

Liability of Internet Service Providers

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1. Preface

With respect to the liability of ISPs, in the United States a uniform legislative solution has already been devised, with the Digital Millennium Copyright Act (DMCA) in connection with copyright infringement and pursuant to the Federal Communications Decency Act (CDA) with respect to defamation of character, and in Japan as well the situation is one of anticipation of enactment of a bill that takes those laws into consideration.

Accordingly, in this paper, after examining Japanese legal precedents that touch on the liability of ISPs in light of a review of circumstances in the U.S., I would like to add an explanation of the aforementioned bill.

2. The Discussion in the United States

2.1 Introduction

With respect to the liability of ISPs, in the U.S. separate judicial legal principles have evolved for defamation of character cases and for copyright infringement, and legislative measures with differing contents for those separate issues have been taken. When we look into the matter of ISP liability in Japan there are many points in U.S. judicial precedents and legislation that should be referenced.

2.2 U.S. precedents and legislation concerning defamation of character

2.2.1 The decision in the Cubby v. CompuServe case (1991)

In the United States a defamatory expression is treated as an issue of common law tort. Traditionally, the details of liability are classified as those of (1) the direct expresser of the libel; that is, the author; (2) the publisher, who exercises editorial control; and (3) distributors, such as book stores, who do not have editorial control.

Until the legislative treatment, to be described below, provided by Article 230 of the 1996 CDA came into effect, judicial cases examined the details of liability based on the premise of those three classifications.

One of those precedents is the decision in the Cubby v. CompuServe case (Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991)).

In that case, involving defamatory information disseminated by a news company in a forum provided by the personal computer communications company CompuServe, CompuServe's liability was at issue.

Based on a finding that CompuServe did not edit the relevant information, the court ruled that CompuServe was no more than a distributor, and would not bear liability

unless it knew or reasonably should have known of the defamation. Since the plaintiff did not prove this point, CompuServe's liability was not found.

2.2.2 The decision in the Stratton Oakmont v. Prodigy case (1995)

In the decision in the Stratton Oakmont v. Prodigy case (Stratton Oakmont Inc. v. Prodigy Services Co., 1995.5.24), involving defamatory information entered onto an electronic bulletin board (BBS) provided by the personal computer communications company Prodigy, Prodigy's liability was at issue.

Under the standard of whether or not editorial control was exercised, the court ruled that since Prodigy had been deleting data with offensive content and had publicized its doctrine of "providing a service that could be enjoyed safely by families", Prodigy bore liability as a publisher.

2.2.3 Article 230 of the 1996 Federal Communications Decency Act (CDA)

When the above two cases are compared the result seems unreasonable in that the defendant in the Prodigy case was "rewarded" with heavy liability due to its having been diligent as to its "good conduct" (by actively taking steps), as compared to the CompuServe case, in which the defendant was not diligent in that way.

Accordingly, Article 230 of the 1996 CDA provides that with respect to "offensive data" such as defamatory expression, providers and users of a two-way information communication service would not be treated as "publishers" or "speakers" in connection with information supplied by another information contents provider, and that a provider of a reciprocal information communication service or the like would not bear liability with respect to good faith acts taken for the purpose of limiting access to and use of specified harmful contents.

By reason of its promoting "good conduct" (such as the active blocking of offensive material), this Article is called the "Good Samaritan" provision, since its purpose is to avoid the unreasonableness of having the ISP bear a heavy burden of liability in its relationship with the victim of the defamation. By providing this protection this law functions to promote good conduct.

Note that Section (d) (2) of Article 230 expressly specifies that the Article does not at all affect intellectual property rights.

2.2.4 The decision in the Zeran v. AOL case (1998)

The CDA does not touch on whether or not an ISP bears the liability of a distributor. Thus in the Zeran v. America Online (AOL) case, a case in which the plaintiff, one Zeran, was identified at the contact point by a user who could not be specified as having written in praise of the explosion at the federal building in Oklahoma, the controversy concerned whether or not the defendant AOL, who did not delete that information, bore liability to the plaintiff as a distributor.

After the court of first instance rejected the plaintiff's claims, the federal court of appeals ruled that the immunity under Article 230 Section (c) exempts ISPs from the

liability of a distributor, even if the ISP knew of the contents of the defamation, and dismissed the plaintiff's appeal (*Zeran v. America Online, Inc.*, 129 F. 3d 327 (4th Cir. 1997), cert. denied 118 S. Ct. 2341 (1998)).

The court explained its reasoning as follows.

Namely, if an ISP bore liability as a distributor when it had or reasonably should have had knowledge, each time it receives notice of the possibility of a defamation it would confront the possibility of having to bear liability; therefore, as an ISP it would have to make immediate decisions on such things as the legal risks it could bear from the relevance of the data to the defamation and the publication of the relevant material "as is". However, in contrast to a traditional print publishing company, since there is a huge volume of posting on the Internet the liability of an ISP would be impossibly heavy. Regardless of whether or not the contents of the information are defamatory, since it could avoid liability as an ISP by deleting a message upon receiving a notice claiming that the message was defamatory, it would wind up taking the attitude of simply deleting the message. Since that would have the effect of inhibiting free speech on the Internet, it would invite a result contrary to legislative intent. Also, since if by an ISP carrying out its own regulation it would increase its own chance of coming to know of defamatory data, in order to escape from liability the ISP would avoid trying to carry out its own regulation. This, too, would invite an effect contrary to the intent of the legislation.

A principle of common law is subject to limitation if it harms the clear purpose of an enacted statute. In the case under discussion, the court reasoned that it is clear that the legislative purpose of Article 230 would have been harmed if the exemption provision would have been interpreted under common law as being limited.

2.3 Judicial precedents and legislation in the U.S. concerning copyright infringement

2.3.1 The decision in the *Playboy v. Frena* case (1993)

With regard to an ISP's civil liability for copyright infringement, before the 1998 Digital Millennium Copyright Act (DMCA) was enacted in the United States, decisions were handed down in which heavy liabilities were found for copyright infringement based on traditional legal principles.

First, in the *Playboy v. Frena* case, in which photographs taken from the men's magazine *Playboy*, which was published by the plaintiff, were uploaded without permission onto a personal computer communications BBS operated by defendant Frena and were freely downloaded by users, in 1993 the federal district court assessed a heavy liability on the defendant, ruling that, without getting into the question of whether or not the BBS operator knew of the relevant acts, it was liable for direct infringement of the plaintiff's exclusive rights to public distribution and public performance (*Playboy Enterprises Inc. v. Frena*, 893 F. Supp. 1552 (M.D. Fla. 1993)).

2.3.2 The decision in the *Sega v. MAPHIA* case (1994)

The *Sega v. MAPHIA* case was one in which the plaintiff, a copyright holder, sued a defendant who promoted the unauthorized uploading and downloading of video games on

a BBS that it operated, receiving a fee from a user when a video game was downloaded and, as a condition for the exchange of a download, requiring the uploading of another game.

The federal district court (*Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994)) required proof, as to formation of liability from a direct infringement, that the defendant itself was uploading and downloading and that this was being carried out directly. Next, the court attached importance to the fact that the defendant actively participated in the acts, and considering that it provided facilities and recommended reproduction of the materials, even if for the sake of argument the defendant did not know precisely when these acts were conducted, the defendant's actions constituted contributory infringement.

2.3.3 The decision in the Netcom case (1995)

The Netcom case was one in which the copyrighted works of the founder of a religious sect for which the plaintiffs held copyrights were uploaded without permission by defendant Erlich, who was a former minister who was critical of such material, onto the BBS operated by defendant Klemesrud. Through the intermediation of the connection service provided by defendant Netcom, a provider, the material was connected to the Usenet.

The federal district court (in *Religious Technology Center v. Netcom On-Line Communication Services Inc.*, 51 BNA PTCJ 115 (N.D. Cal. 1995)) ruled as follows in 1995 as to the liability of Netcom.

First, as to liability for direct infringement, since Netcom itself was not actively copying the material and was only temporarily involved in the process of transmitting the copyrighted work onto the Internet, its actions did not constitute "copying". Further, unlike in a case such as *Playboy v. Frena* in which the information was stored in a file archive for a long time, this information was kept for no more than a short time. Therefore, Netcom did not create or control the contents of the information, and this kind of activity as a "conduit" did not amount to "public distribution" or "public exhibition".

Next, the court ruled that liability for vicarious infringement could not be found because Netcom did not directly receive economic profit from the activities. However, with respect to liability for contributory infringement, as to the requisite of knowledge of the infringement, after Netcom received notice from the plaintiff, it knew or should have known of the infringing acts. And as to the point of furtherance of the infringing act, since the acts of preserving the uploaded information and disseminating it throughout the world can be found to constitute substantial participation, there should be an inquiry as to the facts related to liability for contributory infringement, the court said.

2.3.4 The 1998 Digital Millennium Copyright Act (DMCA)

As a result of the DMCA enacted in 1998, Article 512, entitled "Limitation of Liability as to Online Data" was added to the U.S. Copyright Act, and provisions were promulgated as to the liability of "service providers". As the result of the "safe harbor provisions" provided thereby, a system was established under which an ISP would obtain a limitation on its liability if it fulfilled certain specified obligations.

Pursuant to Section (g) (1) of Article 512, regardless of whether or not the material or act is ultimately judged to be pertinent to a copyright infringement, the service provider will not be liable to any person whatsoever with respect to a claim based on the service provider's good faith disabling of access to or removal of materials or activity that is claimed to be infringing, or based on facts or circumstances from which infringing activity is apparent. As an exception, however, if a service provider has put material into a system or network it controls or operates based on directions from a subscriber or member, the deletion of material or exclusion from access will from the first be exempt from liability only if the service provider does so in conformity to certain specific rules (Article 512 Section (g) (2)).

In connection with these specific rules, the same Article (Section (c) (2)) establishes a system under which the service provider must first of all pick a designated agent and register with the U.S. Copyright Bureau certain items about the agent, such as name, address, telephone number, e-mail address and so forth, so that it will be possible for the service provider to receive notices of allegations of copyright infringement from copyright holders. This is, so to speak, like a complaint window.

Next, when the service provider has received notice of copyright infringement, addressed to the designated agent, that satisfies certain specified requisites (pursuant to Article 512 Section (c) (3)) from the person asserting that a copyright has been infringed, after deleting the material and blocking access the service provider must take reasonable steps to promptly notify the subscribers or members as to those facts (pursuant to Section (g) (2) (A)).

If the member who has been denied access or the like has an objection, under Section (g) (3) it can send a rebuttal notice to the designated agent of the service provider. Pursuant to Section (g) (2) (B), the service provider, upon receipt of that notice, sends a copy of the rebuttal notice to the person who sent notice of the copyright infringement, together with a notice that the deleted materials or the like will be restored after ten business days.

In such a case, the person who sent notice of the copyright infringement can look into whether or not it will seek an injunction in court, and if it decides to file suit it will so notify the designated agent of the service provider (Section (g) (2) (C)).

It will suffice for a service provider who has received this notice to continue the status of maintaining the deletion or the like, and to ultimately follow the court's decision. Conversely, if it does not receive notice that a legal action has been filed, pursuant to Section (g) (2) (C) the service provider can restore the deleted material or the like from the tenth through the fourteenth business day after receipt of the rebuttal notice; and in such case the matter ends without any liability for the deletion or the like.

The detailed procedure in these rules is called "Notice and Takedown", and if the procedure is observed the service provider is placed in a safe position with no questions about his liability; thus this is called a "safe harbor".

2.4 Summary

With respect to defamation of character, since the Zeran decision concerning Article 230 of the CDA was handed down from the viewpoint that the legislative purpose

of that Article was to prevent a restrictive effect on freedom of expression and to promote self-regulation measures by ISPs, its effect is to extend to ISPs an exemption from liability under that Article until they have knowledge of the details of the defamation. At the same time, this result has been criticized as overly neglecting the protection of victims.

In comparison with this, the Notice and Takedown provisions established by the DMCA with respect to copyright infringement are extremely interesting in that they have freed ISPs from liability for damages if they take steps in accordance with specified rules after coming to know of the fact of an infringement, and have removed the danger of liability to the user as well even if the ISP deleted or suspends access to infringing contents, while at the same time the ISPs can to some extent be counted on to fill the role of removing content that infringes a copyright.

On the other hand, however, logically some doubts remain as to the fact that the requisites and systems for exemption from liability differ in the CDA and in the DMCA. Since for the ISP the unlawful or damaging contents are the same whether the case is one of defamation of character or copyright infringement, as a legal theory it should be possible to establish unified requisites for exemption from liability. This point should be closely examined when the subject matter is legislated in Japan.

The “Interim Report - The Proper International Copyright Policy for Coping with Advancements in Information Technology (IT) and in Electronic Commercial Transactions” (July 2000) by the International Subcommittee of the Copyright Deliberative Commission of the Agency for Cultural Affairs has pointed out that, in view of the fact that the issue of the legal liability of service providers is not restricted only to the field of copyright but is a matter that crosses many fields, it is necessary to advance a variety of inquiries, taking into consideration discussions in the field of communications and arguments about how to deal with defamation of character and the like, and these inquiries should be carried out in close collaboration with other ministries and agencies.” Further, the December 2000 Report of the “Study Group for Appropriate Security for Distribution of Information on the Internet” of the Ministry of Public Management, Home Affairs, Posts and Telecommunications (formerly the Ministry of Posts and Telecommunications) has similarly stated that in connection with the civil liability of ISPs with respect to unlawful information, since there are no reasonable grounds for distinguishing between the treatment of libelous information and information that infringes an intellectual property right, all unlawful information should be the subject matter of the inquiry.

3. Issues concerning the civil liability of providers in Japan

3.1 Introduction

In Japan there still is no judicial precedent in a copyright infringement case concerning the civil liability of operators of networks, such as ISPs. However, a few precedents involving defamation of character cases have been published.

In connection with the theory of liability for damages under Japanese law, no differences have been promulgated in the legal system between copyright infringement and defamation of character. Moreover, both of them are similar on the point that they are positioned with absolute authority. Therefore, when examining the civil liability of ISPs

under Japanese law, it is important to reference cases regarding defamation when looking at the question of copyright infringement.

3.2 The NiftyServe Modern Thought Forum case

The first judgment handed down in Japan concerning the civil liability of a network operator was in the first-instance decision in the NiftyServe Modern Thought Forum case (May 26, 1998 decision of the Tokyo District Court, Hanji No. 1610 page 22).

In that case, a dispute among members of an electronic meeting room called the “Modern Thought Forum” operated by Nifty Serve, Japan’s largest personal computer communications company (now called “At Nifty”), led to a civil action. With the contents of the speech (input data) constituting a defamation of the character of another member (the plaintiff) not only was a claim made that the “speaker” should be made to compensate for damages and have to publish an apology but also Nifty and the systems operator who operated and controlled the forum were subject to similar claims based on the alleged neglect of their duty to delete the aforesaid “speech”.

The aforementioned decision in the first trial found that the issuer of the statement was partially liable for damages based in tort (unlawful act). Furthermore, the court ruled that, with respect to the systems operator, “In the case where it is recognized that a systems operator came to concretely know that speech that defamed the character of another person was input, it has a positive duty to take necessary steps so that such person’s reputation is not unduly injured”, and that since in this case such duty had been partially neglected, the systems operator was liable based on its unlawful act. In addition, as the result of finding that Nifty, who employed the systems operator, had the liability of an employer (Civil Code Article 715), the court ruled that both the systems operator and Nifty Serve were partially liable for damages.

The decision on appeal by the Tokyo High Court on September 5, 2001 (not yet published) found that the speaker himself was in part liable for damages, as parts of the speech that were defamatory and insulting constituted an unlawful act but, on the other hand, it dismissed the claims against the systems operator and Nifty.

That is to say, with respect to the liability of the systems operator, the court ruled that despite the allegation that “in certain specific cases there were no effective relief measures in the forum for protecting oneself and even if a policy was put into place based on directions or the like from members or others, they were not successful at all”, the defendant in this case did not exceed its exercise of authority beyond the permitted limit through its delay, and no grounds were found for concluding that there were improper methods of operation, so that there was no breach of a duty to delete. Since the systems operator had no such duty, in turn, Nifty did not bear responsibility as an employer.

3.3 The Nifty Serve Book and Magazine Forum case

Only a few days before the aforementioned appellate decision, a civil judgment was handed down in a defamation of character case arising from a dispute among members in Nifty’s electronic meeting room called the “Book and Magazine Forum” (Tokyo District Court decision of August 27, 2001; not yet published).

This case was one in which the plaintiff, a Nifty member, made a claim for damages, asserting that notwithstanding the fact that another member, using the “handle” “Shinna”, defamed and insulted him in statements in said electronic meeting room that constituted unlawful acts, Nifty did not take appropriate steps, and despite having no reasonable grounds therefor, it hid from the plaintiff contractual information (name and address) about Shinna, thus obstructing the restoration of the plaintiff’s right to his good name. Thus the case was filed seeking disclosure of information about “Shinna’s” name and address, based on the right to seek an injunction pursuant to the plaintiff’s personal rights and the right to seek removal of a nuisance, grounded in tort (unlawful act).

The Tokyo District Court adjudicated, first of all, that when deciding on whether or not an expression of speech has injured the reputation or sense of honor of a person, if the special characteristics of acts of expression in personal computer communications are examined, “along with a concrete scrutiny of the content of the speech, the particulars of said speech, the context of the sequence, and the counter-argument of the defendant must also all be taken into consideration”, and that using the ordinary reader who participates in personal computer communications as a standard, the speech should be examined as to whether or not it would threaten to cause a lowering of a person’s social standing, and whether or not as an opposing argument its unlawfulness is eliminated.” The result of the examination of the aforesaid speech by “Shinna” was that the court denied the formation of a tort (unlawful act). Next, the court decided that, “Premised on the fact that Shinna did not commit an unlawful act, there is no reason to even adjudicate on any points whatsoever as to the plaintiff’s claims against the defendant”, and it dismissed all of the plaintiff’s claims. Therefore, this precedent did not result in a court decision as to the liability of a personal computer communications operator.

3.4 The Toritsu University case

A case similar to the above civil disputes arose not only concerning personal computer communications but also related to the Internet. That was the Toritsu University case.

In that case, one organizer (the defendant) of a coordinating group at Toritsu University placed on the university’s site a web page that libeled another organizer (the plaintiff), who sought damages for defamation of character against the one who built the web page as well as the founder of the university, the City of Tokyo (as a joint defendant).

The judgment (Tokyo District Court decision of September 24, 1999 Hanji No. 1707 page 129) found the defendant who posted the message liable for damages, but at the same time denied the liability of the City of Tokyo.

Namely, the court reasoned that, “Whether or not the manager’s duty to prevent the occurrence of injury arises depends on the nature of the case; logically, it is a matter that should be investigated on an individual basis according to what type of case it is.” The court also reasoned that, even in the case where the manager of a network came to have knowledge of the fact that a defamatory statement had actually been made, it would only be in an extremely exceptional case where it would be clear as to whether the defendant had a duty to prevent the expression in question, and that would depend on factors such as its relationship to the defamatory statement, whether the nature of the harmful act was

extremely vicious and whether or not the degree of injury was serious. In this case, the court ruled, it could not be said that it was clear at a glance that the statement in question constituted a defamation of character, and there were questions as to whether the harmful act was vicious and whether the damage was very serious.

3.4.2 The Channel 2 case

Further, in a case where libelous data about the Nihon Life Insurance Company was written on a BBS on the Internet called “Channel 2”, the Tokyo District Court issued a decision of provisional disposition, ordering the manager of Channel 2 to delete the input information (Tokyo District Court decision of August 28, 2001; not yet published). Since the details of the decision have not yet been made public they are not clear.

3.6 Analysis of court precedents in Japan

3.6.1 Basis for the duty to act

Among the court cases presented above, in the four other than the Book and Magazine Forum case the courts found that there were circumstances in which network managers would have a positive duty to delete or otherwise deal with data. The contents of the Channel 2 decision are not known but in the other three cases the basis for the positive duty was found to be logic or reasonableness.

Generally the bases for a positive duty are, in addition to logic, such things as an antecedent act, laws and regulations, or a contract.

It would be difficult to find that a network operator has a duty to act based on an antecedent act, and at present there are no laws or regulations to serve as a basis either. Furthermore, since it is usual in Internet cases that no contractual relationship exists between the victim and the network operator, it is difficult as well to establish a contractual relationship as the basis. Accordingly, the only thing left to serve as the basis for a duty to act is logic or reason. In that sense, the aforementioned three precedents can assent to that.

With respect to the liability of a network manager in the case of a copyright infringement as well, since there is no reason to distinguish it from the case of a defamation of character, the basis should be found in logic as well.

3.6.2 Scope of formation of duty to act

In the aforementioned three precedents various standards were exhibited concerning the scope of the formation of the duty to act, but a minimum condition is the fact of knowledge of the existence of the problematical information. In other words, this issues shares contradictory points in common with a prior duty to inspect.

First, with the lower court’s decision in the Modern Thought Forum case, a comparatively simple standard was shown: “it was a case in which it was found that it was concretely known that an expression that had defamed another person had been published.”

Thereupon, when the make-up of “concrete knowledge” is analyzed, it can be further divided into two factors: (1) the fact of the relevant input or publication (perception

of the subject matter of the assessment) and (2) the fact that this publication defamed the character of another person (assessment of the subject matter).

It is not entirely clear from the decision in the court of first instance as to whether or not only knowledge of the aforementioned factor (1), or if factor (2) as well, is required. However, if it were the case that simply knowledge of factor (1) would give rise to the duty to act, as the Zeran decision serves to indicate, each time a notice expressing the possibility of a defamation of character is received the network operator would confront the possibility of being held liable. It would have to make immediate judgments with respect to the legal risk that might be borne pursuant to relevance to the defamation and to whether or not the relevant data was left “as is”. However, since there is a huge volume of posting on the Internet, an impossibly heavy burden would be imposed on the network operator. Moreover, as indicated by the Toritsu University case, “there are many problems with making the manager evaluate whether or not the statement in question is defamatory.” Therefore, it seems that, as the Zeran case indicates, if the result is apt to cause the network operator to rush to delete material, that will likely cause an atrophy of the freedom of expression and, at the same time, would also have the effect of deterring the manager from taking independent steps to delete objectionable material.

In the Toritsu University case, in addition to the aforementioned issues, there was the question of whether the parties having an interest relationship to the defamatory act are basically the victim and the tortfeasor only. Reasoning that there is more than a little fear that benefits to the average person, aside from that of the relevant parties, would be injured, the court ruled that in principle it is not proper that the network operator, who is neither the victim nor the perpetrator, should be made to legally bear a duty to prevent the occurrence of injury to the victim from an act of defamation of character.

Viewing the matter from this standpoint, in addition to limiting the scope of the formation of the duty to act, the court held that, “even in the case where the network manager had knowledge of the fact of the actual occurrence of the transmission of a defamatory statement, making the manager bear a duty to prevent the said transmission by reason of a relationship to the victim should be limited to extremely exceptional cases, when it would be clear at a glance with respect to the defamatory statement that the attitude of the perpetrator was very vicious and that the degree of injury would be serious.”

Accordingly, the scope for formation of a duty to act is limited due to making both said factors (1) and (2) requisites. Further, the Toritsu University decision stated that it is necessary to note, as to the point of “being clear at a glance”, that the nature of factor (2) is an issue to be legally adjudicated, and that the question of whether or not the network manager had actual knowledge is not an issue of subjective knowledge but, rather, one of whether or not it was knowledge from objectively obvious facts.

At the same time, the appellate decision in the Modern Thought Forum case also added to the limitation on the scope for the formation of the duty to act. Namely, the court held that based on the nature of that forum, it would be irrational under the conditions of discussion in a democratic society to require the systems operator to examine the contents of members’ expressed speech, even after the fact. And by reason of the fact that an issue about problematic speech should be primarily solved by civil or criminal legal actions between the parties, the court reasoned that the forum did not provide any effective relief measures for protecting oneself and stated that “in cases where even if the defendant

devised measures based on pointers from the members or the like, they would be fruitless, the defendant has a logical duty to delete the information.”

Here, differing from the limitation technique as found in the Toritsu University decision, a technique of limitation corresponding to the individualistic characteristics of the forum was employed. These approaches on the one hand have the advantage of reflecting the individual concrete characteristics but this also makes it difficult to establish a universal and definite standard, thus giving rise to the dilemma that the threat will remain that the ISP's possibility of foreseeing the situation will be harmed.

In the case where the network operator has neglected the duty to act, liability is owed to the victim. On the other hand, however, in a case where it should not act, if it takes its own measures such as deleting material without the permission of the speaker, that would result in a breach of the contract between the ISP and the speaker, and the possibility would remain that the speaker would seek to hold the network operator liable. Therefore, it is to be hoped that legal measures will be devised that clearly define the scope of liability.

3.7 Issues surrounding anonymity and disclosure of information about the speaker

A case dealing with an ISP's liability primarily concerns a matter that should be resolved between the victim and the perpetrator. Accordingly, in the case where the victim demands that the perpetrator delete information but that is not done, the matter should be settled by a civil law action (or by provisional disposition) with the perpetrator as defendant. To file a civil action, however, it is necessary to specify the address and name of the sender.

When it is not possible to specify these items, there are many cases when no method exists other than to request the information from the ISP who has a contractual relationship with such sender.

However, as a telecommunications company, an ISP has a duty to protect the secrecy of communications pursuant to Article 4 of the Telecommunications Industry Act (an action in violation thereof is subject to the penal regulations of Article 104 of the Act), and the subject matter of that duty is understood to include information about the sender. As a result, even if a victim demands of an ISP that it disclose information (sender information) about the perpetrator (sender), unlike in the case of a search warrant in a criminal law case, the ISP cannot comply with the demand to disclose. In that sense the “anonymity of the Net” is protected. Accordingly, as a factual matter there will be no way to receive relief by means of the filing of civil proceedings making the sender the direct other party to the suit. So, as a result, in the abovementioned Book and Magazine Forum case Nifty was sued in a demand for disclosure of information about the sender.

That being said, even if the victim demands that the ISP itself delete the information by its own hand, as stated above if an ISP itself deletes information without the permission of the sender, the possibility remains that the sender might seek to hold the ISP liable for direct breach of contract. So it is not an easy matter for the ISP to make the deletion in compliance with the victim's request.

As a result of this dilemma, the trend is growing for victims to plan to resolve the dispute by taking advantage of the power of a compulsory search by filing a criminal complaint. Consequently, disputes are escalating. Particularly in the case of copyright disputes, this trend is strong, since there are many times when the amount of damages per

case is small or when the perpetrator is an individual and has meager resources.

In order to resolve the foregoing issues, as a matter of legislative theory it will be necessary to devise certain methods for specific cases in which it will be recognized that information about the sender can be disclosed.

3.8 Bill Related to Limitation on Liability for Damages of Specific Telecommunications Service Providers, and Disclosure of Sender Information

3.8.1 Introduction

At the time of the writing of this paper, mid-October, 2001, there is a proposal to soon introduce in the Diet of Japan a “Bill Related to Limitation on Liability for Damages of Specific Telecommunications Service Providers, and Disclosure of Sender Information”. It should be kept in mind that it is possible that ultimately the actual law that will be enacted may differ in its contents from the description herein.

The bill is composed of four articles plus supplementary provisions, and provides (in Article 1) for the two points of “limitation on liability for damages” for specific telecommunications service providers (Article 3) and “requests, etc. for disclosure of information about senders” (Article 4). Both these provisions have as their subject matter civil law cases of infringements of rights. Accordingly, information that is merely damaging is not the subject matter of the bill; neither is information that may be unlawful but does not infringe rights. At the same time, to the extent that there is an infringement of rights, the bill treats in common all varieties of rights including without limitation defamation of character and copyright infringement cases. Note that Article 2 is the provision that sets out definitions.

3.8.2 Outline of limitation of liability for damages

Article 3 has as its subject matter civil law liability for damages related to unlawful information, and specifies the cases that can receive an exemption from liability. The reason that damaging information that is not unlawful is not included in the subject matter is based on the fact that even if the ISP or the like has not devised measures to prevent transmission it is not charged with legal liability stemming from the relationship with receivers of the information. The reason that criminal law liability is not covered is based on the fact that it would be difficult to hypothesize that an ISP or the like would be all of a sudden charged with criminal liability merely for having knowledge of the publication of unlawful information. In contrast, there is the possibility that ISPs and so on can be charged with civil law liability in connection with unlawful information, but for the reason that that there are no reasonable grounds for distinguishing among the rights that may be infringed by the particular infringement, whether defamation, or intellectual property rights or other, the provision is applied in common to all infringements of rights.

By the way, the scope of the duty to act that should be borne by the ISP or the like by reason of its relationship to the person whose rights have been infringed (the so-called victim) is not clear-cut. In addition, in the case where measures were devised for the prevention of the transmission but the upshot was that rights were not violated, there is also

the possibility of being charged with liability by the sender. In order to stimulate the institution of prompt and appropriate measures on the part of ISPs and others, it is necessary to clearly define their liability. One way to do so would be to provide for their duties in the statute. But the judgment of whether or not there was an infringement of rights must ultimately be carried out by the court. However, when it is taken into consideration that since under the present circumstances there are not many legal precedents, that makes it difficult to come up with provisions in the statute that would delineate the duties. Rather than proceeding in that way the method that was adopted was to stipulate “safe harbor” provisions that set forth the circumstances in which the ISP or the like would receive exemption from liability. Therefore, it is important to note that even a case that does not receive exemption under Article 3 should not immediately be deemed to be one in which liability attaches.

In this Article 3, Section 1 treats the liability for damages of ISPs and the like in a case where information that infringes rights has been sent, in light of the ISP’s relationship with the person whose rights have been infringed (the so-called victim). And Section 2 has provisions related to the case of the exemption from liability received by various specific telecommunications service providers, in light of the relationship between ISPs and senders of information such as ISP members.

3.8.3 Limitation on liability for damages -- exemption from liability in the relationship with the person whose rights have been infringed

First of all, in Section 1 of Article 3 it is provided that in principle ISPs are not liable by reason of their relationship to the person whose right was infringed, with respect to damages arising from the sending of information that infringes a right.

In contrast, pursuant to item 1 of Section 1, when a designated telecommunications service provider has come to know that the distribution of the relevant information is infringing the rights of another person or, pursuant to item 2 of Section 1, when there are sufficient grounds to find that it could have known that rights were infringed by the distribution of such information, that service provider will not receive the exemption from liability under Section 1.

As mentioned above, Japanese court precedents all have in common the point that a minimum requisite for liability of the ISP in its relationship with the person whose right was infringed is that the ISP knew of the distribution of the relevant information. Therefore, if the ISP did not know of such, it seems proper that this Section exempts it from liability.

Next, even in the case where the ISP knew of the distribution of the relevant information, there are more than a few cases where it is difficult for the ISP or the like to make a judgment as to whether or not that information infringed a right. From this standpoint, Section 1 provides that cases where there are reasonable grounds for concluding that the ISP did not know of the pertinence of the information to the infringement of the right will also be exempted from liability.

Note that the text also clearly provides for an exemption from liability in other cases as well, such as when it would be technically impossible to construct measures to prevent transmission of the relevant information to unspecified persons, or where the

possibility for action is lacking, since it is natural that in such cases it would be unreasonable to impose a burden of liability.

3.8.4 Limitation on liability for damages, part 2 - - exemption from liability in the relationship with the sender of the information

Next, Section 2 of Article 3 of the bill provides that if certain specified requisites are satisfied, even if the specified telecommunications service provider has devised measures for the prevention of a transmission, it will be exempt from liability for damages that are incurred by the sender of the relevant information. In the case where, logically, the ISP or the like bears an active duty to put in place measures to prevent a transmission, since essentially the performance of that duty (the steps to prevent the transmission) are lawful acts, grounds are lacking for a finding that liability is owed to the speaker or sender. However, in addition to the scope for formation of the aforementioned duty to act being imprecise, since the possibility remains that if the devised measures for preventing transmission are applied to information that consequently is found not to infringe a right then the sender will charge the ISP with liability, this Section 2 promulgates provisions for dealing with such cases.

This Section 2 establishes a type of “Notice and Takedown” provision. It sets out as specific requisites the following: (1) where the ISP receives a request indicating specified matters (the relevant information, the rights that have been infringed and the reason for the infringement) from a person whose own rights have been infringed by the sending of information, asking that measures be devised for the prevention of the transmission of the information; (2) an inquiry is made as to whether or not the relevant sender or speaker agrees to the devising of measures to prevent the transmission; and (3) if after the lapse of seven days after the receipt of such inquiry by the sender of the information a notice from such sender that he does not agree with such preventive measures is not made, then to the extent necessary the ISP can devise measures to prevent the transmission, and in such a case it will not bear a liability toward the sender to compensate for damages. Unlike the case of the DMCA, however, there are no provisions for establishing a “clearinghouse” center exclusively for such notices.

Pursuant to this Section 2, even in case the exemption from liability is not expressly granted, if there are other cases that should be recognized as instances in which there should be no liability to the sender, they probably will be treated in the same way as cases under Section 1 of Article 3.

Note that pursuant to the text of this Section 2, exemption from liability is found only in the relationship with the sender. However, if the procedures in this Section are performed but the measures for the prevention of transmission are not immediately put in place, since the requirements for exemption from liability in Section 1 would not be applicable it cannot be said that theoretically there is no possibility that the ISP will be charged with liability to the person whose rights were infringed with respect to damages arising in the interim. Therefore, with respect to the performance of the procedures in this Section, even with respect to a relationship with the person whose rights were infringed, it can be thought that the interpretation should be that because the action of the ISP was a proper act it will not incur liability. From this way of thinking, when the legislation is

enacted, in order to sweep away doubts in interpretation after it goes into effect, there should be express provisions about this point. At the same time, in the case where it can be thought to be clear that an ISP member, on disc space borrowed from the ISP, has continued to execute the placement of a program setting up a denial of service attack against a specific site, an ISP who has received notice from the victimized site should be able to take steps immediately to prevent the transmission even without sending out the inquiry and so forth pursuant to this Section. Based on this way of thinking, the performance of the procedures in this Section should be immediately understood to be proper acts in the ISP's relationship with the person whose rights have been infringed.

In order to receive the exemption from liability under this Section, there is an express provision that it must be the case that the ISP or the like has a sufficiently proper reason to believe that another person's rights are being infringed by the distribution of the relevant information. In other words, in a case where there is no justifiable reason for belief, the possibility remains that the liability of the ISP or the like will be sought by the sender. This would serve to prevent the ISP from hastily devising unreasonable measures to prevent transmissions.

3.8.5 Requests, etc. for disclosure of information about senders

A victim or the like who plans to claim damages and who has an adequate reason for receiving the disclosure of information about the sender of information can request the disclosure of information about the sender from the ISP or the like. The ISP or the like who has received the request will, after hearing the opinion of the sender, disclose the information in cases where there is a clear infringement of a right. Since through such disclosure a resolution between the parties becomes possible, relief for victims is facilitated.

With this Article, even if the ISP or the like rejects disclosure, it will not be held liable barring bad faith or gross negligence. But even to that extent, since the ISP or the like must decide on its own liability, a judgment difficult even for a legal expert, this becomes a heavy burden to bear. On the other hand, if it were the case that refusal to disclose were readily permitted, the relief of the victim would not be put into effect and the disclosure system would be meaningless.

Moreover, the trend is that generally it is becoming easy for parties to impulsively initiate defamatory incidents on the Net. There also is anxiety that a situation will develop in which a person to whom information is disclosed will not use it for negotiations or in a court trial but, instead, for some misuse or for some disagreeably violent self-help measures. Provisions prohibiting such acts are also incorporated in the bill but as yet the bill lacks penalties for violation of the prohibitions, so some apprehension remains as to this issue.

If the above problems are thought about, decisions with respect to public disclosure of information should not wind up being entrusted to the ISP or like entity, but the pros and cons of public disclosure should be committed to judicial decision. In order to avoid such things as the misuse of a public disclosure or an excessive burden on the courts, should it not be possible to utilize a method of deciding to publicly disclose on condition that a court accepts the filing of the lawsuit? This undoubtedly calls for further study.