

Liability of Internet Service Providers

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1. U.S. Rules Limiting Liability of Internet Service Providers

(1) Copyright Infringement

In the U.S. where a number of actions relating to copyright infringement on the Internet¹ have been brought with the spread of computer communications, the “Digital Millennium Copyright Act of 1998” (“DMCA”) was enacted in October 1998 as an amendment to then-in-force Copyright Act. Section 512 of DMCA provides rules for limiting liability of Internet service providers which, without going into detail here, are safe harbor provisions called “notice and take-down” provisions limiting the liability of Internet service providers who follow the procedures set forth in the section. The provisions can be outlined as follows:

- ① An Internet service provider who receives notice of a copyright infringement claim from a copyright owner which meets the statutory requirements² must take down works specified as infringing the copyright in question from its Internet site, and at that time, notify the person who posted the information in dispute;
- ② Should the person who posted the information have any objection to the taking-down of the information, he/she may submit the objection to the Internet service provider who shall in turn forward it on to the copyright owner;
- ③ Upon receipt of the objection, the copyright owner may institute court proceedings against the person who posted the information, thereafter notifying the Internet service provider. In such an instance, the Internet service provider shall continuously keep the information in dispute off the Internet;
- ④ If there is no notice of court proceedings, the Internet service provider may re-post the information.

On September 4, 2001, the Federal District Court for the Central District of California ruled in favor of defendant eBay, which operates an interactive auction site on the Internet, on a copyright infringement claim. This claim alleged that eBay had

¹ Playboy Enterprise Inc. v. Frena, 893 F. Supp. 1552 (M.D. Fla. 1993), Sega Enterprises Ltd. v. Maphia, 857 F. Supp. 679 (N.D. Cal. 1994), Religious Technology Center v. Netcome On-Line Communication Services, Inc., 51 BNA PTCJ 115 (N.D. Cal. 1995), Frank Music v. CompuServe, 93 Civ. 8153 (S.D.N.Y. Dec 19, 1995)

² In fact, Section 512(c)(2) provides that “The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making its service available in a location accessible to the public such as its website, and by providing to the Copyright Office, identifying information including the following: `(A) the name, address, phone number, and electronic mail address of the agent; and `(B) other contact information which the Register of Copyrights may deem appropriate.”

infringed on the copyright of plaintiff Hendrickson through eBay's unauthorized sales of DVDs on its Web site. The court in that case ruled that³: eBay was eligible for the protection under the safe harbor provisions set forth in Section 521(c) of DMCA; that the letter Hendrickson provided to eBay failed to meet the statutory requirements for notice set forth in Section 521(c)(3); and consequently eBay had no duty to take "notice & take-down" procedures set forth in the provisions.

(2) Defamation

Since the spread of online computer services⁴, defamation actions, in addition to copyright infringement claims, have been instituted against Internet service providers. With respect to copyright infringement claims, Internet service providers have been held either to have directly infringed upon the copyright in question or engaged in contributory infringement thereof whether or not the provider knew that infringing material was posted on their networks. However, in defamation actions, Internet service providers may be held to be liable as a "Publisher" only if they knew of the contents of the information posted on their network. Internet service providers have not been held to be liable if they did not know of the contents of subject material. In such instances, the Internet service provider has been deemed to be a mere "Distributor."

Based on such background, Telecommunication Act of 1996 (Communication Decency Act) was enacted in the U.S., which contains so-called "Good Samaritan" provisions⁵. According to these provisions, Internet service providers may not be treated as the "publisher" or "speaker" of any offensive information, including defaming material, which has been supplied by a third party information content provider. The Good Samaritan provisions also provide that no Internet service provider will be held liable for any offensive material on account of any action taken by the provider in good faith to restrict access to or availability of certain offensive material.

After enactment of CDA, the meaning of "Publisher" in §230(c) of CDA was disputed in the Zeran v. AOL case⁶ in which the court found that Internet service providers would not be held liable even though they are deemed as "Distributors" and they "knew or had reason to know".

(3) Summary of U.S. Rules

As previously discussed, there are two types of U.S. rules for limiting the liability of Internet service providers: rules set forth in DMCA which provide procedures for limiting liability in copyright infringement cases; and rules set forth in CDA, including "Good Samaritan" provisions, in relation to the treatment of offensive material.

³ Hendrickson v. eBay Inc., C.D.Cal. No. 01-0495 RJK (RNBx), 9/4/2001

⁴ Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Services Co. (1995.5.24)

⁵ "Protection for "Good Samaritan" Blocking and Screening of Offensive Material" (CDA § 230(c))

⁶ Zeran v. America Online, Inc., 129 F.3d. 327 (4th Cir. 1999)

2. EC Rules Limiting Liability of Internet Service Providers

The EC Directive on Electronic Commerce⁷, which contains provisions limiting the liability of Internet service providers (Articles 12-15), became effective on July 17, 2000. Such liability may be limited in the case of mere conduit (Article 12), caching (Article 13) and hosting (Article 14). Such classifications are essentially the same as those employed in the U.S. in DMCA, as previously discussed⁸.

As to hosting services, Internet service providers will not be held liable in principle if they meet the following requirements:

- ① that an Internet service provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; and
- ② that the Internet service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Rules of the EC Directive for limiting liability are thus quite simple compared with those of DMCA. However, they apply not only to copyright infringement claims but also to general illegal conduct, trademark infringement, civil liability for acts such as damages due to unfair competition, and criminal liability for acts such as obscenity and defamation. Member States are expected to enact national laws and regulations to establish procedural rules to comply with the Directive. The Directive requires Member States to bring such rules into force before 17 January 2002.

3. Japanese Cases Where Liability of Internet Service Providers Was Disputed

In Japan, thus far there have been the following 3 court decisions relating to the liability of Internet service providers on their networks, each of which was delivered in defamation cases. No such decision has been delivered in a copyright infringement action as of yet.

- ① Niftyserve Genzai-Shiso Forum Case
Decision of Tokyo District Court on May 26, 1997
Decision of Tokyo High Court on September 5, 2001
- ② Toritsu-Daigaku (Tokyo Metropolitan University) Case
Decision of Tokyo District Court on September 24, 1999
- ③ Claim of Disclosure of Niftyserve Member Name
Decision of Tokyo District Court on August 27, 2001

All of the cases were claims for damages and the trial court of Niftyserve Genzai-Shiso Forum case found that NIFTY Corporation, the service operator, must pay damages based on the user's liability because as supervisor it did not take appropriate actions toward removing defamatory messages. The appeal court, however, reversed the

⁷ Officially named as "European Parliament and Council Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market"

⁸ DMCA also provides as to another case, "information search tools" which is not statutorily provided by the EC Directive.

lower court's decision stating that, though the message was defamatory, the operator did not fail to perform obligatory acts and found that NIFTY Corporation was not liable to damages.

In Toritsu-Daigaku case, the court rejected a claim for damages stating that the operator of a Web site (Toritsu-Daigaku) bears an obligation to prevent damage only when it is obvious that the posted message is defamatory and when it is offensive and causes material damage, features, which the court found were lacking in the case.

In the Claim of Disclosure of Niftyserve Member Name, the court found no defamation existed and rejected the claim for damages against NIFTY Corporation.

Early establishment of rules limiting the liability of Internet service providers not involved in the posting of illegal material is also strongly demanded in Japan for both defamation and copyright infringement claims.

4. Japanese Bill for Limiting Liability of Internet service providers

In Japan, the Ministry of Public Management, Home Affairs, Posts and Telecommunications was currently drafting a bill based on the prior planning by the Ministry of International Trade and Industry, the Ministry of Posts and Telecommunications and the Agency of Cultural Affairs which was submitted to the current (153rd) session of Parliament after approval of by a Cabinet meeting (October 30, 2001), the bill may be outlined as follows:

(1) Limitation of Liability of Damages of Internet service providers

According to the bill, the following provisions are contained in Article 3 "Limitation of Liability of Damages of Service Providers":

Article 3. (Limitation of Liability of Damages)

1. *If a distribution of information through a certain telecommunication constitutes infringement of another's rights, the telecommunication service provider which operates the telecommunication facilities used for said telecommunication (hereinafter referred to as "Related Service Provider") shall not be held liable to the damage unless it is technically possible to take actions to prevent the infringing information from being transmitted to unspecified persons and either of the following conditions ①② are met; however, this provision shall not apply where the Related Service Provider is the entity which posted the infringing information:*

① that the Related Service Provider had knowledge that distribution of information through said telecommunication constituted infringement of rights of a person;

② that the Related Service Provider had knowledge of distribution of information through said certain telecommunication and there are sufficient reasons to find that the Related Service Provider could have known that the distribution of information through said certain

telecommunication would cause infringement of another's rights.

2. *A telecommunication service provider which took actions to prevent transmission of information through a certain telecommunication shall not be held liable to damage to the transmitter of information who was prevented from transmitting the information if such actions were taken only to the necessary extent to prevent such information from being transmitted to unspecified persons and if any one of the following conditions ①② is met:*

① that said telecommunication service provider had sufficient reasons to believe that distribution of information through said certain telecommunication means infringed another's rights; or

② that where Related Service Provider receives from a person alleging that his/her rights were infringed by distribution of information through a certain telecommunication a request to take actions to prevent transmission of information allegedly infringing such rights (hereinafter referred to as "Infringing Information"), the request giving the Infringing Information as well as the allegedly infringed rights and reasons to believe that the rights were infringed (in this subparagraph, hereinafter referred to as "Actions to Prevent Transmission"), and the person who posted the Infringing Information (poster) does not indicate disagreement with Actions to Prevent Transmission within seven (7) days after the Related Service Provider's inquiry as to whether or not the poster agrees that the Related Service Provider should take Actions to Prevent Transmission.

According to the reported provisions, a service provider will unconditionally be held not to be liable if it did not know that infringing material was posted and if, after the service provider forwarded to the person who posted the information in dispute a request from the right holder to remove the information, the person who posted the information does not respond whether he/she agrees that the information in dispute should be removed. If, however, the service provider knew that the information was posted, it must decide whether or not the information infringes another's rights. However, the service provider will be held not to be liable if the decision is found as based on sufficient reasons.

(2) Request of Disclosing Information on Transmitter

Article 4 provides as follows for the right holder to obtain information (name, address, and others) of the person who posted the subject information in order to institute court proceedings:

Article 4. (Request of Disclosing Information on Transmitter)

1. *Any person alleging that his/her rights were infringed by a distribution of*

information through a certain telecommunication may request to the telecommunication service provider which operates the telecommunication facilities used for said telecommunication means (hereinafter referred to as "Related Disclosing Service Provider") to disclose information on the transmitter involved in such infringement (name, address and other information prescribed in the decree of Ministry of Public Management, Home Affairs, Posts and Telecommunications to identify the transmitter of the infringing information) as long as both of the following conditions ①② are met.

① where it is obvious that distribution of the infringing information will infringe the rights of the person who requests such disclosure; and

② where such information on the transmitter is necessary for the person who requests such disclosure to enforce his/her rights to claim damages or where the person who requests such disclosure has other legitimate reasons to access to the information on the transmitter.

- 2. Upon receipt of request for disclosure pursuant to the preceding item, Related Disclosing Service Provider must hear the opinion of transmitter in question as to whether or not to disclose; except, however, where no contact can be made with the transmitter of the infringing information relating to the request for disclosure or there are other special reasons.*
- 3. The person to whom information on the transmitter was disclosed pursuant to item 1. herein may not arbitrarily use the information on the transmitter to unreasonably undermine the reputation of the transmitter or damage the peace of the transmitter's everyday life.*
- 4. Related Disclosing Service Provider shall not be held liable for damage caused to the person who requested such disclosure by its not complying with the request made pursuant to paragraph 1 herein, as long as there is no willful or gross negligence on the part of the Provider.*

That is to say, a service provider who received a request for disclosure will be required to consider the contents of request for disclosure and decide at its own discretion whether or not to disclose. A service provider will not be held liable for its non-disclosure as long as this is not due to willful or gross negligence.

5. Commentary on Japanese Bill for Limiting Liability of Internet service providers

(1) As an Internet service provider, we strongly demand the establishment of a system under which we will not be held to be liable as long as we follow "prescribed procedures" in deciding whether or not posted information shall be removed, and there is no requirement for us independently to determine such matters. As previously discussed, the EC and U.S. have such rules, but the latest Japanese bill requires the Internet service

provider to decide on its own whether or not another's rights are infringed (Article 3.1 clause 2 and 3.2 clause 1). It is very difficult in the cases relating to a defamatory message or unauthorized posting of copyright works to decide whether or not an act in question constitutes statutory defamation or copyright infringement, as can be well imagined even without referring to the Niftyserve cases. As a result, service providers will be required to decide whether to voluntarily remove the material or retain it on their networks. To find "sufficient reasons" is quite difficult and thus imposes an excessive burden on Internet service providers. In addition, if the court finds that the provider incorrectly made the decision in an action filed by the right holder or the transmitter of subject information, the service provider may be ordered to pay damages. Considering such difficulties, we must say that the latest bill does not have sufficient provisions to limit the liability of Internet service providers.

(2) Under the EC and U.S. rules, Internet service providers are not required to monitor their networks at all times to find if any unauthorized information is posted. The Japanese bill does not clearly specify whether there is an obligation of Internet service providers to monitor their networks. We believe that the non-existence of such an obligation should be specified as in the EC and U.S. rules.

(3) EC rules, which apply the same horizontal approach as the Japanese bill, provide for the limitation of not only civil liability but also criminal liability. The latest Japanese bill limits liability of damages caused by copyright infringement, defamation, and other rights infringements. Further consideration will be required as to whether or not the law should cover criminal liability as in the EC rules.