



Review Article

Liability of Internet Service Providers for Online Copyright Infringement: International Experience and Recommendations for Vietnam

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Abstract: The advent of the Internet has posed unprecedented challenges on enforcing copyright. Online copyright infringements are pervasive, while it is not easy to impose liability on direct infringers, *i.e.*, Internet users. This leads to a debate over whether online platforms or online intermediaries, which are often named “Internet Service Providers” (ISPs), should be held liable for these infringing activities or not, and if so, how to balance between Internet freedom, technological innovation and the need for effective copyright enforcement in the digital era. The aim of this paper is to provide answers to these questions by analyzing ISP’s liability from different international approaches such as the United States, the European Union, and China; hence, some experience for Vietnam could be drawn. Finally, the authors make recommendations to address the shortcomings in Vietnam’s intellectual property law with respect to ISP’s liability. This research is perfectly timing, given that Vietnam is amending its Intellectual Property Law to implement its commitments under the new generation free trade agreements and to meet the demand of the Fourth Industrial Revolution.

Keywords: Internet Service Provider (ISP); Intellectual Property Rights (IPRs); Online Copyright Infringement; Vietnam Intellectual Property law.

1. Introduction

In recent years, with the explosion of information sharing on digital platforms, there have been an ever-increasing amount of online copyright infringements, mostly committed by

Internet users. However, it is difficult and inefficient for copyright holders to police and go after millions of users, many of whom are anonymous. A possible alternative strategy is to hold online intermediaries ISPs liable for their users’ activities.

Nevertheless, under current law of Vietnam, it is challenging for copyright holders to put those ISPs under responsibility. With the alarming increase in

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online copyright infringement in Vietnam, there should be some practical solutions that can make those ISPs play a more active role in protecting copyright against the wrongdoings of their subscribers. This paper will analyze the legal theories to hold ISPs liable and explore different international legal frameworks for ISP's liability, then deciding on what is the most suitable approach that can be applied to Vietnam.

2. Concept of Internet Services Providers and Their Involvement in Online Copyright Infringement

2.1. Definition of Internet Service Providers

ISPs have formed and progressed with such a variety of ways to meet the ongoing demand of users. They can be defined broadly, including not only connecting network providers, but also caching and hosting service providers. They are considered as the providers of any kind of services on the Internet, including social networks and peer-to-peer sharing platforms. According to the encyclopedia Britannica, ISP is a company that provides Internet connections and services to individuals and organizations. In addition to providing access to the Internet, ISPs may also provide software packages (such as browsers), email accounts, and a personal website or home page. ISPs can host websites for businesses and can also build the websites themselves. ISPs are all connected to each other through network access points, public network facilities on the Internet backbone." [1].

Under the Digital Millennium Copyright Act of the United States, "service provider" is defined as "an entity offering the transmission, routing, or providing connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received". [2; §512 (k) (A)].

In Vietnam, current laws and regulations do not have a clear and unified definition of ISPs. Clause 2, Article 3 of the Joint Circular No. 07/2012/TTLT - BTTTT - BVHTTDL regulating the responsibilities of intermediary service providers in protection of copyrights and related rights in the digital environment defines "intermediary service providers" to include ISP; Telecommunication enterprises; Enterprises providing digital information storage space rental services, including website rental services; Enterprises providing online social networking services; and Enterprises providing digital information search services. [3; Art. 3]. Meanwhile, Decree No. 72/2013/ND-CP on management, provision and use of Internet services and online information states that: "Internet service providers are telecommunications businesses providing Internet service", and "Internet service is a type of telecommunications service, including Internet access service and Internet connection service: Internet access service is a service provided to users using the Internet with access to the Internet; Internet connection service is a service that provides Internet service providers and telecommunications application service providers the ability to connect with each other to transmit Internet traffic" [4; Art. 3]. It can be seen that the definitions of ISP under current Vietnamese law are not unified and seems narrower than the international community's common understanding of ISPs.

2.2. The Involvement of ISPs in Online Copyright Infringements

It is undeniable that online copyright infringements by Internet users cannot be made possible without the role of online platforms. On one hand, ISPs have significantly improved our access to information and human connection, introducing new business models; on the other hand, they have complicated copyright enforcement to a great extent, given that people nowadays are able to easily share content throughout social media and the Internet. The absence of territorial limits on the

Internet, along with the scope it offers for anonymity, has opened the door to copyright infringements that are new in both nature and scale. Massive amounts of copyright-protected content in digital form, including software, music, films, electronic games and text, are also distributed online without the copyright owners' consent via websites or file-sharing networks.

Copyright is typically viewed as a bundle of exclusive rights, including the right to make copies (right to reproduction), the right to make derivative works, the right to distribute the works or copies of the works, the right to publicly perform the work, the right to communicate the works to the public, and the right to rent the work or copies of the work. Copyright infringement occurs when someone performs one or more of the above-mentioned acts without copyright holders' permission or without authorization by copyright law.

Based on the services that ISPs provide for their users, online copyright infringements can be categorized into three groups as follows:

Streaming or accessing - by this method, a user can view, listen or operate the content directly through the Internet without downloading a copy. Large-scale copyright infringements on the Internet have been recorded by means of unauthorized streaming and/or through peer-to-peer sites. The act of streaming without permission infringes on copyright holders' exclusive right to communicate their works to the public or the right to public performance.

Downloading - by this method, a user can transfer a copy of the file to his own device. For example, downloading music from iTunes or movies from AppleTV are considered legal downloads. However, there is an alarming rate of illegal downloading on pirated sites. Downloading without permission infringes on copyright holders' exclusive right to reproduction (the right to make copies).

Sharing - by this method, the user can make the files publicly available by means of sending or uploading these files on digital platforms. However, this does not include sharing links

online due to the problematic issue of whether such shared content is shared by its original author or another right-holder? [5] Sharing without permission also infringes on copyright holders' exclusive right to communicate their works to the public and the right to reproduction.

Although the Internet as a new medium of communication offers unparalleled new freedom, it is also vulnerable to being misused. A major issue that has raised concerns in this area is the position of those who provide the services and facilities which facilitate copyright infringement on the Internet. Internet Service Providers (ISP) are entities that have the most control over the flow of information, yet they often deny responsibility to protect copyright. ISPs provide the hardware and infrastructure for the society to enable communication, including access to the web through local servers, bulletin boards and websites where others can post information, and also internet cafes which provide temporary access to the net.

Different jurisdictions have taken different approaches with regard to the liability of ISPs for copyright infringements. In many countries, ISPs can be found liable for the infringing activities on the websites that they host. Even though the ISPs themselves are not undertaking any act that violates copyright law, they can still be indirectly liable for contributing to, or knowingly ignoring those online infringements by their users, and can be sued by copyright holders for damages.

3. Legal Theories of ISP Liability for Online Copyright Infringement

3.1. Direct Liability

Direct liability is the most straightforward type of liability. To establish direct liability for copyright infringement, a plaintiff must prove (1) he/she owns a copyrighted work, and (2) the alleged infringer violated his/her exclusive right to the copyrighted material. To prove the copyright element, the plaintiff may either

produce direct evidence that the defendant copied the plaintiff's material, or create an inference that copying occurred by showing that the defendant had access to the protected work, and the two works are similar. Once the plaintiff has satisfied these requirements, the plaintiff can then establish direct infringement by proving the defendant used the alleged copies. [6] Other factors such as the defendant's knowledge, intention, negligence, or direct financial benefit are not needed. In reality, it is very difficult for copyright holders to successfully prove that ISPs directly infringe on their exclusive rights since ISPs are only online intermediaries; the users or subscribers of ISPs are those who directly commit infringing acts, such as copying, making derivative works, distributing works to the public, publicly performing the works, or communicating the works to the public. Therefore, copyright holders usually have to rely on other legal theories on indirect liability (secondary liability) to hold ISPs liable for online copyright infringements.

3.2. Secondary Liability

The secondary liability theory is the imposition of liability on one whose action does not directly violate one's right [7] but what they commit as a role in the third party's suffering, such as encouraging, facilitating or profiting from the infringing act. Secondary liability typically comes in two principal forms: vicarious liability and contributory liability. These theories were mainly developed through case law.

i) Vicarious liability

Vicarious liability first appeared to hold the master liable over the servant's action, as long as the servant's action was controlled by the master's order. This theory is typically applied in employment context. In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such

activities. Thus, there are two aspects that must be proved to hold ISPs liable for vicarious liability. First, ISPs must have the ability to control, or at least, to supervise the subscribers' material. Secondly, ISPs must gain direct financial benefit arising from such infringing activity. The financial interest has been emphasized as an important aspect when interpreting the theory. For example, in *A M Records, Inc. v. Napster, Inc.*, a case in which copyright holders tried to hold Napster, a peer-to-peer music sharing platform, liable for its users' infringement, the United States Court of Appeal for the Ninth Circuit held that "financial benefit exists where the availability of infringing material acts as a draw for customers", and "Napster's future revenue is directly dependent upon increases in user base". More users register with the Napster system as the quality and quantity of available music increases [8; 1023].

ii) Contributory Liability

Contributory liability may be found if someone, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. Under this theory, ISPs will be held liable if they conduct any action that advances the infringing activities. The role of ISP is merely providing their users with a platform, but such platform enables users to infringe others' rights by helping them making and distributing unauthorized copies through the platform they provide. If ISPs know or have reason to know of the infringement, they would be held liable for causing and providing the means for the direct infringer to carry out the infringement.

Contributory liability requires the plaintiff to prove that ISPs have actual knowledge and strong evidence of the infringing activity conducted by their users. An ISP will be contributorily liable for online copyright infringement if it knew or should have known about the infringing conduct, and "induced, caused or materially contributed to the infringing conduct of another".

4. International Approaches to ISPs' Liability for Online Copyright Infringement

4.1. The United States: The Digital Millennium Copyright Act

The United States adopted the Digital Millennium Copyright Act (hereinafter DMCA) in 1998. This act approaches the issue of holding ISPs liable for online copyright infringement under both vicarious liability and contributory liability theories. The DMCA also provides four safe harbors and ISPs must comply with three levels of requirements to be shielded from liability.

The first requirement is that an ISP must fall within the protected scope of the DMCA. It must be recognized as a "service provider" as provided in the Act [2; § 512(k)(1)].

Secondly, ISP must comply with the specific requirements of at least one out of four safe harbors:

The first safe harbor for transitory network communication protects the ISPs action of "transmitting, routing, or providing connections" [2; §512 (a)]. This provides a limitation of liability on actions that are made automatically in the operation where ISPs simply provide the services and do not initiate any activities concerning the copyrighted material.

The second safe harbor concerns system caching [2; §512 (b)]. The action of "intermediate and temporary storage of materials" that were made available online by someone other than the ISPs and then get transmitted to the users will not be seen as ISPs' infringements if they comply with the conditions to provide the technology solution to protect the copyrighted material and remove the infringing material as soon as they are aware of.

The third and fourth safe harbors on information residing on systems or networks at the direction of users and on information location tools have the same requirements to be met. It focuses on ISPs' consent and acts upon the acknowledgement of such infringing activities. If they have the ability

to control subscribers' action, they must not be financially benefited from the infringing act [2; § 512(c) & (d)].

Thirdly, ISPs must comply with the notice and take down procedure [2; § 512 (g) (3)]. As soon as ISPs receive notice from the copyright owners reporting the infringing act, they have the duty to disable the alleged infringing material. If the person whose material was taken down due to the claim of infringement proved such a claim was baseless, he or she could send a counter notification to require the ISPs to put the material back online.

If ISPs have satisfied all these three requirements, they will be shielded from liability for online copyright infringement. Moreover, as long as the action of removing or blocking access to one's material is based on the notice and takedown procedure, ISPs will also be protected from any liability to any person for claims based on such material [2; §512 (g) (1)].

From the above safe harbors, it can be seen that the DMCA relieves ISPs from the burden of supervising all the material available on their network. It also requires the right holder to actively protect their right. ISPs can only be held for having actual knowledge about the infringing act when the owner fulfilled their duty to send the notice. Obviously, the reason why the DMCA takes such a liberal approach to ISP liability was the need to boost the development of Internet and online platforms in the early years of 1990s. For direct liability, the DMCA will protect ISPs if they only act as a data conduit, transmitting information, as well as routing and providing services. With respect to vicarious liability, the Act requires the plaintiff to prove the right to supervise and the financial benefit of ISPs. For the contributory liability, the DMCA requires ISPs to take action when they are aware of the existence of the infringing activity. For the notice and take down procedure, in order to reduce the risk of false notification, DMCA provides that any person who intentionally misrepresents that material is infringing or mistakenly removed, or copyright owners who give false notifications is

liable for the damages incurred and will be penalized under the DMCA [2; §512 (f)].

4.2. Europe: European Union Directives on Copyright

The European legal framework has been changing from time to time in order to adapt to any situations with the use of new effective dispute resolution methods. In the EU, before 2019, safe harbors for ISPs are provided under the E-commerce Directive and more specifically in the transposing laws in each Member State [10]. These safe harbors are quite similar to those provided under the DMCA. ISPs are granted a safe harbor which covers activities of mere conduit [11; Art. 12], caching [11; Art. 13], and hosting [11; Art. 14]. ISPs will be shielded from liability if they only participate in the process passively and adopt necessary measures to stop the infringing act as soon as they are aware of the act.

However, on March 15, 2019, the European Parliament passed the new directive on copyright in the Digital Single Market (DSM Directive), which contains a different liability scheme for ISPs, providing a wider definition of “communication to the public” and places new monitoring duties on ISPs [12; Art. 2(6)]. Article 17 of the DSM Directive aims to provide better protection to the right holders by requiring ISPs to make the best effort to acquire authorization. It makes the providers of such platforms enter into license agreements with the right holders of the protected subject matter, usually combined with a commission for the right holders or else ISPs shall be liable as perpetrators [12; Art. 17].

However, the DSM Directive also provide a safe harbor with three requirements of making “the best efforts” that ISPs must fulfill cumulatively: “to obtain an authorization” [12; Art. 17(4)(a)]; “to ensure the unavailability of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information” [12; Art. 17(4)(b)]; and to act to stop the infringement upon the

receiving of the notice from the right holders [12; Art. 17 (4) (c)].

Another exception of ISPs’ liability under the DSM Directive is the Start-up Privilege for new ISPs with an annual turnover below 10 million Euros, and an average number of monthly unique visitors below 5 million. This will last for three years and no extension.

The new approach of the DSM Directive, though shows the EU’s great efforts in strengthening digital copyright enforcement, is now facing numerous criticisms, for imposing too much a burden on ISPs, which may hinders the free flow of information and the development of online platforms [10].

4.3. China: Civil Code regulating ISP’s Liability for Online Copyright Infringement

China has the largest number of Internet users in the world, which is approximately 988.99 million users in the year 2020 [13]. The Internet in China has been styled as the entertainment superhighway, with content providers such as iQiyi, Youku and Tencent streaming foreign and home-grown content to millions of smartphones and computer screens. This requires a more efficient legal framework to protect the right-holders from any online infringing activities.

Although Chinese legislation has been striking the balance between rights-holders and ISPs, there are still some challenges in determining the liability of those ISPs due to the lack of legal theories on ISP’s liability on digital platforms. Most Chinese courts held ISPs liable under contributory liability by interpreting an ISP’s duty of care broadly.

Different from the DMCA and the EU’s E-Commerce Directive, ISPs’ liability in China is not established on the system of liability exemptions or limitations, but on the knowledge of the ISPs. The Tort Law of 2009 provides for the contributory liability of ISPs based on their intent and negligence. Specifically, in Article 36, ISPs’ duties of care are stated as when they get the notification from the right-holder, they should immediately adopt

any necessary measures such as deletion, block or disconnection. If they fail, they will be jointly liable with the users for paying the damages caused by those infringing activities on their platforms [14; Art. 36].

On May 28, 2020, China adopted its first Civil Code (effective from January 1, 2021), with Book Seven on Tort Liability containing more elaborate provisions on ISP liability [15; Arts. 1194-1197], including both direct and indirect liability. Network users and network service providers who, through the network, infringes upon the rights and interests of another person will be subject to tort liability [15; Art. 1194]. The Civil Code also includes a notice-and-take-down procedure. If a network user commits a tortious act through using the network service, for example, a copyright infringement, the right holder can notify the network service provider. The notice must include the preliminary evidence establishing the infringement and the real identity information of the right holder. After receiving notice, the network service provider must timely forward the notice to the relevant network user and take necessary measures such as deletion, block, or disconnection. If it fails to take necessary measures in time, it will have to assume joint and several liability for the aggravated part of the damage with the network user. On the other hand, the right holder who causes damage to the network user or network service provider due to erroneous notice must also be liable [15; Art. 1194]. After receiving the forwarded notice, the network user may submit a declaration of non-infringement to the network service provider, which includes the preliminary evidence of non-infringement and the real identity information of the network user. After receiving this declaration, the network service provider must forward it to the right holder who issued the notice, and inform him that he may file a complaint to the relevant department or a lawsuit with the people's court. The network service provider must timely terminate the measures taken where, within a reasonable period of time after the forwarded declaration reaches the right holder, it fails to

receive notice that the right holder has filed a complaint or a lawsuit [15; Art. 1196]. Based on the contributory liability theory, the Civil Code further provides that a network service provider who knows or should have known that a network user has infringed upon the rights and interests of another person by using its network services but fails to take necessary measures, must assume joint and several liability with the network user [15; Art. 1197]. However, no clear safe harbors are provided for ISPs under the Civil Code.

China's E-Commerce Law: A series of provisions are directly addressed to ISPs and aim to put in place a framework of obligations and duties of care that will, directly or indirectly, help rights holders to protect their rights. In this law, ISPs' liabilities are regulated under various articles ranging from Article 31 to 45 [16], which describe the role of ISPs as similar as the guardians who have to protect the safety of their consumers on digital platforms. From the legal perspective, they need to ensure their roles both in noticing the act of violating copyright law and defending the infringing activities. From the economic perspective, they should keep the balance in putting a barrier toward the infringing content and paying for the damages of the victims.

It can be seen that among the three jurisdictions analyzed above, the United States takes the most liberal approach to ISP's liability for online copyright infringements by providing ISPs with numerous safe harbors. This approach is understandable given that the DMCA was adopted in the early years of the Internet with a view to foster technological innovation in this new area and ensure the right to freedom of speech, including Internet freedom. Meanwhile; the European Union and China recently impose stricter liability on ISPs. With the controversial DSM Directive, the EU is narrowing the prior safe harbors and requiring higher responsibility from the ISPs. Under Chinese legislation, the level of the ISPs' duty of care in copyright protection has increasingly heightened by imposing joint and several liability on ISPs who fail to comply

with the notice and take down procedure or who have actual or constructive knowledge of the infringement but fail to act timely.

5. ISPs' Liability for Online Copyright Infringement Under Vietnamese Law

5.1. Pervasive Digital Copyright Infringements in Vietnam

According to the 2020 Reviews of Notorious Markets for Counterfeiting and

Piracy conducted by USTR (United States Trade Representative), Vietnam has been put on the "Watchlist" with a great quantity of online copyright infringements in recent years. In addition, shopee.vn, phimmoi and phimmoizz are reported as selling counterfeit products and violating copyright law on digital platforms [17]. Even though the enforcement authorities have made great progress in enforcing copyright, the current situation remains challenging.



Total visits to *phimmoizz.net* from 20th October, 2020 to 21st March, 2021
from: Similarweb)

It can be seen from the graph above that after the website *phimmoi.net* was blocked, there was a significant drop in the number of visitors (from October, 2020 to December, 2020). However, since *phimmoizz.net* was created (January 2021), it has witnessed an increase in the amount of total visitors, which means online copyright infringements are rising rapidly together with its unjust enrichment arising from promoting advertisements on the website. Understandably, the blocking measure has only created a permanent effect on online copyright protection.

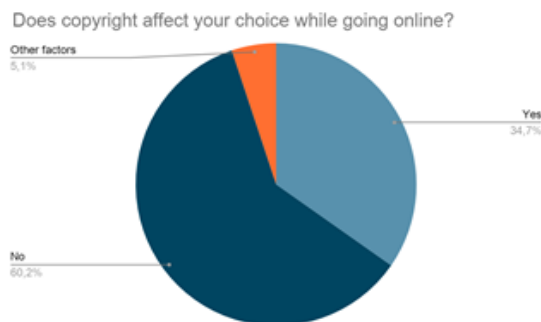
Some typical cases of online copyright infringement in Vietnam are the disputes between Lazada and First News [18], TikTok v. VNG [19]; movies summarized videos on Facebook; pirated film sites such as *phimmoi.net*,

phimbathu.com and *dongphym.vn*. These problems result not only from the shortcomings of Vietnamese law, but also from the ignorance of Internet users and ISPs.

While doing this research, we have conducted a survey among 712 youngsters from 18 to 25 years old on Facebook with the question "Does copyright affect your choice while going online?", then we made a pie chart as below to demonstrate the survey result.

As shown in the pie chat, more than a half of the respondents are not concerned about online copyright infringement; they would rather enjoy their personal financial benefits than care about the copyrights and the benefits of the right-holders. Additionally, Vietnamese people lack a long-lasting culture of respecting

others' intellectual creations as in developed countries.



On their part, ISPs in Vietnam often deny their responsibility for online copyright infringement, claiming that their roles are merely providing and supporting the users within the scope of their sites, and have no knowledge of users' infringement.

With respect to copyright enforcement, most copyright infringement cases in Vietnam are handled through administrative avenue. This has the advantage of stopping the infringing activity much more rapidly than going to court. However, administrative remedies aim to punish the infringers rather than to make copyright holders whole. Administrative fines are often not strict enough to deter infringement, which is approximately VND500 million (\$21,600) for organizational infringers and VND250 million (\$10,800) for individual infringers [20; Art. 5].

Although civil remedies can address those limitations of administrative enforcement, the number of copyright cases handled by Vietnamese courts is very limited due to the expensive and prolonged litigation process, difficulty in proving and calculating actual damages and applying for provisional measures.

5.2. Liability of ISPs Under Vietnamese Current Laws

The current legal framework for ISP's liability in Vietnam includes the Information Technology Law of 2006, Cybersecurity Law

of 2018, and some specific regulations such as Decree No.15/2020/ND-CP on administrative penalties for breach of postal services, telecommunications, radio frequencies, information technology and electronic transactions ("Decree 15/2020/ND-CP"), and Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on obligations of intermediary service providers in protection of copyright and related rights on the internet and telecom network environments ("Joint Circular 07/2012"). However, this framework seems bureaucratic and administrative law-driven rather than proving effective civil remedies for copyright holders as well as safe harbors for ISPs.

Under Article 16.3 of the Information Technology Law of 2006, at the request of competent authorities, transmitters of digital information must promptly implement necessary measures to stop illegal access to information or deletion of information [21; Art. 16.3]. Under Article 21 of the Cybersecurity Law of 2018, ISPs have the responsibility to cooperate with professional cybersecurity forces of the Ministry of Public Security to prevent, detect and respond to cybersecurity emergencies. ISPs that detect a cybersecurity emergency must promptly inform a professional cybersecurity force and implement response measures which include preventing or minimizing the damage caused by the emergency. In the case of copyright infringement, this could be done by initiating a site-blocking action [22; Art. 21].

Decree No.15/2020/ND-CP imposes administrative liability on websites, social networking service providers and social media users for intellectual property infringements on journalistic, literary, artistic and other online publications and works without the permission of the right-holders. Such infringements may be subject to a fine ranging from 10 million VND to 70 million VND [23; Art. 100].

Up to date, Joint Circular 07/2012 is the only regulation that specifically addresses the issue of ISP's civil liability for online copyright infringements. Under this Circular, ISPs have the obligation to remove and delete digital

content which violates copyright and related rights, and to cut, stop or suspend internet or telecom connections (of their customers/users), upon the receipt of a written request from the authorities. Although preventing or blocking access to sites not hosted/operated by the ISP itself is not mentioned, there is an implication that ISPs could be required to do so, if there is a request from the authorities [3; Art. 5(3)]. ISPs must be directly responsible for paying damages due to violation of copyright and related rights in the following cases: (a) being source to start publishing, transmitting or supplying content of digital information by Internet and telecommunication network without permission of the subject having right; (b) editing, truncating, copying content of digital information in any manner without permission of the subject having right; (c) intentionally canceling or disabling technical measures performed by the subject having right for protection of copyright and related rights; and (d) operation as source of secondary distribution of content of digital information that obtain due to violation of copyright and related rights. Instead of setting conditions for ISPs to enjoy safe harbors, this provision lays out specific circumstances in which ISPs are directly liable. It lacks a solid theory of secondary liability and seems to over-emphasize the role of administrative agencies rather than copyright holders in giving notice to ISPs [24; pp. 41 - 42]. Surprisingly, the current Intellectual Property Law of Vietnam of 2005 (amended in 2009 and 2019) has no specific provision on ISP liability for online infringement.

Meanwhile, Vietnam is amending its Intellectual Property to implement its commitments under the European-Vietnam Free Trade Agreement (EVFTA), including commitment on ISP liability, which requires Vietnam to provide for limitations or exemptions regarding the liability of intermediary service providers, in relation to the provision or use of their services, for infringements of copyright or related rights that take place on or through telecommunication networks. These limitations or exemptions must

at least include three types of ISP's activities: mere conduit, caching and hosting, with a notice-and take-down requirement, similar to the safe harbors in the EU's E-Commerce Directive [25; Art. 12.55]. However, the latest Draft Amendment of Intellectual Property Law merely adopts the current provision of Joint Circular 07/2012 without reference to the EVFTA's requirement as well as international experience. Such old approach is quite disappointing and cannot address the issue of ISP liability in the new technological age in Vietnam [26; Art. 1(75)].

5.3. Suggestions on the Liability of Vietnamese ISPs

From the legal perspective, to fully comply with Vietnam's commitment under the EVFTA and to effectively address the issue of ISP's liability for copyright infringement, Vietnam should shift from the administrative mindset to the civil mindset, establishing a notice and take down procedure which empowers copyright holders rather than government authorities to give notice to ISPs. Vietnam should also need to take into account secondary liability theories to hold ISP liable and should not only rely on direct liability theory. Instead of listing circumstances in which ISPs may be liable, the law should clearly provide safe harbors for ISPs who have fulfilled the notice and take down requirements. Because of its importance, these issues should be embraced in the Draft Amendment of Intellectual Property Law. Furthermore, the speed of resolving enforcement cases must be improved. IP right owners need a quick response from enforcement authorities to immediately stop the infringement, thus, for instance, they can both notify and receive the response on the official website of the authorities. However, it is important that users be made to provide sufficient evidence of the infringement in order to avoid misleading or fraudulent reports that could result in the removal of lawful posts. This procedure has been adopted by international ISPs, such as YouTube and Facebook.

From the economic perspective, the law should impose a stricter level of punishment,

which is at least compatible with the damage caused to the right-holders. Service providers are also responsible for contributing to the movement against IP infringements. Pay-per-download mechanisms and subscription services, as used by service providers such as Spotify or iTunes to control music piracy, have been proven to be an effective approach for combating IP infringements. In addition, termination of access to social networking sites in cases of repeated infringements, as applied by YouTube, is also a method to be considered.

6. Conclusion

It cannot be denied that ISPs play a crucial role in the current age when providing people around the world the privilege to access creativeness and at the same time, threatening the protection of copyright. Many jurisdictions have found them liable for a third-party's infringement under both direct and indirect liability theories.

In order to better protect copyright and to comply with the international standard, Vietnamese legislation will need to change. Besides holding ISPs liable for infringement if they directly violated copyrights, holding ISPs liable for online copyright infringement for a third party act is necessary and viable. In the authors' point of view, Vietnam is at the stage where it will need to focus more on the protection of the copyrights' owners than a pro-ISP policy in order to raise people's awareness over copyright as well as encouraging people to actively enforce their rights. However, in order to guarantee the ability to the development of technology as well as considering the technical level at the time, Vietnamese policy should not consider to adopt a general obligation to monitor the content on ISPs.

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