains (copyright, protection of children, personal data, counterfeiting, domain names, online gambling, etc.), findable in the US, China, South Korea, France, etc.

As studied in the previous chapters, both US and South Korea have created a separate regime of intermediary liability regarding materials infringing copyright, separately from the other types of contents such as defamation, etc. in the digital environment. As for Mongolia, it does not provide any “immunity” provisions regarding intermediary liabilities, and that being said, the Law on Copyright and Related Rights only provides a general provision with three sections under which the internet service providers be obliged for any copyright infringing materials within their systems, subject to removal of infringing materials upon demand, addressing websites in general. There is no unified law that deals with the illegal information and materials on the internet. However, the Digital Content Regulation adopted by the Communications Regulatory Committee, provides procedural norms dealing with content providers’, addressing websites, activities regarding illegal information including defamation, pornography, copyright infringing materials, advertisement, etc.

Recently, in 2017, the Parliament of Mongolia unified and harmonized the all types of statutory penalties for the infringements that are not subject to criminal liability under one law, named the “Law on Infringement”. Also, together with its attempt of providing a unified regulation for the online infringement of illegal information by the Digital Content Regulation, the Parliament of Mongolia may consider to adhere the “horizontal” approach when adopting a law dealing with intermediary responsibilities and liabilities for illegal information and material on the internet.

In my point of view built on the process of thesis research, the “vertical” approach similar to the US and Korea, may be preferable to the case of Mongolia, taking into consideration the likely expedition and effectiveness of the whole system in the enforcement phase if the copyright infringement and other illegal information are allocated to the Copyright Agency and the Communications Regulatory Committee, respectively. Also, the legal characteristics of copyright-related materials may be

more complicated to determine and in need of a separate regulation compared to other illegal information that is often explicit to see as illegal.

*ii. Abolishment of Digital Content Regulation*

As discussed in the Chapter 4, Mongolia has been combating with online piracy by imposing an obligation for websites to take down the illegal materials or for internet service providers, to close down the webpages in breach of illegal information under the Digital Content Regulation, adopted by the Communications Regulatory Committee in 2011 with amendments of 2014, under which the CRC may also block the access from Mongolia when the websites fails to fulfil their duties. Now that Mongolia does not have a general law regarding online service providers' responsibilities, the Digital Content Regulation is the only procedural legal instruments addressing those issues. Based on the studies in this thesis, I conclude that the Digital Content Regulation should be replaced by a general law adopted by the Parliament of Mongolia in order to abolish unclear, ambiguity regulations for the purpose of being effective and transparent and avoidance of possible breach of fundamental rights on the following reasoning.

First of all, the Digital Content Regulation is in breach of the "Rule on Issuing Public Administrative Regulations" adopted by the Government Resolution No. 119 in May 2010, under which the public administrative regulations must not impose new obligations which are not stated in the law, and to set prohibitive regulations not imposed by law. In addition, the Digital Content Regulation is not yet registered with the Ministry of Justice and Internal Affairs in order to come into force. Without fulfilling all these requirements to be adhered in the process of adopting a public administrative regulation as required by higher status regulations, it has breached the rule of law and due process requirements. Also, under the 2016 Report of the United Nations Special Rapporteur for Free Expression has recommended that:

*"any demands, requests and other measures to be down digital content or access customer information must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and*

*proportionate means of achieving one or more aims under article 19 (3) of the International Covenant on Civil and Political Rights.*<sup>227</sup>

Secondly, due to the fact that the Digital Content Regulation does not provide any specific requirement for reporting a content or website, or procedural steps in this regards, there is a high possibility of unreasonably taking down or closing down the alleged content and websites and the misuse of the position in charge. The statistics shows that during the Parliamentary Election held in 2016, eleven news websites were blocked for twenty-hour hours and by May 2017, a total of 552 websites were blocked for allegedly breaching intellectual property law.<sup>228</sup> It is uncertain how many of these actions were done in compliance with due process. For these reasons above, the Digital Content Regulation should be abolished, and issues covered by Digital Content Regulation should be regulated by the Copyright Act in adherence of a vertical approach.

*iii. Provision of Legal Definition to Internet Service Providers*

There is no legal definition of a “internet service provider” in Mongolian legal system. The literal translation of the term used in the MCA would be a “internet service distributor”. Yet, the legal meaning to this term within the MCA is unclear. From the overall context of the law, it is likely to refer to only internet service providers that allow an Internet access to end-users. However, the universal “internet service provider” term includes different types of intermediaries and is not limited to only a mere conduit internet service provider. Even for the case of Mongolia, the types of internet intermediaries are becoming diverse, including social payment systems based on social networking sites. Therefore, for avoidance of ambiguity, the MCA should provide a legal definition for internet intermediary that would be subject to a certain immunity of liabilities.

As discussed in the Chapter 3 of the thesis, under the U.S. Copyright Act, the term “service provider” means an entity offering the transmission, routing, or providing

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<sup>227</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/32/38, 5 Nov. 2016, at s 85

<sup>228</sup> Kh. Narangerel. Internet Freedom in Mongolia, 2018, <https://www.hurights.or.jp/archives/focus/section3/2018/03/internet-freedom-in-mongolia.html>

of connection for digital online communications, between or among points specified by a user, of a material of the user's choosing, without modification to the content of the material as sent or received. Similarly, the KCA defines a "online service provider" as (i) a person who transmits, designates a route of, or provides connection to the work, etc. selected by users to deliver such works, etc. without any modification of their content through the information and communications networks between the points designated by users, and (ii) as a person who provides the services to allow users to access information and communications network or reproduce or interactively transmits the works, etc. through information and communications network, or who provides or facilitates therefor. According to the definitions above, the main feature of internet intermediaries is not to be in a position of modifying a user's content at their initiative.

Since the grant of immunity for liability creates exceptional treatment for those who meet general requirements, it is important to provide a legal definition for internet intermediaries so that it will make clear who would be subject to such immunity.

*iv. Adoption of a Clear and Transparent Notice and Takedown Scheme*

Intermediary liability has become one of the most critical issues of our time and modern legal theory and policy still struggles with defining an adequate framework for the liability and responsibility of Internet intermediaries for user-generated content.<sup>229</sup> As argued by Frosio (2017), the policy discourse is shifting from intermediary liability to intermediary responsibility.<sup>230</sup> Countries across the world are now considering to coerce online intermediaries to implement policy tools such as monitoring and filtering obligations, blocking orders, graduated response,

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<sup>229</sup> Frosio, Giancarlo F. "Why Keep a Dog and Bark Yourself? From intermediary Liability to Responsibility". *International Journal of Law and Technology*, 2018, 26, 1-33

<sup>230</sup> See also Rowland, Kohl and Charlesworth. *Information Technology Law*, 5th ed, Taylor and Francis, 2016, Chapter Three "Since 2011, it seems how to be more appropriate to structure the discussion on intermediaries around their regulatory involvement, rather than their immunities – a trend suggests that the internet is being absorbed by existing law."

payment blockades, private Domain Name System content regulation, etc. either by voluntarily or under validly enacted obligations.<sup>231</sup>

Even though both US and South Korean notice and takedown system have been criticized for its chilling effect on the freedom of speech and the expeditious takedown without a proper review on the notice requested<sup>232</sup>, both systems provide clear requirements for receiving a takedown notice and the correspondent counter-notice as well as for delivering proper notifications for both parties in action. For example, under “notice and takedown” system, in order to provide the content provider with the opportunity to protest the alleged material not to be removed, it requires that any takedown notice must be notified to the content provider first prior to removal upon demand. If the original notifier continue to challenge the legality of the content and decides to take a legal action over the content, the service provider is allowed not to take down the content. As well as, it requires that the person making a takedown request properly identify himself or herself as a right holder of the alleged content. This whole system seems effective in terms of transparency of the notice and takedown and have a deterrent function in regards of eventual misuse of the system.<sup>233</sup>

The Chapter 4 of the thesis has provided several incidents happened in Mongolia, which resulted in a serious breach of freedom of expression, due to legal ambiguity of procedures of taking down contents. The current regulations of Mongolia have created a system under which state authorities may breach a user’s rights on the Internet without any record of documents. Therefore, it is highly recommendable to provide a clear and transparent procedure for the notice and takedown scheme, so that it can provide the most complete and balanced regime for stakeholders of copyright law. For this purpose, the experiences of the U.S. and South Korea needs to be reviewed and analyzed for the further effective transplantation in a context

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<sup>231</sup> Frosio, *id.*

<sup>232</sup> In case of US, “Urban and Quilter found that almost a third of takedown requests made by right holders were apparently flawed or unjustified, and that over half of the demands for link removal came from competitor companies.” Urban J and Quilter L. “Efficient Process or Chilling Effects? Takedown Notices under Section 512 of the Digital Millennium Copyright Act: Summary Report”, [http://mylaw.usc.edu/documents/512Rep-ExecSum\\_out.pdf](http://mylaw.usc.edu/documents/512Rep-ExecSum_out.pdf).

<sup>233</sup> Lilian (2010), *ibid.*

that will be in consistent with the country's constitution and general principles of law.

v. *Other Possible Aspects to Consider from the U.S. and South Korean Experiences*

The Chapter 1 of the thesis has discussed the notion of user-generated contents from a copyright perspective and in the context of a user's right. As technologies advance over time, Internet gives users a considerable number of opportunities to combine, remix, mashup or parody existing copyrighted material, which, at some point, may infringe the copyright in the original work. However, as discussed in the Chapter 1, it is by no means an indication that every user-generated content would be in breach of copyright. Contrary to an implicit infringement, most of user-generated contents today can be subject to the limitations and exceptions to the copyright.

In this context, the concept of user-generated content in the copyright ecosystem is worth studying, and it challenges the impact of the notice and takedown procedures in a safe harbor regime. As such, the cases studied in Chapter 4 including *Lenz v. Universal Music Corp.* in the United States and *Son Dam-bi* case in South Korea are the examples of chilling effect on the user's right in the course of policing online copyright infringements.

Nowadays, the notice and takedown procedures implemented by online intermediaries upon request by a copyright holder have been fallen under criticism due to its potential negative impacts on rights and creative uses of Internet users. While notice and takedown is an effective measure to stop direct piracy of content, neither rightholders nor Internet intermediaries have developed due process for making judgment about fair derivative or transformative uses.<sup>234</sup> Understaffed and risk-averse, online platform operators may simply choose to comply with a takedown notice, rather than risk safe harbors protection by standing up for a user

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<sup>234</sup> Erickson, Kristofer and Kretschmer. Martin. "This Video is not Available: Analyzing Copyright Takedown of User-Generated Content on YouTube". *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2018

who may indeed benefit from a copyright protection.<sup>235</sup> Moreover, according to an empirical study, Urban and Quilter found that almost a third of takedown requests made by rightholders were apparently flawed or unjustified, and that over half the demands for link removal came from competitor companies.<sup>236</sup> The effect is same for users. According to a study of almost 500 documentary filmmakers taken down by the DMCA notices, it showed that 60% of these respondents were confident that their work fell within the parameters of fair use, and yet many of those still failed to contest the takedown.<sup>237</sup> The examples illustrated above highlights a legal question of whether fair use or limitations and exceptions to the copyright should be considered at every stage of implementing notice and takedown procedures.

The approach to copyright limitations and exceptions differs significantly in each country depending on what models they are following. Generally speaking, there are three types of limitations and exceptions to copyright, including the U.S. fair use model, the fair dealing model in most UK Commonwealth and Continental European countries, and a combination of the US and European models found in the Korean Copyright Act as amended in 2016. The newly amended Korean copyright act offers both a closed list of permissible use and an open-ended consideration based on statutory factors.<sup>238</sup> Article 35-3(1) of the KCA states that works not falling into enumerated categories may be used in cases where there is no conflict with the normal exploitation of copyright work and does not prejudice the legitimate interest of the copyright holder. It further states in Article 35-3(2) that in determining whether an act of using works, etc. falls under Article 35-3(1), the following shall be considered: i) purposes and characters of use including whether such use is for or not-for profit, ii) types and natures of works, etc., iii) amount and substantiality of portion used in relation to the whole works, etc., and

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<sup>235</sup> Id.

<sup>236</sup> Urban J and Quilter L. “Efficient Process or Chilling Effect? Takedown Notices under Section 512 of the DMCA: Summary Report”, at [http://mylaw.usc.edu/documents/512Rep-ExecSum\\_out.pfd](http://mylaw.usc.edu/documents/512Rep-ExecSum_out.pfd)

<sup>237</sup> Patricia Aufderheide & Adam Sinnreich, Documentarians, Fair Use, and Free Expression: Changes in Copyright Attitudes and Actions with Access to Best Practices, 19 *Info. Comm. & Soc’y* 187, 183 (2016)

<sup>238</sup> <http://infojustice.org/archives/28766>

iv) effects of the use of works, etc. on the current or potential market for or value of such work, etc.

Instead of an open-ended, flexible regulation of limitations and exceptions to the use of copyrighted works, some countries have chosen to extend their a closed list of L&Es to the copyright. For example, Australia<sup>239</sup> and Hong Kong<sup>240</sup> have made amendments to their copyright law as to include parody as an exceptional use of the copyright work. Furthermore, the Canadian Copyright Act has introduced a non-commercial user-generated contents exception to the copyright infringement.

These extensions of limitations and exceptions to the copyright highly connect with today's users' diverse activities on the Internet, the main purpose of copyright law that promotes creation, and the idea that copyright laws must be flexible because creativity is inherently flexible (Patry, 2017<sup>241</sup>). Another impact of a clear and certain regulation of L&Es would be on the effectiveness of notice and takedown regime. Introduction of fair use doctrine would be highly controversial in case of Mongolia due to the sentiment of foreignness to common law legal system, however, the possible extension to the current closed list of limitations and exceptions under the MCA would bring a positive impact on the creativity and diminish potential adverse impact of notice and takedown scheme once it clearly defines which uses would be allowed without authorization.

### 5.3. Conclusion

With the rise of Internet usage impacted on our everyday lives, the modern copyright system are required to find a fair balance among copyright holders, Internet users and online intermediaries in their contradicting rights and legal interests. Having noted that all stakeholders of copyright law are in a vulnerable position in the digital world, this thesis has highlighted the position of online intermediaries and studied their liability for online copyright infringement and

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<sup>239</sup> In 2006, provisions for parody and satire were added under the Copyright Amendment Bill of Australia.

<sup>240</sup> In 2014, a new fair dealing exception that covers work for the purpose of "parody, satire, caricature or pastiche" was introduced to the Copyright Bill of Hong Kong.

<sup>241</sup> Patry, William F. "A few observation about the state of Copyright Law". *Copyright law in an age of limitations and exceptions*. Cambridge University Press, 2017

limitation of such liability in the context of striking a balance in the digital copyright law. As studied in the thesis, the adoption of immunity for secondary liability of online intermediaries regarding a third party's infringement has been introduced to many countries' copyright regulations, including the U.S. and most of OECD countries. Taking this global trend on this issue into consideration, this thesis has aimed to provide a legal analysis on the necessity of immunity regulations regarding online intermediaries for Mongolian copyright system, by evaluating the country's legal and socio-economic situations and the experiences of other countries, namely the United States and South Korea.

The studying of the legal and regulatory framework and notable cases regarding online intermediaries in both the U.S. and South Korea provides significant insight into understanding how these countries have adopted the legal concept of limitation of liability for online intermediaries into their copyright law, the importance of such adoption for technological innovation, and what other legal issues have raised in the implementation phase. Historically, both countries have faced with the necessity of adopting such a regulation, which imposes a conditional immunity for internet service providers under certain requirements to be fulfilled, and internet service providers at the time of the introduction of immunity had been in a critical position due to constant opposition from copyright holders and legal possibility of being liable for a third party's direct copyright infringement under secondary liability doctrines. Both U.S. and South Korean regulations regarding online service providers have their similarities and differences. Based on the U.S. regulations, the Korean Copyright Act has created an extended version of the U.S. safe harbor, including a three-strike rule, known as graduated responses. The Korean Copyright Act also set an additional condition for online service providers of special type to implement technical measures to block the illegal transmission of the copyright works within their routes.

In comparison with the U.S. and South Korea, the Mongolian Copyright Act does not provide any broad regulations regarding online service providers for online copyright infringement to date. This shortage of regulation in this area is due to the fact that Mongolia is not only a country with young and not-well developed

intellectual property system but also with not so familiar with the new emergence of digital technologies at its national scale. Due to these reasons, the current Mongolian copyright regulations only cover the activities of mere conduit internet service providers and websites. This indicates that there is no applicable regulations for other types of online intermediaries that are emerging in Mongolia. Without a clear and efficient regulation designated to online service providers, it is prospected that online service providers may be subject to unreasonable liability as a result of controversial secondary liability doctrines under the relevant laws of Mongolia. As discussed in the Chapter 4 and 5 of the thesis, Mongolia is in need of a systematic revision of the Copyright Act.

In light of the above conclusion on the necessity of devising a conditional immunity for online service providers, this thesis has made several recommendations for Mongolia. First of all, upon the comparison between horizontal and vertical approach of constructing intermediary liability issues, it is concluded that the vertical approach as implemented by the U.S. and South Korea appears to be more efficient for the application in Mongolia, therefore, it is advised to regulate the issue of intermediary liabilities for copyright infringement as separately from other types of breaches including defamation, hate speech, etc. Second, based on the experiences of the U.S. and South Korea and recommendations of international organizations, it further recommends that the Digital Content Regulation, which is not based on a law and creates severe prohibitive measures and legal sanctions directed to the websites and internet service providers, should be abolished and the issues covered by the Regulation should be regulated by law. Third, for avoidance of ambiguity in the current regulations, it is recommended to provide a legal definition of internet service provider in a legal context. Last but not least, it proposes that a clear and transparent notice and takedown scheme should be shaped to the current copyright system on the basis of a thorough study of the U.S. and South Korean regulations as benchmark. Besides the limitation of liability of online intermediaries, the Chapter 5 of the thesis highlighted the legal importance of limitations and exceptions to the copyright in the context of notice and takedown procedures. As discussed in the thesis, it is prospected that the notice and takedown procedures

would have a chilling effect on the users' right to use the copyrighted works in a permitted way. Therefore, it is recommended that in introducing a safe harbor regime, it should consider possible extensions to the closed list of limitations and extension to the copyright for purposes of diminishing negative effects of the safe harbor regime on the users' rights.

Once adopted and well implemented as consistent with its social needs and general legal principles of the country, it will provide an efficiently practical way of dealing with online copyright infringement and encourage the cooperation of copyright holders, users and online intermediaries. Further, it will diminish the legal ambiguity of imposing a liability for online service providers and will support the proliferation of new technologies and emergencies of different types of internet intermediaries.

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## 초록

### 서비스제공자의 저작권 관련 책임에 관한 비교법적 연구: 몽골을 위한 제안을 위하여

우리는 지금 인터넷 없이는 어려움을 겪는 독특한 환경에 살고 있다. 인터넷은 우리에게 문학 창작 및 배포, 지식 전달 등 다른 많은 활동에 개인적으로 참여할 수 있는 기회를 제공한다. 인터넷 개발 초기 때는 주요 쟁점은 많은 사람들에게 접근성을 최대한 허용하는데 관한 것이었지만 요즘은 보다 안전한 환경을 구축하고 저작권 소유자, 인터넷 사용자 및 인터넷 서비스 공급자인 세가지 다른 이익을 평등하게 보호하는 것을 강화하고 있다. 본 연구에서, 인터넷의 부정적 사용으로 인해 발생하고 있는 명예 훼손, 모욕, 개인 정보의 불법 사용, 저작권침해 등의 여러 사이버 범죄 중에 사이버 환경에서의 저작권침해 문제를 강조하고, 이용자생산콘텐츠와 관련하여 서비스제공자의 책임 또는 책임 면제에 대한 법적 규제를 주제로 삼았다.

서비스제공자의 책임 또는 의무에 관해 저작권법상 생겨난 최근 변화를 반영하기 위해 여러 국가들에서 각자의 저작권법 개정안이 논의되고 있다. 또한 서비스제공자의 책임면제에 대한 규제의 여러 가지 개념이 있으며 많은 학술논문과 기사에서 사이버공간에서의 저작권 침해와 관련하여 “사이버 신고접수, 저작권 침해 저작물 및 정보 삭제”의 규정의 효과를 평가했다. 그러나 이 문제에 대한 공통된 입장은 없으며 법적 환경에서 저작권 보유자, 인터넷 사용자 및 인터넷 서비스 공급자의 이익을 균형 잡는데 여전히 어려움을 겪고 있다. 본 연구는 사이버공간에서의 저작권 침해에 관련된 국제법 및 규제 경험의 조사를 바탕으로 몽골은 (1) 현행 저작권법을 개정하고 인터넷 서비스 공급자에 대한 규제를 도입할지 여부, (2) 미국과 한국의 경험을 통해 온라인 저작권 침해에 관한 다른 국가의 경험을 어떻게 배우고 반영 할 수 있는지, (3) 지금의 저작권 시스템에 어느 정도까지 합법적 이식을 할 수 있는지 탐구하기 위한 것이다.

인터넷은 더 이상 영토 경계에 묶여 있지 않기 때문에 저작권 침해 문제는 모든 국가에 적용되므로 이 문제에 대해 다른 국가에 대한 다양한 접근법을 조사 또는 연구하면서 비교하는 것이 매우 중요하다. 본 연구의 이러한 목적을 위해, 이 논문에서는 가장 대표적인 국가인 미국, 그리고 미국과 유럽의 접근법을 일부씩 채용한 한국의 각 경험에 대한 고찰을, 주로 서비스제공자의 책임제한 및 그런 제한의 전제요건으로서 법적의무를 중심으로 진행하였다. 이 연구의 3 장에서는 각 국가의 인터넷 서비스 제공 업체와 관련된 법적 소송 및 법원에서 판결이 난 소송 사건을 조사하였다.

인터넷 서비스제공자의 책임의 대한 문제는 그들의 활동과 제공하는 서비스를 통해 직접 또는 간접적으로 저작권 보유자의 독점적 권리를 침해하는 콘텐츠를 통해 생성된다. 따라서 “사용자생산콘텐츠”의 직접과 간접적 법적 책임의 성격을 연구하는 것이 중요하다. 이와 관련하여 연구의 첫 번째 장에서 작성된 이용자가 만든 콘텐츠의 법적 개념, 두 번째 장에서 직접과 간접적 책임의 대한 개념을 간단하게 살펴 봤다. 이 연구의 5 장은 현재 몽골의 법적 규제 체계를 해석하고 현재 규제 체제의 몇 가지 단점을 제시하였다.

결론적으로 이 논문은 지금 까지 몽골에서 온라인 저작권 침해에 대한 인터넷 중개자의 2 차적 책임에 관한 문제를 제기하는 사례에 직면하지는 않았지만, 가까운 미래에 몽골 정부가 책임제한 법제를 채택 할 필요성이 높다고 결론 지었다. 또한, 저작권 침해에 대한 저작권부여자의 요청에 따라 저작권 침해 콘텐츠를 삭제하는 것과 관련된 투명하고 효과적인 법적 조치를 마련하는 것을 적극적으로 고려할 필요가 있다고 본다.

**주요어:** 이용자 생산 콘텐츠, 간접 책임, 사이버 공간 저작권 침해, 인터넷 서비스 제공 업체, 저작권 제한, 지적 재산권

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