
The Prospect for ISP's Liability in UGC-Related Cases in Korea*

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I. Introduction

User Generated Content (UGC), also known as Consumer Generated Media (CGM) or User Created Content (UCC),¹⁾ refers to various kinds of media content, publicly available, that are produced by end-users.²⁾ In reality, the concept of UGC can include not only pure creative works and parody, but also mere compilations or collective works based on others' copyrighted materials, and reproductions of others' works. Needless to say, such compilations or collective works or mere reproductions should be controlled by copyright owners and are illegal without the copyright owners' permission, while creative works or parodies have to be protected. The problem at this point is that UGC in many practical cases mostly seem to be illegal usage of copyrighted material, automatically raising concern about the secondary liability of Internet Service Providers (ISP). The issue of the degree of liability to be assumed by an ISP when its users infringe on copyright — through activities such as the illegal posting and sharing of video clips using services delivered by an ISP, for instance — has already become a heated social issue in the US. *Viacom v. YouTube* is a good example.³⁾

The situation around UGC in Korea is not too different from that of the US.

* The research for this article was funded by the Law Research Institute of Seoul National University College of Law.

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1) In Korea, the word UCC is more frequently used.

2) http://en.wikipedia.org/wiki/User-generated_content

3) *Viacom International, Inc. v. YouTube, Inc.*, No. 07CV2103 (S.D.N.Y. March 13, 2007).

Pandora TV, which has been known as the most popular UGC service in Korea, was sued by copyright owners in Nov. 2007.⁴⁾ Moreover, one might be surprised to hear that the time Korean copyright owners were grappling with UGC-related disputes was earlier than in the US.⁵⁾ *Pandora TV* started its service of video clip sharing in Oct. 2004. It was 4 months before the beginning of YouTube service in US.⁶⁾

In any case, the legal finding by both countries' courts for UGC disputes will be based on similar theories and rules that governed in *Bulletin Board Service* (BBS) or Peer to Peer service disputes. In Korea, the *Sori-Bada*⁷⁾ case brought about the country's most severe legal battle between copyright owners and P2P service providers, as did the *Napster* case in the US. *Sori-Bada* has been the most widely used Peer-to-Peer software in Korea and has continuously changed its technical structure from hybrid model P2P service of *Sori-Bada 1.0 era* to super-node model P2P software in *Sori-Bada 3.0* or *5.0 era*.

In this article, I will discuss the prospect for ISP's liability in pending or forthcoming UGC-related cases in Korea. In doing so, I will mention the statutory grounds for ISP's secondary liability in Korea. The leading case decisions related with *Sori-Bada 1.0* which was one of hybrid P2P services have firmly set up the principle that any P2P service provider can be liable in certain situation as an aider-and-abettor (in other words, instigators and accessories) for users' copyright infringement under Korea Civil Act, while the precedents dealing with "*Sori-Bada 3.0*" allegedly expanded the above principle to super-node P2P software providers. I will also briefly explore the ISPs' liability limitation clauses in Korea Copyright Act.

In the later part of this article, I will explain that the liability limitation standard for ISPs in Korea has become stricter against ISPs in recent years because of two main reasons. First, recent Korean courts' interpretation about the statutes related with ISP's liability seems to be rigorous with ISPs. The best example for such tough interpretation is Seoul High Court's preliminary injunction decision in *Sori-Bada 5.0*

4) <http://www.zdnet.co.kr/news/internet/entertainment/0,39031275,39163463,00.htm>

5) It was because that Korea had been the best-developed country for a few years since 2001, especially in broadband Internet infrastructure. For more details, see Republic of Korea E-Commerce, 'Korea E-Commerce Infrastructure,' http://www.ecommerce.or.kr/about/ec_infra5.asp

6) http://itnews.inews24.com/php/news_view.php?g_menu=020900&g_serial=290462

7) *Sori-Bada* means 'Sea of Sound' in Korean. In its glory days of *Sori-Bada 1.0* from 2000 to 2003, it had over 10 million members, even though Korea's total population was just around 50 million.

cases on Oct. 10, 2007. The court concluded that P2P service providers or P2P software providers should adopt the so-called positive filtering system (the system having only legal music files, which are supplied from license contracts with copyright owners or the like, distributed on P2P networks) by all means, even before copyright owners' notification. Second, the new article 104 in the Korean Copyright Act 2006 imposes the duty along with penalty upon a specific type of ISP such as P2P service providers to accommodate so-called technological measures for interrupting illegal distribution of copyrighted materials, if copyright owners notice users' infringement and demand the accommodation of the technological measures to ISPs.

As a result of these two events, Korean courts' ruling toward ISPs related with UGC is likely to become harsher and stricter against ISPs. But the final part of this article suggest that Korean courts should be careful about the difference between carbon copies of copyrighted music in *Sori-Bada* cases and users' contents with at least minimum creativity in forthcoming UGC cases.

II. The statutory ground for ISP's secondary liability in Korea

1. Background

Although intellectual property law in Korea has strongly been influenced by US IP law, it should be noted here that Korea's legal system has traditionally accommodated *civil law*, based mainly on the German model. So, there is no traditional case law, such as the principles of contributory liability and vicarious liability. Moreover, there has been no clear line in Korea distinguishing between direct liability and indirect liability. There was much controversy over the matter of which provision should provide the positive legal standard for copyright owners suing an ISP, because the Korean Copyright Act provides only negative legal ground for ISP immunity.⁸⁾

8) Korean Copyright Act, Chapter VI: Online Service Provider's Liability Limitation.

2. The clause 3 of article 760 of the Korean Civil Act

Thus, Korean courts had to search codified statutes which might provide a standard for ISP's secondary liability in their cases. Such efforts have revealed that clause 3 of article 760⁹⁾ of the *Korean Civil Act* is meant to provide the main standard for ISP liability.

Some lower courts' decisions in the past which dealt with BBS providers' liability cases (*Cocktail 98 case*¹⁰⁾ and *Internet Empire case*¹¹⁾) had not clarified this point. But, a series of decisions about *Sori-Bada* more and more clarified which provision in Korea's many statutes could be best-related to ISP secondary liability. Seoul High Court decisions¹²⁾ and a decision¹³⁾ by the Supreme Court of Korea in *Sori-Bada 1.0*¹⁴⁾ made it an established and irrefutable theory that the clause 3 of article 760 of the Korean Civil Act was the exact statutory ground for ISP liability. In the *Sori-Bada 3.0 cases*,¹⁵⁾ the storage and supply of information accessed by users

9) Korean Civil Act, Chapter V (TORTS), Article 760 (Liability of Joint Tort-feasors)

(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 (3) The abettor or aider shall be considered as a joint tortfeasor.

10) *Seoul District Court Decision 98GaHap111554* delivered on Dec. 3, 1999. In this case, *Cocktail 98* was the name of the multimedia authoring computer software developed by the plaintiff. The defendant was a university that operated a website serving the bulletin board, which was open to the public. One day, one of its users uploaded a compressed file of the plaintiff's software on the defendant's bulletin board without authority and more than 400 users downloaded that file. Then, the plaintiff sued.

11) *Seoul District Court Decision 2000GaHap83171* delivered on Aug. 24, 2001. In this case, the plaintiffs were the copyright holders of certain music videos and the defendant was a company that operated a website, including a bulletin board, for the purpose of music file transfer. Some users transformed the plaintiffs' music videos into movie files and illegally uploaded these files onto the defendant's bulletin board.

12) *Seoul High Court Decision 2003Na21140* delivered on Jan. 12, 2005 & *Seoul High Court Decision 2003Na80798* delivered on Jan. 25, 2005.

13) *Supreme Court of Korea Decision 2005Da11626* delivered on Jan. 25, 2007.

14) *Sori-Bada 1.0* had been the most famous and gigantic P2P service in Korea since its advent in May 2000. It had over 10 million members within Korea. Its technical structure is a kind of Hybrid P2P and very similar to that of *Napster*. The essential difference between *Sori-Bada 1.0* and *Napster* is that the central server of *Sori-Bada 1.0* does not save so much as even the information on files' locations; it saves only the information on users' access. The benefit of this difference is that the *Sori-Bada 1.0* central server keeps only essential information for the network and the host can thus save money in maintaining central servers.

15) *Seoul Central District Court Decision 2004KaHap3491* delivered on Aug. 29, 2005 (certified in *Seoul*

in *Sori-Bada 3.0* was allegedly performed by super nodes. But the court applied the same theory as before and held the defendant liable as an aider-and-abettor despite of the defendant's insistence that there was no longer a central server. Moreover, in petition for preliminary injunction cases¹⁶⁾ related to *Sori-Bada 5.0*, Seoul High Court ruled on Oct. 10., 2007 again that *Sori-Bada 5.0* should be liable as an aider-and-abettor for copyright infringement, vacating the lower court's judgment.

3. *Some vagueness remaining in the meaning of an aider-and-abettor*

The civil courts in *Sori-Bada* cases have interpreted clause 3 of article 760 of the Korean Civil Act as that an ISP could negligently as well as intentionally aid its users' infringing activity¹⁷⁾ and be held liable. And the courts have understood that the totality of circumstances should be considered in determining whether or not the defendant had aided its users' infringing activity. The specific examples of the circumstances are as follows: whether users could transfer files without intervention by the defendant; whether the ISP could block an infringing user if the ISP knew him or her; and whether the ISP had as its purpose, commercial benefit from users' infringing activity.¹⁸⁾

On the other hand, the criminal decision¹⁹⁾ by the appellate branch of the Seoul Central District, which concluded that the defendant was not an *aiders-and-abettors* (in other words, not guilty), Court contrasted sharply with the above civil decision by the Seoul High Court.

The opposing results in the above two decisions on January 12, 2005²⁰⁾ created a sensation and revealed some vagueness existing in Korean courts' interpretation of the meaning of an *aiders-and-abettors*. But, on Dec. 14, 2007, the Supreme Court of Korea struck down the appellate branch of the Seoul Central District Court's

Central District Court Decision 2005KaHap3179 delivered on Oct. 26, 2005).

16) *Seoul High Court Decision 2006Ra1232, 2006Ra1233, 2006Ra1245* delivered on Oct. 10, 2007.

17) That an aider could negligently as well as intentionally aid infringing activity has been the dominant interpretation of the Korean Civil Act, in contrast to the Korean Criminal Act allowing only for an intentional aider.

18) Some part ('*as its purpose, commercial benefit*') of the phrase might be a vestige of US case law's influence on vicarious liability theory. There is no provision or theory in Korea that requires for tort the acquisition of benefits or profits by a tortfeasor as well as damages against a victim.

19) *Seoul Central District Court Decision 2003No4296* delivered on Jan. 12, 2005.

20) The two decisions were made on same day by coincidence.

decision.²¹⁾ The Supreme Court confirmed once again that *Sori-Bada 1.0* should be liable as an aider-and-abettor for copyright infringement even in a criminal case.²²⁾

III. The ISPs' liability limitation clauses in Korea Copyright Act

1. *The Outline of ISPs' liability limitation clauses*

The Korean Copyright Act amended in Dec. 2006 includes article 102 & 103 very similar to the preceding article 77 & article 77-2 in the same Act 2003 which were ISP's copyright infringement liability limitation provisions. Any person who asserts that his or her copyright and other rights have been infringed upon due to the reproduction or transmission of the works, etc. through the utilization of services of an on-line service provider (hereafter referred to as the rights assertor) may demand, by indicating the said facts,²³⁾ that the on-line service provider (OSP)²⁴⁾ suspend the reproduction or transmission of the works, etc.²⁵⁾ In cases where there exists such a demand, the on-line service provider shall suspend without hesitation the reproduction or transmission of works, etc., and notify the person who reproduces or transmits the relevant works, etc. (hereinafter referred to as the reproducer or transmitter) of the said facts.²⁶⁾

In cases where the reproducer or transmitter who is in receipt of a notification under article 103 clause 2 indicates that his reproduction or transmission is based on lawful rights, and demands a resumption of such reproduction or transmission, the on-line service provider shall promptly notify the rights assertor of the fact of demanding a resumption and the scheduled date of resumption, and shall have the reproduction or transmission resumed on the said scheduled date.²⁷⁾

21) Unlike US public prosecutors, Korean prosecutors are comparatively free to appeal any decision including 'not-guilty' by a lower court.

22) *Supreme Court of Korea Decision 2005Do872* delivered on Dec. 14, 2007.

23) The information, which the rights assertor should include in his vindication, is prescribed by article 40 in the Presidential Decree for the Korean Copyright Act. The contents are very similar to § 512(c)(3)(A)(i-vi) in OCILLA.

24) The Korean Copyright Act uses the word *OSP* instead of *ISP*.

25) Korean Copyright Act, Article 103, Clause 1.

26) Article 103, Clause 2.

27) Article 103, Clause 3.

In case where the on-line service provider has suspended or resumed the reproduction or transmission of relevant works, etc. under clause 2 and 3 of article 103, the online service provider's liability for the infringement on other persons' copyrights and other rights protected under copyright act, and the online service provider's liability for the losses incurred to the reproducer or transmitter, may be mitigated or exempted.²⁸⁾

On the other hand, in cases where an on-line service provider comes to know that the copyright and other rights protected under the copyright act have been infringed upon due to the reproduction or transmission of the works, etc. by other persons in connection with the provision of services related to the reproduction or transmission of the works, etc., and he or she prevents or suspends the relevant reproduction or transmission, the online service provider's liability for the infringement on the copyright of other persons and other rights protected under the copyright act may be mitigated or exempted.²⁹⁾

In cases where an on-line service provider comes to know the same facts as above, and he or she tries to prevent or suspend the relevant reproduction or transmission, but it is technically impossible to do so, the online service provider's liability shall be exempted.³⁰⁾

2. Characteristics of the ISPs' liability limitation clauses

First of all, all clauses in the chapter *Online Service Provider's Liability Limitation* in the Korean Copyright Act were heavily affected by OCILLA³¹⁾ in the US.

Second, ISP liability limitation clauses in the Korean Copyright Act have effect only in the area of copyright infringement.³²⁾ In this regard, the legislative method for determining OSP liability limitation is similar to that of the US, and contrasts with

28) The preceding paragraph of clause 5 of article 103.

29) Article 102, Clause 1.

30) Article 102, Clause 2.

31) Online Copyright Infringement Liability Limitation Act.

32) Unlike the US, Korea has a separate law for computer software. Therefore, the Korean Copyright Act is not applied to computer software. But Computer Programs Protection Act in Korea has also similar OSP Liability Limitation clauses which are applied to computer software copyright infringement cases.

those of the EU, Germany, and Japan, which have unified laws for the overall area including defamation. But, Korea didn't have a separate law, such as the CDA(Communications Decency Act.) in US, covering defamation area until the article 44-2 of the *Act on Promotion of Information and Communications Network Utilization and Information Protection* amended in 2007 provides a kind of *Notice and Take-down* procedure and ISPs' liability exemption similar to those in Korean Copyright Act. As a result, OSPs involved in defamation cases in Korea had had no defense based on safe harbors until 2007.

Third, the attitude of the Korean law, under which there is only a uniform requirement for ISP immunity and no specific requirement according to the type of information technology, such as caching, hosting, search engine, etc., presents a striking contrast to the attitudes of the US, EU, Germany and others. But this difference will be eradicated soon because Korea must amend the present Copyright Act to implement the FTA³³⁾ with US which imposes specific immunity requirements according to ISP's different technology types.

Fourth, the effect related to immunity is no more than discretionary mitigation or exemption in Korea. The only situation in which ISP liability is sure to be exempted is when it is technically impossible for an ISP to prevent or suspend the infringement even though he or she tries to do.

IV. The new article related with ISPs' liability in Korean Copyright Act

The Korean Copyright Act amended in 2007 established a new article related with ISPs' liability. The article seems to be peculiar to Korean Copyright Act. The new article 104 in the Act imposes the duty along with penalty upon a so-called specific type of ISPs whose main purpose is distribution of works by transmission, to accommodate so-called technological measures for interrupting illegal distribution of copyrighted materials. There had been severe disputes about whether the article would really be needed. The said *technological measures* are different from *technological protection measure* in article 124 of the Korean Copyright Act. The

33) Free Trade Agreement between the United States and South Korea was concluded in June 2007.

former means the measures by an ISP to prevent or suspend the reproduction or transmission of works, such as keyword search restriction, while the latter is almost same as *technological measure* of sec. 1201 in DMCA.

The *Minister of Culture and Tourism* has a mandate to provide which type of ISPs will come under so-called a specific type of ISPs.³⁴⁾ After the new Korean Copyright Act 2007 became effective on June 29, the *Minister of Culture and Tourism* proclaimed the scope of a specific type of ISP in form of administrative regulation. The regulation provides that a specific type of ISPs means any online service providers (1) which give a commercial benefit or advantage to the uploading user, (2) which offer the downloading function to its users and charge a fee for downloading to its users, (3) which service are based on P2P technology and which obtain a benefit from uploading or downloading function in its service, (4) the main purpose of which are to search others' copyrighted materials and to transmit those to its users.³⁵⁾

The important thing which can't be ignored is that copyright owners must previously demand ISPs to accommodate technological measures under article 104 if they want to have ISPs take steps. The form of such a demand is prescribed by the article 45 in Presidential Decree for the Korean Copyright Act. If ISPs don't accommodate technological measures after such a demand, ISPs would be liable under article 142 of Korean Copyright Act which proscribes the negligence fine.

It seems to be more reasonable to rescind article 104 in future amendments of the Act. The reasons are as follows: 1) it is hard to find a precedent in the world for article 104 which is not ISP's liability limitation provision but ISP's liability creating provision,³⁶⁾ 2) the scope of article 104 may be improperly expanded to almost all ISPs owing to an ambiguous definition for a specific type of ISP, 3) it is unfair that only an administrative regulation by Korean Ministry of Culture & Tourism or presidential decree will actually determine what the technological measures are to be. In fact, it is still not clear which technological measures should be adopted to satisfy the requirement of article 104.³⁷⁾

34) Article 104, Clause 2.

35) The administrative regulation by the Minister of Culture and Tourism (No. 2007-24, July 6, 2007)

36) Even US who has put great stress on the copyright protection seems not to have a similar provision to article 104 in Korean Copyright Act 2007.

37) article 46, clause 1 in *Presidential Decree for the Korean Copyright Act* just proscribes that the

V. The shock from recent Seoul High Court's decisions in *Sori-Bada 5.0* cases

The recent Seoul High Court's decision³⁸⁾ about *Sori-Bada 5.0* has special meaning in that the decision indicated the detailed standards for the OSPs' immunity under the liability limitation clauses of Korean Copyright Act, especially in adopting so-called *technological measure*.

After *Sori-Bada 3.0* has been shut down according to the preliminary injunction order³⁹⁾ by the court in 2005, the same operators as in the above *Sori-Bada 1.0* or *Sori-Bada 3.0* cases launched another new business with a new type of super nodes P2P model (*Sori-Bada 5.0*). In this case, they tried to avoid legal attack from copyright owners not only by abolishing the central server as in the *Sori-Bada 3.0* but also by voluntarily accommodating technological measures. It was before the promulgation of new article 104 in Korean Copyright Act 2007 which would impose the duty to accommodate technological measures. While the technological measures included Audio Fingerprinting (or Acoustic fingerprint),⁴⁰⁾ the technological measure was usually applied only to the music a copyright owner of which already demanded for protection by a notification. This system was called as so-called negative filtering system by *Sori-Bada 5.0* court. The notification procedure was similar to the demand or notice procedure under Article 103, Clause 2.⁴¹⁾

However, the court's conclusion was that such accommodation of technological measures was not sufficient to get immunity under liability limitation clauses of

technological measures means all technological measures which can discriminate copyrighted materials from other materials by comparing those titles or characteristics and which can prevent users from searching or transmitting copyrighted materials already discriminated as above.

38) *Seoul High Court Decision 2006Ra1232, 2006Ra1233, 2006Ra1245* delivered on Oct. 10, 2007.

39) *Seoul Central District Court Decision 2004KaHap3491* delivered on Aug. 29, 2005 (certified in *Seoul Central District Court Decision 2005KaHap3179* delivered on Oct. 26, 2005).

40) An acoustic fingerprint is a unique code generated from an audio waveform. Depending upon the particular algorithm, acoustic fingerprints can be used to automatically categorize or identify an audio sample. Practical uses of acoustic fingerprinting include broadcast monitoring, identification of music and ads being played, peer to peer network monitoring, sound effect library management, and video identification. For more detail, see http://en.wikipedia.org/wiki/Acoustic_fingerprint

41) See above III. 1. 'The Outline of ISPs' liability limitation clauses'

Korean Copyright Act. In other words, the court denied the defendant's defense based on Article 102, Clause 2 of Korean Copyright Act which clarified that a service provider's liability shall be exempted when it is technically impossible to prevent or suspend the relevant reproduction or transmission. 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 (the system having only legal music files, which are supplied from license contracts with copyright owners or the like, distributed on P2P networks). Moreover, the court rejected the defendant's argument that enforcing positive filtering system would make it impossible for UGC to survive. The fierce debate about the soundness of the court's strict attitude is still progressing in Korea.

VI. Conclusion

The legal theory about ISPs' indirect liability is, of course, different between the US and Korea. While the starting point in the US has been historically and logically the principle of contributory liability and vicarious liability, Korea has had no case law encompassing contributory liability and vicarious liability theory. Instead, clause 3 of article 760 of the Korean Civil Act has become the positive ground on which copyright holders could sue ISPs. On the other hand, the Korean Copyright Act was intensely affected by DMCA of US when the clauses of the chapter *Online Service Provider's Liability Limitation* were formulated.

In Korea in recent days, one of the striking characteristics of the rules related to ISP's legal liability is article 104 which imposes the duty on ISPs to accommodate technological measures under certain conditions. As see above, *Sori-Bada 5.0* court made a much more biased interpretation toward copyright owners by demanding the defendant to accommodate technological measures even without copyright owners' demand or notification for copyright protection. Considering these trends in ISP's secondary liability rules, Korean courts' ruling toward ISPs related with UGC is likely to become harsher and stricter against ISPs. While such a trend could be already predictable because Korean copyright industry had experienced more devastating infringement than that of US by well-developed broadband internet users, the attitude of *Sori-Bada 5.0* court seems to be unreasonable at least at this time. It is because the liability limitation clauses of Korean Copyright Act are

basically based on so-called negative filtering principle, not requiring P2P service providers to positively find users' infringement, and the development of filtering technology is not yet perfect enough to enforce the adoption of specific technologies. Contrary to the *Sori-Bada 5.0* court's insistence, UGC will be endangered under the so-called mandatory positive filtering system because the complicated right-verification procedure will be needed, based on the detailed explanation from the court's decision. In future decisions, Korean courts should be more careful about the difference between carbon copies of copyrighted music in past *Sori-Bada* cases and contents made in part by, so to speak, users' creative sweat in forthcoming UGC cases. Though a majority of video clips on *YouTube* in US or *Pandora* in Korea still seems only illegal reproductions of copyrighted material, video clips will become more and more close to creative works as a result of the related technology development that can finally make it possible for users to create original work, not just to produce a derived work.

KEY WORDS: UGC, User Generated Content, ISP, Internet Service provider, OSP, Online Service provider, *Sori-Bada*, technological measure