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온라인 서비스 제공자의 法的 責任:  
DMCA 와 韓國 著作權法 體系의 比較 分析

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**Online Service Provider's Liability**  
**: Comparative Analysis on DMCA and Korean Copyright Law System**

A thesis presented

By

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## Abstract

Recently, there have come up the online service networks like Internet and the rapid explosion of the scale of those industries. They have made both positive and negative aspects such as the highly flowing information and the anonymously infringed copyrighted works on the other side. This thesis is mainly dealing with the online service provider's liability, who is providing the service for the users to access the networks and the information material, rather than the service users themselves as the direct infringers.

The problems can be solved out by the way of interpreting and applying current Copyright Law, the other relative provisions, or the judicial theories. Until now, we do not have any special legislation, and so far the mentioned methods have been used. It is notable that Korean Court used the similar standards with US Courts to make a judge whether the online service provider is held liable for their service users' infringing acts. The judicial theories and the precedents could be encarved into the provisions of Korean legislation just like DMCA.

According to DMCA, possibly service provider should be liable for the copyright infringement under strict conditions, which have the various exemptions. Because unreasonably extend liability can not protect the copyright owners nor boost up the online service industries. Rather, it is required that service provider should be liable only within the reasonable limit in order to make them play their role for the protection of the copyright.

With the increasing cases beyond the control of current regulations, there will be a new action for the legislation in Korea, too. Heavy burden on online service providers does not guarantee the safe copyright, it should be required that reasonable exemptions and strict conditions are coded.

Key Words: Online service provider, Internet, Digital, Copyright, Negligence

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# **ONLINE SERVICE PROVIDER'S LIABILITY**

## **Comparative Analysis**

### **On DMCA and Korean Copyright Law System**

#### **CONTENTS**

<b>Chapter I.</b>	<b>Introduction</b>	<b>5</b>
<b>Chapter II.</b>	<b>The Copyright Infringement on the Internet and the Liable Party</b>	<b>4</b>
1.	The Copyright Infringement on the Internet	8
(1)	Direct Infringement	8
(2)	Indirect Infringement	9
2.	The Liable Party	11
<b>Chapter III.</b>	<b>Online Copyright Infringement Liability Limitation</b>	
	<b>Under Digital Millenium Copyright Act</b>	<b>14</b>
1.	Judicial Theories about Copyright Infringement and Online Service Provider's Liability	14

(1) Three Types of Copyright Infringement	14
(a) Direct Infringement	14
(b) Contributory Infringement	16
(c) Vicarious Liability	18
(2) Online Service Provider's Liability	19
2. Court Decisions before DMCA	
	21
(1) Positive Decisions about Online Service Provider's Liability	
(a) Playboy Enterprises v. Frena	21
(b) Sega Enterprises v. Maphia	22
(2) Negative Decision about Online Service Provider's Liability	
Religious Technology Center v. Netcome Online	
Communication Services Inc.	23
3. Changes to Online Service Provider's Liability by DMCA	
	25
(1) Historical Background of DMCA Legislation	25
(2) Liability Limitation under DMCA	28
(a) General Conditions for Eligibility	28
(b) Safe Harbors	29
i. Transitory Communications	30
ii. System Caching	31

iii.	Storage of Information on Systems or Networks at the Direction of Users	33
iv.	Information Location Tools	34
(c)	Exemptions from Liability	35
i.	Monetary Relief	35
ii.	Relief from Injunctions	35
(d)	Notice and Take-Down Provisions	36
(e)	Special Provisions for Nonprofit Educational Institutions	37
(f)	Other Provisions	38

#### 4. Court Decision after DMCA

A&M Records, Inc., et al. v. Napster, Inc.

39

### **Chapter IV. Korean Approach**

41

#### 1. Historical Background

41

#### 2. The Implication of Court Decisions

42

#### 3. Analysis on the Current Copyright Law System and Relative Laws in Comparison with DMCA

44

##### (1) Liability against Copyright Infringement on the Internet or the Online Services

44

(a)	Liability against Copyright Infringement by Cooperative Illegal Activities	44
(b)	Liability from the Employer-Employee Relationship	44
(2)	Remedies for the Copyright Infringement	47
(a)	Internet Service Provider's Direct Financial Benefit from the Copyright Infringement	48
(b)	Actual Damages and Lost Profits	49
(3)	Terminating Copyright Infringement Status	49
(4)	Extent of Exemption by Contract	50

**Chapter V. Conclusion**

52



## Chapter I

### Introduction

The commercialization and exponential growth of the Internet<sup>1</sup> create an entirely new set of problems for copyright holders in terms of copyright infringement.<sup>2</sup> Through the Internet, copyright holders can expand their markets at an unprecedented rate. At the exactly same time, the anonymous and invisible copyright infringer can copy and disseminate anything displayed on the Internet.

The expansion<sup>3</sup> of the population of Internet users does not have only the positive aspect but has also the other side of coin. There are hundreds of thousands of problems in the cyber-space<sup>4</sup> just like the real world. It has brought up the discussion about the proper level and degree of the protection of copyright owners. The copyright infringement on the Internet or other Online services, so-called in the cyber-space, has broader and wider extent and range of damages than the classical one in the real world. On the contrary, it is not easy to chase a specific infringer who commits the violation against the copyright owner's right and even more difficult to impose the proper due on

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<sup>1</sup> The Internet is defined by the Federal Networking Council as a "global information system that is logically linked together by a globally unique address space based on the Internet Protocol or its subsequent extensions/follow-ons, is able to support communications using the Transmission control Protocol/ Internet Protocol suite or its subsequent extensions/follows-ons, and/ or other IP-compatible protocols and provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure. (Barry M. Leiner, et. al., A Brief History of the Internet)

<sup>2</sup> Doug Isenberg, *Digital Watermarks: New Tools for Copyright Owners & Webmasters*, Mecklermedia Corporation, January 26, 1998

<sup>3</sup> At the end of Reagan- Bush era, the world of cyberspace consisted of fewer than 50 World Wide Web sites, most of them used by computer scientists and physicists. Today, the Internet is no longer just for researchers, and it is expected that within five years international commerce on the Internet could reach \$3.2 trillion. (Eileen Colkin & Clinton Wilder, *E-Commerce could Hit \$3.2 Trillion*, TechWeb, November 6, 1998)

<sup>4</sup> Cyberspace is a popular term for the world of electronic communications over computer networks,"

the infringer who does not have the enough competence. It does mean that it is almost impossible to protect the copyright owner's right on the satisfactory level for the copyright owner. To make the gap narrower, it has been argued that online service providers should take the certain due portion of the liability with the primary infringers for the copyright infringement. Because the online service providers provide potential infringers the access and the means to violate the copyright owner's works. However, in fact, it is not difficult to guess that the service providers would still like to seek the way of avoiding the liability against the services users' infringing acts.

It is evident that there is an urgent need for protective measures which could guarantee copyright owner's economically safe and non-infringed creation. However, as a basic principle of Copyright Law, primarily the direct infringer should be liable for the copyright infringement. However necessary the protection of copyright holders is, there should be a legal basis, which is one of the main concern of this paper, to impose the liability on the service provider as a third party. This paper will not deal with only the types of acts that constitute copyright infringement on the Internet, but the party who may be held liable for the infringing act. Chapter III will examine the cases where not only the direct infringer was liable, but the BBS and/or online service provider was also held accountable as a direct or indirect infringer, through which the infringers used to copy, distribute, or display the copyrighted materials. In addition, it will provide a general overview of Title II of DMCA. And then Korean approach will follow. It will present the accumulated cases in Korea and the interpretation and the application of the relative rules of the current Copyright Law system and other laws such as Computer

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which would include the Internet. (Netcom, 907 F. Supp. At 1365, n. 1 : citing Trotter Hardy, The Proper

Program Protection Law and Civil Law. It will shed highlight on the comparison of the Korean Copyright Law system with DMCA and suggest the ideal direction of the future legislation.

## Chapter II

### The Copyright Infringement on the Internet and the Liable Party

#### 1. The Copyright Infringement on the Internet

##### (1) Direct Infringement

Direct copyright infringement occurs when a person violates any of the exclusive rights<sup>5</sup> of the copyright owner which include the right to reproduce, distribute, and publicly display and perform. To prove direct copyright infringement, a plaintiff does not have to prove that the defendant had knowledge of the infringement nor that they intended to violate the copyright holder's interests.<sup>6</sup>

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<sup>5</sup> Section 5 Authors' Property Rights in Korea Copyright Law, the copyright owner has the rights to do and to authorize any of the following:

Article 16 to reproduce his work

Article 17 to perform his work publicly

Article 18 to broadcast his work

Article 19 to exhibit the original or reproduction of his work of art, etc.

Article 20 to distribute the original or reproduction of his work

Article 21 to produce and exploit a derivative work based on his original work, or a compilation work which is composed of his work.

Cf) Subject to sections 107 through 120 in 17 U.S.C., the owner of copyright under the section 106 "Exclusive rights in copyrighted works" has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

<sup>6</sup> To prove direct copyright infringement, the plaintiff must show that the defendant actually did the copying, distributing, or displaying of the material.

## (2) Indirect Infringement<sup>7</sup>

The US Supreme Court characterized a contributory infringer<sup>8</sup> as one who “was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.”<sup>9</sup> The Eleventh Circuit ruled that “one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer.”<sup>10</sup> The latter definition was used in an infringement suit involving a BBS.

In *Sega Enterprises Ltd. v. Maphia*<sup>11</sup>, BBS users uploaded and downloaded unauthorized copies of Sega’s copyrighted video games. In addition to having knowledge of these transmissions, the BBS operator solicited such copied and informed users of his desire to have these games on the bulletin board. The court found prima facie evidence of contributory infringement based on the operator’s “role in the copying, including provision of facilities, direction, knowledge and encouragement.”

Although the BBS operator in *Sega* had actual knowledge of copying infringement, constructive knowledge may have been enough to satisfy the requirements of contributory infringement. Thus, if the facts show an online service provider should have known about a user’s infringing activity, a court may still find contributory infringement. If the BBS operator had no actual or constructive knowledge

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<sup>7</sup> Indirect infringement consists of two type in US judicial theories which are derived from the relative cases.

<sup>8</sup> In Korean Criminal Law, there are the provisions for the “Kyo-sa bum” and “Bang-jo bum”. The definition of contributory infringement is similar with the definition of these two types of criminal act.

<sup>9</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417,437

<sup>10</sup> *Casella v. Morris*, 820 F. 2d 362, 365 (11<sup>th</sup> Cir. 1987) (quoting *Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 )

<sup>11</sup> 857 F. Supp. 679(N.D. Cal. 1994)

of the infringing activity, contributory infringement would not apply. In such a case, the operator may still be liable as a third party under the vicarious liability doctrine.

Vicarious liability<sup>12</sup> differs from contributory infringement.<sup>13</sup> Whereas the key elements of contributory infringement are “knowledge and participation,” the distinguishing characteristics of vicarious liability are “benefit and control.” Vicarious liability will be found “when the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials.”<sup>14</sup> Even if the “supervisor” lacks actual knowledge of the infringement activity, he or she may be held vicariously liable for the infringement. Notwithstanding its roots in the notion of respondeat superior, where the master is held liable for a servant’s wrongful acts performed within the scope of employment, vicarious liability may operate in the absence of the control implied by an employer-employee relationship.<sup>15</sup> The Court found Frena guilty of copyright infringement despite of the unawareness and no intention of the infringement. “It does not matter that Defendant Frena may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright

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<sup>12</sup> Vicarious liability is similar with the “Employer’s liability for damages” from employer-employee relationship in section 756 of Korean Civil Affairs.

<sup>13</sup> Despite their differences, some courts confuse these two types e.g., *Blendingwell Music Inc. v. Moor-Law, Inc.*, 612 F. Supp. 474, (holding defendant liable for contributory infringement under the “rule of respondent superior”); *SBK Catalogue Partnership v. Orion* 723 F. Supp. 1053, 1065(D.N.J. 1989) ( finding contributory infringement was induced by the controlling party ).

<sup>14</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F. 2d 304, 307

<sup>15</sup> The scope of vicarious liability is manifested in the well-known “dance-hall” cases, where dance hall owners who hired bands that publicly performed copyrighted musical works without authorization were found vicariously liable for infringement, regardless of whether they had knowledge of the infringement or whether they had explicitly warned the bands not to play copyrighted works without permission. In some cases, liability attached even though some dance hall owners hired bands as independent contractors. In these situations, the owner would exercise no actual control over the songs selected by the band-contractor.

infringement. Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement.”<sup>16</sup>

## 2. The Liable Party

There should be a liable party against the three types of copyright infringement listed above. Even on the direct infringement, it was sometimes difficult to impose the liability on the online service provider, as a direct infringer though there was the established standard. On the other two types of copyright infringement, there have been a lot of controversial views.

According to the Motion Pictures Association of America, U.S. companies are losing millions per year to online copyright pirates, and with the current growth of the Internet, the group of copyright holder fears that the amount lost of pirates will only increase.<sup>17</sup> The group of Internet service provider, however, does not want to become a third party defendant<sup>18</sup> in every online copyright infringement lawsuit.

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<sup>16</sup> *Playboy Enterprises Inc. v. Frena*, 839 F. Supp. 1552 at 1559. (M.D. Fla, 1993)

<sup>17</sup> House Judiciary Comm Hearing on WIPO Treaty & Online Copyright Legislation, September, 1997, prepared statement of Jack Valenti, President, Motion Picture Association of America

<sup>18</sup> The USA Copyright Act explicitly imposed liability only on direct infringers. A third party liability provision was added in 1984, but it applies only to semiconductor mask works. Congress' general silence on this issue in copyright law stands in contrast to its Patent law approach where one who actively encourages patent infringement or who fits the definition of "contributory infringer" is labeled an infringer. Nonetheless, a long line of cases incorporates third party liability into Copyright law: the absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another. Some support for third party liability can also be squeezed out of the statutory language. The copyright owner is granted exclusive right "to authorize" another party to exercise the owner's reproduction, derivation, distribution, public performance, or public display right. Congress intended that this phrase establish the infringement liability of one who does not exercise a copyright owner's rights, but causes or allows another to do so. Violating the judicial doctrine or the authorization right may give rise to one of

Recognizing the inherent difficulty of enforcing copyrights against individual Internet users world-wide, some experts have argued that the answer to this problem is placing legal liability for copyright infringement on those who allows and enable Internet copyright pirates to exist, namely Internet service providers.<sup>19</sup> It is argued that Internet service providers profit from the pirates' use of the Internet, and in comparison to an independent publisher or author, an Internet service provider is in a much better position to police how its subscribers use the Internet.<sup>20</sup>

On the other side of the argument, the group of Internet service provider claims that they are passive carriers similar to telecommunications companies and therefore should be granted some limitation from copyright infringement liability.<sup>21</sup> In addition, they argue that to make Internet service providers liable could stifle the growth of the Internet.<sup>22</sup>

Others argue that the answer to this problem will come from technological innovations, such as the use of "digital watermarking", rather than through legal regulation.<sup>23</sup> In addition, the argument has been made that cooperation between Internet service providers and the content providers is what truly needed to solve this problem.<sup>24</sup> Internet service providers share the desire of content provider group to see the Internet

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two types of third party liability: contributory infringement or vicarious liability.

<sup>19</sup> House Judiciary Comm Hearing on WIPO Treaty & Online Copyright Legislation, September, 1997, prepared statement of John Bettis, Songwriter, on behalf of the American Society of Composers, Authors and Publishers.

<sup>20</sup> House Judiciary Comm Hearing on WIPO Treaty & Online Copyright Legislation, September, 1997, prepared statement of Jack Valenti, President, Motion Picture Association of America.

<sup>21</sup> House Judiciary Comm Hearing on WIPO Treaty & Online Copyright Legislation, September, 1997, prepared statement of Robert Holleyman II, President, The Business software Alliance.

<sup>22</sup> House Judiciary Comm Hearing on WIPO Treaty & Online Copyright Legislation, September, 1997, prepared statement of Roy Neel, USTA.

<sup>23</sup> Virginia Lawrence, *Protecting Copyrights Online*, CongiText, 1998

<sup>24</sup> House Judiciary Comm Hearing on WIPO Treaty & Online Copyright Legislation, September, 1997, prepared statement of Jack Valenti, President, Motion Picture Association of America.



grow, and some believe that the threat of holding Internet service providers liable for copyright infringement may not be the best way to encourage Internet service providers to help minimize Internet copyright piracy.<sup>25</sup>

Though each party of debate has their own grounds for the argumentation, for the development of high-quality information society, there must be a proper liability of online service providers. In order that it is not an excessively strict liability regime, it should be devised the reasonable standards for the online service providers' liability and the specific remedies against the copyright infringement on the online.

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<sup>25</sup> Id.

**Chapter III**  
**Online Copyright Infringement Liability Limitation**  
**Under Digital Millenium Copyright Act**

1. Judicial Theories about Copyright Infringement  
and Online Service Provider's Liability

(1) Three Types of Copyright Infringement

(a) Direct Infringement

A majority of the cases seem to require that there be some kind of a direct volitional act in order to establish direct infringement liability on the part of an online service provider<sup>26</sup> or BBS<sup>27</sup> for infringing postings and unauthorized uses by users' <sup>28</sup> acts of uploading<sup>29</sup> or downloading<sup>30</sup> themselves.

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<sup>26</sup> In this paper, online service provider has the same meaning with Internet service provider. "Internet service providers are either commercial or non-profit entities offering Internet access for a monthly or hourly fee by providing modem telephone access to a computer network linked to the Internet." (ACLU v. Reno, 929 F. Supp. at 833) Online services provide dial-up access to the Internet, but also provide "extensive and well organized content within their own proprietary computer networks.

<sup>27</sup> BBS(Bulletin Board Services) are another way to access the Internet through the local dial in service. The BBS is composed of "friends, members, subscribers, or customers...exchanging ideas and information. (Id.)

<sup>28</sup> The Netcome court refused to hold an online service provider directly liable for automatic pass through of allegedly infringing messages posted to Usenet by a subscriber. The subsequent MAPHIA case and the Sabella case extended the logic of Netcom, refusing to hold liable as a direct infringer the operator of a BBS for the uploading and downloading by subscribers of unauthorized copies of Sega's video games through the BBS, even though the operator encouraged the initial uploading, because the operator had not participated in the very acts of uploading or downloading themselves.

<sup>29</sup> "uploading" is the process of transferring computer-stored information from one's own computer to a remote computer.

There should not be direct liability for persons who merely place material on a network for subsequent unauthorized copying, display, performance or the like.<sup>31</sup> *Subafilms*<sup>32</sup> held that no independent “right of authorization” was created by the copyright statute’s reference in section 106 of the exclusive right “to do or to authorize” the acts enumerated therein. Rather, the reference to “authorize” was meant only to establish potential liability for contributory infringement on the part of a person who causes an infringement by authorizing it. Under the reasoning of the *Subafilms* decision, even if loading material onto a server encourages (or authorizes) copying through downloading, that authorization does not suffice for direct liability.<sup>33</sup>

However, the *Frena*<sup>34</sup> and *Webbworld*<sup>35</sup> cases seem to go further in their willingness to impose direct liability on a BBS operator, at least where an actor such as a BBS operator or website operator has some form of direct involvement in the anticipated acts that lead to infringement or in the infringing acts themselves (such as resale of the infringing material). Such acts of direct involvement in the infringement process may be sufficient for a finding of enough volitional activity to impose direct liability.

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<sup>30</sup> “downloading” is the process of transferring computer-stored data from a remote computer to one’s own computer.

<sup>31</sup> The Ninth Circuit’s decision in *Subafilms, Ltd. v. MGM-Pathe Communications Co.* case.

<sup>32</sup> 24 F.3d 1088 (9<sup>th</sup> Cir. 1994)

<sup>33</sup> R. Nimmer, *Information Law*. 1996

<sup>34</sup> *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (M.D. Fla, 1993)

(b) Contributory Infringement

A party may be liable for contributory infringement where “with knowledge of the infringing activity, it induces, causes or materially contributes to the infringing activity of another.” The standard of knowledge is objective: to know or have the reason to know that the subject matter is copyrighted and that the particular uses were violating Copyright law. For the liability for contributory infringement, there must be a direct infringement to which the contributory infringer has knowledge and encourages or facilitates.

The requirement of knowledge may eliminate contributory liability on the part of an online service provider or BBS operator with respect to many instances of infringement for which the online service provider or BBS is merely a passive information conduit and has no knowledge of the infringement. However, given knowledge (or reason to know), a system provider cannot simply continue to provide the facility that enables infringement.<sup>36</sup> The court held that the copyright notices in the posted works were sufficient to give online service provider such as Netcom notice that the works were copyrighted.<sup>37 38</sup>

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<sup>35</sup> Playboy Enterprises v. Webbworld, Inc., 968 F. Supp 1171 (N.D. Tex. 1997)

<sup>36</sup> For example, in Religious Technology Center v. Netcom Online Communication Services, the court held that the online service provider Netcom could be contributorily liable for infringing postings by an individual named Erlich of copyrighted religious materials to Usenet through the provider after the service was given notice of the infringing material.

<sup>37</sup> “If plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel Erlich’s infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation in Erlich’s public distribution of the message.”

<sup>38</sup> Religious Technology Center v. Netcom On-Line Communication Services, 907 F. Supp. 1361 (N.D. Cal. 1995)

However, the court was careful to note that where an operator is unable to verify a claim of infringement, there may be no contributory liability:

Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system.

Nevertheless, the court clearly imposed a duty on the operator to actively attempt to verify a claim of infringement and to take appropriate action in response.<sup>39</sup>

In sum, it appears that an online service provider, BBS operator or other operator of an online service can be liable for contributory infringement where the operator has knowledge of the infringing activity.<sup>40</sup>

The DMCA defines certain safe harbors against liability for online service providers who act as merely passive conduits for infringing information and without knowledge of the infringement.

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<sup>39</sup> Thus, it is fair, assuming Netcom is able to take simple measures to prevent further damage to plaintiffs' copyrighted works, to hold Netcom liable for contributory infringement where Netcom has knowledge of Erlich's infringing postings yet continues to aid in the accomplishment of Erlich's purpose of publicly distributing the postings.

<sup>40</sup> How much the operator must contribute to the infringing activity after gaining such knowledge beyond the mere provision of the facilities used to accomplish the infringement is unclear. The Ninth Circuit's Fonovisa decision might be read to require little more than continuing to provide such facilities after knowledge that infringing activity is taking place. The MAPHIA court interpreted the Netcom decision to require more, although one should note that the Netcom case was decided before Fonovisa.

### (c) Vicarious Liability

A party may be vicariously liable for the infringing acts of another if it (1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement.<sup>41</sup> Unlike contributory infringement, knowledge is not an element of vicarious liability.<sup>42</sup>

The Netcom case is the principal decision to consider the vicarious liability of an online service provider. In that case, the court refused to impose liability on Netcom under a theory of vicarious liability. The court found that there was a genuine issue of material fact as to whether Netcom had the right and ability to control the activities of its subscribers, in view of the fact that Netcom's expert testified that with an easy software modification Netcom could identify postings containing particular words or from particular individuals, and Netcom had acted to suspend subscribers' accounts on over one thousand occasions.<sup>43</sup>

However, the court held that the second element of the test was not satisfied, because there was no evidence that Netcom received a direct financial benefit from the infringing postings, or that such postings enhanced the value of Netcom's services to subscribers or attracted new subscribers.<sup>44</sup>

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<sup>41</sup> E.g., *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F. 2d 304, 306 (2d Cir. 1963)

<sup>42</sup> *Religious Technology Center v. Netcom Online Communication Servs.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)

<sup>43</sup> *Religious Technology Center v. Netcom Online Communication Servs.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)

<sup>44</sup> In refusing to impose vicarious liability because it found Netcom received no direct financial benefit from the infringing postings, the court in Netcom relied on the district court's decision in *Fonovisa, Inc. v. Cherry Auction, Inc.* (847 F. Supp. 1492 (E.D. Cal. 1994)), which found no direct financial benefit despite an argument that lessees at a swap meet included many vendors selling counterfeit goods and that clientele sought "bargain basement prices." It should be noted that the Ninth Circuit subsequently reversed *Fonovisa*, and appears to have adopted a less demanding standard for financial benefit for purposes of vicarious liability, which may undermine the strength of the Netcom decision as precedent. The Ninth

The Ninth Circuit's holding in *Fonovisa* suggests a standard that does not require direct financial benefit from the infringing activity itself, but rather that the infringing activity contributes to an overall commercial design and benefit for the operator.<sup>45</sup>

In one decision handed down after both the *Netcom* and *Fonovisa* decisions, *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*<sup>46</sup>, the court, citing the *Netcom* case, refused to hold vicariously liable an online service provider supplying Internet service to a website that contained infringing material because the infringements that occurred through the website did not directly financially benefit the online service provider. The website owner paid the online service provider a flat quarterly subscription fee that did not change based upon how many people visited the website or what was accessed on such site.<sup>47</sup>

## (2) Online Service Provider's Liability

The online service provider industry, with acknowledging its unique position in the area of the internet, does not want to become a "deep pocket" being a third party defendant in every online copyright infringement lawsuit. They have argued that due to the nature of the Internet and the unique role of the online service provider industry, a narrow limitation on copyright infringement liability should be established for them so

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Circuit held that adequate financial benefit was alleged by virtue of the fact that the operator of the swap meet received financial benefits through admission fees, parking fees, and sales at concession stands (76 F. 3d. 259 (9<sup>th</sup> Cir. 1996)). A copyright holder seeking to hold an online service provider or BBS operator vicariously liable might argue under *Fonovisa* that the subscription fees paid by the infringers should be sufficient financial benefit, just as were the admission fees, parking fees, and concession stand sales in *Fonovisa*

<sup>45</sup> R. Nimmer, *Information Law*, 1996

<sup>46</sup> 45 U.S.P.Q.2d 1236 ( N.D. Ill. 1997)

that more entrepreneurs can enter the Internet industry and speed up its development.

In opposing to the limitation, the other party looked at the publishing industry and asked why should online service providers be granted a limitation on liability.<sup>48</sup> The publishing industry has been held strictly liable for copyright infringement.<sup>49</sup> And even photo finishers also operate under a strict liability standard for copyright infringement.<sup>50</sup> So they argued that rather than limiting the copyright infringement liability for the online service providers, they should bear their share of the burden.<sup>51</sup>

Considering online service providers' function for the internet, when they have the power to minimize the Internet service users' infringing acts, they should have a legally enforceable duty to help minimize online piracy and a legal obligation to monitor the users for the copyright infringement. It does not mean only online service providers take the whole responsibility nor they get the perfect exemption to copyright infringement liability.

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<sup>47</sup> Id. at 1245

<sup>48</sup> Intellectual Property and the NII, page 118

<sup>49</sup> Id.

<sup>50</sup> Olan Mills, Inc. v. Linn Photo Co., 23 F. 3d 1345 (8<sup>th</sup> Cir. 1994)

<sup>51</sup> Intellectual Property and the NII, page 118



## 2. Court Decisions

### (1) Positive Decisions about Online Service Provider's Liability

#### (a) Playboy Enterprises v. Frena<sup>52</sup>

Playboy magazine brought suit against a BBS operator who allegedly infringed numerous magazine copyrights by allowing users of the BBS to upload and download Playboy photographs.<sup>53</sup> Defendant George Frena operated a subscription BBS which users could access for a fee or if they bought a product from Frena.<sup>54</sup> Users could then download any of the photographs on the BBS, which one hundred and seventy were unauthorized copies from Playboy magazine.<sup>55</sup> However, Frena was not responsible for uploading the infringing materials, nor did he have actual knowledge that these unauthorized copies were on the BBS.<sup>56</sup> Court held that Frena was directly responsible for unauthorized distribution and a display that was “public” even though only subscribers had access to the bulletin board.<sup>57</sup> Frena was cast as a direct infringer of the

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<sup>52</sup> 839 F. Supp. 1552 (M.D. Fla. 1993)

<sup>53</sup> Frena, 839 F. Supp. at 1552

<sup>54</sup> Id. at 1554

<sup>55</sup> Id.

<sup>56</sup> Id. To prove direct copyright infringement, the plaintiff must show that the defendant actually did the copying, distributing, or displaying of the material. Playboy had the burden of proving that they owned the copyright, that Frena made unauthorized copies, and that the copying violated Playboy's rights as a copyright holder. The court had little problem with the ownership issue since Playboy possessed valid copyrights on each of the pictures and Frena stipulated that each of the pictures were substantially similar to the ones displayed on his BBS. However, the latter issues of copying and violating Playboy's rights under the Copyright Act posed some difficult problems for the court, which in the end resulted in misapplication of the law.

<sup>57</sup> The court was not successful in respect to whether or not Frena's actions constituted “copying” under the Copyright Act. The Copyright Act defines a “copy” as a “material object . . . in which a work fixed,” and “fixation” as “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”

distribution right, rather than say a contributory infringer of the reproduction right, and could be held strictly liable for the infringement. Frena's lack of knowledge or intent to infringe any copyright was held irrelevant, as was the fact that he himself never viewed or copied the photographs. It was sufficient that Frena provided the means by which the infringement could take place.<sup>58</sup> No fair use defense was allowed as all the statutory factors weighed against him. Holding institutes strict liability for sysops whose BBS allows the distribution of infringing material tends to force service providers into copyright police.<sup>59</sup>

(b) Sega Enterprises Ltd. v. Maphia<sup>60</sup>

A BBS operator, Sherman, was held liable for contributory copyright infringement as a matter of law<sup>61</sup> for Sega games that were uploaded and downloaded from his BBS called Maphia. Unlike the defendant in Frena, Sherman not only knew that the infringing conduct was taking place, but encouraged the practice. The court determined that "copying by someone was established," by the uploading and downloading of the Sega games.<sup>62</sup> Assuming that Maphia users were direct infringers of

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<sup>58</sup> In stead of analyzing Frena's actions as copying material that was fixed, the court applied judicial reasoning that having access to the BBS would imply that Frena copied the materials.

<sup>59</sup> The court held Frena liable for direct copyright infringement as a matter of law, even though his actions looked similar to contributory infringement.

<sup>60</sup> 857 F. Supp. 679 (N.D. Cal. 1994)

<sup>61</sup> The same court in Netcom decided that the issue of contributory infringement was one for the fact finder to determine, not the court. 907F. Supp. at 1375

<sup>62</sup> Court relied on the decision of MAI Systems Corp. v. Peak computer Inc. According to MAI case, a copy in RAM meets the fixation requirement.

Sega's copyright, it was not difficult to prove that Sherman was liable for contributory infringement in that he set up the Maphia BBS for the explicit purpose of allowing subscribers to upload and download Sega games.<sup>63</sup> Therefore, the court granted Sega's summary judgment on the grounds that "Sherman's role in the copying, including providing facilities, direction, knowledge, encouragement, and seeking profit, amounts to a *prima facie* case of contributory infringement."<sup>64</sup>

## (2) Negative Decisions about Online Service Provider's Liability

Religious Technology Center v. Netcom Online

Communication Services, Inc.<sup>65 66</sup>

In this case, the Church of Scientology (a.k.a. RTC) sued an ex-scientologist, Dennis Erlich, a BBS operator, Tom Klemesrud, and an online service provider, Netcom Online Communication Services, Inc.<sup>67</sup> for copyright infringement.<sup>68</sup> Erlich posted to his Usenet newsgroup various portions of published and non-published works by Ron-Hubbard, the founder of the Church of Scientology. Since Erlich gained access to the

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<sup>63</sup> In assuming that Maphia users were direct infringers of Sega's copyright, court adopted that a copy in RAM meets the fixation requirement. But it has been a very controversial area of copyright law, since this storage capacity is purged when the computer is turned off.

Cf) H.R. Rep. No. 1476, 94<sup>th</sup> Cong., 2d Sess. 51, 54 (1976) : The definition of "fixation" would exclude from the concept purely evanescent or transient reproduction such as those projected briefly on a screen, shown electronically on television or other cathode ray tube or captured momentarily in "memory" of a computer.

<sup>64</sup> After disposing of Sherman's fair use defense because he made commercial profit off of the BBS, the court found that Sherman's actions were so egregious that they awarded Sega the maximum amount in damages because Sherman acted wilfully.

<sup>65</sup> 907 F. Supp. 1361 (N.D.Cal. 1995)

<sup>66</sup> Court held that only subscriber liable, not the sysop corporation and that there was neither direct nor contributory infringement.

<sup>67</sup> Netcom is one of the largest online service providers in the United States.

<sup>68</sup> RTC has been very active in litigating former scientists for posting alleged copyrighted trade secrets

newsgroup through Klemesrud's BBS who has access to the Internet via Netcom, RTC sued all three for Erlich's actions.<sup>69</sup>

Since RTC proved that they own the copyright to the material in question and proved that they will likely succeed in their case against Erlich as a direct infringer, the court only analyzed whether or not Netcom or Klemesrud were directly, contributorily, or vicariously liable for Erlich's infringement. The court stated that "the mere fact that Netcom's system incidentally makes temporary copies... does not mean that Netcom has made the copies."<sup>70 71</sup> Accordingly, the court found that Netcom's system was like a copy machine and as such would only be contributorily liable and not directly liable for the end user's infringing copy.<sup>72 73</sup> To find Netcom and/or Klemesrud contributorily liable for Erlich's infringement, RTC must prove that the defendants knew or should have known about the infringement, and with this knowledge, the defendants substantially participated by "inducing, causing, or materially contributing to the infringing conduct of another."<sup>74</sup> The Netcom court, however, decided to place the issue of contributory liability with the jury. Accordingly, the Netcom decision does not provide any concrete answers as to potential online service provider contributory liability.

In terms of vicarious infringement and liability, the Netcom decision suggests

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about the Church of Scientology on the Internet.

<sup>69</sup> Erlich's potential liability for copyright infringement was addressed in a separate action where the court upheld the preliminary injunction against Erlich because of RTC's likelihood of success on the merits of their case. 923 F. Supp. 1231 (N.D. Cal. 1995)

<sup>70</sup> 907 F. Supp. at 1368

<sup>71</sup> The Netcom court found that Neither Netcom nor Klemesrud had taken any affirmative steps to place the copies in the RAM of their systems like the defendants in MAI.

<sup>72</sup> Id.

<sup>73</sup> In concluding that Netcom was not liable for direct infringement as a matter of law, the court stated, "it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet." Id. at 1372

<sup>74</sup> Id. quoting *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (2d

that an online service provider and a BBS operator who have terms and conditions in the contracts with users will not be able to successfully argue that they do not have the right or ability to control their users.<sup>75</sup> As long as the online service provider and BBS operator do not make a financial benefit from the infringing activity, they will be able to escape vicarious liability.<sup>76</sup>

### 3. Changes to On-line Service Provider's Liability by DMCA

#### (1) Historical Background<sup>77</sup> of DMCA Legislation

From late 1995 through May 1996, online service providers, telecommunications carriers and other distributors of online information, content providers and software companies negotiated intensively to reach a consensus on proposed legislation that would provide various statutory safe harbors with respect to the liability of online service providers. The parties were unable to reach agreement for legislation in the 103<sup>rd</sup> Congress. The debate among the various industry segments was ignited again in connection with the WIPO Copyright Treaties in Geneva in December of 1996.

A number of bills were then introduced in Congress that would limit the liability of online service providers. The first to be introduced was by Rep. Coble on

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Cir. 1971)

<sup>75</sup> Netcom's terms and conditions reserve Netcom's right to take action against subscribers and gives Netcom the right to restrict copyright infringing activity.

<sup>76</sup> The court viewed that Netcom as a landlord of Cyberspace and as such would only be liable if Netcom was supervising Erlich or receiving more from Erlich than a fixed fee. Netcom, 907 F. Supp. at 1376. RTC could not prove that Netcom was receiving a direct financial benefit from Erlich's actions through enhancing the value of Netcom's services "...or attracting new subscribers." Netcom, 907 F. Supp. at 1375. RTC's arguing about vicarious liability is also dismissed.

July 17, 1997 (H.R. 2180). This bill would have exempted online service providers from direct or vicarious liability solely based on the transmission or providing access to online material, and eliminate any damage remedy for contributory liability, limiting plaintiffs to injunctive relief. The criteria for exemption were that the online service provider: (a) does not initially place the material on the online; (b) does not generate, select, or alter the content of the material; (c) does not determine the recipients of the material; (d) does not receive a financial benefit directly attributable to a particular act of infringement; (e) does not sponsor, endorse, or advertise the material; and (f) either does not know or be unaware by notice or other information indicating that the material is infringing, or be prohibited by law from accessing the material.

The second bill to be introduced was S. 1146, which, in addition to the WIPO treaty implementation provisions, also contained provisions limiting liability of online service providers. S. 1146 adopted a different approach to online service provider's liability than H.R. 2180. It contained three major provisions. First, it provided blanket exemptions from direct, vicarious or contributory liability for online service providers based on the mere provision of defined electronic communication network services or facilities, or on the transmission of private electronic communications, including voice messaging or electronic mail services or real-time communication formats, including chat rooms, streamed data, or other virtually simultaneous transmissions. Second, it provided exemptions from direct, vicarious, or contributory liability for the provision of the following information location tools: a site-linking aid or directly, including a hyperlink or index; a navigational aid, including a search engine or browser; and the tools for the creation of a site-linking aid. Third, it provided immunity from direct,

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<sup>77</sup> Advanced Copyright Issues on the Internet, David L. Hayes, Esq. May 1998.

vicarious, or contributory liability to online service providers for stored third party content, unless upon receiving notice of infringing material that complied with certain defined standards, the online service provider failed expeditiously to remove, disable, or block access to the material to the extent technologically feasible and economically reasonable for the lesser of a period of ten days or receipt of a court order concerning the material.

Hearings were held in Sept. of 1997 on both H.R. 2180 and S. 1146. These hearings revealed the conflicts between service providers and copyright owners on liability issues. Rep. Goodlatte led continuing negotiations between the content providers and online service providers, and to further a compromise, he and Rep. Coble introduced on Feb. 12, 1998 a substitute for H.R. 2180, entitled the “ On-line Copyright Infringement Liability Limitation Act” (H.R. 3209)On April 1, 1998, the House Judiciary Committee approved the substance of H.R. 3209, but folded it into the pending WIPO implementation legislation, H.R. 2281. Subsequently, based on continuing negotiations, an agreement was finally reached between service providers and copyright owners with respect to the proper scope of liability for online copyright infringements. H.R.2281 was then amended to include this compromise agreement. Meanwhile, similar actions were taking place in the Senate. The provisions of S.1121, implementing the WIPO treaty, were combined with a new title embodying the compromise agreement between service providers and copyright owners with respect to liability. The combined Senate bill was denominated S. 2037, and was unanimously approved by the Senate Judiciary Committee in April of 1998 and adopted by the full Senate in May of 1998. Both H.R. 2281 and S.2037 contained the same substantive provisions with respect to online service provider’s liability, which were ultimately

adopted in DMCA.

## (2) Liability Limitation under DMCA

The liability provisions are contained in Title II<sup>78</sup> of the DMCA. These provisions seek to clearly define the conditions under which an online service provider's liability for infringement that occur on the online service provider's system or networks is limited. The provisions define four safe harbors that are codified in a new section 512 of Title 17.<sup>79</sup> If the online service provider falls within these safe harbors, the online service provider is exempted from monetary damages and is subject only to carefully prescribed injunctive.

### (a) General Conditions for Eligibility

A party seeking the benefit of the limitations must qualify as a "service provider". For purposes of the first limitation, relating to transitory communications, "service provider" is defined in section 512(k)(1)(A) as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received ." For purposes of the other three limitations, "service provider" is more broadly defined in section

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<sup>78</sup> Title II consists of three sections such as Section 201. Short Title, Section 202. Limitations on Liability for Copyright and Section 203. Effective Date.

<sup>79</sup> Title II of the DMCA amends chapter 5 of the Copyright Act(17 U.S.C. 501, et seq.) to create a new section 512, titled "Limitations on liability relating to material online".



512(k)(1)(B) as “ a provider of online services or network access, or the operator of facilities therefor.”

In addition, to be eligible for any of the limitations, a service provider must meet two overall conditions:

- (1) it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and
  - (2) it must accommodate and not interfere with “standard technological measures.”
- (Section 512(i)) “Standard technological measures” are defined as measures that copyright owners use to identify or protect copyrighted works, that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers.

#### (b) Safe Harbors

The four safe harbors are described below and are applicable to a “service provider” under Section 512(k), for purposes of the first safe harbor, a “service provider” is defined as “ an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” For purposes of the other three safe harbors, a “service provider” is defined more broadly to be “a provider of online services or network access,

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or the operator of facilities therefor.” The latter definition would seem to cover a broad array of online service providers, BBS operators, system operators, search engines, portals, and the like. It may even be broad enough to potentially cover the owners and operators of corporate Intranets, university networks and interactive Web sites.<sup>80</sup>

Title II of the DMCA adds a new section 512 to the Copyright Act to create four new limitations on liability for copyright infringement by online service providers. The limitations are based on the following four categories of conduct by a service provider.

i. Transitory Communications

The first safe harbor is essentially a codification of the Netcom case and a rejection of the Frena case, at least to the extent that the Frena case suggested that passive and automatic acts engaged in through a technological process initiated by another other than the facilities of an online service provider could constitute direct infringement on the part of the online service provider.

In general terms, section 512(a) limits the liability of service providers in circumstances where the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else’s request. This limitation covers acts of transmission, routing, or providing connections for the information, as well as the intermediate and transient copies that are made automatically in the operation of a network.

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<sup>80</sup> Ian C. Ballon & Keith M. Kupferschmid, Third Party Liability under the Digital Millennium Copyright Act: New Liability Limitations and More Litigations for ISPs, *Cyberspace Lawyer*, October 1998

In order to qualify for this limitation, the service provider's activities must meet the following conditions:

- The transmission must be initiated by a person other than the provider.
- The transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider.
- The service provider must not determine the recipients of the material.
- Any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients, and must not be retained for longer than reasonably necessary.
- The material must be transmitted with no modification to its content.

## ii. System Caching

Section 512(b) limits the liability of service providers for the practice of retaining copies, for a limited time, of material that has been made available online by a person other than the provider, and then transmitted to a subscriber at his or her direction. The service provider retains the material so those subsequent requests for the same material can be fulfilled by transmitting the retained copy, rather than retrieving the material from the original source on the network.

The benefit of this practice is that it reduces the service provider's bandwidth requirements and reduces the waiting time on subsequent requests for the same information. On the other hand, it can result in the delivery of outdated information to subscribers and can deprive website operators of accurate "hit" information –

information about the number of requests for particular material on a website – from which advertising revenue is frequently calculated. For this reason, the person making the material available online may establish rules about updating it, and may utilize technological means to track the number of “hits”.

The limitation applies to acts of intermediate and temporary storage, when carried out through an automatic technical process for the purpose of making the material available to subscribers who subsequently request it. It is subject to the following conditions:

- The content of the retained material must not be modified.
- The provider must comply with rules about “refreshing” material – replacing retained copies of material from the original location – when specified in accordance with a generally accepted industry standard data communications protocol.
- The provider must not interfere with technology that returns “hit” information to the person who posted the material, where such technology meets certain requirements.
- The provider must limit user’s access to the material in accordance with conditions on access (e.g., password protection) imposed by the person who posted the material.
- Any material that was posted without the copyright owner’s authorization must be removed or blocked promptly once the service provider has been notified that it has been removed, blocked, or ordered to be removed or blocked, at the originating site.

iii. Storage of Information on Systems  
or Networks at the Direction of Users

Section 512(c) limits the liability of service providers for infringing material on websites (or other information repositories) hosted on their systems. It applies to storage at the direction of a user. In order to be eligible for the limitation, the following conditions must be met:

- The provider must not have the requisite level of knowledge of the infringing activity, as described below.
- If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.
- Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.

In addition, a service provider must have filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement.

Under the knowledge standard, service provider is eligible for the limitation on liability only if it does not have actual knowledge of the infringement, is not aware of facts or circumstances from which infringing activity is apparent<sup>81</sup>, or upon gaining such knowledge or awareness, responds expeditiously to take the material down or block access to it.

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<sup>81</sup> This standard of awareness appears by its terms to require more knowledge on the part of the service provider than a “should have known” (or reason to know) standard. Specifically, it requires that the service provider have actual awareness of facts from which infringing activity is apparent.

#### iv. Information Location Tools

Section 512(d) provides that a service provider is not liable for monetary relief, and is subject only to limited injunctive relief, for referring or linking users to an online location containing infringing material or activity by using information location tools (including a directory, index, reference, pointer or hypertext link), provided the service provider does not have actual knowledge that the material is infringing; is not aware of facts or circumstances from which infringing activity is apparent; does not receive a financial benefit directly attributable to any infringing activity for which it has the right and ability to control; and if properly noticed of the infringing activity or otherwise obtaining knowledge or awareness of the infringement, responds expeditiously to remove or disable access to the infringing material. Section 512(d) does not mention framing as an example of an information location tool to which the safe harbor applies. Thus, although framing is accomplished by linking, it is unclear whether framing would fall within the safe harbor.<sup>82</sup>

The infringement is carried out by the information location tools such as directory, index, reference, pointer and hypertext link. The conditions, which are necessary to be eligible for the limitation, are same with the elements of the above information stored on systems or networks at the direction of users.

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<sup>82</sup> Ian C. Ballon & Keith M. Kupferschmid, Third Party Liability under the Digital Millennium Copyright Act: New Liability Limitations and More Litigations for ISPs, *Cyberspace Lawyer*, October 1998

(c) Exemptions from Liability

i. Monetary Relief

The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement. Monetary relief is defined in subsection (k)(2) as encompassing damages, costs, attorney's fees, and any other form of monetary payment.

To qualify for these protections, service providers must meet the conditions set forth in subsection (i), and service providers' activities at issue must involve a function described in subsection (a),(b),(c),(d) or (g), respectively. The liability limitations apply to networks "operated by or for the service provider", thereby protecting both service providers who offer a service and subcontractors who may operate parts of, or an entire, system or network for another service provider.

ii. Relief from Injunctions<sup>83</sup>

The limitations in subsections (a) through (d) protect qualifying service providers from liability for injunctive relief for the above infringement. The extent is specified in subsection (j).<sup>84</sup>

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<sup>83</sup> A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. Generally, it is a preventive and protective remedy, aimed at future acts, and is not intended to redress past wrongs. Ex) Interlocutory injunction, Mandatory injunction, Permanent injunction, Perpetual injunction, Preliminary injunction, Preventive injunction, Prohibitory injunction, Provisional injunction, Temporary injunction.

<sup>84</sup> Under section 512(j), if a service provider is subject to injunctive relief other than under the first safe

(d) Notice and Take-Down Provisions

The statute also establishes procedures for proper notification, and rules as to its effect. (Section 512(c)(3)) Under the notice and takedown procedure, a copyright owner submits a notification under penalty of perjury, including a list of specified elements, to the service provider's designated agent. Failure to comply substantially with the statutory requirements means that the notification will not be considered in determining the requisite level of knowledge by the service provider. If, upon receiving a proper notification, the service provider promptly removes or blocks access to the material identified in the notification, the provider is exempt from monetary liability. In addition, the provider is protected from any liability to any person for claims based on its having taken down the material. (Section 512(g)(1))

In order to protect against the possibility of erroneous or fraudulent notifications, certain safeguards are built into section 512. Subsection (g)(1) gives the subscriber the opportunity to respond to the notice and takedown by filing a counter notification. In order to qualify for the protection against liability for taking down material, the service provider must promptly notify the subscriber that it has removed or disabled access to the material. If the subscriber serves a counter notification complying with statutory requirements, including a statement under penalty of perjury that the

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harbor, courts are limited to injunctions that restrain the service provider from providing access to infringing material at particular online sites on its service, that restrain it from providing services to a subscriber engaging in infringing activity by terminating the subscriber, or that otherwise are necessary to prevent or restrain infringement of specified copyright material at a particular online location, if such relief is the least burdensome to service provider among the forms of relief comparatively effective for that purpose. If the service provider is subject to injunctive relief under the first safe harbor, then courts are limited to injunctions that restrain the service provider from providing access to a subscriber engaging in infringing activity by terminating the subscriber or by taking reasonable steps specified in order to block access to a specific, identified, online location outside the United States.



material was removed or disabled through mistake or misidentification, then unless the copyright owner files an action seeking a court order against the subscriber, the service provider must put the material back up within 10-14 business days after receiving the counter notification.

Penalties are provided for knowing material misrepresentations in either a notice or a counter notice.

(e) Special Provisions  
for Nonprofit Educational Institutions

Section 512(e) contains an additional liability limitation for nonprofit educational institutions. According to the Conference Report, Congress recognized that university environments are unique, and a university might otherwise fail to qualify for the safe harbors simply because the knowledge or actions of one of its employees might be imputed to the university under basic principles of respondeat superior<sup>85</sup> and agency law. Based upon principles of academic freedom and independence, Congress believed that in certain circumstances it would be inappropriate for actions on the online of faculty members and graduate students to be imputed to the university to prevent it from being eligible for the safe harbors.

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<sup>85</sup> This doctrine means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. Under this doctrine master is responsible for want of care on servant's part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment. Under doctrine an employer is liable for injury to person or property of another proximately resulting from acts of employer's service. Doctrine applies only when relation of master and servant existed between defendant and wrongdoer at time of injury sued for, in respect to very transaction from which it arose. Hence, doctrine is inapplicable where injury occurs while employee is acting outside legitimate scope of authority. But if deviation be only slight or incidental, employer may still be liable.

Accordingly, section 512(e) provides that online infringing actions of faculty members or graduate student employees that occur when they are “performing a teaching or research function” will not be attributed to the university in its capacity as their employer, and the university will therefore not be charged with the faculty member’s or graduate student’s knowledge or awareness of his or her infringing activities, if (i) the infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding three-year period, for a course taught at the university by such faculty member or graduate student; (ii) the university has not, within the preceding three-year period, received more than two notifications of claimed infringement by such faculty member or graduate student; and (iii) the university provides all users of its system with informational materials that accurately describe and promote compliance with U.S. Copyright Law.

(f) Other Provisions

Section 512(h) sets up a procedure through which a copyright owner may obtain an order through a United States district court directing the service provider to release the identity of an alleged direct infringer acting through the service provider’s system or network. Under Section 512(l), failure of a service provider’s claim that its conduct is nonetheless non-infringing, or any other defense. Finally, Section 512(m) clarifies that the safe harbors are not conditions upon a requirement that the service provider monitor its system for infringements, or access, remove or disable access to

material where such conduct is prohibited by law.<sup>86</sup>

#### 4. Court Decision after DMCA<sup>87</sup>

In *A&M Records, Inc., et al. v. Napster, Inc.*, the court denied Napster Inc.'s (Napster) motion for partial summary judgment, in which motion Napster sought to limit the damages and other relief that could be awarded against it for alleged direct or contributory copyright infringement by application of the safe harbor provisions of 17 U.S.C. section 512(a) of the DMCA. Section 512(a) limits a service provider's liability for copyright infringement by reason of the service provider's "transmitting, routing or providing connections for material through a system or network controlled or operated by or for the service provider ..."

The court held that Napster's role in the transmission of MP3 files by and among the various users of its system was not entitled to protection under Section 512(a) because such transmission does not occur through Napster's system.<sup>88</sup>

The court also held that issues of fact existed as to whether Napster was entitled to any protection under the DMCA at all. To be entitled to such protection, a service provider must meet the requirements of section 512(i) of the DMCA, which, among other things, obligates the service provider to "adopt and reasonably implement and inform subscribers and account holders of the service provider's system or network of a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat

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<sup>86</sup> Ex)Electronic Communications Privacy Act.

<sup>87</sup> *A&M Records, Inc., et al. v. Napster, Inc.* C 99-05183 MHP (N.D. Cal. 2000)

<sup>88</sup> Although the Napster server conveys address information to establish a connection between the

infringers ...”. The court held that issued of fact existed as to whether Napster had appropriately adopted and informed its users of such an effective policy which precluded at this time any relief to Napster under the DMCA.

Noting DMCA section 512(n), the court held that each independent function of the Napster system must be judged independently against the various safe harbors afforded by the DMCA. The fact that one function is not afforded protection under a particular safe harbor provision does not mean that another function provided by the service provider is not entitled to protection under another safe harbor provision. Conversely, the fact that a service provider is entitled to protection under a safe harbor provision for providing or performing for its users a particular function does not entitle the service provider to “blanket protection” for all activities.

The court also held that “some of the ...essential functions (of the Napster system) – including but not limited to the search and index – should be analyzed under subsection 512(d)” and the safe harbor provisions found therein.

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requesting and host users, the connection itself occurs through the Internet.

## Chapter IV

### Korean Approach

#### 1. Historical Background

The advances in digital technology make the electronic networks develop very rapidly. The establishment of high speed and high capacity information systems makes it possible for one individual, only with a few key strokes, to deliver perfect copies of digitized works to scores of others, or to upload a copy to a bulletin board or other service where thousands can download it or print unlimited “paper” copies. Just one unauthorized uploading could have devastating effects on the market for the work.

In Korea, the development speed of Internet industry is very high. It has the bright side and the dark side altogether. Though the cases, which are related with the online service provider’s liability against the copyright infringement on the internet, have not been sufficiently accumulated<sup>89</sup> to make the standards for those infringing activities, the proper level of protection against copyright infringement on the internet or the other electronic networks has been required already. In recent time, the Seoul District Court<sup>90</sup> held that online service provider does not take the liability for the Copyright infringement on the Internet under the certain conditions. The meaning of this case is clarifying which elements are required for imposing the liability on Internet service provider rather than stating that service provider does not take any liability for

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<sup>89</sup> The data of this issue is rather shallow in comparison of USA or other foreign country such as Germany.

<sup>90</sup> Seoul District Court 1999.12.3. 98Gahap111554

the copyright infringement.

There has not been the specific legislation about this issue so far. We have dealt with the related cases by the way of the interpretation and application of current provisions of Copyright Law and such related laws as Computer Program Protection Law and Civil Law.<sup>91</sup>

## 2. The Implication of Court Decisions

Even though there have not been a lot of cases enough to make the standards for the online service provider's liability, there are some court decisions from the related precedents.

The Court held, in the case of Seoul District Court 1999. 12. 3, 98Gahap111554<sup>92</sup>, "as a general principle, in the case of transmitting the digital file in the cyberspace, if the third party provided only the access service and equipment, and simply connected the users' activities, the service provider does not take the liability for the copyright infringement, but if the service provider voluntarily induces or causes the infringing activities, or does not take any measures to protect the copyright infringement even with knowledge of the infringing activities, and it has the right and the ability to control the infringer's acts and receives a direct financial benefit from the infringement,

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<sup>91</sup> YoungJun, Kweon, Online service provider's liability on Copyright, Feb. 2000

<sup>92</sup> "Cocktail 98", which was made by the Korean software venture company Cocktail.Co., was uploaded as a digital file to the homepage of JungAng University. For about one month, it was opened at the program bulletin board, clicked more than 400 times, and downloaded. JungAng University closed the program bulletin as soon as they received the notice from the Cocktail.Co. The Cocktail.Co. claimed that the JungAng University should take the liability for not monitoring the program bulletin board for the case of copyright infringement but they did not take the proper measures for it. The Cocktail.Co claimed 300,000,000 won for the copyright infringement and the mental damages.

it should take the liability for the infringement,” and denied<sup>93</sup> the service provider’s liability. The standards stated by the Cocktail<sup>98</sup> Court are very similar with those elements by adopted US Court for the cases relating to two indirect forms of copyright infringement, contributory infringement and vicarious liability.

In another Supreme Court case<sup>94</sup>, the Court acknowledged the right for the service provider to delete the postings, which is against the public and social order or which causes the defamation. It does not necessarily mean that the service provider has the legal obligation to monitor and to delete such material. However, this kind of contract can be another element with judging the service provider’s right and ability to monitor and control the user’s infringing activities. About the standard for cooperative liabilities, Supreme Court pointed out the knowledge and predictability as the standards. The standard of knowledge<sup>95</sup> is to know or have the reason to know the infringement. The standard of predictability<sup>96</sup> is the possibility for the online service provider to

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<sup>93</sup> The reasons that the Court denied the liability of the service provider JungAng University are as follows: The program bulletin board of JungAng University was opened to anyone that it could not be expected for defendant to monitor the infringing activities by the a lot of unknown users beforehand. The process of posting the program to the bulletin board is automatic that there was no possibility for the service provider to know the infringing act beforehand. The service provider, JungAng University, is the non-profit educational institution that the program bulletin board does not seek the commercial profit. The defendant took the measure to terminate the infringement by closing the program bulletin board right after receiving the notice from the plaintiff. The Court held that the defendant does not have the specific legal obligation to monitor and control the infringing material on the bulletin board and there is not any special conditions to regard the defendant make any direct infringement.

<sup>94</sup> Korea PC Telecommunication Co. erased the digital file on the Hitel posted by the Labor Union of the Korea Electronic Telecommunication Co. LUKETC claimed that Korea PC Telecommunication violated the contract and should take the responsibility for the default. The Court held that the terms and conditions of the contract are right and efficient and that it is permissible for the defendant to delete the file.

<sup>95</sup> In KBS case(Supreme Court 1996. 6. 11, 95Da49639), Court held that there was not any employer-employee relationship between KBS and scenario writers and that KBS does not have the right and obligation to monitor and control whether the writers infringe any copyrighted works.

<sup>96</sup> Supreme Court 1990. 2. 27, 89Daka4342. The publisher was not the direct infringer. But Court held that the publisher could predict the interpreter’s infringing act and that there was co-relationship between publisher and interpreter.

predict the infringing activities by the online service users beforehand.

The above three cases<sup>97</sup> are not directly related with the online service provider's liability. However, the standards could be drawn from these precedents when the Court judges the copyright infringement on the Internet or any other electronic networks by the way of the interpretation and application of the current Laws. But the recent Cocktail 98 case shows that Korean court is taking the similar standards with which of contributory infringement and vicarious liability adopted by US Court.

### 3. Analysis on the Current Copyright Law system and Relative Laws<sup>98</sup> in Comparison with DMCA

#### (1) Liability against Copyright Infringement on the Internet or the Online Services

To be liable for any copyright infringement on the Internet or the online services, there should be any portion of acts contributed by service provider. In case that online service providers infringe the copyright holder's right directly, or cause or induce the other to make infringement, it is relatively easy to impose the liability on service providers.<sup>99</sup> When online service providers do not infringe the copyright directly but have the ability to control or monitor the other infringers' infringing acts, it is also possible to ask online service providers to take the liability. In comparison with DMCA, it is compared with the infringement type by the storage of information on systems or

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<sup>97</sup> Supreme court 1998.2.13, 97Da37210;1996.6.11,95Da49639;1990.2.27,89Daka4342

<sup>98</sup> Relative Laws are Computer Program Protection Law and Civil Law.

<sup>99</sup> Online service provider's direct uploading the infringing material to the bulletin board or causing or



networks at the direction of users, or by the information location tools. DMCA requires certain conditions for the liability limitation.<sup>100</sup>

In another case that online service providers only provide automatic technical process or transmitting service, it is difficult to impose the liability on online service providers. In DMCA, transitory communication and system caching are the examples for this case. Under DMCA, to be eligible for the limitation on liability, service providers' activities should meet the respective conditions.<sup>101</sup>

Under certain conditions like the provisions under DMCA they are eligible for the liability limitation, but otherwise they are required to be liable for the copyright infringement. The below theories are applied to impose the liability on service providers when the other party's activities are clarified as the copyright infringement.

(a) Liability against Copyright Infringement  
by Cooperative Illegal Activities

Without any special legislation, section 760 of Civil Affairs "Liability of Joint Tort-feasors"<sup>102</sup> is the core provision for the online service provider's liability against the copyright infringement. According to section 760 of the Korean Civil Affairs, service provider might share his or her own portion of the liability for copyright

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inducing the service users to download the infringing material from their own site like Sega case.

<sup>100</sup> Knowledge or awareness standard, the right and ability to control the infringing acts, expeditious taking down or blocking access to infringing material after notification.

<sup>101</sup> Ex) the transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider. (transitory communication) the provider must limit user's access to the material in accordance with conditions on access imposed by the person who posted the material. (system caching)

<sup>102</sup> 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. (2)the provisions of paragraph (1) shall also apply if it is impossible to ascertain which of the participants,

infringement on the Internet or other online services with the direct infringers.<sup>103</sup> Because Section 93 of Copyright Law and section 27 of Computer Programs Protection Law has the basic provision for the direct infringer's compensation for the damages, section 760 of Civil Affairs suggests the possibility for the service providers' liability when service provider is not the direct infringer. In Korea, adopting the theory of objective co-relationship<sup>104</sup>, if the service provider serves the access program and manages the place the copyright is infringed by service users, it is assumed that there is the co-relationship between infringers and service provider.<sup>105</sup> However, it should not automatically mean that the service provider takes the liability against the infringement, even when there is the co-relationship between the direct infringer and service provider. Only if service providers, themselves, meet the elements of illegal activities, and then they are examined for the cooperative illegal activities. If the service provider's function for the access or some other service is operated in a way of the simply automatic technical process, service provider's liability should be limited.

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albeit not joint, has caused the damages. (3) instigators and accessories shall be deemed to act jointly

<sup>103</sup> YoungJun, Kweon, Online service provider's liability on Copyright, Feb. 2000

<sup>104</sup> There are two types of theory such as theory of the subjective and the objective cooperative illegal activities about the establishment of co-relative unlawful acts. Court and scholars take the objective theory. It does not require the common intent or recognition between the violators. If there is objectively cooperatively infringing acts, the cooperative illegal activity is established.

<sup>105</sup> YoungJun, Kweon, Online service provider's liability on Copyright, Feb. 2000

(b) Liability from the Employer-Employee Relationship

Only if there is employer-employee relationship and the employee<sup>106</sup> is the direct infringer, it can be tested whether the liability against the copyright infringement on the Internet or the online network services is imposed on the service provider or not.<sup>107</sup> As an liable employer for his or her employee's infringing acts, online service provider should have the right and ability to supervise the employees.

In the section 756<sup>108</sup> of Korean Civil Affairs, "the course of the execution of the undertaking ..., due care in the appointment of the employee...and the supervision of the undertaking" are required as the conditions for the establishment of the employer's liability. However, there was not any provision requiring the direct financial benefit element as a condition for the liability for the infringement by the employee. If this section 756 is directly applied to service provider, it is too strict for the Korean service provider, considering the vicarious liability of the US judicial theory and DMCA provision for the online service provider's liability. When online service provider should take the liability for the copyright infringement of the employees or the sysops as the

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<sup>106</sup> For example, someone hired by the service provider and the sysops are the employees of the service provider.

<sup>107</sup> Since general users are not the employees of the service provider, when they infringe the copyright, the service provider does not take this liability.

<sup>108</sup> Employer's Liability for Damages: (1) a person who employs another to carry out an undertaking shall be bound to make compensation for damages done to a third person by the employee in the course of the execution of the undertaking: Provided that this shall not be the case, if the employer has exercised due care in the appointment of the employee and the supervision of the undertaking, or if the damage would have resulted even if due care had been exercised. (2) a person who supervises the undertaking in place of the employer shall also assume the same liability as set forth in paragraph (1). (3) in cases of paragraph (1) and (2), the employer or the supervisor may exercise the right to obtain reimbursement from the employee.

employer, the direct financial benefit can be required as the additional element.

## (2) Remedies for the Copyright Infringement

When the liability for the copyright infringement on the internet or other electronic networks is imposed on the service provider, there should be the legal obligation to compensate plaintiff's related damages in the both area of money and mentality. In Korean Civil Affairs, principally the defendant should compensate for the amount of actual damages and lost profits by money. DMCA is defining the conditions for limiting the service provider's liability and dealing with the monetary and injunctive relief as the exemptions from liability. However, Korean Copyright Law system does not have such a regulation limiting online service provider's liability, and consequently when service provider satisfies certain conditions for the establishment of liability under the interpretation and application of the current Civil Affairs, Copyright law and related laws, it should take the obligation to return the unlawful benefit and/or compensate damages from the infringement.

### (a) Internet Service Provider's Direct Financial Benefit from the Copyright Infringement

If the service provider could receive any direct financial benefit from the copyright infringement by the service users on the networks of their own, they should return the total amount of the financial benefit to the plaintiff.<sup>109</sup> Because the benefit is

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<sup>109</sup> With the knowledge or the reason to know the infringement, the service provider should give the whole-received benefit back to the plaintiff. Without any knowledge of the infringement, the service provider has only to turn back the remained benefit.

derived from the unlawful source without any reason, the service provider should not be entitled to receive the benefit for its own sake.<sup>110</sup>

(b) Actual Damages<sup>111</sup> and Lost Profits

According to Section 93. (2) and (3)<sup>112</sup> of Copyright Law, the copyright owner has only to prove the infringer's benefit from the infringement and the amount of the benefit he or she can earn usually. The Court held that the plaintiff can argue both ② and ③ for the remedies and choose the higher amount of benefit if the two amounts are different.

According to Section 27. (5)<sup>113</sup> of the amended Computer Programs Protection Law, when the copyright owner's damage is evident but difficult to calculate, the Court can determine the reasonable amount of damages and loss.<sup>114</sup>

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<sup>110</sup> Section 741 of the Korean Civil Law, Definition of Unjust Enrichment: a person who without any legal ground derives a benefit from the property or services of another and thereby causes loss to the latter shall be bound to return such benefit.

<sup>111</sup> It is including damages, costs, attorney's fees, and any other form of monetary payment.

<sup>112</sup> Claim for damages: (2) if the owner of authors' property rights, etc., claims compensation under paragraph (1), the amount of profit which the infringing person has gained by his act of infringement shall be presumed to be the amount of damages sustained by the owner of authors' property rights, etc. (3) the owner of authors' property rights, etc., may claim, in addition to the amount of compensation for damages as referred to in paragraph (2), an amount of compensation for damages equivalent to that which he could have earned by the ordinary exercise of his rights.

<sup>113</sup> Claims for damages: (5) the program copyright owner may claim as damages the amount corresponding to that amount gainable ordinarily through the exercise of his right in addition to the amount of damage as provided in paragraph (3).

<sup>114</sup> Considering the whole meaning of affidavit and the evidence, the Court can calculate the reasonable

### (3) Terminating Copyright Infringement Status

When the service provider have the right and the ability to monitor or control the infringer's copyright infringing acts and when the service provider know or have the reason to know the infringement, he or she should terminate<sup>115</sup> the copyright infringement according to Section 91<sup>116</sup> of Copyright Law and Section 25<sup>117</sup> of Computer Program Protection Law. If service provider does not take any proper measure to block users' access to the infringing material, the copyright owner can ask the court of the temporary injunction.<sup>118</sup> Under DMCA, if online service provider take the termination policy, it is eligible for the liable limitation. Under Korean Copyright Law system, rather, it is the condition for service provider to be court-ordered by copyright owner when it does not take the proper step for blocking users' access to infringing material or taking down the infringing program.

### (4) Extent of Exemption by Contract

In fact, the main Korean online service providers such as Hitel, Chollian and Unitel are making the exemption provisions with the service users by the contract. They are trying to avoid their liability against the copyright infringement on the online by the service users. Obviously, this contract does not automatically guarantee the exemption of service provider's liability. Let alone the relationship between the online service

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amount of damage.

<sup>115</sup>For example, the measures to terminate the infringing acts are breaking the material, deleting the copied digital information on the networks.

<sup>116</sup> Right of Demanding Suspension of Infringement

<sup>117</sup> Request for Suspension, etc. of Infringement

provider and the users infringing the copyright, the service provider should take the proper level of liability to copyright owner when he or she meets the standard for the copyright infringement on the online.

In a case that (1)the service provider has the contract with the exemption clause between service users, (2)the service user infringes the copyright owner' s copyrighted works on the online, and (3)the service provider is acknowledged as being liable against the infringement, service provider should be liable for the copyright owner' s rights. Online service providers may ask the service users to pay them back for their liabilities if the contract is not illegal.

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<sup>118</sup> Korean Law of Civil Procedure Section 714

## **Chapter V**

### **Conclusion**

The rapid growth of the Internet and online network services has made the concern of online copyright infringement appear and affected the number of relative cases dramatically increase. Consequently, the proper protection for online copyright infringement has been required and discussed. In terms of the online copyright liability, this thesis deals with the issue of whether online service provider can be held liable for the online copyright infringing acts by their service users.

The classic judicial theory and provisions of Copyright law and other relative laws can solve these problems. On the other side, this area is newly emerging and, in fact, requiring the proper level of legal policy to impose liability and legal obligation for the protection for online copyright infringement and the remedies for the damage. In case of U.S.A, even they had certain judicial theories from the precedents, the lack of concrete standards for imposing the liability gave a birth to DMCA. It implies that Korea can solve online copyright infringement problems by the new legislation. Because we do not have enough number of accumulated cases, the provisions of DMCA can be reviewed as a model.

In the process of legislation, the codification of technical protection methods can be considered. Digital technology can serve the copyright infringers as the weapon for the infringing acts. At the same time, it can be served for the copyright owner right against the infringer's violation. If the obligation is codified for online service provider to take a measure for the technical protection method, it will increase the effectiveness of protection and the cost of management or the service users' fee simultaneously. It is



required to meditate what is the optimal point of balancing the effectiveness of protection and the cost of management or the service users' fee in order to avoid excessively heavy burden on online service providers. By the way of legislation, it can be crystallized what the standards are for online service provider and to what extent they are liable for the copyright infringement. However, if online service provider takes a pre-cautious step properly for their obligation of online copyright protection, and if the copyright infringement is beyond the reasonable boundary of online service provider's right and ability to control and monitor, online service provider should be able to get the monetary and/or injunctive exemption like the provisions of DMCA. Because it is equally important that online service providers take the right portion of the liability to protect the owner of copyright in the cyberspace, and that they can promote their business without shrinking their market via increasing the management cost, and monitoring or deleting the online material because of their legal obligation for copyright protection.

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