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ESTABLISHING SECONDARY LIABILITY WITH A HIGHER DEGREE OF CULPABILITY: REDEFINING CHINESE INTERNET COPYRIGHT LAW TO ENCOURAGE TECHNOLOGY DEVELOPMENT

Yiman Zhang[†]

Abstract: While enjoying the tremendous economic benefit brought by the Internet to the nation, China has been attempting to update its intellectual property law to address online copyright infringement issues. The current legal framework, which premises copyright liability upon a direct infringement and joint liability theory, unfortunately has produced considerable ambiguity both within the judiciary and the affected industries. As shown in recent cases, the theory of joint liability, in addition to the broad scope of Chinese copyright law, has been particularly troublesome for China's technology industry.

Given China's priority in technology innovation, its current copyright law has too low a threshold for liability on the part of Internet service and technology providers. To better facilitate its national technology development strategy, Chinese copyright law should redefine the balance between copyright protection and encouraging technology innovation. It needs to establish safe harbors to technology providers from the broad statutory rights enjoyed by copyright holders. More importantly, a secondary liability theory that requires a higher-than-negligence degree of culpability will provide a better legal platform for online copyright adjudication.

I. INTRODUCTION

With the dawn of the twenty-first century, the Internet is playing an increasingly important role in people's lives and the nation's economy in China.¹ While continuing to make information sharing easier and faster for regular consumers, the ever-changing Internet technology also poses a threat to content providers, such as the music and film industries, who want to maintain control over their traditional distribution channels.² In the face of the growing tension between information consumers and copyright owners, the Chinese copyright law, like its counterparts in other countries, needs to strike a balance between these two groups.

The current legal framework of online copyright adjudication in China is composed of two major authorities: the 2001 Copyright Act of the

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¹ Zhongguo hu lian wang luo fa zhan zhuang kuang tong ji bao gao [The 18th Statistical Survey Report on Internet Development in China] 23-24 (July 2006) [hereinafter 18th Statistical Survey Report].

² See generally J. D. LASICA, DARKNET: HOLLYWOOD'S WAR AGAINST THE DIGITAL GENERATION 7-22 (2005).

People's Republic of China ("2001 Copyright Act")³ and the 2003 Interpretations on Some Issues Concerning Applicable Laws for Trial of Disputes over Internet Copyright by the Supreme People's Court ("2003 Interpretations").⁴ However, as demonstrated in several recent high-profile online copyright disputes, which primarily involved the downloading of MP3 files, the application of the copyright law has not been consistent.⁵ Moreover, courts generally set too low a threshold for liability on the part of technology providers.

In light of China's focus on technology development,⁶ this comment argues that both the direct-infringement liability theory in the 2001 Copyright Act and the joint-liability theory set forth in the 2003 Interpretations must be revised to create a more technology-friendly legal environment in China. Specifically, China needs to establish a secondary-liability theory that requires a higher degree of culpability than the negligence standard. China should also establish safe harbors for Internet service providers ("ISPs") from the broad scope of its copyright statute.

This comment examines the judicial application of current Chinese copyright law in recent MP3 file download cases, and suggests how to achieve a proper balance between providing adequate copyright protection and facilitating technology development. Part II discusses in detail two leading cases on ISP liability in China within the larger context of Chinese copyright law in the digital age. Part III focuses on two United States Supreme Court cases to illustrate judicial interpretation of American copyright law and how the judiciary attempts to maintain a balance between competing interests. Part IV proposes to develop a secondary liability theory for Chinese copyright law and provides recommendations with respect to its scope. Finally, this comment posits that the revised copyright law will provide a more technology-friendly legal environment appropriate for China.

³ Zhonghua Renmin Gongheguo zhu zuo quan fa [Copyright Act of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (amended 2001) (P.R.C.) [hereinafter 2001 Copyright Act].

⁴ Zui gao ren min fa yuan guan yu shen li ji suan ji wang luo zhu zuo quan jiu fen an jian shi yong fa lü ruo gan wen ti de jie shi [Interpretations on Some Issues Concerning Applicable Laws for Trial of Disputes Over Internet Copyright] (2003) [hereinafter 2003 Interpretations].

⁵ See Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc. (Beijing Supreme People's Ct., Dec. 2, 2004); Shanghai Busheng Music Culture Media Co., Ltd. v. Baidu.com, Inc. (Beijing Haidian Dist. People's Ct., Sept. 16, 2005).

⁶ See Guo jia zhong chang qi ke xue he ji shu fa zhan gui hua gang yao [(China's) National Mid- and Long-Term Science and Technology Development Outline (2006–2020)] (promulgated by the State Council of the People's Republic of China, Feb. 9, 2006) §§ 1-2, 7 [hereinafter Technology Development Outline].

II. CURRENT CHINESE COPYRIGHT LAW LACKS FLEXIBILITY AND CONSISTENCY IN ONLINE COPYRIGHT ADJUDICATION

Intellectual property protection is a relatively new and foreign concept in Chinese society compared to Western civilizations.⁷ With Confucianism as its dominant cultural philosophy for the past two thousand years, learning by imitation, coupled with disdain for the profit motive, produced “no indigenous counterpart”⁸ in Chinese culture to Western notions of intellectual property. The current Chinese intellectual-property law emerged onto the legal scene only recently, primarily in response to external pressures demanding stronger intellectual-property protection from China as a “precondition to full participation in international trade regimes.”⁹

A. *China’s Current Copyright Law Reflects Its Need to Become a Member of the World Community*

Legal protection of intellectual property started to develop in China at the beginning of the twentieth century.¹⁰ In 1910, China enacted its first copyright law.¹¹ This early copyright law was short lived, however; it was repealed the very next year with the demise of the Qing dynasty.¹² Two subsequent copyright laws were promulgated in pre-Communist China, one by the warlord then in power¹³ and the other by the Republican government.¹⁴ Unfortunately, these fledgling copyright-protection schemes failed to flourish, not only because the country was plagued by political and social upheaval for the following four decades, but also because China lacked the “legal consciousness” presumed by the law.¹⁵

After taking over the country in 1949, the Chinese Communist Party eliminated the existing legal system and started to explore its own legal

⁷ See Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 N.W. J. INT’L L. & BUS. 15, 29-32 (1993).

⁸ William P. Alford, *Don’t Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3, 3 (1993).

⁹ Michael N. Schlesinger, Note, *A Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93, 93 (1995).

¹⁰ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 30-55 (1995).

¹¹ *Da qing zhu zuo quan li* [Law of Author’s Rights of the Qing Dynasty] (1910).

¹² ZHENG CHENGSI, *CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW* 87 (1987).

¹³ *Bei yang zheng fu zhu zuo quan fa* [Law of Author’s Rights of the Northern Warlords] (1915).

¹⁴ *Guo min dang zheng fu zhu zuo quan fa* [Law of Author’s Rights of the Republic of China] (1928).

¹⁵ ALFORD, *supra* note 10, at 53.

structure.¹⁶ Substantive introduction of intellectual-property law, however, did not occur until the adoption of China's Fifth Constitution in 1982.¹⁷ The advent of China's Open Door policy and greater economic integration with the rest of the world over the following two decades resulted in significant development of its intellectual-property law.¹⁸

In 1990, the Communist Party promulgated the Copyright Act of the People's Republic of China ("1990 Copyright Act").¹⁹ Two years later, China became party²⁰ to the Berne Convention for the Protection of Literary and Artistic Works.²¹ Shortly after, the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms²² entered into force in China.²³ Through participation in these international agreements, China signaled to the world its willingness to provide greater protection to copyrighted works.

The 1990 Copyright Act was amended in October 2001,²⁴ on the eve of China's final accession to the World Trade Organization ("WTO")²⁵ and the Agreement on Trade-Related Aspects of Intellectual Property Rights,

¹⁶ Mikhaelle Schiappacasse, Note, *Intellectual Property Rights in China: Technology Transfers and Economic Development*, 2 BUFF. INTELL. PROP. L. J. 164, 176 (2004).

¹⁷ *Id.*

¹⁸ Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes*, 26 N.W. J. INT'L L. & BUS. 225, 257 (2006).

¹⁹ Zhonghua Renmin Gongheguo zhu zuo quan fa [Copyright Act of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (P.R.C.) [hereinafter 1990 Copyright Act].

²⁰ Zhonghua Renmin Gongheguo guo jia ban quan ju—Zhong guo yu guo ji zu zhi [National Copyright Administration of the People's Republic of China—China and International Organizations], <http://www.ncac.gov.cn/servlet/servlet.info.OrgServlet?action=list> (last visited Nov. 1, 2006).

²¹ Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 1161 U.N.T.S. 3, http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf. The Berne Convention is the oldest international treaty in the field of copyright and it is open to all states. WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE § 5.166 at 262 (2d ed. 2004). The aim of the Berne Convention is "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works." *Id.* § 5.169.

²² Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67, http://www.wipo.int/treaties/en/ip/phonograms/pdf/trtdocs_wo023.pdf. The Phonograms Convention provides for the obligation of each contracting state to protect a producer of phonograms who is a national of another contracting state against the making of duplicates without the consent of the producer, against the importation of such duplicates, where the making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public. *Id.* Art. 2.

²³ China and International Organizations, *supra* note 20.

²⁴ 2001 Copyright Act.

²⁵ Member information on China, <http://www.wto.org> (follow "the WTO's 149 members" hyperlink; then follow "China" hyperlink) (last visited Nov. 1, 2006). The WTO came into being in 1995 and is the only global international organization dealing with the rules of trade between nations, <http://www.wto.org> (follow "What is the WTO?" hyperlink) (last visited Nov. 1, 2006).

Including Trade in Counterfeit Goods (“TRIPs”).²⁶ The TRIPs Agreement, as part of the WTO framework, requires that signatories adopt minimum standards of intellectual-property protection in order to reduce barriers to international trade.²⁷ Indeed, during the latter half of the 1990s, “the prospect of permanent membership in the global economy propelled China along a path of greater intellectual property reform.”²⁸ As an increasingly prominent member of the world community, China should continue to make efforts to bring its intellectual property law up to the international standards.

B. Current Chinese Copyright Law Attempts to Address Issues Particular to the Internet

The onset of Internet technology has changed the landscape of traditional copyright protection worldwide, and China is no exception. Recognizing the importance of Internet copyright protection, China has taken steps to update its copyright law in this digital age. In 2000, the Supreme People’s Court, charged with giving judicial explanations of the specific application of laws that must be carried out nationwide,²⁹ first promulgated its interpretations of the copyright law in the Internet context.³⁰ The court further amended the interpretations in 2003.³¹ The current legal authorities regarding online copyright adjudication in China include both the 2001 Copyright Act and the 2003 Interpretations.

The 2001 Copyright Act provides strong protection to copyright holders. It grants a copyright holder seventeen exclusive rights,³² among which is the right of communication to the public.³³ A copyright holder is entitled to “make his or her works available, through wireless means or otherwise, so the public can get access to such work at the time and place of

²⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Jan. 1, 1995, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197. The agreement was negotiated in the 1986-94 Uruguay Round of trade negotiations, introducing intellectual property rules into the WTO’s multilateral trading system. Understanding the WTO—Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Nov. 1, 2006).

²⁷ G. GREGORY LETTERMAN, *BASICS OF INTERNATIONAL INTELLECTUAL PROPERTY LAW* 30 (2001).

²⁸ Warren Newberry, Note, *Copyright Reform in China: A “TRIPS” Much Shorter and Less Strange than Imagined?* 35 *CONN. L. REV.* 1425, 1444 (2003).

²⁹ Chinacourt.com, *The Responsibilities of the Supreme People’s Court of the PRC* (May 2002), <http://en.chinacourt.org/public/detail.php?id=24> (last visited Nov. 1, 2006).

³⁰ *Zui gao ren min fa yuan guan yu shen li ji suan ji wang luo zhu zuo quan jiu fen an jian shi yong fa lü ruo gan wen ti de jie shi* [Interpretations on Some Issues Concerning Applicable Laws for Trial of Disputes over Internet Copyright] (2000) [hereinafter 2000 Interpretations].

³¹ 2003 Interpretations.

³² 2001 Copyright Act, § 10.

³³ *Id.* No. 12.

its choice.”³⁴ In addition to granting specific rights to copyright holders, the law also tightens the leash on online copyright infringers. The fourth provision of the 2003 Interpretations establishes that ISPs can be jointly liable³⁵ if they “participate in, assist in, or incite infringing activities.”³⁶ The fifth provision further specifies that if an ISP has either actual knowledge of infringing activity or notification of such infringing activity on its premises, yet refuses to stop such infringement, it will be held jointly liable with the infringing party.³⁷

C. *Application of Chinese Copyright Law in the Online Context Has Produced Ambiguities and Raised Concerns in the Technology Industry*

The music industry, among other content providers, has been particularly concerned about the impact of Internet-based technology.³⁸ MP3,³⁹ “currently the most popular compression format for digital music,”⁴⁰ makes online music file sharing easier and faster without compromising quality. Not surprisingly, this new avenue of content distribution poses a significant threat to the financial well-being of record labels, whose lucrative business models depend largely on the sale of packaged compact discs (“CDs”).⁴¹ Indeed, music-recording companies have experienced a decrease in CD sales by roughly ten percent in recent years, and they “blame the loss of sales on downloading of MP3 files from the Internet.”⁴²

China, still struggling to crack down on the production and sale of counterfeit CDs, now finds itself pulled onto a new battleground against “twenty-first century piracy”⁴³—unauthorized Internet music and video file-

³⁴ *Id.*

³⁵ In defining joint liability, the 2003 Interpretations specifically references § 130 of the Chinese Civil Code, which provides that “joint liability is found when more than two people act in concert causing harm to third parties.”

³⁶ 2003 Interpretations, § 4.

³⁷ *Id.* § 5.

³⁸ LASICA, *supra* note 2, at 88.

³⁹ MP3 stands for MPEG-1 Audio Layer-3.

⁴⁰ Kimberly D. Simon, Note, *Establishing Accountability on the Digital Frontier: Liability for Third Party Copyright Infringement Extends to Manufacturers of Audio Compression Software*, 52 SYRACUSE L. REV. 921, 924 (2002).

⁴¹ Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, TOURO L. REV. 375, 430-31 (2006).

⁴² Gino Spinelli, *Siva Vaidhyanathan's The Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System*, 4 J. HIGH TECH. L. 1 (2004-2005) (book review).

⁴³ Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 801 (2006).

sharing. As of June 30, 2006, China boasts the second-highest number of Internet users in the world, with a total reaching 123 million.⁴⁴ Among those, 77 million are broadband users.⁴⁵ Just over thirty-five percent of Internet users in China list online music streaming and downloading as one of their primary online activities.⁴⁶ There is no doubt that many, if not most, of the music files available on the Internet now are copyrighted materials.

With the rapid growth of Internet activity and continuing development of MP3 technology, the tension between copyright holders and file distributors finally culminated in a wave of litigation, primarily in the United States, in the early twenty-first century.⁴⁷ China, though a latecomer on the MP3 download scene, deserves particular attention due to the potential magnitude of its Internet usage. The following two recent cases demonstrate the operation of current Chinese copyright law in the Internet context.

1. *The Outcome of the Chinamp3.com Litigation Imposes a Heavy Burden on Internet Technology Providers*

In 2004, Warner Music Hong Kong Ltd., as copyright owner of the recordings of twenty-seven songs, brought an infringement action in the First Beijing Intermediate People's Court⁴⁸ against Chinamp3.com.⁴⁹ Defendant Chinamp3.com was a commercial music website that collected and indexed information on musicians and their works for music fans.⁵⁰ As part of its index service, Chinamp3.com also allowed visitors to search and download MP3 files stored on other websites.⁵¹ There was no dispute as to the architecture of the MP3 file-downloading service on Chinamp3.com.⁵² The download procedure was as follows: an Internet user could go through the index on Chinamp3.com to search a particular artist or song. By clicking

⁴⁴ 18th Statistical Survey Report, *supra* note 1, at 23.

⁴⁵ *Id.* Broadband Internet access enables far higher transfer rates than narrowband access, allowing subscribers to engage in more telecommunications services, such as high-quality voice, data, graphics, and video telecommunications. See Aaron M. Wigod, *The AOL-Time Merger: An Analysis of the Broadband Internet Access Market*, 6 J. SMALL & EMERGING BUS. L. 349, 370-73 (2002).

⁴⁶ 18th Statistical Survey Report, *supra* note 1, at 16.

⁴⁷ See, e.g., *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (2001); *Arista Records, Inc. v. MP3Board, Inc.*, 2002 WL 1997918 (S.D.N.Y.).

⁴⁸ The First Beijing Intermediate People's Court governs the western part of Beijing and has both trial and appellate jurisdiction. Its civil division has jurisdiction over litigation of significant impact within the area, including civil, commercial, administrative, and intellectual-property lawsuits. Beijing shi di yi zhong ji ren min fa yuan [The First Beijing Intermediate People's Court], <http://www.bj148.org/bureau/court/fzfcon.htm> (last visited Nov. 1, 2006).

⁴⁹ *Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc.* (First Beijing Interm. People's Ct., 2003).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

the download icon, the user then was introduced to the download interface. Depending on the available source websites, each song had from two to ten download addresses. These addresses were numbered, and the specific URL address would show up if the user right-clicked the address. Chinamp3.com also inserted a disclaimer under each downloading address stating that it was only a linking service, and the MP3 files were not available from Chinamp3.com.⁵³

The trial court found the defendant liable for direct infringement. According to the trial court, it was significant that an Internet user could download those MP3 files without ever leaving Chinamp3.com's website.⁵⁴ The court then held that, despite the fact that the MP3 files were not stored on Chinamp3.com's server, the linking service violated the plaintiff's right of communication to the public, and should be prohibited under the 2001 Copyright Act.⁵⁵ Following this ruling, Chinamp3.com appealed to the Beijing Supreme People's Court.⁵⁶

The appellate court eventually affirmed the trial court's decision but arrived at the conclusion based on a different rationale. The appellate court disagreed that this was a direct infringement case and instead emphasized the fact that the defendant's server never uploaded, copied, or distributed the copyrighted work. In addition, the court recognized that Chinamp3.com had no control over those source websites, which could block visitors by changing their URL or adding access control. Accordingly, the court reasoned that the linking service was "merely a conduit rather than 'communicating to the public' as defined in the 2001 Copyright Act."⁵⁷

The appellate court then proceeded with an analysis under the 2003 Interpretations to determine whether the defendant was jointly liable for copyright infringement. In doing so, the court applied a negligence standard of culpability. According to the court, Chinamp3.com "had a duty, indeed a heightened duty, because of its commercial nature," to monitor the source websites and filter any infringing activities.⁵⁸ The defendant's failure to perform such duty resulted in participation and assistance of the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ The Beijing Supreme People's Court is the superior court over the First Beijing Intermediate People's Court and has appellate jurisdiction over litigation of significant impact in Beijing. Beijing shi gao ji ren min fa yuan [The Beijing Supreme People's Court], <http://www.bj148.org/bureau/court/bjgfcen.htm> (last visited Nov. 1, 2006).

⁵⁷ Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc., at 6 (Beijing Supreme People's Ct., Dec. 2, 2004).

⁵⁸ *Id.* at 7.

infringement by the source websites, making the defendant jointly liable.⁵⁹ As discussed later in this comment, applying the low-negligence standard of culpability imposes a heavy burden on technology innovators and may chill the development of Internet commerce.

2. *The Trial Court Decision in the Baidu.com Litigation Unreasonably Expands a Copyright Holder's Right of Communication to the Public*

Within months after the Chinamp3.com litigation, the MP3 music-downloading service was once again in the legal spotlight. Shanghai Busheng Music Culture Media, a local Chinese music-recording company, brought suit against Baidu.com, the self-acclaimed "most powerful Chinese language MP3 search engine,"⁶⁰ in the Beijing Haidian District People's Court⁶¹ for copyright infringement. The trial court found for the plaintiff, granting an injunction requiring Baidu.com to stop its MP3 downloading service and to pay damages in the amount of RMB 68,000.⁶²

The Baidu.com lawsuit caused an even bigger stir due to the defendant's fame and success in the Chinese Internet business.⁶³ Baidu.com started its Chinese language search engine service in 2000 and has grown rapidly ever since.⁶⁴ It went public on NASDAQ in August 2005⁶⁵ and immediately became a celebrity in the Chinese Internet industry.⁶⁶ Powered by its self-developed search software, Baidu.com builds and refines "a large database of Chinese synonyms and closely associated phrases, . . . providing access to more than 740 million indexed Chinese-language web pages."⁶⁷ Among its various products and services, the MP3 search is the most popular,

⁵⁹ *Id.*

⁶⁰ Baidu.com Home Page, <http://www.baidu.com>.

⁶¹ The Haidian District People's Court is the only district court in Beijing that has a separate intellectual-property division. See <http://www.chinaiprlaw.com/spjg/spjg1.htm> (last visited Nov. 1, 2006).

⁶² Shanghai Busheng Music Culture Media Co., Ltd. v. Baidu.com, Inc., at 6 (Beijing Haidian Dist. People's Ct., Sept. 16, 2005).

⁶³ See Guan yu Baidu.com yin yue qin quan an de shen du fen xi [Special report on Baidu.com litigation], <http://net.chinabyte.com/bdqq/> (last visited Nov. 1, 2006).

⁶⁴ Baidu.com Home Page, <http://www.baidu.com/about/index.html> (last visited Nov. 1, 2006).

⁶⁵ *Baidu.com Sees IPO Pop, But Some Fear a Burst Bubble*, WALL ST. J., Aug. 8, 2005, 2005 WLNR 12451764. During the first day of its trading on NASDAQ, Baidu.com's price per American depositary share rose to \$122.54 from \$27, up 354 percent, the highest for a NASDAQ-listed firm since the 357 percent rise for telecom-equipment group Finisar Corporation in November 1999. *Id.*

⁶⁶ See Baidu na si da ke shang shi [Special report on Baidu.com's NASDAQ Listing], <http://tech.tom.com/zhuanti/baiduIPO.html> (last visited Nov. 1, 2006).

⁶⁷ Prospectus of the Initial Public Offering of American Depositary Shares of Baidu.com, Inc. 87 (Aug. 4, 2005).

providing “algorithm-generated links to nearly four million songs and other multimedia files found on the Internet.”⁶⁸

To download MP3 files from Baidu.com, a user could either do a keyword search or go through an index of artists or songs. The search engine would match the search term with all source websites containing such terms from which the user could download the file.⁶⁹ Ironically, though the MP3 files were not uploaded or stored on the server, Baidu.com attributed the MP3 files to itself if the user chose to download the file.⁷⁰ While the download service was free of charge, banner ads were displayed on the webpage at all times.⁷¹

The trial court’s brief opinion demonstrated the court’s struggle with the interpretation of the right of communication to the public in the copyright statute. Though not explicitly articulated, the court seemed to recognize that under certain circumstances, the basic search service, without more, would not incur copyright liability.⁷² However, the defendant’s search service, concluded the court, “went beyond the limited scope of legitimate business.”⁷³ In arriving at this conclusion, the court was heavily influenced by the fact that Baidu.com, through the banner ads, indirectly profited from the MP3 file-downloading service.⁷⁴ As a result, the court held that Baidu.com violated the plaintiff’s right of communication to the public within the scope of the 2001 Copyright Act.⁷⁵

3. *The Propensity of Finding Copyright Liability under the Current Copyright Law Will Have Considerable Impact upon the Burgeoning Internet Industry in China*

The Baidu.com litigation has significantly impacted not merely Baidu.com’s business, but also the entire Internet search-engine industry in China.⁷⁶ Since the search technology and business model used by

⁶⁸ *Id.*

⁶⁹ Baidu.com’s answer brief at 1 (on file with author).

⁷⁰ Shanghai Busheng Music Culture Media Co., Ltd. v. Baidu.com, Inc., at 5 (Beijing Haidian Dist. People’s Ct., Sept. 16, 2005).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Baidu xian xiang kao wen sou suo yin qing hang ye [Baidu.com Litigation Challenges the Search Engine Industry—Forum on the Development of Internet Search Engine Industry] (Sept. 28, 2005), http://news.xinhuanet.com/it/2005-09/28/content_3557613.htm (last visited Nov. 1, 2006). A representative from the National Copyright Administration was quoted as saying that “[B]aidu.com’s litigation is not an isolated case, rather it is a challenge to the entire search engine industry.” *Id.*

Baidu.com is typical of those used by other search engines in China, the ruling against Baidu.com rendered other search engines equally vulnerable to copyright-infringement attack.⁷⁷

An examination of the latest Internet copyright-infringement cases makes one wonder whether the current Chinese copyright law provides a desirable legal platform for the country. To answer this question, it is helpful to look first at the American approach on the same issue, taking into account the dynamics between content⁷⁸ and technology industries.

III. AN OVERVIEW OF AMERICAN COPYRIGHT LAW SHOWS THAT THE LAW SHOULD STRIKE A PROPER BALANCE BETWEEN PROTECTING COPYRIGHT AND ENCOURAGING TECHNOLOGICAL DEVELOPMENT

The root of intellectual-property law in the United States is traced to the patent and copyright clause in the U.S. Constitution: “The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷⁹ The monopoly privileges granted by Congress, therefore, are “intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”⁸⁰ Rewarding the authors and inventors is only a “secondary consideration,”⁸¹ subordinated to the primary goal of achieving “the general benefits derived by the public” from the authors’ and inventors’ labors.⁸² In other words, “copyright law has always been a means to an end.”⁸³

The 1976 Copyright Act,⁸⁴ the current governing copyright statute, protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁸⁵ Responding to the development of the

⁷⁷ *Id.* More than twenty Internet search engines and telecommunication companies, including major Chinese Internet search engines such as Sina.com, Sohu.com, and Zhongsou.com, attended the forum and expressed their concern about the legitimacy of their services. *Id.*

⁷⁸ Principal content industries include publishing, music, film, and television. Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 98 (2002-2003).

⁷⁹ U.S. CONST. art. I, § 8, cl. 8.

⁸⁰ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

⁸¹ *Id.*

⁸² *Id.* (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

⁸³ Menell, *supra* note 78, at 103.

⁸⁴ 17 U.S.C. § 101 et seq.

⁸⁵ 17 U.S.C. § 102.

printing press, broadcast technology, and the digital revolution, the contours of American copyright law “have been shaped by advances in the technologies of creating, reproducing, and disseminating such works.”⁸⁶ Indeed, from the Copyright Act of 1790⁸⁷ to the Digital Millennium Copyright Act of 1998 (“DMCA”),⁸⁸ Congress has repeatedly amended the copyright statute and enacted new legislation in order to keep up with technological innovations in creating new ways of making and transmitting copies.⁸⁹

Section 106 of the 1976 Copyright Act accords copyright owners six exclusive rights to use and authorize the use of their work, including reproduction of the copyrighted work in copies.⁹⁰ Furthermore, though the Copyright Act “does not expressly render anyone liable for infringement committed by another,”⁹¹ the common-law doctrine of secondary liability has long been established in American law.⁹² Specifically, one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor.⁹³ The concept of contributory infringement in the context of copyright law is “merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”⁹⁴

While the copyright statute protects copyright holders against direct infringement, the common-law tort doctrine can impose contributory liability on those who indirectly infringe a copyright.⁹⁵ The scope of protection under contributory infringement, accordingly, is “directly related to the nature of the originating contribution and the fault standard applied to the contributor.”⁹⁶ In the United States, more specifically, “one who, with *knowledge* of the infringing activity, induces, causes or materially

⁸⁶ Menell, *supra* note 78, at 64.

⁸⁷ The 1790 Act was the first copyright act passed by Congress after the ratification of the patent and copyright clause in the Constitution. It was continuously amended and extended by court decisions and eventually was replaced by the 1909 Act. The 1909 Act was later reformed by the 1976 Act. See Jessica Litman, *Copyright Legislation and Technological Changes*, 68 OR. L. REV. 275, 282-342 (1989).

⁸⁸ 17 U.S.C. §§ 1201-1332.

⁸⁹ See Britton Payne, Note, *Super-Grokster: Untangling Secondary Liability, Comic Book Heroes and the DMCA, and a Filtering Solution for Infringing Digital Creations*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 946-47 (2006).

⁹⁰ 17 U.S.C. § 106.

⁹¹ *Sony*, 464 U.S. at 434.

⁹² See generally PROSSER AND KEETON ON TORTS §46, at 322-23 (5th ed. 1988).

⁹³ NIEL BOORSTYN, BOORSTYN ON COPYRIGHT § 10.06(2), at 10-21 (1994).

⁹⁴ *Sony*, 464 U.S. at 435.

⁹⁵ See Deborah J. Peckham, *The Internet Auction House and Secondary Liability—Will Ebay Have to Answer to Grokster?* 95 TRADEMARK REP. 977, 981-83 (2005).

⁹⁶ A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47, 64 (1989).

contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”⁹⁷

A. *The United States Supreme Court Has Carefully Mapped Out the Contours of Secondary-Liability Theory to Protect Technology Innovation*

Because copyright protection is statutory in nature, American courts consistently defer to Congress “when major technological innovations alter the market for copyrighted materials.”⁹⁸ In the absence of any Congressional mandate, courts turn to the underlying rationale of copyright protection for guidance, trying to find the proper balance between the competing interests of copyright holders and technology providers.⁹⁹ The ultimate aim, by granting “a fair return for an author’s creative labor,” is to “stimulate artistic creativity for the general public good.”¹⁰⁰

The two most important Supreme Court cases on interpreting secondary liability in copyright infringement in the United States are *Sony Corp. of America v. Universal City Studios, Inc.*¹⁰¹ and *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*¹⁰² The reasoning of the Court demonstrates that, between the technology and content industries—two important sectors of the American economy—a refined balance must be maintained.

I. *The Sony Doctrine Distinguishes the Level of Knowledge Required for Secondary Liability and Establishes a Strong Technology-Friendly Rule*

The dispute in *Sony* originated in the 1970s, and the technology in question was the Betamax video tape recorder (“VCR”), which enabled individual consumers to record television programs at home for later viewing.¹⁰³ Based on the fact that consumers had been using VCRs to record copyrighted works on commercially sponsored television, Universal Studios and Walt Disney Productions, the copyright owners of various

⁹⁷ *Gershwin Publ’g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added).

⁹⁸ *Sony*, 464 U.S. at 431.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Sony*, 464 U.S. 417 (1984).

¹⁰² *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).

¹⁰³ *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 432 (C.D. Cal. 1979), *rev’d*, 659 F.2d 963 (9th Cir. 1981), *vacated*, 464 U.S. 417 (1984).

audiovisual works, brought suit against Sony, the manufacturer and distributor of the VCRs, alleging contributory infringement.¹⁰⁴

The United States District Court for the Central District of California entered judgment for Sony.¹⁰⁵ In its ruling, the trial court assumed Sony had constructive knowledge that some consumers used the VCRs to accumulate personal libraries of tape recordings.¹⁰⁶ Agreeing with Sony's defense that "a manufacturer of a staple article of commerce cannot be held liable for infringement by purchasers of that product,"¹⁰⁷ the trial court did not find Sony's technical contribution to any infringing uses sufficient as a ground for liability.¹⁰⁸

The Ninth Circuit Court of Appeals reversed.¹⁰⁹ Instead, it imposed liability on Sony based on its finding that the VCRs were sold primarily for recording television programs, and "virtually all" such programming was copyrighted material.¹¹⁰

The United States Supreme Court ultimately agreed with the trial court, refusing to impose liability on Sony.¹¹¹ In reaching this conclusion, the Court cautioned against generalizing a finding of liability for copyright infringement.¹¹² Like the trial court, it analogized the VCRs to the "staple article of commerce" in the Patent Act¹¹³ and held that the sale of a product that is "capable of substantial noninfringing uses"¹¹⁴ does not constitute contributory infringement, even if the distributor knew that its products would be used for copyright infringement.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 433.

¹⁰⁶ *Id.* at 460.

¹⁰⁷ *Id.* at 459.

¹⁰⁸ *Id.* at 461.

¹⁰⁹ *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 977 (9th Cir. 1981), *vacated*, 464 U.S. 417 (1984).

¹¹⁰ *Id.* at 975.

¹¹¹ *Sony*, 464 U.S. at 421.

¹¹² *Id.* at 431. The Court noted that "in a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." *Id.*

¹¹³ 35 U.S.C. § 271(c). The Patent Act, unlike the Copyright Act, expressly provides for contributory liability, but exempts sale of a staple article or commodity of commerce: "Whoever . . . sells . . . a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." *Id.*

¹¹⁴ *Sony*, 464 U.S. at 442.

2. *The Grokster Decision Introduces the Inducement Theory to Punish Secondary Actors Who Intentionally Encourage Copyright Infringement*

Twenty years after the Sony case, after digital technology had revolutionized the content-distribution channel, the United States Supreme Court once again was called upon to resolve the tension between copyright holders and technology distributors. In 2003, MGM and other copyright holders brought a copyright-infringement suit against Grokster and StreamCast Networks, distributors of free software that allowed computer users to share electronic files through peer-to-peer networks.¹¹⁵

This newer generation of peer-to-peer networks established a “decentralized distribution structure” that no longer employed “any central index.”¹¹⁶ A user searching for a particular file could send a request that would be directly passed to users of the same peer-to-peer application to locate the requested file.¹¹⁷ The record showed that because of the security and efficiency offered by this technology, peer-to-peer networks were employed by various institutions to store and distribute electronic files.¹¹⁸ The primary use of such networks by individual users, on the other hand, was to share copyrighted music and video files without authorization.¹¹⁹

The United States District Court for the Central District of California granted summary judgment in favor of the defendants,¹²⁰ a decision later affirmed by the Ninth Circuit Court of Appeals.¹²¹ Relying on the Supreme Court decision in *Sony*, the Ninth Circuit held that absent actual knowledge of specific acts of infringement “at a time at which they contribute[d] to the infringement”¹²² and failure to act upon that knowledge, the defendants could not be held contributorily liable for distributing a product capable of substantial noninfringing uses.¹²³

¹¹⁵ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *rev'd*, 125 S.Ct. 2764 (2005).

¹¹⁶ Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15, 20 (2006). “The first generation of peer-to-peer systems, introduced by Napster, incorporated a centralized index that listed all the files that were made available for download by Napster’s users. The second generation of peer-to-peer networks, based on Gnutella technology, no longer employed any central index.” *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Grokster*, 125 S.Ct. at 2770.

¹¹⁹ *Id.* at 2771.

¹²⁰ *Grokster*, 259 F. Supp. 2d at 1031.

¹²¹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *aff'g*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

¹²² *Id.* at 1162 (citing 259 F. Supp. 2d 1029, 1036 (C.D. Cal. 2003)).

¹²³ *Id.* at 1160.

The United States Supreme Court vacated the Ninth Circuit Court of Appeals decision and remanded.¹²⁴ Rejecting the Ninth Circuit's reading of *Sony*, the majority opinion did not view the *Sony* decision as a complete shield of contributory liability.¹²⁵ According to the Court, *Sony* stands for the proposition that if the product is capable of noninfringing uses, the requisite knowledge will not be imputed solely from "the design or distribution of a product capable of substantial lawful use."¹²⁶ In other words, *Sony* "did not displace other theories of secondary liability" when there was affirmative evidence of wrongful intent.¹²⁷

In contrast to *Sony*, the Court found wrongful intent in *Grokster* and held the defendants liable on an inducement theory.¹²⁸ According to the Court, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."¹²⁹ The defendants' affirmative steps to encourage infringing activity by the users, such as advertising infringing uses and instructing users on how to engage in such activities, the Court reasoned, overcame "the law's reluctance to find liability" when a defendant merely sells a product capable of substantial noninfringing use.¹³⁰

B. The Sony Rule, After Grokster, Will Continue to Provide Assurance to Technology Providers for Their Innovation

The *Sony* and *Grokster* decisions demonstrate how American courts approach the ambiguities of the law when existing copyright protection is challenged by technology innovation. Finding the balance is never an easy task, and a decision to impose liability always will have an enormous impact on the development of the technology involved. Without *Sony*, the viewing experience today, where time-shifting is so prevalent, would not have been imaginable. On the other hand, an adverse ruling for the technology distributor may very well put an end to the operation in question. Indeed, *Grokster* eventually decided to stop its software distribution and shut down the associated network as part of its settlement with the recording and movie industry.¹³¹

¹²⁴ *Grokster*, 125 S.Ct. at 2783.

¹²⁵ *Id.* at 2779.

¹²⁶ *Id.* at 2778.

¹²⁷ *Id.*

¹²⁸ *Id.* at 2782.

¹²⁹ *Id.* at 2780.

¹³⁰ *Id.* at 2779.

¹³¹ Jeff Leeds, *Grokster Calls It Quits on Sharing Music File*, N.Y. TIMES, Nov. 8, 2005, at C1.

The United States has become a country known for both its content exports and its technology innovation,¹³² which stand on the “two sides of intellectual property rights.”¹³³ Revolutionizing the content distribution channel, digital technology “represents possibly the most profound challenge to copyright law.”¹³⁴ The content industries, not surprisingly, have actively resisted the change and used the threat of such technologies as a basis to obtain new legislation “expanding rights and enforcement powers of copyright owners.”¹³⁵

The law, accordingly, needs to strike a balance between Hollywood and Silicon Valley. The *Sony* decision ensures that wrongful intent will not be imputed when a product has potential to significantly benefit the public. As Justice Breyer observed in his concurring opinion in *Grokster*, the *Sony* rule is “clear” and “strongly technology protecting,”¹³⁶ assuring technology providers that they will not be subject to copyright liability if the product is “capable of substantial noninfringing uses.”¹³⁷ The *Grokster* decision, strengthening copyright protection where there is affirmative intent to infringe, left the *Sony* rule intact. The *Sony* rule, consequently, will continue to guide the technology industry, providing “breathing room for innovation and a vigorous commerce.”¹³⁸

Sony and *Grokster* show how the American judiciary, by carefully defining the contours of secondary-liability theory, balances the interests of the technology and content industry in the United States. The rationale behind the Court’s reasoning in both cases may provide insight when China examines its own copyright law in this digital age.

¹³² Over the twenty-four-year period examined (1980–2003), the United States has consistently been one of the world’s leading manufacturers of high-technology products. LAWRENCE M. RAUSCH, SCIENCE AND ENGINEERING INDICATOR 2006, CHAPTER 6: INDUSTRY, TECHNOLOGY, AND THE GLOBAL MARKETPLACE 6-12 (National Science Foundation, vol. 1, 2006). The content industry of the United States, including entertainment and digital culture, generates \$400-\$500 billion per year, accounting for four to five percent of GDP. Leslie Evans, *The Battle for the Global Entertainment Industry: Japan’s Growing Strength in Digital Culture*, <http://www.international.ucla.edu/article.asp?parentid=2931> (Jan. 17, 2003) (last visited Nov. 1, 2006).

¹³³ Evans, *supra* note 132.

¹³⁴ Menell, *supra* note 78, at 63.

¹³⁵ *Id.* at 129.

¹³⁶ *Grokster*, 125 S.Ct. at 2791.

¹³⁷ *Sony*, 464 U.S. at 442.

¹³⁸ *Grokster*, 125 S.Ct. at 2778.

IV. A LEGAL PLATFORM BASED ON DIRECT INFRINGEMENT AND NEGLIGENCE-BASED JOINT LIABILITY IS NOT THE SOLUTION FOR INTERNET COPYRIGHT DISPUTES IN CHINA

Currently, direct liability and joint liability are the two premises for finding copyright liability in the Internet context in China. One may be directly liable for violating a copyright holder's right of communication to the public,¹³⁹ or jointly liable for participating in or inciting the infringing activities of others.¹⁴⁰ Given the transitory and fast-changing nature of Internet activity and China's need for technology innovation, these two theories do not provide the best mechanism for resolving Internet copyright disputes in China and indeed may even hinder Internet activities.

A. *An Overbroad Definition of a Right of Communication to the Public Encourages Courts to Find Direct Liability on the Part of Technology Providers*

A notable feature of China's 2001 Copyright Act is the inclusion of a right of communication to the public as one of the seventeen exclusive rights of copyright owners.¹⁴¹ By its definition, the right is a very broad concept and potentially encompasses all forms of online activity, as long as it results in "providing the work to the public."¹⁴² Unfortunately, the statute does not offer further guidance in interpreting the scope of this right.

When applying the statute, courts usually have little difficulty finding violations. The trial court opinions in *Chinamp3.com* and *Baidu.com* are indicative of the courts' propensity to apply this direct-infringement theory.¹⁴³ *Chinamp3.com* and *Baidu.com* allowed Internet users to download MP3 files by providing links to source websites. Despite the fact that they never uploaded or stored the files on their respective servers, both trial courts found that such service constituted communication to the public and therefore violated the exclusive right of the copyright holders.¹⁴⁴

¹³⁹ See 2001 Copyright Act.

¹⁴⁰ See 2003 Interpretations.

¹⁴¹ 2001 Copyright Act, § 10, No. 12.

¹⁴² *Id.*

¹⁴³ See *Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc.* (First Beijing Interm. People's Ct., 2003); *Shanghai Busheng Music Culture Media Co., Ltd. v. Baidu.com, Inc.*, at 6 (Beijing Haidian Dist. People's Ct., Sept. 16, 2005).

¹⁴⁴ *Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc.* (First Beijing Interm. People's Ct., 2003); *Shanghai Busheng Music Culture Media Co., Ltd. v. Baidu.com, Inc.*, at 5 (Beijing Haidian Dist. People's Ct., Sept. 16, 2005).

Given the broad definition of this right of communication to the public, there is considerable concern that a copyright owner's right may reach too far into the operation of Internet technology.¹⁴⁵ Even within the judiciary, judges do not agree on the scope of the statute. In contrast to the two trial courts, the appellate court in *Chinamp3.com* emphasized the fact that the MP3 files were not available on the defendants' servers. Consequently, it held that the service fell outside the gamut of the copyright statute.¹⁴⁶ The appellate court's view was widely shared by ISPs, and indeed was the rationale behind Baidu.com's defenses.¹⁴⁷

As shown in these two recent Chinese copyright cases, the courts' interpretation of the statutory language has led to considerable uncertainty about its appropriate scope. In the United States, interpretation of statutes can be complemented by case law. In China, in contrast, courts are not bound by precedent, and there is not much predictability as to how they will construe a given statute in a particular case.¹⁴⁸ This uncertainty regarding liability will no doubt affect the operating strategies of ISPs and indeed may have a chilling effect on their participation in online commerce. For example, immediately before the *Baidu.com* ruling, Netease.com, another major search engine in China, voluntarily terminated its MP3 search service, apparently because of its fear of potential copyright liability.¹⁴⁹

B. Negligence-Based Joint Liability Does Not Provide the Best Legal Regime for Internet Copyright Infringement in China

The establishment of joint liability in the copyright context is an indication that China recognizes the need to look beyond direct infringement for copyright protection. However, the adoption of a joint-liability theory and its current application, evidenced by the appellate opinion in *Chinamp3.com*, is not the best platform for Internet copyright adjudication in China. The negligence standard employed by the court not only sets too low a threshold for finding liability, but also requires a court to study

¹⁴⁵ Baidu.com Litigation Challenges the Search Engine Industry, *supra* note 76.

¹⁴⁶ Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc., at 8 (Beijing Supreme People's Ct., Dec. 2, 2004).

¹⁴⁷ See Baidu.com's answer brief (on file with author).

¹⁴⁸ China is a civil law country. Though precedents played some role in its ancient legal system, the current legal system does not grant authority to precedents. Pan Shengli, Liu Xiaoqing, *Zai wo guo tui xing pan li zhi du de jia zhi fen xi* [*The Value of Precedents in the Chinese Legal System*], <http://www.chinacourt.org/public/detail.php?id=168887> (July 11, 2005) (last visited Nov. 1, 2006).

¹⁴⁹ Xu Yaping, *Wang yi zan ting Mp3 sou suo yin fa ban quan jiu hua* [*Netease.com Temporarily Halts its MP3 Search Service*], BEIJING ENTERTAINMENT DAILY, Aug. 26, 2005 (on file with author).

extensively the technology involved, a task for which the judicial system is not well prepared.

1. *The Chinese Court Applied a Negligence Theory in Its Analysis of Online Copyright Liability*

The essence of joint liability in the Chinese civil code lies in the finding of a “common infringing act.”¹⁵⁰ The necessary elements of such an act, however, have long been an issue of debate within the Chinese judiciary. The controversy focuses on whether the common infringing act should require a fault-based subjective requirement or an objective requirement that looks only at the resulting harm regardless of fault.¹⁵¹

Aside from indicating that the common infringing act should be fault based, the 2003 Interpretations provide no further guidance as to the standard of conduct that will give rise to liability. The appellate opinion in *Chinamp3.com* chose to apply a negligence standard to find joint liability for copyright infringement.¹⁵² According to the court, *Chinamp3.com* had a duty to monitor its online activities and would be held liable unless it “fulfilled its duty to the fullest extent to avoid any potential harm.”¹⁵³

The appellate court eventually decided that the defendant breached that duty, resulting in its participation in and assistance of copyright infringement by those source websites.¹⁵⁴ In reaching this conclusion, the judge extensively studied the service provided by the defendant. Considering the service’s architecture and design, the court determined that the defendant was fully capable of monitoring those source websites and blocking any infringing websites yet failed to do so.¹⁵⁵

The court also rejected the defendant’s argument that, based on the fifth provision of the 2003 Interpretations, knowledge is a necessary element for joint liability.¹⁵⁶ The fifth provision, the only other provision relating to joint liability in the 2003 Interpretations, stipulates that copyright liability will attach if ISPs, with actual knowledge of infringing activity or after being notified of such infringing activity by copyright holders, still refuse to

¹⁵⁰ Zhao Xiang, *Gong tong qin quan xing wei yu wu yi si lian luo de shu ren qin quan [Joint Liability of Copyright Infringement]*, <http://www.civillaw.com.cn/weizhang/default.asp?id=25670> (Apr. 8, 2006) (last visited Nov. 1, 2006).

¹⁵¹ *Id.*

¹⁵² *Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc.*, at 6 (Beijing Supreme People’s Ct., Dec. 2, 2004).

¹⁵³ *Id.* at 7.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

stop such infringement.¹⁵⁷ It is not clear, however, whether this is the only ground for a court to find joint liability.

The appellate court did not think the fifth provision was the appropriate standard for the current case. Reading this provision as an exception rather than the rule, the court decided that for parties like the defendant, which clearly had the ability to monitor and filter infringing activities, the provision would not apply.¹⁵⁸ Instead, only when the architecture of the service or technology is not capable of preventing copyright infringement will the court require a higher degree of fault to impose liability.¹⁵⁹

In summary, a Chinese court will use a negligence standard to determine whether a defendant is jointly liable for copyright infringement. Presuming a duty to prevent harm to copyright holders, a court will then make a case-by-case determination of the nature of the service or technology involved. If the architecture of the service or technology is such that it is impossible to carry out the duty, then the fifth provision of the Interpretations applies and actual knowledge is required to find joint liability. On the other hand, if the court finds that the service or technology provider is capable of performing the duty yet fails to do so, then that provider is jointly liable for copyright infringement.

2. *The Negligence Standard Applied by the Court Is Burdensome to Both Courts and ISPs*

The approach by the appellate court in *Chinamp3.com* raises two questions as to whether a negligence standard for applying joint liability provides the best legal platform for Internet copyright adjudication. First, are the courts suited to handle the detailed technological inquiry required by the negligence standard? Second, does the negligence theory afford a friendly legal environment for technology providers?

a. *The Negligence Standard Requires a Detailed Technological Inquiry That the Court Is Not Suited to Handle*

Under the current legal framework, the inquiry of each case turns on a judge's decision about whether the defendant is capable of monitoring and

¹⁵⁷ 2003 Interpretations, § 5.

¹⁵⁸ Warner Music Hong Kong Ltd. v. Chinamp3.com, Inc., at 7 (Beijing Supreme People's Ct., Dec. 2, 2004).

¹⁵⁹ *Id.*

preventing infringing activity. As the appellate judge in *Chinamp3.com* acknowledged, this will be a “case-by-case determination”¹⁶⁰ which requires the judge to conduct extensive studies of the architecture and operation of the particular technology.¹⁶¹

Judges in general are not in the best position to make technological determinations. As U.S. Supreme Court Justice Breyer noted, “judges have no specialized technical ability to answer questions about present or future technological feasibility or commercial viability. . . .”¹⁶² Furthermore, the constantly changing online business presents “a quicksilver technological environment with courts ill-suited to fix the flow of Internet innovation.”¹⁶³

In light of China’s inquisitorial judicial system,¹⁶⁴ such a task can be particularly challenging for judges. Not only do they have to research the appropriate legal authorities, they must often gather facts on their own.¹⁶⁵ Most Chinese judges lack experience and expertise in intellectual property cases in the first place,¹⁶⁶ and to further burden them with the responsibility of making technological determinations may very well threaten the effectiveness and efficiency of the judicial process.

b. The Negligence Standard Does Not Create a Friendly Legal Environment for Technology Providers

More importantly, imposing a duty on the part of technology providers to prevent copyright infringement can be an onerous burden for the industry. The nature of the services provided by ISPs demands that they come into contact with a vast amount of information and innumerable actors. Presuming a duty on the part of ISPs to monitor potential infringing activity, therefore, is not the most reasonable and practical solution. “Formulation of such a broad duty, which departs radically from the established doctrine that

¹⁶⁰ *Id.* at 6.

¹⁶¹ China does not have the equivalent of “special masters” in the U.S. who assist judges in fact finding and court proceedings. See LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, UCLA J. L. & TECH. 1 (2002) (discussing the special master system in the United States).

¹⁶² *Grokster*, 125 S.Ct. at 2792.

¹⁶³ *Grokster*, 380 F.3d at 1167.

¹⁶⁴ Under the inquisitorial system, Chinese judges conduct “an active and independent inquiry into the merits of each case.” Zhong Jianhua, Yu Guanghua, *Establishing the Truth on Fact: Has the Chinese Civil Process Achieved This Goal?* 13 J. TRANSNAT’L L. & POL’Y 393, 400 (2004).

¹⁶⁵ Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 214 (2000).

¹⁶⁶ *Id.*

duty arises from a specific relationship between two parties, . . . should not be undertaken. . . .”¹⁶⁷

Furthermore, imposing such a duty on ISPs fails to recognize the “dialectic relationship between law and technology”—not only does the law respond to new technologies, it also “affect[s] technological progress and the availability of technology.”¹⁶⁸ Requiring ISPs to watch out for potential copyright issues at all times, simply because they are capable of doing so, will certainly increase their costs of operation. In addition, a “high level of uncertainty regarding the scope of liability” could also have a chilling effect on innovation and prospective investment.¹⁶⁹

With the current negligence standard, an ISP needs to be concerned about whether its service fulfills the duty to prevent copyright infringement. It may be able to invoke the fifth provision of the 2003 Interpretations, arguing that knowledge is required to impose liability. Whether the provision applies or not, however, depends on a judge’s determination of the nature of the service or technology. Such a legal standard inevitably results in inefficiency on the part of the judiciary and, more important, imposes a burden on the technology industry. Consequently, it creates a legal environment that hinders, rather than encourages, technology development in the Internet world in China.

V. BOTH THE DIRECT AND NEGLIGENCE-BASED JOINT LIABILITY THEORIES IN CHINA SHOULD BE REFORMED TO FACILITATE TECHNOLOGY DEVELOPMENT

Since its establishment in 1949, the Chinese government has made technology development one of its top priorities.¹⁷⁰ Not only does China try to be independent of imported technology, it strives to be a technology provider.¹⁷¹ According to the newly published technology development plan, China has designed a long-term strategy for its technology industry and

¹⁶⁷ *Chiarella v. United States*, 445 U.S. 222, 233 (1980).

¹⁶⁸ Elkin-Koren, *supra* note 116, at 57.

¹⁶⁹ *Id.* at 58.

¹⁷⁰ See Technology Development Outline, *supra* note 6, § 1.

¹⁷¹ Jeffrey Sparshott, *China Moves Past the U.S. in Tech Exports Think-Tank Report Looks at Beijing’s Rising Power*, THE WASHINGTON TIMES, Dec. 13, 2005, at A01. (In 2004, China surpassed the U.S. as the world’s top exporter of high-tech communications and information products such as cell phones, laptop computers, and digital cameras. The Organization for Economic Cooperation and Development (OECD) report highlights China’s rapid rise as an economic power and a manufacturing hub for sophisticated electronics.)

plans to increase its technology research and development budget to more than 2.5 percent of its GDP by 2020.¹⁷²

To facilitate this strategy, specifically the development of information and communication technology,¹⁷³ China needs to carefully construct its legal platform of copyright law. Copyright law is a matter of balance between copyright holders and technology providers. While it is difficult to weigh different kinds of gains and losses between the two, the U.S. copyright law “leans in favor of protecting technology.”¹⁷⁴ Considering the importance of technology development for China, it is particularly desirable to create a legal environment that is technology friendly.

To create a technology-friendly legal environment, China must rethink both the direct and joint liability rationale and its application to online copyright adjudications. If ISPs’ basic services, such as storing, linking, and transmission, are deemed to conflict with a copyright holder’s right of communication to the public, the law should offer exemptions from the encompassing scope of the 2001 Copyright Act. To implement the change, China may consider the safe-harbor provision in America’s Digital Millennium Copyright Act of 1998 (“DMCA”).¹⁷⁵

As to copyright disputes involving more sophisticated technology and services, a secondary-liability theory with a higher threshold of culpability will free the court from the difficult task of technical determination and provide clarity to the industries. Establishing this new standard, the *Sony* rule from the United States serves as an excellent example of how courts should narrowly define the contours of secondary liability to promote technology development.

A. *To Promote Online Commerce, Chinese Copyright Law Should Provide ISPs Safe Harbor from Copyright Holders’ Right of Communication to the Public*

Under the United States’ copyright law, a copyright holder does not enjoy a right of “communication to the public,”¹⁷⁶ equivalent to that in China. However, case law has established that a temporary copy in a program’s memory,¹⁷⁷ because it can be “perceived, reproduced, or

¹⁷² Technology Development Outline, *supra* note 6, § 2.

¹⁷³ *Id.* § 3, No.7.

¹⁷⁴ *Grokster*, 125 S.Ct. at 2793.

¹⁷⁵ 17 U.S.C. §§ 512, at 1201-5, 1301-32.

¹⁷⁶ 2001 Copyright Act, § 10, No. 12.

¹⁷⁷ This memory is known as “RAM,” or random access memory.

otherwise communicated,"¹⁷⁸ is within the meaning of the reproduction right under the 1976 Copyright Act.¹⁷⁹ Accordingly, ISPs will be secondarily liable whenever their users visit their sites. Responding to the concerns of ISPs regarding such liability, the U.S. Congress established a series of safe harbors in the DMCA insulating ISPs from copyright liabilities.¹⁸⁰

Both copyright owners and the Internet industry voiced strong opinions over the DMCA legislation,¹⁸¹ and the safe-harbor regime was a result of compromise between the two. The regime did not confer outright immunity to the ISPs, rather it enabled the copyright owners to introduce "a more effective mechanism for enforcing their rights."¹⁸² The DMCA's safe harbors cover transmission and routing,¹⁸³ storage,¹⁸⁴ caching,¹⁸⁵ and linking.¹⁸⁶ To qualify for these safe harbors, ISPs have to meet certain threshold conditions,¹⁸⁷ including notice and takedown procedures,¹⁸⁸ termination of repeat infringers' accounts,¹⁸⁹ and disclosure of infringers' identities upon subpoena.¹⁹⁰ If ISPs take these required steps to facilitate copyright protection, they will be shielded from lawsuits for monetary relief and most forms of equitable relief.

Though the statutory scheme and the industry dynamic are entirely different from the American counterparts, China can still borrow the rationale of the DMCA. To encourage economic activity on the Internet, China can establish similar safe harbors absolving ISPs from the broad right of communication to the public. In the meantime, the safe-harbor provision can serve as a tool to promote copyright protection. For example, to qualify for immunity, an ISP could be required to publish its copyright-protection policy on its website and promptly take action upon actual notice of copyright infringement. Clearly defining the scope of liability and setting forth the standard of conduct could reduce the uncertainty prevalent among

¹⁷⁸ 17 U.S.C. § 101. "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed. *Id.*

¹⁷⁹ *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (Cal. 1993).

¹⁸⁰ 17 U.S.C. § 512.

¹⁸¹ Elkin-Koren, *supra* note 116, at 28.

¹⁸² *Id.*

¹⁸³ 17 U.S.C. § 512 (m).

¹⁸⁴ 17 U.S.C. § 512 (c).

¹⁸⁵ 17 U.S.C. § 512 (b).

¹⁸⁶ 17 U.S.C. § 512 (d).

¹⁸⁷ Elkin-Koren, *supra* note 116, at 29.

¹⁸⁸ 17 U.S.C. § 512 (j)(1)(B).

¹⁸⁹ 17 U.S.C. § 512 (i)(1).

¹⁹⁰ 17 U.S.C. § 512 (h).

ISPs in China and encourage compliance with procedures necessary for better copyright protection.

B. To Encourage Technology Development, China Should Establish a Secondary-Liability Doctrine that Requires a Higher Degree of Culpability than Negligence

Rather than adapting the civil-code joint-liability theory to the Internet context, a secondary-liability theory that requires more than negligence to impose liability will provide a better legal platform for Internet copyright disputes in China. Promulgating such a clear rule benefits both courts and potential litigants. Courts do not have to engage in detailed examinations of the service or technology, and the technology providers, if acting within the bounds of law, are free to explore new services and products without copyright-liability concerns. Once again, American copyright law provides insights as to how to define the scope of such a secondary-liability theory.

1. Secondary Liability Will Be a Better Platform to Adjudicate Internet Copyright Disputes

Secondary liability, as a legal concept, allows a straightforward analysis with respect to different sets of actors involved in copyright infringement. Under American copyright law, the statutory rights of copyright holders and the common-law doctrine of secondary liability together serve as the foundation of copyright-infringement adjudication. Similarly, though Chinese copyright law does not stipulate liability based on another party's infringement, it clearly recognizes that it is necessary to look beyond direct infringement to provide adequate copyright protection.

The theory of secondary liability simplifies the liability analysis and is particularly suitable for Internet copyright infringement adjudication. As shown in the *Chinamp3.com* and *Baidu.com* cases, online activity is fast, transitory, and very often anonymous. When the underlying infringing party is nowhere to be found, applying the joint-liability theory, which is based on a "common infringing act" and "nondivisible harm,"¹⁹¹ is not the most logical approach. The secondary-liability theory, on the other hand, focuses on whether the secondary actor encourages or assists a third party to infringe

¹⁹¹ According to § 130 of the Chinese Civil Code, there are five elements of the common infringing act that will result in joint liability. First, there are two or more infringers. Second, the infringers are at fault. Third, the common infringing act results in one nondivisible harm. Fourth, the common infringing act causes the harm. Fifth, the infringers are jointly liable for the harm. Zhao Xiang, *supra* note 150.

and directly examines the culpability of the secondary actor's conduct. Accordingly, secondary-liability theory is conceptually preferable in the Internet context.

2. *To Encourage Technology Development, a Higher-Than-Negligence Degree of Culpability Should Be Required Before Imposing Secondary Liability*

Enlarging the premises for liability with a secondary-liability theory, while providing better protection for copyright holders, may pose a threat to the legitimate interests of the technology industry. Properly defining the scope of secondary liability, therefore, is critical to prevent the law from overreaching into the operation of the technology industry.

Since China always has focused on technology development and will continue to do so,¹⁹² the law should facilitate this national goal. Rather than presuming a duty to prevent harm on the part of technology providers and imposing liability upon mere negligence, Chinese copyright law should raise the threshold of liability.

A higher degree of culpability, requiring at least knowledge, would achieve the proper balance between encouraging technology development and copyright protection in China. ISPs would not have to be concerned about fulfilling their duty of preventing copyright infringement in their online activities. On the other hand, this higher standard also ensures that technology providers, though favored by the law, act within legal boundaries. Where there is evidence of intentional misconduct, any actors, regardless of the nature of the technology, should not go unpunished.

Such a standard would simplify legal analysis and offer a homogenous framework for applying secondary liability. If there is a Chinese *Grokster* that actively encourages infringing activity, a secondary theory requiring at least knowledge could certainly impose liability without the need for invoking the inducement theory¹⁹³ and "treating secondary liability as part of a whole set of theories."¹⁹⁴ Under the proposed scheme, no intentional wrongdoer will escape liability.

Finding no intent to infringe, courts should require a finer distinction with respect to the knowledge requirement. While it is wrong to assist with knowledge that the assistance will facilitate copyright infringement, it "does not necessarily mean that any kind of knowledge and any kind of assistance

¹⁹² Technology Development Outline, *supra* note 6, § 1.

¹⁹³ *Grokster*, 125 S.Ct. at 2778.

¹⁹⁴ Elkin-Koren, *supra* note 116, at 51.

should establish liability.”¹⁹⁵ Therefore, it is important to determine the requisite level of knowledge before imposing copyright liability.

The *Sony* rule provides helpful guidance in construing the knowledge requirement where more sophisticated technology is involved. The central theme of *Sony*—if the technology is capable of substantial noninfringing use, then the law will not impute the requisite level of knowledge¹⁹⁶—is particularly relevant to China, a country that strives to advance its technology development. Building on the *Sony* principle, Chinese copyright law should distinguish cases based on whether the technology in question is capable of substantial noninfringing use. If it is, then a higher level of knowledge should be required to affix liability. Conversely, constructive knowledge may be enough for a product that is not capable of substantial noninfringing use. Chinese courts should carefully apply the knowledge standard and avoid imposing any unnecessary burden on technology providers.

VI. CONCLUSION

Current Chinese copyright law, with its broad statutory rights for copyright holders and low threshold of liability for technology providers, does not provide an optimal legal scheme for online copyright-dispute adjudication. Given its focus on technology advancement, China has a strong incentive to create a technology-friendly legal environment. To better achieve this goal, Chinese copyright law needs to provide safe harbor to well-defined online services and technologies and, more important, adopt a secondary-liability theory that requires a higher-than-negligence standard of culpability.

As more and more people get online in China, the Internet is becoming an increasingly important part of their lives and the nation's economy. Challenged by this wave of digital technology, Chinese copyright law cannot solve the problem with mere constraint. Instead, to find the right balance between the technology and content industry that is conducive to the nation's long-term development strategy, China will fare better with a technology-friendly copyright law.

¹⁹⁵ Alfred C. Yen, *Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE W. RES. L. REV. 815, 827 (2005).

¹⁹⁶ *Grokster*, 125 S.Ct. at 2778.