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## **Oscillating from Safe Harbor to Liability: China's IP Regulation and Omniscient Intermediaries**

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### **INTRODUCTION**

There are opposing and strengthening forces that influence IL regulation in the People's Republic of China (China). China's E-Commerce Law draft<sup>1</sup> raises the standard for knowledge before infringing information might be removed; while the many laws and regulations involved in censorship exclude the possibility of ignorance.<sup>2</sup> Moreover, the existent technological level of big data<sup>3</sup> and developments in artificial intelligence<sup>4</sup> have caught up with discussions about the desirability of safe harbors<sup>5</sup> and the degree of filtering requirements.<sup>6</sup> On the other hand, there is case law, recently codified in guidelines for Beijing courts,<sup>7</sup> which is reinforcing the duties of care.

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<sup>1</sup> 26 December 2016, the Standing Committee of the National People's Congress (NPC) issued the first draft of China's first E-commerce Law. The public consultation period ended 26 January 2017. No drastic changes from the first draft are expected. '立法规范市场秩序已迫在眉睫'('Legislation to regulate the market order is imminent'), NPC, 27 December 2016, available at: [http://www.npc.gov.cn/npc/lfzt/rlyw/node\\_31834.htm](http://www.npc.gov.cn/npc/lfzt/rlyw/node_31834.htm).

<sup>2</sup> The censorship regulations are partly overlapping and fragmented over the organizational layers of the internet. Examples include Article 57 Telecommunications Regulation and Article 15 Measures on the Administration of Internet Information Services. Subsequently, online service providers will receive secret lists of words that need to be immediately censored. To be able to abide with the comprehensive censorship requirements, online platforms have put human review systems in place. Qian Tao, The knowledge standard for the Internet Intermediary Liability in China (advance access 2011) 20(1) *INTERNATIONAL JOURNAL OF LAW AND INFORMATION TECHNOLOGY* 11.

<sup>3</sup> Tom Brennan, Alibaba Launches 'Big Data Anti-Counterfeiting Alliance', Alizila, 16 January 2017, available at: <http://www.alizila.com/alibaba-launches-big-data-anti-counterfeiting-alliance/>.

<sup>4</sup> Cade Metz, 'Google's AI Wins Fifth And Final Game Against Go Genius Lee Sedol', *Wired*, 15 March 2016, available at: <https://www.wired.com/2016/03/googles-ai-wins-fifth-final-game-go-genius-lee-sedol/>. See also, Sarah Zhang, 'China's Artificial-Intelligence Boom', 16 February 2016, available at: <https://www.theatlantic.com/technology/archive/2017/02/china-artificial-intelligence/516615/>.

<sup>5</sup> Danny Friedmann, Sinking the safe harbour with the legal certainty of strict liability in sight (2014) 9(2) *J. OF INTELL. PROP. L. & PRACT.*, 148-155.

<sup>6</sup> Online platforms use different kinds of digital fingerprinting systems to facilitate content creators to manage and enforce their copyrighted works; and provide systems to submit complaints of copyright and trademark infringements. AliProtect, available at: [https://legal.alibaba.com/index.htm?language\\_id=english](https://legal.alibaba.com/index.htm?language_id=english).

<sup>7</sup> Beijing High People's Court Guidelines on Trial of IP Cases involving Networks, 13 April 2016.

This article applies a holistic approach by analyzing the individual forces to see what their influence is on IL case law.

Since a growing part of copyrighted works and trademarked goods in China is consumed via network service providers,<sup>8</sup> the regulations on IL has become ever more relevant. July 2016, it was estimated that about 52 percent of the population in China (721 million people) had access to the internet.<sup>9</sup> Goods are traded between businesses and consumers, between consumers, and between businesses, at enormous online market platforms, such as those of the Alibaba Group.<sup>10</sup> To give an indication of the magnitude of the online sales in China: on 11 November 2016, “Singles’ Day”, the Alibaba Group sold 18 billion US dollar in one day.<sup>11</sup>

China took notice of the introduction of the Digital Millennium Copyright Act (DMCA)<sup>12</sup> in the U.S. and the E-Commerce Directive<sup>13</sup> in the EU, in 1998 and 1999 respectively. China’s IL regulation evolved from broad and granular to more specific and sophisticated. The regulation for IL concerning copyright infringement led the way, followed by case law in regard to trademark infringement, which was analogously applied. The big leap forward that refined and codified China’s experience with IL in case of copyright infringement, was the promulgation of the Regulations for the Protection of the Right of Communication through the Information Network in 2006 (Regulations 2006).<sup>14</sup> The Regulations 2006 clarifies which kind of network service providers are eligible for safe harbors, and makes clear when the immunity via the safe harbors are cancelled. In case of trademark law, China will, for the first time, get an E-Commerce Law in 2017.<sup>15</sup>

Copyright Law,<sup>16</sup> which touches upon the expressions of ideas, has always been politicized in China. With filter technology and monitor obligations, Chinese authorities have focused on unwelcome expressions that were deemed to endanger social harmony.<sup>17</sup> Trademark Law,<sup>18</sup> however, was considered apolitical and the filtering of counterfeit products more or less a private

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<sup>8</sup> Most Western intermediaries for user-generated content are blocked in China. Therefore, national champions have developed in China which, after first having imitated their Western counterparts, went on to emulate some of them, by combining different functionalities. Danny Friedmann, Chapter 25 Rise and demise of U.S. social media in China, A touchstone of WTO and BIT regulations (Sept. 2011), CHINA’S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW (Paolo Farah, Elina Cima ed., Routledge: London, 2016).

<sup>9</sup> Internet Live Stats; elaboration of data by International Telecommunication Union, World Bank, and United Nations Population Division.

<sup>10</sup> Taobao Marketplace is an online marketplace for consumers-to-consumers; Taobao Mall (TMall) for business-to-business, and Alibaba for business-to-business. They are all part of the Alibaba Group in Hangzhou, Zhejiang.

<sup>11</sup> ‘Singles Day: Alibaba breaks record sales total’, BBC News, available at: <http://www.bbc.com/news/37946470>.

<sup>12</sup> 17 U.S.C. § 512, 112 STAT. 2860. PUB. L. 105–304—OCT. 28, 1998.

<sup>13</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16.

<sup>14</sup> Regulations for the Protection of the Right of Communication through the Information Network promulgated by decree of the State Council No. 468, adopted at the 135th Executive Meeting of the State Council on May 10, 2006 and went into effect on 1 July 2006.

<sup>15</sup> *Supra* note 1.

<sup>16</sup> Copyright Law (amended up to the Decision of 26 February 2010, by the Standing Committee of the National People’s Congress on Amending the Copyright Law).

<sup>17</sup> Danny Friedmann, Paradoxes, Google and China - How Censorship Can Harm and Intellectual Property Can Harness Innovation, GOOGLE AND THE LAW: IT AND THE LAW (Aurelio Lopez-Tarruella, ed., TMC Asser, 2012), 15.

<sup>18</sup> Trademark Law (as amended up to Decision of 30 August 2013, of the Standing Committee of National People’s Congress on Amendments to the Trademark Law).

affair.<sup>19</sup> A convergence between IL regulation for copyright and trademark infringement has taken place. The emergence of the comprehensive and extremely ambitious Social Credit system that rewards moral and punishes amoral conduct from a Chinese socialist perspective, the realm of Trademark Law also becomes political.<sup>20</sup> The success of the Social Credit system, and the ability to monitor online conduct, depends on real-name registrations. Although the Chinese authorities have tried real-name registrations for the last seven years, with less than success,<sup>21</sup> overcoming this challenge would have far-reaching consequences for identifying direct infringers. This re-direction of liability away from intermediaries will probably be coupled to an increased monitoring obligation for intermediaries and foreshadows the end of safe harbors.<sup>22</sup>

Although the doctrine of internet sovereignty rules supreme in China, the country is not operating in a vacuum. China acceded to the 1967 Stockholm Act of the Paris Convention in 1984,<sup>23</sup> and the 1971 Paris Act of the Berne Convention in 1992.<sup>24</sup> These World Intellectual Property Organization (WIPO) conventions were negotiated before the digital revolution, and remain silent about the internet, the relationship between network service providers, rights holders and internet users. In 2001, the digital revolution in full swing, China became a member to the World Trade Organization (WTO).<sup>25</sup> It thereby accepted the 1994 Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>26</sup> which largely incorporated the Paris and Berne Conventions, without specifically taking the internet into account. However, in 1996, WIPO filled the gap by introducing the WIPO Internet Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). Article 8 WIPO Copyright Treaty states that the right of communication to the public should be protected. The Diplomatic Conference on Certain Copyright and Neighboring Rights concluded that this right should be limited, if “the mere

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<sup>19</sup> Although counterfeit products, threatening to health and safety, can seriously cause social upheaval. An example: ‘China ‘fake milk’ scandal deepens’, 22 April 2004, BBC News, available at: <http://news.bbc.co.uk/2/hi/asia-pacific/3648583.stm>.

<sup>20</sup> State Council Guiding Opinions concerning Establishing and Perfecting Incentives for Promise-keeping and Joint Punishment Systems for Trust-Breaking, and Accelerating the Construction of Social Sincerity, State Law No. (2016)33, 30 May 2016, original and translation at China Copyright and Media, available at: <https://chinacopyrightandmedia.wordpress.com/2016/05/30/state-council-guiding-opinions-concerning-establishing-and-perfecting-incentives-for-promise-keeping-and-joint-punishment-systems-for-trust-breaking-and-accelerating-the-construction-of-social-sincer/>. Catherine Lai, ‘China announces details of social credit system plan, deemed ‘Orwellian’ by critics’, Hong Kong Free Press, 3 January 2016, available at: [https://www.hongkongfp.com/2017/01/03/test-zone-proposed-for-chinas-orwellian-social-credit-system/?utm\\_content=bufferc23d5&utm\\_medium=social&utm\\_source=linkedin.com&utm\\_campaign=buffer](https://www.hongkongfp.com/2017/01/03/test-zone-proposed-for-chinas-orwellian-social-credit-system/?utm_content=bufferc23d5&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer).

<sup>21</sup> Catherine Shu, ‘China attempts to reinforce real-name registration for Internet users’, TechCrunch, 1 June 2016, available at: <https://techcrunch.com/2016/06/01/china-attempts-to-reinforce-real-name-registration-for-internet-users/>.

<sup>22</sup> Friedmann, *supra* note 5.

<sup>23</sup> Paris Convention for the Protection of Industrial Property of 1883, last amended in 1979.

<sup>24</sup> Berne Convention for the Protection of Literary and Artistic Works of 1886, last amended in 1979.

<sup>25</sup> Thirty days after notifying its acceptance to the Agreement on the WTO, China became a member to the WTO on 11 December 2001.

<sup>26</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), forms an integral part of the Agreement on the WTO.

provision of physical facilities for enabling or making a communication does not in itself amount to communication”,<sup>27</sup> within the meaning of the WIPO Copyright Treaty.

§ 512 DMCA in the U.S. in 1998,<sup>28</sup> and Article 14 E-Commerce Directive<sup>29</sup> in the EU which implemented the WIPO Internet Treaties in 1999, have heavily influenced China’s policy towards IL in case of copyright and trademark infringement. In 2006, the State Council of China promulgated the Regulations 2006,<sup>30</sup> which prepared China to become a member in 2007 of the WIPO Internet Treaties.

Although IL regulation in case of trademark law followed IL in case of copyright law, Section 2.1 will deal with it in a reversed chronological order, since IL regulation in case of trademark law provides an indicator where the converged IL regulation will lead to. Section 2.2 deals with legislation and case law of IL in case of copyright infringement; Section 3 provides the conclusion. Due to the limitations in length this article will not deal with the relevant obligations for intermediaries to disclose the identity of the direct infringers, and the consequences, withdrawal of their immunity, in the case that they do not.

## Section 2.1 IL in case of Trademark Infringement

First, this Section deals with the E-Commerce Law 2017.<sup>31</sup> Then it will cover the historical development of IL in case of trademark infringement following in the footsteps of IL regulation in case of copyright infringement.

Counterfeiters in China make extensive use of online market platforms, infringing intellectual property rights,<sup>32</sup> and endangering the safety and health of the public with its supply of fake and substandard goods. By sending one or two packages at the same time, counterfeiters remain under the criminal thresholds,<sup>33</sup> which makes the enforcement of online trademark infringement particularly challenging.

The Alibaba Group which includes Taobao, TMall and Alibaba, was identified in the USTR’s Special 301 Reports of 2008, 2009, 2010 and 2011 for facilitating the sale of counterfeit goods to consumers and businesses. Assurances and measures taken against counterfeit products were the reason that Taobao was removed from the Lists of Notorious Markets in 2012, 2013, 2014 and 2015. However, in 2016 Taobao returned to this list. Not only the USTR complained that Taobao is taking insufficient measures to enforce against counterfeit products, but also the State Administration for Industry and Commerce (SAIC), China’s authority responsible for

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<sup>27</sup> Agreed Statements Concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on 20 December 1996, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, 2 to 20 December 1996, WIPO Doc. No. CRNR/DC/96.

<sup>28</sup> *Supra* note 12.

<sup>29</sup> *Supra* note 13.

<sup>30</sup> *Supra* note 14.

<sup>31</sup> *Supra* note 1.

<sup>32</sup> IL in case of patent infringement is another important issue. See for example *Zaigle v. TMall*, where the Zhejiang High People’s Court held TMall jointly liable for patent infringement in 2015. ‘SBZL Awarded a Top-Ten China IP Case of 2015’, SBZL Intellectual Property, undated, available at: <http://www.sbzl.com/index.php?a=show&catid=10&id=166>.

<sup>33</sup> The threshold for criminal liability is RMB 50,000, pursuant to Article 140 Criminal Law. Adopted by the Second Session of the Fifth National People’s Congress on 1 July 1979 and amended by the Fifth Session of the Eighth National People’s Congress on 14 March 1997.

trademark registration and administration nationwide, stated complaints in a 2015 White Paper.<sup>34</sup> Subsequently, in 2016, the head of the SAIC, Zhang Mao, did so again in a TV interview saying that the executive chairman of the Alibaba Group, Jack Ma, is not outside the law and should take the primary responsibility in regard to counterfeit products on the online market platforms.<sup>35</sup> On 13 April 2016, Alibaba became the first online market platform to become member of the International Anti-Counterfeiting Coalition (IACC). However, a month later the IACC suspended Alibaba's membership.<sup>36</sup> Alibaba vowed "to keep fighting fakes",<sup>37</sup> but a month later Ma was harshly criticized after he asserted that the fakes offered online are often of better quality and better priced than the genuine products.<sup>38</sup>

During the "Two Sessions" of the National People's Congress and China People's Political Consultative Conference in March 2017, Ma urged legislators in an open letter to increase punishments for counterfeiters.<sup>39</sup> Besides deflecting attention away from online market platforms facilitating counterfeiting to direct infringers,<sup>40</sup> online trade platforms were also successful in lobbying to increase the knowledge standard in China's first E-Commerce Law draft. In this E-Commerce Law draft,<sup>41</sup> the emphasis seems to be more on facilitating e-commerce than on regulating it. The draft can be perceived as a way to try to "dilute duties of care already applicable to online trade platforms".<sup>42</sup> Any obligations to take preventive measures have been removed. The draft also leaves uncertainty about the role of administrative enforcement authorities such as the SAIC.<sup>43</sup>

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<sup>34</sup> On 28 January 2015 the White Paper was issued and on 30 January 2015, it was retracted. Megha Rajagopalan, John Ruwitch and Edwin Chan, 'Alibaba meets with China regulator, controversial report retracted', Reuters, 30 January 2015, available at: <http://www.reuters.com/article/us-alibaba-group-saic-idUSKBNOL31S020150130>.

<sup>35</sup> Scott Cendrowski, 'Chinese Regulator Again Calls Out Alibaba for Counterfeit Goods', Fortune, 11 August 2016, available at: <http://fortune.com/2016/08/11/alibaba-counterfeit-goods-regulator/>.

<sup>36</sup> Several brands had complained of its non-compliance; another reason was that there was a conflict of interest by the IACC president who did not disclose he had stocks in the Alibaba Group. Rishiki Sadam, 'Anti-Counterfeiting group suspends Alibaba's membership', Reuters, 13 May 2016, available at: <http://www.reuters.com/article/us-alibaba-iacc-idUSKCN0Y42LS>.

<sup>37</sup> Haze Fan, 'Alibaba vows to keep fighting fakes despite IACC snub', CNBC, 16 May 2016, available at: <http://www.cnbc.com/2016/05/16/alibaba-vows-to-keep-fighting-fakes-despite-iacc-membership-suspension.html>.

<sup>38</sup> David Ramli and Lulu Yilun Chen, 'Alibaba's Jack Ma: Better-Than-Ever Fakes Worsen Piracy War', Bloomberg Technology, 14 June 2016, available at: <https://www.bloomberg.com/news/articles/2016-06-14/alibaba-s-ma-fake-goods-today-are-better-than-the-real-thing>.

<sup>39</sup> Meng Jing, 'Alibaba's Jack Ma calls for laws on counterfeiting to be 'as tough as those on drunk driving'', SCMP, 7 March 2017, available at: <http://www.scmp.com/business/china-business/article/2076768/alibabas-jack-ma-calls-laws-counterfeiting-be-tough-those>.

<sup>40</sup> However, Article 54 E-Commerce Law draft protects vendors against abuse of IP rights, via a system of counter-notifications and imposing liability to the rights holder if he causes losses to the vendor who was not selling counterfeit goods. *Supra* note 1.

<sup>41</sup> Mark Cohen, 'E-Commerce Law Up for Public Comment', China IPR, 30 December 2016, available at: <https://chinaipr.com/2016/12/30/e-commerce-law-up-for-public-comment/>.

<sup>42</sup> SIPS Asia, 'China: Trade Marks, Draft Ecommerce Law issue', Managing Intellectual Property Magazine, International Briefings, March 2017.

<sup>43</sup> Do they have the legal authority *ex officio* and/or *inter partes*, and can they request evidence held by platforms and other parties, such as payment services and transport companies. 'Draft Ecommerce Law Issued for Public Comment', SIPS Asia, 28 February 2017, available at: <http://sips.asia/knowledge/legislation-and-policy/draft-ecommerce-law-issued/>.

Article 88 E-Commerce Law draft: “If a third-party platform for e-commerce violates the provisions of Article 53<sup>[44]</sup> and *clearly* knows or has actual knowledge that the operator of the platform does not take the necessary measures for infringement of intellectual property rights, the relevant departments of the people’s governments at various levels shall order it to make corrections within a prescribed time limit.”<sup>45</sup> By contrast, other Chinese laws adopt the lower standard of “knowledge”.<sup>46</sup> Judicial decisions also make reference to a standard of deemed knowledge (“knew or should have known”) that creates a duty for intermediaries to intervene against infringements. These proactive measures standard was already accepted in Article 27 of the Beijing Higher People’s Court Guidelines on Trial Cases Involving Intellectual Property Rights through the Network by judicial authorities in Beijing.<sup>47</sup> Although, formally this opinion guides only Beijing courts, it can be seen as the accumulation and codification of authoritative case law, and therefore has persuasive power. The guidelines work horizontally, and is relevant for IL in case of both trademark and copyright infringement. It provides eight factors that indicate when a platform service provider knows that a network vendor infringes intellectual property rights:<sup>48</sup>

- (1) If the alleged infringing information is located on the front page of the website, on the front page of a section or on other obvious visible locations;
- (2) If the platform service provider initiated the editing, selection, sorting, ranking, recommendation or modification of the alleged infringing information;
- (3) Notification by the right holder is sufficient to enable the platform service provider to know that the alleged infringing information or transaction is transmitted or implemented through its network service;
- (4) If the platform service provider did not take appropriate reasonable measures even though the same network vendors repeated the infringement;
- (5) If there exists information that the network vendor acknowledged that it infringed rights;
- (6) If the sale or offering of goods or services is at a price that is clearly unreasonable;
- (7) If the platform service provider directly obtains economic benefit from the spread or transaction of the accused infringing information;
- (8) If the platform service provider knows of the existence of alleged infringement from the infringing behavior on other trademark rights.

A ninth factor, that can be found in the case law, but not in the guidelines, although it is probably implied, is that network service providers have to develop and implement methods for notification-and-takedown.

Before the E-Commerce Law draft,<sup>49</sup> there was no particular nationwide regulation for IL in case of trademark infringement. In its absence, the horizontally working<sup>50</sup> General Principles of

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<sup>44</sup> Article 53 E-Commerce Law draft: “If the e-commerce operator infringes the IP rights within the platform, the online trade platform shall take the necessary measures such as deleting, shielding, breaking the link, terminating the transaction and service according to the law.” Whether the scope of the provision includes social media or search engines; domestic and international purchasers, is not known yet. *Ibid.*

<sup>45</sup> *Supra* note 1.

<sup>46</sup> Article 36 Tort Liability Law (*supra* note 52) or Article 52 Trademark Law (*supra* note 18).

<sup>47</sup> *Supra* note 7.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Supra* note 1.

<sup>50</sup> Just like the E-Commerce Directive, that works across all sorts of intellectual property rights. *Supra* note 12.

the Civil Law 1986<sup>51</sup> and the Tort Liability Law 2009<sup>52</sup> could be used to base an action against online trademark infringement:

Article 118 General Principles of the Civil Law 1986<sup>53</sup> states that intellectual property rights holders have the right to demand that infringement by plagiarism, alteration or imitation be stopped, that its ill effects be eliminated and that damages be compensated. This article together with Article 130 of the same law, which imposes joint liability to two or more persons, if they jointly infringe another person's rights and cause that person damage, provided for IL in case of trademark infringement.<sup>54</sup>

The legislation and case law regarding IL of online copyright infringement was applied analogously in case of online trademark infringement. This was especially the case with the notice-and-takedown and safe harbor provisions of Regulations 2006<sup>55</sup> and the Tort Liability Law 2009.<sup>56</sup>

Article 36(1) Tort Liability Law 2009,<sup>57</sup> imposes tort liability to a network user or network service provider who infringes upon the civil right or interest of another person through the network. Therefore, if the network service provider directly infringes a trademark, he falls within this provision. Article 36(2) Tort Liability Law 2009,<sup>58</sup> provides that the network service provider will be jointly and severally liable if he fails to take necessary measures in a timely manner such as deletion, blocking or disconnection after being notified. The case law below gives answers to what the courts consider as "necessary" and what they understand to be "timely". The Provisions on Relevant Issues Related to the Trial of Civil Cases Involving Disputes over Infringement of the Right of Dissemination through Information Networks of 2012, a judicial interpretation by the Supreme People's Court,<sup>59</sup> sets out a range of factors for determining liability for online service providers. Although these are intended to address online copyright infringements, judges of the Supreme People's Court have indicated that the principles therein may also be applied to online infringements of other IP rights, including counterfeiting, according to Simone.<sup>60</sup>

#### Establish internal procedures and enforce accordingly

In *Aktieselskabet AF v. eBay Shanghai* in 2006, the establishment of a procedure to notify the online market platform of trademark infringement by a vendor is sufficient, because, according to the judge, not all advertised goods can be checked.<sup>61</sup>

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<sup>51</sup> General Principles of the Civil Law, adopted at the Fourth Session of the Sixth National People's Congress on 12 April 1986 and promulgated by Order No. 37 of the President on 12 April 1986.

<sup>52</sup> Tort Liability Law, adopted at the 12th Meeting of the Standing Committee of the Eleventh National People's Congress on 26 December 2009, is hereby promulgated and shall go into effect as of 1 July 2010.

<sup>53</sup> *Supra* note 51.

<sup>54</sup> Du Ying, Secondary Liability for Trademark Infringement Online: Legislation and Judicial Decisions in China (2014) 37 COLUM. J. L. & ARTS 541.

<sup>55</sup> *Supra* note 14. In Section 2.2, the Regulations 2006 will be dealt more comprehensively.

<sup>56</sup> *Supra* note 52.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> On 17 December 2012 the Supreme People's Court promulgated the Provisions on Relevant Issues Related to the Trial of Civil Cases involving Disputes over Infringement of the Right of Dissemination through Information Networks.

<sup>60</sup> Joe Simone, 'Comments on the PRC Trademark Law Amendments' China IPR, 27 January 2013, available at: <https://chinaipr.com/2013/01/27/comments-on-the-prc-trademark-law-amendments/>.

<sup>61</sup> In 2006, in *Aktieselskabet AF v. eBay Shanghai*, the Shanghai First Intermediate People's Court decided that defendants did enough by establishing a reporting system to stop online intellectual property violations. The court argued that online market platforms cannot investigate every piece of merchandise sold, and even though defendants could have checked the products advertised online, which might be genuine, but fake products could

In 2010, E-land Fashion sued Taobao for contributory liability on the ground that it complained five times about Xu's offer for sale and sale on Taobao of goods bearing the E-LAND trademark, licensed to the plaintiff.<sup>62</sup> However, the court held that Taobao had fulfilled its reasonable duty of care as a network service provider.<sup>63</sup>

In 2011, E-Land Fashion sued Taobao again, this time with more success. The Shanghai First Intermediate People's Court held an online platform jointly liable with the counterfeiter for the first time in China.<sup>64</sup> The court decided that Taobao knew or should have known that its user was selling counterfeit goods, but, nevertheless had not adopted effective measures to end this illegal activity. The Shanghai Pudong New Area People's Court held that although Taobao might qualify for the immunity from liability, because it deleted the infringing links, it was aware of Du Guofa's acts of infringement after reviewing relevant complaints and notice-and-takedown requests from the plaintiff. Despite this knowledge, the defendant did not adhere to its own rules.<sup>65</sup>

#### Appropriate Reasonable Measures in Case of Repeat Infringement

In 2010, after seven complaints E-Land Fashion sued Du Guofa and Taobao for trademark infringement at the Shanghai Pudong New Area People's Court,<sup>66</sup> even though Taobao removed the infringing links, but did not take any further measures. The case was decided in favor of E-Fashion, because Taobao had knowledge of further infringement and intentionally continued to provide services to the infringer, thus becoming guilty of contributory infringement according to Article 50(2) Implementing Rules of the Trademark Law 2001.

Taobao appealed to the Shanghai First Intermediate People's Court: The court considered that E-Land Fashion and its licensee Yinian filed 131,261 notice-and-takedown requests (with relevant explanations and justifications) to Taobao about links on its online platform that offer counterfeit goods from September to November 2009. Taobao deleted 117,861 infringing links, and from February to April 2010, E-land Fashion filed another 153,277 complaints, which resulted in 124,742 deletions. The sheer number of complaints and deletions, after investigation by Taobao, demonstrates that Taobao was aware of the high frequency of infringements.<sup>67</sup>

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still be delivered offline. *Aktieselskabet AF v. eBay Network Info. Services (Shanghai) Co.* for Trademark Infringement (21 November 2001) 2005 No. 371 (Shanghai First Intermediate People's Court. (21 August 21 2006).

<sup>62</sup> *E-land Fashion (Shanghai) Trade Co. v. Taobao Network Co. & Xu* for Infringing Registered Trademark Rights, 2010 (Shanghai Huangpu District People's Court 10 September 2010).

<sup>63</sup> *Ibid.*

<sup>64</sup> *E-Land Fashion (Shanghai) Trade Co. v. Taobao Network Co. & Du Guofa* for Infringing Trademark Rights, 2011 No. 40 (Shanghai First Intermediate People's Court 25 April 2011), affirming 2010 No. 426 (Shanghai Pudong New Area People's Court 17 January 2011).

<sup>65</sup> "Rules of Taobao.com Governing the Management of User Behaviors (non-mall)" adopted by Taobao on 15 September 2009, if a Taobao user committed any act of infringement, Taobao could prevent the accused vendor from releasing the goods, withdraw the disputed goods, make public announcements about the penalty, deduct points from the accused vendor, freeze the accused account on Taobao.com, cancel the account concerned, etc.

<sup>66</sup> E-Land Fashion claimed compensation for its losses and a public apology in newspapers from defendants. *E-Land Fashion v. Taobao and Du Guofa*, Shanghai Pudong New Area People's Court, 19 July 2010. E-Land Fashion claimed compensation for its losses and a public apology in newspapers from defendants.

<sup>67</sup> *Ibid.* It certainly did not help Du Guofa's defence that he explicitly had stated on his Taobao vendor's site that some of his goods were high quality counterfeits. Moreover, Du Guofa did not once react with a counter-notification to Taobao's notifications that they would remove infringing links. In the eyes of the court, this was another indication that Du Guofa was an infringer.

### Immunity of IL only when there is non-interference

In 2012, in *Descente v. Today Beijing City Info. Tech.*, the Beijing Higher People's Court held that because the defendant was running a website for group purchasing it should not only apply reactive but also proactive measures.<sup>68</sup> In other words, depending on its involvement in services offered and the process used, his duty of care increases or decreases.

### Logical Inferences

In 2005, Taobao was sued by the Swiss watch brands Longines, Omega and Rado. The Swiss watch brands argued that Taobao should have known of counterfeits, because of the big price differences between the genuine and the watches on offer at their online platforms. The parties settled.<sup>69</sup>

In 2013, the Trademark Law was amended. Article 57(6) Trademark Law 2013 became: "Providing, intentionally, convenience for such acts as infringe upon others' exclusive right of trademark use, to facilitate others to commit infringement on the exclusive right of trademark use."<sup>70</sup> Compare this with the previous provision Article 52(5) Trademark Law 2001, which did not include the condition "intentionally" for infringement.<sup>71</sup> Prior to 2013, language that includes the intentionally requirement only appeared in Article 50(2) Regulations Implementing the Trademark Law 2002.<sup>72</sup> The inclusion of the intentionality language in the Trademark Law 2013, demonstrates the importance the National People's Congress' drafters attach to this. Trademark holders expressed concern that the term "intentionally" excludes constructive knowledge and have suggested the use of the phrase "knew or should have known". The concern was picked up by the legislators since Article 75 Implementing Regulations of the Trademark Law 2014 does not have the word "intentionally".<sup>73</sup>

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<sup>68</sup> *Descente Ltd. v. Today Beijing City Info. Tech. Co.* for Trademark Infringement, 2011 No. 11699 (Beijing Second Intermediate People's Court, 25 April 2012), affirming, 2012 No. 3969 (Beijing Higher People's Court 19 December 2012).

<sup>69</sup> 'Taobao sued for selling fakes' Global Times, 22 July 2011, available at: [http://www.china.org.cn/business/2011-07/22/content\\_23046304.htm](http://www.china.org.cn/business/2011-07/22/content_23046304.htm).

<sup>70</sup> *Supra* note 18.

<sup>71</sup> Article 52(5) Trademark Law 2002 defined infringement as conduct "impairing in other manners another person's exclusive right to the use of its registered trademark shall constitute an infringement on the exclusive rights to the use of a registered trademark." Trademark Law (adopted at the 24th Meeting of the Standing Committee of the Fifth National People's Congress on August 23, 1982 and promulgated by Order No. 10 of the Standing Committee of the National People's Congress on August 23, 1982; amended for the first time in accordance with the Decision on Revising the Trademark Law adopted at the 30th Meeting of the Standing Committee of the Seventh National People's Congress on February 22, 1993; and amended for the second time in accordance with the Decision on Revising the Trademark Law adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001).

<sup>72</sup> Article 50(2) Implementing Regulations of Trademark Law 2002 defines infringement as "intentionally providing facilities such as storage, transport, mailing, concealing, etc. for the purpose of infringing another person's exclusive right to use a registered trademark." Regulations for the Implementation of the Trademark Law (Promulgated by Decree No. 358 of the State Council on August 3, 2002, and effective as of September 15, 2002).

<sup>73</sup> Article 75 Implementing Regulations of Trademark Law 2014: "An act of providing such facilities as storage, transport, mailing, printing, concealing, business premises, or an online goods trading platform for infringing upon another person's exclusive right to use a registered trademark constitutes an act of providing convenience prescribed in subparagraph (6) of Article 57 of the Trademark Law." Regulations for the Implementation of the Trademark Law (Promulgated by Decree No. 358 of the State Council on August 3, 2002, revised and promulgated by Decree No. 651 of the State Council on April 29, 2014, and effective as of May 1, 2014)

## Section 2.2 IL in case of Copyright Liability

Before the E-Commerce Directive<sup>74</sup> and DMCA<sup>75</sup> were able to inspire China's IL regulation, Article 130 General Principles of the Civil Law 1987<sup>76</sup> could be applied to network service providers who together with a direct infringer infringed upon a copyright holder's rights and caused that party damage, in which case they shall bear joint liability.<sup>77</sup>

The fault-based liability doctrine is demonstrated in *Music Copyright Society of China v. Netease & Mobile Communications* in 2002.<sup>78</sup> Here, a distinction can be made between primary and secondary liability. The first for direct infringement of the right of communication of the works, in this case ringtone files, through the information network by Netease; the latter for the alleged negligence of Mobile Communications in its duty of care to examine the works it was disseminating, or, after being informed by the copyright holder, to stop the transmission of the infringed works. Beijing Second Intermediate People's Court accepted Mobile Communications' defense that it was merely providing a technical and passive service of network dissemination. It only received ringtones from Netease and forwarded them to its subscribers.<sup>79</sup> Article 20 Regulations 2006<sup>80</sup> would codify the conduit or transmission defense.<sup>81</sup>

### Non-interference

The same non-interference principle could be observed in *Go East Entertainment v. Beijing Century Technology* in 2004.<sup>82</sup> Here, the Beijing High People's Court held that ChinaMP3.com by selecting and organizing various links to infringing third party sources, it had demonstrated that it could discriminate between licensed and unlicensed recordings, and its negligence of its own duties and intentional participation in the illegal dissemination of unlicensed recordings. This made it jointly liable with the third party websites under Article 130 General Principles of the Civil Law 1987.<sup>83</sup> According to the court it was not relevant that the plaintiff did not send any notice-and-takedown requests to enable the defendant to take the necessary measures to remove the infringing links.

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<sup>74</sup> *Supra* note 12.

<sup>75</sup> *Supra* note 13.

<sup>76</sup> *Supra* note 51.

<sup>77</sup> Also Article 148 Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of Civil Law, the Supreme People's Court states that "a person who instigates or assists others to perform a tortuous act is joint tortfeasor, and shall bear civil liabilities jointly."

<sup>78</sup> *Music Copyright Society of China v. Netease Com., Inc. & Mobile Communications Corp.*, (2002) No. 3119 (Beijing Second Intermediate People's Court) 20 September 2002).

<sup>79</sup> According to the court, Mobile Communications was unable to select, examine or delete infringing ringtone files it transmitted, and was not at fault. This doctrine is also called the passive conduit or transmission doctrine. Compare this with Transitory Digital Network Communications: 17 U.S. Code § 512 (a).

<sup>80</sup> *Supra* note 14.

<sup>81</sup> *Supra* note 79. The conditions are that the network service provider should not choose or alter the transmitted works, and that the transmitted works be offered only to its subscribers.

<sup>82</sup> *Go East Entertainment Co. Ltd. (H.K.) v. Beijing Century Technology Co., Ltd.* No. 713 (Beijing High People's Court, 2 December 2004).

<sup>83</sup> Article 4 Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network 2003 was the basis of this case. The 2006 version of the Interpretation of the Supreme People's Court on Several Issues Related to the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network, supersedes the old one and the provision can be found in Article 3.

More specific regulation in regard to IL in case of online infringements was promulgated in 2000. This included the Regulation on Internet Information Services, which deals with the activity of providing information services to online subscribers.<sup>84</sup> Article 15 of this regulation postulates the prohibition to produce, copy, publish or distribute information containing content forbidden by laws and regulations.<sup>85</sup> Article 16 requires network service providers to immediately terminate a transmission, keep a record of it and report to relevant authorities when it finds forbidden information.<sup>86</sup>

The Interpretation of Several Issues Relating to Adjudication of and Application to Cases of Copyright Disputes on a Computer Network was enacted by the Supreme People's Court in 2000 to clarify IL in case of online copyright infringement.<sup>87</sup> Rule 4 imposes joint liability to the direct infringer and the intermediary for aiding and abetting of copyright infringement. Rule 5 also imposes joint liability if the intermediary obtained clear knowledge or was warned by a rights holder based on solid evidence of copyright infringement.

After the abovementioned regulation, the statutes for copyright were updated in 2001. However, Copyright Law 2001 only prepared China's accession to TRIPS,<sup>88</sup> but did not deal with IL.<sup>89</sup>

Then in 2006, the most important specific piece of legislation for IL in case of copyright infringement was promulgated: Regulations 2006.<sup>90</sup> These regulations distinguish between the following categories of network service providers:

Those, who provide automatic access to its subscribers;<sup>91</sup> who provide automatic storage of works, performances and audio-visual recordings from other network service providers to its subscribers;<sup>92</sup> that provide subscribers with storage space to make works, performances and audio-

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<sup>84</sup> Article 2 Regulation on Internet Information Services, promulgated by decree of the State Council (No. 292), has been adopted at the 31st regular meeting of the State Council on 20 September 2000 and is published on 25 September 2000.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Interpretation of Several Issues Relating to Adjudication of and Application to Cases of Copyright Disputes on Computer Network Adopted at the 1144th Meeting of the Adjudication Commission of the Supreme People's Court on 21 December 2000, and went into effect on 21 December 2000.

<sup>88</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), forms an integral part of the Agreement on the WTO.

<sup>89</sup> Yong Wan, Safe Harbors from Copyright Infringement Liability in China (2012-2013), 60 J. OF COPYRIGHT SOC'Y U.S.A. 635.

<sup>90</sup> *Supra* note 14. The Regulations were amended on 30 January 2013, by Order No. 634 of the State Council. However, for IL the changes are insignificant. Although the most important laws in China are promulgated by the National People's Congress or sometimes the Standing Committee of the National People's Congress, Regulations 2006 and its 2013 amendment were promulgated by the State Council.

<sup>91</sup> Article 20, *supra* note 14. Compare this with 17 U.S. Code § 512 (a): Transitory Digital Network Communications.

<sup>92</sup> Article 21, *ibid.* provides that a network service provider caches works, performances and audio-visual recordings from another network service provider "for the purpose of elevating the efficiency of network transmission," would not be held liable to compensate the right holder in damages, if it did not alter any of the automatically cached materials, and did not affect the originating network service provider's ability to obtain information about use of the cached materials, and automatically revises, deletes or disables access to the materials where the originating network service provider does the same. Caching links, fall outside the scope of this safe harbor as *Flyasia v. Baidu* makes clear. *Zhejiang Flyasia E-Business Co., Ltd. v. Baidu, Inc.*, (2007) No. 1201 (Beijing High People's Court): Baidu

visual recordings available to the public;<sup>93</sup> that provide searching or linking services to its subscribers.<sup>94</sup>

Network service providers of the first two categories cannot be held liable if they did not interfere with their automatic access or storage processes. For the latter two categories, the network service providers have to comply with the following rules to enjoy the protection of the safe harbor:

#### Remove after a notice-and-takedown request

Article 15 Regulations 2006,<sup>95</sup> clarifies that network service providers that provide storage space, searching or linking services to their subscribers, after they get a notice-and-takedown request<sup>96</sup> from rights holders should promptly remove or disconnect the link to the works, performances or audio-visual recordings that are thought to be infringing. There is no consistency in whether one notice can concern to different works. The court in *Guangdong Mengtong Culture Development v. Baidu* in 2007, confirmed this was possible.<sup>97</sup> Other courts, however, demand that each work will get its own notification, see *Warner Music Hong Kong v. Alibaba* in 2007.<sup>98</sup>

After the notification, the storage space provider should promptly<sup>99</sup> remove alleged infringing work, performance or audio-visual recording or it will be liable for IL.<sup>100</sup> If the network service provider removes or disconnects a link to work, performance or audio-visual recording, that turn out to be non-infringing, the right holder that requested the removal will be held liable.<sup>101</sup>

Article 14 Regulations 2006<sup>102</sup> states practically that rights holders when they file a notice-and-takedown request that they write down their contact information, information of the work and

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provided on its own initiative access to an archived copy and modified that copy. Compare this with 17 U.S. Code § 512 (b): System Caching.

<sup>93</sup> Article 22, *ibid.* Compare this with 17 U.S. Code § 512 (c): Information Residing on Systems or Networks At Direction of Users.

<sup>94</sup> Article 23, *ibid.* In *EMI Group Hong Kong v. Beijing Baidu Network Technology* in 2006,<sup>94</sup> the Beijing District High People's Court held that search engines are *prima facie* not liable for referring to infringing resources because their indexing engines could not predict, distinguish or control the contents of unrestricted websites they searched. *EMI Group Hong Kong Limited v. Beijing Baidu Network Technology Co. Ltd.*, (2007) No. 593 (Beijing High People's Court, 17 November 2006). However, the safe harbor based on the referrer's defense is cancelled where search engines fail or insufficiently remove the infringing links after notification by the copyright holder. This was the case in *Go East Entertainment v. Beijing Alibaba Technology* in 2007, where the Beijing High People's Court held the search engine Alibaba liable for only removing only 15 out of 26 allegedly infringing recordings, pursuant to take-down notices. After receiving from the copyright holder the request to remove 26 links and their locations, the court held that Alibaba should have known that its search engine contained infringing links to these recordings, and was thus negligent in terminating all links pointed out. *Go East Entertainment Co. Ltd. (H.K.) v. Beijing Alibaba Technology Co., Ltd.*, (2007) No. 02627 (Beijing High People's Court, 20 December 2007). Compare this with 17 U.S. Code § 512 (d): Information Location Tools.

<sup>95</sup> *Supra* note 14.

<sup>96</sup> *Supra* note 14. Article 22(1) Regulations 2006: the network service provider that provides storage space to subscribers, should make this clear, indicate its name, contact person and network address. If not, it will be held liable.

<sup>97</sup> *Guangdong Mengtong Culture Dev. Co., Ltd. v. Baidu, Inc.*, (2007) No. 17776.

<sup>98</sup> *Warner Music Hong Kong, Ltd. v. Alibaba Info. Tech. Co., Ltd.*, (2007) No. 02630

<sup>99</sup> Article 14 of the Draft of the Regulations of September 2005 defined "promptly" as within five days. However, in the final Regulations 2006 draft, this definition was removed. *Supra* note 14.

<sup>100</sup> Article 22(5) Regulations 2006. *Ibid.*

<sup>101</sup> Article 24 *ibid.*

<sup>102</sup> Article 14 *ibid.*

how it can be found, and preliminary evidence of the infringement. Network service providers will replace or restore a link to the work, performance or audio-visual recording<sup>103</sup> upon the receipt of a counter-notification of the subscriber in case of evidence of non-infringement.<sup>104</sup>

#### Necessary measures

Article 36(2) Tort Liability Law 2009<sup>105</sup> imposes obligations to the network service provider to take necessary measures such as deletion, block or disconnection, after being notified by a rights holder, or if it knows that a network user is infringing upon the civil rights or interests of another person through its network services.<sup>106</sup> If the network service provider fails to take the necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user. Qiao pointed out the debate about the exact scope of the knowledge standard: in the first and second drafts of the Tort Liability the term ‘actually knew’ was used, followed by ‘knew’ in the third draft, and ‘knew or should have known’ in the fourth draft, and back to ‘knew’ in the fifth and final version.<sup>107</sup> The Tort Liability Law makes a distinction between direct tort liability<sup>108</sup> and indirect liability.<sup>109</sup>

#### No financial benefits

Article 22(4) Regulations 2006<sup>110</sup> states that the safe harbor is not for network service providers providing storage space that receive financial benefits from copyright infringements. However, unlike DMCA § 512(c),<sup>111</sup> it does not mention “without the ability to control”, which is the other condition for the U.S. safe harbor. The logic is that a network service provider, who has no control over the infringement, should not be held liable. However, in China, in principle, a network service provider without control could still be held liable. In practice the specificity of the connection between the infringed works and the financial benefits for the network service provider determines whether it will lose the immunity provided by the safe harbor.<sup>112</sup>

#### Inducement and contributory liability

Tortious liability consists of inducement or contributory liability which are based on encouragement or aid to the wrongdoer.<sup>113</sup> The tortious liability is created where the network

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<sup>103</sup> Article 17 *Ibid.*

<sup>104</sup> Article 16 *Ibid.*

<sup>105</sup> *Supra* note 52.

<sup>106</sup> Article 36(3) *Supra* note 52. Notice that the infringement of civil rights or interests of another person, could concern copyright, trademark or patent infringement.

<sup>107</sup> Qiao Tao, The Knowledge Standard for the Internet Intermediary Liability in China (2012) 20 INT'L J.L. & INFO. TECH. 3.

<sup>108</sup> Article 36(1) *Supra* note 52.

<sup>109</sup> Article 36(2) *Ibid.*

<sup>110</sup> Article 22(4) *Supra* note 14.

<sup>111</sup> *Supra* note 13.

<sup>112</sup> “Generally, the advertising fees charged by an ISP for the information storage space service provided shall not be determined as the directly gained economic interests; the advertisements added by an ISP to specific works, performances or sound or video recordings may be taken into account in the determination of the fault of the ISP as the case may be.” Guiding Opinions of Beijing Higher People’s Court 2010, paragraph 25.

<sup>113</sup> Before *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), one could use contributory liability (defendant has knowledge of infringement by another and materially contributed to the infringement) and vicarious liability (defendant had control over another’s infringement and had a direct financial interest in it) as actions in case of copyright infringement. *Grokster* added intentional inducement (defendant acts with the object to

service provider has or should have knowledge of the illegal nature of the subscriber's activity that he instigates or assists.<sup>114</sup>

Article 22(3) Regulations 2006<sup>115</sup> states that a network service provider that provides storage space does not know or has no reasonable grounds to know that the works, performances or audio-visual recordings provided by a subscriber infringes another person's rights is not liable. In other words: the network service provider will be held liable if he has actual knowledge; knowledge of the infringement itself, or should have deduced it from the circumstances, what any reasonable person would do.<sup>116</sup> Notice that this standard of knowledge is lower than apparent knowledge, where a network service provider deliberately proceeds despite "red flags";<sup>117</sup> is willfully blind to the infringement. Therefore, a network service provider becomes liable if he has actual, constructive or apparent knowledge.<sup>118</sup>

### Non-interference

Article 22(2) Regulations 2006<sup>119</sup> asserts that the works, performances or audio-visual recordings cannot be altered by the network service provider that provides storage space, otherwise liability will be imposed.

On 17 December 2012 the Supreme People's Court promulgated the Provisions on Relevant Issues Related to the Trial of Civil Cases involving Disputes over Infringement of the Right of Dissemination through Information Networks.<sup>120</sup> Article 10 of these provisions<sup>121</sup> clarifies that if a network service provider is providing web services, by establishing charts, catalogues, indexes, descriptive paragraphs or brief introductions or other ways, recommends hot movie and television programs which can be downloaded or browsed or are otherwise accessible

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promoting infringement by others) to the possible actions. Alfred C. Yen. Torts and the Construction of Inducement and Contributory Liability in Amazon and Visa (2009) COLUMBIA J. OF L. & THE ARTS 32, 513.

<sup>114</sup> *Supra* note 107, 5.

<sup>115</sup> *Supra* note 14.

<sup>116</sup> Yong Wan, Safe Harbors from Copyright Infringement Liability in China (2012) J. OF COPYR. SOC'TY USA, 646, available at: <http://journal.csusa.org/archive/v60-04-YongWanCPY404.pdf>.

<sup>117</sup> *Zhongkai Co. v. POCO.com* (Shanghai First People's Court 2008) "As a professional video website, in its daily operation of the website, it must have known, or at least should have known that the movie concerned was unauthorized by viewing the poster and the introduction of the movies by the users." See also *Sohu v. Tudou* (Shanghai First Intermediate People's Court 2010).

<sup>118</sup> Guiding Opinions of Beijing Higher Court (2010), paragraphs 19(1)-(4): Current content on a prominent page, infringing content on prominent page, infringing content recommended, ranked (apparent knowledge); any selection, organization, or classification of the alleged infringing material uploaded by service receivers is conducted (constructive knowledge).

<sup>119</sup> *Supra* note 14.

<sup>120</sup> Provisions on Several Issues Concerning Application of Law in Civil Dispute Cases of Infringing Right of Dissemination via Information Network, Judicial Interpretation 2012, No. 20, passed on 26 November 2012, the Trial Committee of Supreme People's Court, Conference No. 1561. Judicial Interpretation original text in Chinese: <http://www.chinacourt.org/law/detail/2012/12/id/146033.shtml>. Translation China Copyright & Media: <https://chinacopyrightandmedia.wordpress.com/2012/12/17/interpretation-concerning-some-questions-on-concretely-applicable-law-in-hearing-civil-dispute-cases-of-infringement-of-the-right-to-dissemination-through-information-networks/>. Gabriela Kennedy and Zhen Feng, 'China's highest court clarifies copyright liability of network service providers', Hogan Lovells, 5 February 2013, available at: <http://www.lexology.com/library/detail.aspx?g=09839f10-4ca7-4daf-92ca-a0e3264b6938>.

<sup>121</sup> *Ibid*.

by the public on its webpage, this is an indication for the court that the network service provider should have known that its users are infringing.<sup>122</sup>

Art 12 of the same provisions<sup>123</sup> states that the court may determine that the network service provider should know that the uploaded content is infringing if the popular movies or TV shows are posted on the homepage or other prominent webpages; the hosting service provider actively selected, edited, arranged, or recommended the topic of content the work, or produced specific “popularity lists”.<sup>124</sup> The court will assume that the infringing nature of the uploaded work could not have escaped the attention of the hosting service provider, but nevertheless did not take reasonable measures to stop the infringement.

### Section 3 Conclusion

In a complex interplay of successive and each other affecting laws, regulations, case law, judicial interpretations and guidelines, a convergence has evolved in the case law of China in regard to IL in case of copyright and trademark infringement.

As a result the Beijing High People’s Court Guidelines on Trial of IP Cases involving Networks 2016,<sup>125</sup> have successfully codified many trends in the IL case law. However, these guidelines have only mandatory authority over Beijing courts, nevertheless their persuasive authority can reach other courts too. Eight factors are indicative for the determination of knowledge by the platform service provider:

1. Prominent placement of the infringing information on the site of the platform service provider;
2. The platform initiated the editing, selection, sorting, ranking, recommendation or modification of the alleged infringing information, indicating its interference;
3. Notification by the right holder is sufficient to establish knowledge of the platform service provider of the alleged infringement;
4. Repeat infringement by the network vendor is an indication that the platform service provider did not take appropriate reasonable measures;
5. The existence of information that the network vendor acknowledged that it infringed rights;
6. The sale or offering of goods or services is at a price that is unreasonably low;
7. The platform service providers obtains direct economic benefit from the spread or transaction of the accused infringing information. This seems harsh without the corresponding condition that the platform service provider should have control. However, with the advanced technology full control becomes a reality;
8. The platform service provider knows of the existence of alleged infringement from the infringing behavior on other trademark rights. The platform service provider should make logical connections. Here too technology, especially deep learning and preventive analytics, will be able to offer solutions.

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<sup>122</sup> The Supreme People’s Court issued five model cases decided by lower courts on 23 June 2014, which included the civil case concerning copyright infringement: *CCTV International v. Shanghai TuDou Network Technology Co., Ltd.* Susan Finder, ‘A model copyright infringement case—“A Bite of China”’, Supreme People’s Court Monitor, 26 June 2014, available at: <https://supremepeoplescourtmonitor.com/2014/06/26/a-model-copyright-infringement-case-a-bite-of-china/>.

<sup>123</sup> *Supra* note 120.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Supra* note 7.

An extra ninth factor which can be gleaned from the case law and is implied in the guidelines: platforms did not set up and implement a system to enforce infringements via notice-and-takedown.

China, with its multi-layered censorship regime, extensively uses human reviewers to find and remove information that the government finds disagreeable to socialist values or endangering state security and social harmony. However, technology has passed a critical threshold, whereby cost-effective computing power can be effectively used to filter the servers proactively against infringements. Platforms, such as Alibaba and Baidu, with their wealth of data are best positioned to continuously teach their machines via deep learning. This can lead to an ongoing improvement of the platforms' predictive analytics which allows them to detect and identify infringements. In short: artificial intelligence makes each platform omniscient, which will give a fatal blow to the already weak safe harbor protection in China. The trend for China's duty of care shifts from an obligation to take appropriate reasonable measures in case of specific knowledge to an obligation to take reasonable measures in case of general knowledge. The implication is that the filtering standard for platform service providers will continuously be intensified and that they gradually will have to proactively monitor and cleanse their servers.

Despite the censorship system and technological advancements, the pendulum has swung back into the direction of weakening the duties of care in the E-Commerce Law draft. This is probably caused by regulatory capture by the powerful platforms and a Confucian reflex of the Chinese government to prefer self-regulation, alternative dispute resolution mechanisms, including mediation and arbitration, to not stifle intermediaries' innovative power, and the confidence that the direct infringers can be detected and identified. However, platforms, especially in China, now mature and financially powerful, are best positioned make full use of technologic advancements to filter what is on their servers. Until the impunity of direct infringers evaporates, one can expect the pressure to increase for platforms to take on more responsibility.