SAFE HARBORS FROM COPYRIGHT INFRINGEMENT LIABILITY IN CHINA

by YONG WAN*

Although the Chinese Copyright Law was amended in 2001, after the American Digital Millennium Copyright Act ("DMCA")\(^1\) and the European Electronic Commerce Directive\(^2\) were enacted, it did not focus on digital copyright, since the primary aim of that amendment was to pave the way for China’s accession to the WTO/TRIPs Agreement.\(^3\) It was not until May 18, 2006, that the Regulations for the Protection of the Right of Communication Through the Information Network ("RPRCIN")\(^4\) were adopted by the State Council of the P.R. China in response to the challenges of digital technology and to strike a balance between liability of network service providers ("NSPs") and the protection of copyright over the network. One of the key elements in the balance was a system of “safe harbors” — a set of provisions protecting qualifying NSPs from liability

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\(^3\) QIAN WANG, ZHISHICHAQUAN FA JIAOCHENG [INTELLECTUAL PROPERTY LAW] 23 (3d ed. 2011). It should be noted that the 2001 Amendment incorporated some initial ideas of the World Intellectual Property Organization Copyright Treaty into the Chinese Copyright Law, for example, adding the provisions on the right of communication through the information network, and the prohibition of circumvention of technological measures. However, those provisions are very simple. This author believes that the reason for the incorporation is that Chinese delegates participated in the 1996 Diplomatic Conference. Some of the delegates were also the main drafters of the 2001 Amendment, so they had some knowledge of the WCT, but unfortunately were unfamiliar with the contents of the DMCA or E-Commerce Directive. For this reason, the 2001 Amendment did not deal with the issue of safe harbors that did not exist in the WCT but in the DMCA.

for damages. Although the logic of safe harbors under the RPRCIN is clear, the definite content of some sorts of safe harbors is not.

I. INTRODUCTION

A. Safe Harbor Provisions Under the American DMCA

In 1998, the American Congress enacted the DMCA to update copyright law by keeping pace with the Internet. The DMCA added to copyright law a most important component in an effort to balance the interests of copyright holders and NSPs in a way that will foster the growth of the Internet, the safe harbor provisions that protect NSPs from monetary liability. These provisions, codified at 17 U.S.C. § 512, have become one of the most important parts of the DMCA.

B. Safe Harbor Provisions Under the European E-Commerce Directive

Two years after the enactment of the DMCA, the European E-Commerce Directive was approved in June 2000. The E-Commerce Directive, which also adopted safe harbors, aims to remove obstacles to providing cross-border online services in the European Union and to provide legal certainty to business. Although largely inspired by the DMCA safe harbors, the approach of the E-Commerce Directive differs from the DMCA in a number of significant ways.

First, the E-Commerce Directive adopted a so-called horizontal approach: (1) to cover not only copyright infringement, but also trademark infringement, defamation, misleading advertising, etc.; and, (2) to cover

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civil, administrative, and criminal liability. In contrast, the safe harbors under the DMCA only cover copyright infringement and just protect the NSPs from monetary damages. Second, Section 512 of the DMCA protects four categories of online activity: transitory digital network communications, system caching, storing information at the direction of users, and use of information location tools. However, the E-Commerce Directive protects only three categories, excluding information location tools. Third, there is no notice and take-down procedures in the E-Commerce Directive since at the time the Directive was adopted it was decided that such procedures should not be regulated in the Directive itself.

C. Safe Harbor Provisions Under the Chinese Right of Communication Through the Information Network (RPRCIN)

The drafters of the RPRCIN hoped to benefit from the experiences of both the DMCA and E-Commerce Directive regarding the safe harbor provisions. Unfortunately, they did not notice the differences between them, which resulted in some ambiguities and paradoxes in the safe harbor provisions under the RPRCIN.

Since the safe harbors are part of the RPRCIN (copyright-related Regulations), they only limit liability arising from copyright infringement alone, which is the same as those in the DMCA. Thus, a question may arise: do the safe harbors under the RPRCIN provide the network service providers blanket exemptions from liability? If we resort to the

10 An NSP that qualifies for the safe harbors under the DMCA may still be subject to an injunction, although that injunction is severely circumscribed in scope. See 3 NIMMER & NIMMER, supra note 6, § 12B.01[C][2].
12 Id. § 512(b).
13 Id. § 512(c).
14 Id. § 512(d).
16 VERBIEST ET AL., supra note 7, at 5.
17 See JIANHUA ZHANG ET AL., XINXI WANGLUO CHUANBO QUAN BAOHU TIAOLI AIYI 77-78 (2006).
18 See RPRCIN art. 1.
19 Under the RPRCIN, network/information network is not limited to the Internet, but also covers other online services. See Yuping Duan, XIN ZHUZUOQUAN FA GUANYU XINXI WANGLUO CHUANBO QUAN DE Guiding Yiji Yu Liangge Xin Tuoyue Zhi Bijiao [The Provisions Under the New Copyright Law on the Right of Communication Through the Information Network and the Comparison with the Internet Treaties], 48 ZHUZUOQUAN 51, 52 (2001).
legislative history of the RPRCIN, we can conclude that the answer is no. Although the provisions on safe harbors under the August 2005 Draft of the RPRCIN used the term “liability for infringement,” the final text of the RPRCIN nevertheless chose the term “damages.” This means that other relief, for example, provisional relief against the NSPs for the infringements remains available.

It is stated clearly in the conference report for the DMCA that the safe harbors are not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.

This means that Section 512 doesn’t modify the general principles of liability, instead it creates a series of safe harbors for certain common activities carried out by service providers.

The E-Commerce Directive closely resembles the DMCA in that it leaves the underlying law on the nature and scope of an NSP’s liability unaffected. It appears that the relationship between the safe harbors and ordinary rules of copyright liability in China will be interpreted in the same manner as the DMCA and E-Commerce Directive, since the drafters of the RPRCIN emphasized that the Chinese safe harbor scheme was largely inspired by the provisions set forth in them and the drafters did not mention any exceptions in this area. If the drafters intended to adopt a different approach from the DMCA or E-Commerce Directive on the relationship between the safe harbors and ordinary rules of copyright liabil-

20 See August 2005 Draft of the RPRCIN arts. 21–24.
21 See RPRCIN arts. 20–23.
22 See Point 22 of Notice of the Higher People’s Court of Beijing on Issuing the Guiding Opinions (I) on Several Issues Concerning the Trial of Cases Involving Copyright Disputes in Cyberspace (for Trial Implementation) [hereinafter Guiding Opinions of Beijing Higher Court]. Although China adopted a two-tier trial system, there are four levels of courts in China: basic courts, intermediate courts, higher courts, and the Supreme Court. A higher court is the highest court in a province (for example, Anhui Province, Hubei Province) or a municipality directly under the central government. The Guiding Opinions of a Higher Court have no de jure binding effect, but have de facto binding effect on the basic and intermediate courts and the higher court of the province or the municipality directly under the central government where the higher court is located.
25 McEvedy, supra note 9, at 69-70.
26 ZHANG ET AL., supra note 17, at 76-90.
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ity, they would have stressed the difference, since it is a very significant issue.

Under the DMCA, before an NSP can take advantage of any safe harbor, it must meet two requirements of Section 512(i). One is that an NSP must “adopt and reasonably implement, and inform subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” The other is that an NSP must “accommodate and not interfere with standard technical measures . . . used by copyright owners to identify or protect copyrighted works.” In contrast, there are no such conditions under the RPRCIN for an NSP to meet before it can enjoy the privileges.

The RPRCIN incorporates all the four safe harbors under the DMCA. Of course, those four online activities under the DMCA were particular NSP activities and functions that seemed especially problematic in 1995. However, with the rapid development of digital technology, it seems that this old system needs to be updated since the safe harbors failed to accommodate perhaps the most explosive online technology today: peer-to-peer technology.

Since the safe harbors under the RPRCIN are aimed at the activities of NSPs, it means that a network company can qualify under all four safe harbors if it engages in all four activities provided for in the RPRCIN. Determining whether an NSP qualifies for one of the safe harbors does not bear upon a determination of whether the NSP qualifies for any of the other three safe harbors.

II. SUBSTANTIAL PROVISIONS OF SAFE HARBORS UNDER THE RPRCIN

Inspired by the DMCA and E-Commerce Directive, the RPRCIN establishes four safe harbors for the NSP’s activities: mere conduit, system caching, hosting, and information location tools. The following sections will discuss them in detail individually.

A. Mere Conduit Safe Harbor

The first limitation on liability provides protection for NSPs that essentially act as conduits. This safe harbor protects NSPs from liability for

28 Id. § 512(i)(1)(B).
29 See RPRCIN arts. 20–23; Wang, supra note 5, at 208.
30 Scott, supra note 5, at 100.
31 Id. at 101.
32 RPRCIN art. 20.
copyright infringement by reason of conduct relating to automatic access or transmission. To qualify for this safe harbor, the NSP's functions must meet the following conditions, all aimed at ensuring that the NSP is truly a mere conduit:

(1) The provision of access or the transmission of the material must have been initiated by or at the direction of the NSP’s subscribers.33

(2) The provision of connections or transmission must be carried out through an automatic technical process.34

(3) The NSP does not select or modify the works,35 performances,36 sound recordings,37 or video recordings38 (hereinafter collectively referred to as the “material”) contained in the transmission.39

(4) The NSP prevents anyone other than the designated recipients from accessing the material.40

In contrast, Section 512(a)(5) of the DMCA states that the material must be “transmitted through the system or network without modification of its content.” The use of the word “content” is deliberate.41 “Thus, for example, an e-mail transmission may appear to the recipient without bolding or italics resulting from format codes contained in the sender’s message.”42 From the plain text of Article 20 of the RPRCIN, it is not clear whether the drafters intended to require that the material (not only the content but also the format) contained in the transmission shall not be

33 Id. art. 20, 1st sentence.
34 Id.
36 Performances shall be understood as fixed performances, since they are the object of the right of communication through the information network by performers in the RPRCIN. See RPRCIN art. 26. It should be noted that the scope of fixed performances under the RPRCIN is broader than that under article 10 of the WPPT, since the latter limits the fixed performances into only those in phonograms, whereas the former does not make such a limitation.
37 Sound recordings are “the recordation of any sounds of performance and other sounds.” See 2002 Implementing Regulations art. 5(2).
38 Video recordings are “the recordation of a series of related images, with or without accompanying sounds, other than cinematographic works to which are assimilated works expressed by a process analogous to cinematography.” See 2002 Implementing Regulations art. 5(3).
39 RPRCIN art. 20(1).
40 Id. art. 20(2).
41 See 3 NIMMER & NIMMER, supra note 6, § 12B.02[A][2].
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modified, before an NSP can invoke safe harbor provisions. However, it seems absurd to adopt such an abnormally high standard. According to this author’s view, Article 20 of the RPRCIN shall be interpreted in accordance with the approach under Section 512(a)(5) of the DMCA, which establishes a requirement that the content shall not be modified.

B. System Caching Safe Harbor

The next safe harbor limits the liability for an NSP “by reason of the storage of material on the NSP’s system in order to facilitate access by users subsequent to the one who previously sought access to it.”43 Although the text of Article 21 of the RPRCIN does not use the term “caching” or “system caching,” it describes the mechanism of such a function,44 so this author calls the safe harbor contained in Article 21 the “system caching” safe harbor in the following part.

1. Conditions

Article 21 imposes four conditions for system caching to be entitled to the provision’s safe harbor.

(1) The storage is carried out through an automatic technical process for the purpose of making the material available to users of the NSP’s system who request access to the material from an originating site. It should be noted that the NSP carries out the transmission through its system acting at the direction of the users who requested the material and to whom the material is transmitted.

(2) The NSP does not modify the material. The same question as that in the first safe harbor mentioned above arises: whether the requirement of “without modification” applies only to the content of the material or also includes the format? In this author’s view, the answer shall also be the same as the first safe harbor.

(3) The NSP has no influence on the originating site’s control on the condition of the target of service acquiring the material.45 An NSP that caches material from an originating site shall not interfere with the ability of certain technology that is associated with the material to inform the operator of the originating site of information that would have been available to it had the access been directly to its site instead of through a cached version on the NSP’s system or network. A good

43 Zhang et al., supra note 17, at 80-81.
44 Qian Wang, Sousuo Yingqing Tigong Kuazhao Fuwu De Zhuzuoquan Qinquan Wenti Yanjiu [Research on the Copyright Infringement of the Cached Link Services Provided by Search Engines], 15 Dongfangfaxue 126, 127 (2010).
45 RPRCIN art. 21 (2).
example is the “hit” counts, on which the advertising revenue might depend.46

(4) The NSP modifies, removes, or disables access to the material it has stored through an automatic technical process when the material on an originating site has been modified, removed, or disabled from the network.47

It should be noted that the system caching safe harbor under the RPRCIN does not establish a notification and take-down procedure for cached material as under Section 512(b)(2)(E) of the DMCA.48

Although this safe harbor has been discussed in a few cases by Chinese courts, they did not really involve the circumstances provided for in RPRCIN Article 21, but dealt with the operation of search engines’ caches, which is a completely different function from that contemplated by this safe harbor.

2. Whether Providing a Cached Link by Search Engines Falls Under the System Caching Safe Harbor?

Google and other major search engines, such as Yahoo! or MSN, have been providing “cached” links for many years.49 When a cached link is clicked, the user is led not to the original Web page, but to the “snapshot”

46 H. R. REP. NO. 105-551 (II), at 52 (1998); WANG, supra note 5, at 389.
47 RPRCIN art. 21 (3).
48 Hong Xue, Wangluo Fuwu Tigongzhe Zhongjie Zeren Bifenggang De Bijiao Yanjiu (A Comparative Study on the Safe Harbor Concerning the Intermedi ate Liability of the Network Service Provider), 58 ZHONGGUO BANQUAN 29, 29 (2011).
49 The search engine caching process can be briefly described as follows. Since the main search engines use a similar mechanism, only Google is mentioned as an example. Google uses an automated program called “Googlebot” to crawl across the Internet to locate and analyze available Web pages, and to make a copy or “snapshot” of every Web page it finds. It stores the HTML code from those pages in a temporary repository called a cache. Once Google stores a Web page in the cache, it can include that page, as appropriate, in the search results it displays to users in response to their queries. When Google displays Web pages in its search results, the first item appearing in each result is the title of a Web page which, if clicked by the user, will take the user to the online location of that page. In most of the search results, Google often displays another link labeled “Cached.” When clicked by a user, the “Cached” link directs an Internet user to the archival copy of a Web page stored in Google’s system cache, rather than to the original Web site for that page. By clicking on the “Cached” link for a page, a user can view the “snapshot” of that page, as it appeared the last time the site was visited and analyzed by the Googlebot. See Field v. Google, Inc., 412 F. Supp. 2d 1106, 1110-12 (D. Nev. 2006).
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of that page that Google took when crawling the Web, as it appeared the last time the site was visited and analyzed by the Googlebot.\textsuperscript{50}

The American courts in \textit{Field v. Google}\textsuperscript{51} and \textit{Parker v. Google}\textsuperscript{52} held that Google’s cached link is entitled to the DMCA caching safe harbor. However, after a close reading of the statutory text and the legislative history of the DMCA, it is submitted that the decisions are questionable.\textsuperscript{53}

Baidu,\textsuperscript{54} as a leading Chinese search engine company, provides many services, including the cached link as does Google.\textsuperscript{55} In \textit{Zhejiang Flyasia E-Business v. Baidu},\textsuperscript{56} the Beijing High Court correctly held that the cached link provided by Baidu falls outside the boundaries of the caching safe harbor for the following reasons: (1) Baidu retrieves the Web page from the originating site on its own initiative, and is not acting at the direction of someone else; (2) the cached copy is made available to users that request access to the archival copy from the search engine cache and not to the original material from the originating site; (3) the cached copy that is displayed to users through cached links has been modified.\textsuperscript{57}

In fact, the American Congress chose certain common activities of service providers in 1998 to grant the benefit of limited liability.\textsuperscript{58} Unfortunately, the search engine’s cached link was not foreseen by Congress, and was omitted from the subject matter of the statutory provision, since it carries out a function “different enough from” the one contemplated by DMCA Section 512(b).\textsuperscript{59} Since the Chinese RPRCIN absorbed experience from the DMCA on the issue of safe harbors, a search engine’s cached link was not also considered by the RPRCIN’s drafters. Of course, this author believes that the provisions should be amended in order to

\textsuperscript{53} See 3 N IMMER & N IMMER, supra note 6, § 12B.03[A][2]; Miquel Peguera, \textit{When the Cached Link is the Weakest Link: Search Engine Caches Under the Digital Millennium Copyright Act}, 56 J. COPYRIGHT SOC’Y 589, 610-27 (2009).
\textsuperscript{54} Baidu was established in 2000, and was the first Chinese company to be included in the NASDAQ-100 index. In the second quarter of 2011, it is estimated that China’s Internet-search revenue share by Baidu was 76%. See WIKIPEDIA, Baidu, http://en.wikipedia.org/wiki/Baidu#cite_note-6 (last visited Apr. 5, 2013).
\textsuperscript{57} Id.
\textsuperscript{58} See S. REP. NO. 105-190, at 19 (1998).
\textsuperscript{59} Peguera, supra note 53, at 623.
make an NSP that provides cached link services be exempted from liability in some circumstances, since this feature is “closely related to the core of the search engine operation.” However, it seems more appropriate to make such an amendment in the framework of the current information location tools safe harbor, or in the framework of the limitations and exceptions provisions, rather than by expanding the scope of the current system caching safe harbor.

C. Hosting Safe Harbor

The third type of limitation on liability for the benefit of an NSP applies by reason of the storage at the direction of a subscriber of material that resides on an NSP’s system. Examples of such storage include providing server space for a user’s Web site or other forum in which material may be posted at the direction of users. If the material resides on the system of the NSP through its own acts or decisions and not at the direction of a subscriber, it will not be included in the RPRCIN article 22.

In order to qualify under RPRCIN article 22, an NSP providing information storage at the direction of subscribers must meet the following requirements.

1. Providing Accurate Information About the NSP

An NSP shall clearly state that “the network storage space is provided for its subscribers and make public its name, liaison person, and network address.” The reason for this condition is to avoid confusion by copyright holders about the material stored on the NSP’s system provided by the NSP itself; when such misunderstanding occurs, the copyright holders will sue the NSP, resulting in increased social costs. This interpretation is surprising. In fact, the copyright holders always sue the NSP even if the NSP states clearly that its network storage space is provided for its subscribers in accordance with RPRCIN Article 22(1). Although the reasoning of this provision is questioned, the courts have generally held that

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60 Id. at 644.
61 See Qian Wang, WAP Sousuo Ji Xiangguan Fuwu Zhuzuoquan Qinquan Wentu Yanjiu [Research on Copyright Infringement of WAP Search and Relevant Services], 131 ZHISHICHANQUAN 18, 24-25 (2012).
62 Peguera, supra note 53, at 645.
63 RPRCIN art. 22.
64 S. REP. NO. 105-190, at 44 (1998); ZHANG ET AL., supra note 17, at 83.
65 RPRCIN art. 22 (1).
66 ZHANG, ET AL., supra note 17, at 85.
the NSP cannot enjoy the privilege of safe harbor if it did not state on its Web site that the network storage is provided for its subscribers. With regard to the information on the name, liaison person, and network address, of the NSP, it seems reasonable to require the NSP to provide this information to the public on its Web site in order that the copyright holders can send notification of infringement to the NSP.

2. The NSP Does Not Modify the Material

The second condition required to take advantage of the safe harbor is that the NSP does not modify the material stored on its system at the direction of its subscribers. What is the meaning of the term “modify”/“modification?” In practice, the controversial issue is that a Web site automatically inserts its logo (digital watermark) at the corner of a video uploaded by a subscriber. Some courts hold that inserting such a logo as an automatically added digital watermark alone does not constitute “modification,” since it does not influence the expression of material substantially and does not impair the use of the material by the public. Others are of the view that such act constitutes “modification.” Three examples are enumerated in the Guiding Opinions of the Beijing High Court as not constituting “modification” in the meaning of RPRCIN Article 22: (i) modification of the storage format of the material; (ii) adding Web site marks, such as digital watermarks to the material; and, (iii) adding advertisements to the beginning or end of the material or inserting advertisements in the material.

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69 RPRCIN art. 22(2).
70 In Chinese, there is no difference between “modify” and its noun form “modification.”
73 Guiding Opinions of Beijing Higher Court, point 24.
3. **Lack of Knowledge**

Although the language regarding the lack of knowledge on the hosting NSP is similar in the DMCA\(^{74}\) and the E-Commerce Directive,\(^{75}\) they diverge on the subject of the awareness of facts or circumstances from which the illegal activity is apparent.\(^{76}\) Under the E-Commerce Directive, a two-tiered standard is set forth: one applicable to criminal liability (lack of actual knowledge, which means that even when the NSP does possess awareness of acts and circumstances from which illegal activity or information is apparent, the NSP will still be free from criminal liability, as long as it lacks actual knowledge), and the other to claims for damages (lack of both actual knowledge and awareness of acts and circumstances from which illegal activity or information is apparent).\(^{77}\) The DMCA, however, does not make such a differentiation. The RPRCIN adopts the approach comparable to the DMCA: only covering monetary relief without establishing a two-tiered standard.\(^{78}\)

**a) Actual knowledge**

The actual knowledge standard is high, requiring a showing that an NSP actually knew that material on its Web site posted by a user infringed on copyright.\(^{79}\) Although such a showing can be accomplished in many ways, it is generally demonstrated through the NSP’s verbal acknowledgement and actual practices.

**b) Apparent Knowledge**

Under DMCA § 512(c), as an alternative to actual knowledge, an NSP must not be “aware of facts or circumstances from which infringe-

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\(^{74}\) Section 512(c)(1)(A) of the DMCA requires that the service provider: (1) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; . . . .”

\(^{75}\) Article 14(1) of the E-Commerce Directive states: “(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; . . . .”

\(^{76}\) See Peguera, supra note 8, at 487-88.

\(^{77}\) Id. at 488.

\(^{78}\) RPRCIN art. 22(3).

\(^{79}\) Qian Wang, Helide Suyin, Zhengquede Panjue-Ping Shiyida Changpian Gongs [Reasonable Cause of Action and Right Judgment: Comments on The First Instance Ruling of the IFPI v. Yahoo! China Case] 34 Zhonggushanquan 44, 46 (2007); WANG, supra note 5, at 277.
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...ment is apparent."\(^{80}\) This standard is the so-called "red flag" test\(^{81}\) and the knowledge required may be described as "apparent knowledge."\(^{82}\)

The apparent knowledge standard is different from the actual knowledge standard in that the former is actual knowledge of the circumstances from which infringement is apparent, and the latter is actual knowledge of the infringement itself.\(^{83}\) The apparent knowledge standard is also different from a constructive knowledge standard.\(^{84}\) The former is on the question of whether an NSP deliberately proceeds in the face of blatant factors of which it is aware,\(^{85}\) or whether it turns a blind eye to red flags of obvious infringement.\(^{86}\) However, the latter is on the question of what a reasonable person would have deduced from the circumstances.\(^{87}\) In sum, the apparent knowledge standard is lower than actual knowledge standard, but more demanding than constructive knowledge.

Since the RPRCIN Article 22(3) uses the terms "should have reasonably known," it seems that the RPRCIN adopts the constructive knowledge standard, not the apparent knowledge standard. However, many Chinese courts interpret this standard in accordance with the so-called "red flag" test under the DMCA § 512 (c)(1)(A)(ii).\(^{88}\) It should be noted that the Guiding Opinions of the Beijing High Court clearly recognize the

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\(^{81}\) The "red flag" test has both a subjective and an objective element. The subjective element tests the service provider’s subjective awareness of the facts or circumstances of infringing activity. The objective element tests whether "infringing activity would have been apparent to a reasonable person under the same or similar circumstances." See H.R. REP. NO. 105-551 (pt. 1), at 26 (1998); H.R. REP. NO. 105-551 (pt. 2), at 53 (1998); S. REP. NO. 105-190, at 44 (1998).

\(^{82}\) See Liliana Chang, The Red Flag Test for Apparent Knowledge Under the DMCA §512(c) Safe Harbor, 28 CARDOZO ARTS & ENT. L.J. 195, 203 (2010).

\(^{83}\) Id.

\(^{84}\) Some commentators and courts have mistakenly regarded the knowledge standard under the red flag test as a constructive knowledge standard. Had Congress intended so, it would have inserted the “should have known” language. The lack of such language indicates that Congress intended to introduce a new standard. See Todd E. Reese, Wading Through the Muddy Waters: The Courts’ Misapplication of Section 512(c) of the Digital Millennium Copyright Act, 34 Sw. U. L. Rev. 287, 300 (2004); McEvedy, supra note 9, at 67.


\(^{87}\) Corbis Corp, 351 F. Supp. 2d 1108.

\(^{88}\) Bo Jiang & Jinping Zhang, Wangluo Fuwu Tigongzhe De Zhidao Biaozhun Panduan Wenti Yanjiu-Chongxin Renshi Hongqi Biaozhun [Defining the Standard of NSP’s Knowledge-Rethinking of the Red Flag Test], 285 FAIY SHIYONG 52, 55-56 (2009); WANG, supra note 5, at 321-322.
“red flag” test, which interprets the terms “should have reasonably known” under RPRCIN Article 22(3) as “whether an NSP should realize the existence of infringing activity from the apparent facts or circumstances.” This interpretation merges both the subjective element (whether the NSP is aware of the circumstances of infringement), and objective element (whether the infringement is apparent from the circumstances), in the DMCA red flag test.89 In addition, some examples of circumstances under which the apparent knowledge standard is to be considered satisfied are listed in the Guiding Opinions of the Beijing High Court:

(1) The alleged infringing material stored is audio-visual works in their current season or are currently being broadcast or shown, popular musical works, other works with high popularity or the related performances or sound or video recordings, and the above works, performances, or sound or video recordings are placed on the homepage, other main pages or other positions obvious to the NSP;

(2) the alleged infringing material is placed on the homepage or other main pages of BBS, and the NSP fails to take measures to remove them within a reasonable period of time;

(3) the alleged infringing audio-visual works, which are professionally made with intact content or audio-visual works in their current season or that are currently being broadcast or shown are placed in a conspicuous position or are recommended, or a classification list of film and television works such as “top chart” or “film and television” channel is set;

(4) any selection, organization, or classification of the alleged infringing material uploaded by service receivers is conducted.90

Under the first three circumstances listed above, the infringements are apparent to an NSP “from even a brief and casual viewing,”91 and the “flag” is “brightly red indeed and is waving blatantly in the provider’s face.”92 However, the fourth example is questionable, since it covers a broad scope, including not only cinematographic works, musical works, but also photographic works, written works, and so on. The human editors and reviewers, who view and classify various categories of material, could not be expected, during the course of a brief visit, to determine whether the material (say, for example, photography) was still protected by copyright or was in the public domain; if the material was still protected by

89 WANG, supra note 5, at 321-22.
92 3 NIMMER & NIMMER, supra note 6, § 12B.04[A][2][a].
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copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.93

A question may arise here: if an NSP obtains actual knowledge or apparent knowledge (except when it obtains such knowledge through a notification from the copyright holder), and it acts expeditiously to remove the material, will the NSP still be disqualified from the safe harbor? From the plain language of RPRCIN Article 22, the answer seems to be positive. However, such an interpretation is obviously absurd and some courts interpreted in the opposite way.94

4. Lack of Direct Financial Benefits

The fourth condition for this safe harbor requires that the NSP not receive financial benefits directly attributable to the infringing activity.95 In contrast with the DMCA § 512(c), RPRCIN Article 22(4) does not mention the second condition “without an ability to control.”96 In this regard, the controversial issue in application of Section 512(c) of the DMCA — how to determine whether an NSP “has the right and ability to control infringing activity” — will not exist in Chinese courts.

With regard to the direct financial benefits, it is agreed that a simple account set-up fee, fees based on the length of the message or by connect time, do not constitute financial benefits.97 However, when advertising fees are concerned, there are different opinions. Some courts found they constitute direct financial benefit.98 Other courts take the opposite view.99

95 RPRCIN art. 22(4).
96 DMCA § 512(c)(1)(B) requires that the service provider, “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”
In this author’s opinion, the essential aspect of the “direct financial benefit” under the RPRCIN is whether there is a causal relationship between the infringing activity and any financial benefit an NSP obtains. In other words, financial benefits from the infringing activity are direct because that activity actually draws customers, rather because the activity draws more customers than would non-infringing activity. The Beijing High Court proposed the following guidance:

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.100

5. Removal

The fifth condition relates to what happens when an NSP gains knowledge that likely infringing material is present. Upon receiving notification of the claimed infringement, the NSP must remove the material that is claimed to be infringing.101

It seems that two issues need to be clarified. The first is when the NSP should respond to remove the material. Although RPRCIN Article 22 is silent on this issue, Article 15 may be referred to, which requires the NSP to “promptly” remove the material suspected of infringement. Compared with the September 2005 Draft of the RPRCIN, the final text is more in favor of the interests of the right holders, since the September 2005 Draft permits the NSP to remove “within five days” after it receives the notification.102 However, no definition of term “promptly” is provided.

The second issue is what the notification must include before it is considered valid. This second issue, will be discussed in the following part D.2: “Notice and Take-Down Procedure.”

D. Safe Harbor for Information Location Tools

The E-Commerce Directive, unlike the DMCA, does not establish a safe harbor for information location tools. In contrast, the Chinese RPRCIN provides such a safe harbor.103 This safe harbor covers a wide variety of activities, which may range from the operation of a search engine to the inclusion of a hyperlink on a website.

100 Guiding Opinions of Beijing Higher Court, point 25.
101 RPRCIN art. 22(5).
103 RPRCIN art. 23.
1. Conditions

RPRCIN Article 23 includes in its safe harbor on an NSP's compliance the same two threshold requirements that Article 22 imposes for storage at the direction of users: the NSP must not have actual or constructive knowledge of the infringement;104 and, upon receiving the statutorily prescribed notification, the NSP promptly disables access to the infringing material. Unlike the hosting safe harbor, this safe harbor lacks the condition on lack of financial benefit.

2. Notice and Take-Down Procedure

As mentioned above, a condition modeled on the hosting safe harbor is that the NSP disables access to the material that is claimed to be infringing upon receiving notification of the claimed infringement. This is the so-called notice-and-take-down procedure, introduced by the DMCA; however, the E-Commerce Directive lacks such a procedure.

RPRCIN Article 14 stipulates in great detail the elements that a notification of claimed infringement must contain in order to be effective. In order to be effective, a notification must be in writing105 and include a statement of certification of the notification’s accuracy.106 A question remains as to whom the notification must be sent. Article 14 only mentions generally that it should be sent to the NSP, but the designated agent to receive notifications of claimed infringement remains to be clarified. In addition, the notification must include the following elements:

(1) the name (appellation), means of contact and address of the right owner;
(2) the title and network address of the infringing material which is requested to be removed or to which the link is requested to be disconnected; and
(3) prima facie proof of the infringement.107

104 See supra Part II. C. 3.
105 RPRCIN provides no clear guidance on the meaning of a written notification. However, in accordance with the Contract Law, a written notification includes telegram, telex, facsimile, electronic data exchange, and electronic mail, etc. which is capable of expressing its contents in a tangible form. See Contract Law of P. R. China art. 11, 2 Zhonghua Renmin Gongheguo Quanguo Renmin Daihao Dahui Changwu Weiyuanhui Gongbao 104 (1999); translated in P. R. C. Laws & Regs. II-04-00-101 (2001).
106 RPRCIN art. 14 (last sentence).
107 Id. art. 14. Prima facie proof of infringement is evidence, which may prove that the right holder’s copyright is prejudiced. These include proof of ownership of a valid copyright, proof of unauthorized use, or proof of breach of contract. The work papers concerning copyrights provided by the parties in question, originals, and legitimate publications, registration certificate of the copyrights, certificates issued by the authentication institution and the
Lack of any one of the elements will result in the notification being non-binding, since the RPRCIN does not use the term “substantially.” Such a defective notification shall not be considered in determining if an NSP has actual or apparent knowledge. In other words, the copyright holder has to demonstrate the NSP’s knowledge based on evidence independent of the matters contained in the notification. However, one court found that a noncompliant notice may be a “red flag,” if the notice includes necessary information to permit the NSP to locate the infringing material. This interpretation is confirmed by the Guiding Opinions of the Beijing High Court. It should be noted that the persons who have the right to notify an NSP can only be the right holders, and not any person acting on the right holders’ behalf.

Naturally, it seems that an NSP that receives a notification of claimed infringement from the copyright holder is free to refuse to take down the claimed infringing material. Such a refusal simply deprives the NSP of the safe harbor that RPRCIN Article 22 affords, without automatic liability. The NSP can still utilize its traditional defenses under the copyright law. If it is ultimately determined by a court that the offending material is not itself infringing, then the NSP should prevail. Unfortunately, Article 15 mistakenly uses the term “shall,” which imposes the obligation on the NSP to take down the offending material after it receives a notification from the copyright holder. This means that the NSP will assume liability automatically if it does not take down the claimed infringing material, after it receives the notification.

contracts obtained may be taken as” such proofs. See ZHANG, ET AL., supra note 17, at 56; Interpretation of the Supreme People’s Court Concerning Some Issues Relating to Application of Law to Trial of Cases of Civil Dispute over Copyright art. 7, ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO, translated in 72 CHINA PAT. & TRADEMARKS 81 (2003); Ningbo Success Multimedia Comm’cn Co., Ltd. v. Beijing Shi Yue Network Tech. Co., Ltd., No. 5314 Erzhongminzhongzi (2008).

See RPRCIN arts. 14, 15.


Guiding Opinions of Beijing High Court, point 28.

“Where a right holder . . . may notify the NSP . . . .” See RPRCIN art. 14.

See Qian Wang, Huangmimui Luoj, Wulide Yaoqiu [Absurd Logic and Unreasonable Demands], 39 ZHONGGUOBANQUAN 56, 58 (2008); WANG, supra note 5, at 265.

WANG, supra note 5, at 265.
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The relative aim of the RPRCIN is not intended to create any new liabilities for an NSP.\(^{115}\)

What if the allegation of infringement relates to several works? Some courts held that one notification may apply to multiple copyrighted works at a single online site, so long as the notification includes a representative list of such works at that site.\(^{116}\) However, other courts were of the view that the notification must clearly state each work.\(^{117}\)

III. NEW DEVELOPMENTS

It is understood that the safe harbor provisions under the RPRCIN encourage the NSPs to cooperate with copyright holders in enforcing their copyright and provide the NSPs with more certainty in order to attract investments to continue the expansion of the Internet. However, there are certain gaps and ambiguities under the RPRCIN. Many Chinese lawyers noticed this problem and some lawyers have suggested improving the safe harbor provisions by the amendment of the Copyright Law.\(^{118}\) An ambitious proposal is to repeal the current six copyright-related Regulations,\(^{119}\) including the RPRCIN,\(^{120}\) and to incorporate the safe harbor provisions into the copyright law and at the same time improve them.

\(^{115}\) See Xueqing Shi & Yong Wang, Bifenggang Haishi Fengbaojiao-Jiedu Xinxu Wanghao Chuanbo Quan Baohu Taoli Di Ershisan Tiao [Safe Harbors or Cape of Storms: Analysis on RPRCIN Article 23], 110 Zhishichanquan 23, 23-24 (2009).


\(^{118}\) On July 13, 2011, the Third Revision of the Copyright Law was launched. It was believed that this revision will make substantial revisions on the Copyright Law. Mingfang Lai, The Third Revision of the Copyright Law Commenced, http://www.ncac.gov.cn/cms/html/309/3517/201107/737276.html (last visited Apr. 5, 2013).

\(^{119}\) The six copyright-related Regulations are as follows: Regulations on Implementing International Copyright Treaties, Regulations on Computer Software Protection, Implementing Regulations of the Copyright Law of P. R. China, Copyright Collective Management Regulations, Regulations for the Protection of the Right of Communication through the Information Network and Interim Measures for the Payment of Remuneration for Phonograms Played by Radio and Television Stations.

It should be noted that, on March 31,121 and July 6,122 2012, the National Copyright Administration of the P. R. China (NCAC) released the First and Second Draft Amendments of the Copyright Law for public comments. Under the two drafts, the above ambitious proposal is rejected. More disappointingly, only one article, Article 69, in the two Drafts is related to safe harbor rules.

A. The First Draft Amendment of the Copyright Law

Paragraph 1 of Article 69 of the First Draft Amendment of the Copyright Law (hereinafter the First Draft) confirms that NSPs, which provide pure network technology services, such as hosting, searching, or linking, will not be put under a general obligation of monitoring their systems or networks for copyright infringement. In fact, it is impractical and technically impossible to request the NSPs to monitor the contents on the network.

Paragraphs 2 and 3 of Article 69, which clarify the interpretation of existing provisions under RPRCIN Article 23 and Article 36 of the Tort Liability Law, are very important.123 They confirm that an NSP will be not liable for damages if it acts promptly to remove, block, or disable access to, the infringing material, upon obtaining actual or apparent knowledge.

B. The Second Draft Amendment of the Copyright Law

Two paragraphs are added in the Second Draft Amendment of the Copyright Law (hereinafter the Second Draft). Paragraph 4 of Article 69 of the Second Draft, for the first time, in the Copyright Law, introduces contributory infringement and induced infringement. Paragraph 5 of Article 69 of the Second Draft makes it clear that NSPs that make available works, performances, or sound recordings directly to the public will not enjoy the privilege provided by Paragraph 1 of Article 69. This clarification is very important, since the meaning of NSP is not defined under the Copyright Law or the RPRCIN, which may be interpreted in broad sense to cover those who provide content services. However, it should be noted

that the term “video recordings”\textsuperscript{124} is not used in Paragraph 5 of Article 69. Does it mean that the NSPs, which make available “video recordings” directly to the public may enjoy the safe harbor? The answer is no. The reason is that the Draft deletes the relevant provisions on video recordings under the current Copyright Law and incorporates video recordings into audiovisual works.\textsuperscript{125} It means that video recordings may be covered by “works” in Paragraph 5 of Article 69 of the Second Draft. However, it is to be noted that the 2012 Network Judicial Interpretations\textsuperscript{126} still use the term “video recordings.” This is understandable, since the Draft has not been adopted.

\textbf{C. The Third Draft Amendment of the Copyright Law}

The Third Draft Amendment of the Copyright Law (hereinafter the Third Draft) was released by the NCAC in October 2012. Different from the First and Second Drafts, it was not made available for public comments.

The Third Draft contained practically identical provisions on the online copyright infringement liability limitations as the Second Draft; the only two minor changes were: (1) the clause number was changed from Article 69 in the Second Draft to Article 73; and (2) the Third Draft did not use the term “block” as a measure for the NSP to adopt, because it was considered as redundant, since the terms “remove” and “disable access to” are used.

The three Drafts are only the first few steps in the long process of legal revision of the copyright law.\textsuperscript{127} The Third Draft has been submitted to the State Council Legislative Affairs Office (“SCLAO”). After revision, the SCLAO will submit the improved Draft to the State Council for approval, and the State Council approved version may then be submitted to the Standing Committee of the National People’s Congress. Then, the Standing Committee of the NPC will request public comments (perhaps several times) before it reviews and approves the final texts. The Third

\textsuperscript{124} For the definition of “video recordings,” see \textit{supra} note 38.

\textsuperscript{125} Audiovisual works means “the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be communicated through a device.” See Second Draft art. 3(2)(12). From this definition, it is understood that “video recordings” in the Copyright Law are covered by “audiovisual works” in the Second Draft Amendment of the Copyright Law.

\textsuperscript{126} See \textit{infra}, note 130.

Revision of Trademark Law has been going on for more than five years, but is still under construction.\textsuperscript{128} Similarly, the final adoption of the Amendment of the Copyright Law could take quite a few years. However, we received the welcome news at the end of 2012 that the Supreme People’s Court had issued the long-awaited Judicial Interpretations on online copyright infringement liability to fill the gap.\textsuperscript{129}

\textbf{D. 2012 Network Judicial Interpretations}

On December 17, 2012, the Supreme People’s Court of China issued the Provisions on Certain Issues Related to the Application of Law in the Trial of Civil Cases Involving Disputes over Infringement of the Right of Communication Through the Information Network (hereinafter “2012 Network Judicial Interpretations”),\textsuperscript{130} which came into force on January 1, 2013. The 2012 Network Judicial Interpretations provide relatively clear guidance for courts as to how to determine direct or indirect infringement and apply safe harbor rules. However, it seems there are still some unclear and ambiguous issues to be clarified.

1. \textit{The Meaning of Information Networks}

Article 2 of 2012 Network Judicial Interpretations clarifies that “information networks include the computer Internet, radio and television networks, fixed communication networks, mobile communication networks, and other information networks with computer, television, fixed-line telephone, mobile telephone, or other electronic equipment as terminals, as well as local area networks accessible by the public.” This definition interprets information networks in a very broad sense, which extends not only to the Internet but also to other digital networks. Unfortunately, there is no definition of the NSP.

2. \textit{No General Obligation to Monitor}

As did the three drafts of the Amendment of the Copyright Law, the 2012 Network Judicial Interpretations reaffirmed that the NSP has no general obligation to monitor the information on its system.\textsuperscript{131}

\textsuperscript{128} Id.
\textsuperscript{129} See infra note 130.
\textsuperscript{131} 2012 Network Judicial Interpretations art 8.
3. Snapshot (Cached Link) Not Covered by the System Caching Safe Harbor

Article 5 of the 2012 Network Judicial Interpretations clarifies that providing snapshot (cached link) is considered as “making available.” It means that the NSP that provides a snapshot service may commit a direct infringement unless such a service “does not affect the normal use of the work and does not unreasonably prejudice the legitimate interests of the right holders.”\textsuperscript{132} It is understood that a snapshot service may not be covered by the system caching safe harbor since the latter is related to indirect copyright infringement.

4. Direct Financial Benefits

With regards to the direct financial benefits, the relevant substantial contents in the Guiding Opinions of the Beijing Higher Court\textsuperscript{133} are incorporated into the 2012 Network Judicial Interpretations, which state that direct financial benefits include advertising fees for specific works, performances, sound or video recordings, or other financial benefits that have certain relationships with the specific works, performances, sound or video recordings.\textsuperscript{134} However, regular advertising fees or service fees for its provision of network service will not be considered as direct financial benefits.\textsuperscript{135}

5. Knowledge Standard

a) Actual knowledge

Article 13 of the 2012 Network Judicial Interpretations confirms that “to establish actual knowledge, a copyright holder may provide the NSP with a notification.” However, it is not clear whether such a notification needs to be in full or substantial compliance with all of RPRCIN Article 14’s clauses.

b) Apparent knowledge

The 2012 Network Judicial Interpretations require that, when determining whether the NSP has apparent knowledge, the courts shall consider all of the following factors:

1. The nature and mode of services provided by the NSP, the possibility that such services may trigger infringement acts and the information management capability that the NSP should have;

\textsuperscript{132} Id. art. 5(2).
\textsuperscript{133} Guiding Opinions of Beijing High Court, point 25.
\textsuperscript{134} 2012 Network Judicial Interpretations art. 11.
\textsuperscript{135} Id.
(2) Type and popularity of the works, performances, or audio-video product disseminated and the degree of obviousness of the infringing information;

(3) Whether the NSP has taken the initiative to select, edit, modify, or recommend the works, performance, or audio-video product involved;

(4) Whether the NSP has taken positive and reasonable measures against infringement acts;

(5) Whether the NSP has set up convenient programs to receive notices of infringement and made timely and reasonable responses to such notices;

(6) Whether the NSP has taken reasonable measures against repeated infringement acts by the same web user; and

(7) Other relevant factors.136

Besides the above-mentioned factors to determine apparent knowledge, it should be noted that the 2012 Network Judicial Interpretations provide independent regulations concerning the apparent knowledge standard for video-sharing providers. If an NSP providing video-sharing services: “establishes charts, catalogues, indexes, descriptive paragraphs or brief introductions or in other ways to recommend hot movie and television programs which can be downloaded or browsed or are otherwise accessible by the public on its webpage,”137 it will be considered as having apparent knowledge.

6. Notice and Take-Down Procedure

First, the 2012 Network Judicial Interpretations clarifies that the form of a written notification includes, but is not limited to letter, fax, and electronic mail.138 Second, the 2012 Network Judicial Interpretations require that an NSP “take necessary measures” to “timely” remove, block, or disable access to the infringing material. It should be noted that the term “timely” is used, instead of “promptly” as adopted by the RPRCIN. The relevant factors to determine whether the measure is taken in a timely manner includes, but is not limited to: (1) method of notification by a copyright holder; (2) degree of accuracy of notification; (3) degree of difficulty in taking measures; (4) nature of services provided by the NSP; and, (5) the type, popularity, and quantity of the material involved.139

136 Id. art. 9.
137 Id. art. 10.
138 Id. art. 13.
139 Id. art. 14.
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Compared with the Draft of the 2012 Network Judicial Interpretations, the current provisions grant the courts more flexibility to determine the “timely” requirement, since the Draft Judicial Interpretations clearly require an NSP to act within “one business day” when a popular film is involved, or within “five business days” for other material. The Draft Judicial Interpretations set out a specific time frame within which an NSP must respond to a take-down notification. However, the final texts delete the specific time requirement.

IV. CONCLUSION

As mentioned above, the RPRCIN establishes four safe harbors for the NSP’s activities and provides conditions for an NSP to be qualified under each safe harbor; however, there are no prerequisites applicable to all the safe harbors as in the DMCA: (a) adopting policy of terminating repeat infringers; and (b) accommodating standard technical measures. Some Chinese scholars are in favor of incorporating these two conditions into the RPRCIN. It should be noted that the 2012 Network Judicial Interpretations enumerate them in the list of factors for the court to determine the NSP’s apparent knowledge.

The RPRCIN contains a provision (RPRCIN Article 13) on the obligation for an NSP to disclose information to identify direct infringers. RPRCIN Article 13 is closer to Article 15.2 of the E-commerce Directive than to DMCA section 512(h)(1), because an NSP is obligated under the RPRCIN to disclose the information to the “copyright admin-


\footnotesize{141} \text{17 U.S.C. § 512(i) (2006).}

\footnotesize{142} \text{See, e.g., Libo Zhang et al., \textit{Bifenggang Yuanze Shiyongxing Yanjiu Ji Lifajianyi [Proposals to Amend the Safe Harbor Rules] 151 TUSHU QINGBAO ZHISHI 122, 126-27 (2013).}}

\footnotesize{143} \text{2012 Network Judicial Interpretations art. 9.}

\footnotesize{144} \text{RPRCIN art. 13.}

\footnotesize{145} \text{E-Commerce Directive Article 15.2 provides that “[m]ember states may establish obligations for information society service providers . . . to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.”}

\footnotesize{146} \text{DMCA § 512(h)(1) provides that “[a] copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer . . . .”}
Whether an NSP qualifies for any one of the four safe harbors has no influence on determining whether it qualifies for any other. Each of the safe harbors contains its own criteria. Even if an NSP fails to qualify for the safe harbor, there is not automatic liability by sole reason of that failure; the plaintiff still bears the burden of proving copyright infringement.\footnote{Qian Wang, *Shipin Fenxiang Wangzhan Zhuzuoquan Qinquan Wenti Zai Yanjiu* [Further Research on the Infringement of Video-Sharing Websites], 135 FASHANG YANJIU 85, 87 (2010).}

With regard to the requirements for a notification to be considered effective, that is unclear under the RPRCIN and the 2012 Network Judicial Interpretations. It seems that the requirement shall only be substantial compliance with the elements provided for in RPRCIN Article 14 (sufficient to locate infringing material), instead of perfect compliance.\footnote{See NIE, supra note 97, at 146.}

Current provisions under the RPRCIN and the 2012 Network Judicial Interpretations only mention that copyright holders may send notification to the NSP, but do not mention a specific entity to receive the notification. It is suggested that provisions need to be introduced to require an NSP to designate an agent to receive the notification of a claimed infringement, that the name, address, phone number, and electronic mail address of the agent be made available to the public on its Web site, and that this information be provided to the Copyright Department.

In digital era, technology advances too quickly and too unexpectedly. It is believed that the 2012 Network Judicial Interpretations may be out of date in the near future. It is not feasible to wait for the NPC, the State Council, or the Supreme Court to pass new versions of the Copyright Law, the RPRCIN or Network Judicial Interpretations. The Chinese courts should have more flexibility to interpret relevant laws, regulations, or judicial interpretations, to deal with new problems and challenges, in such a way as to ensure an effective balance of interests among the copyright holders, the NSPs, and the public. Also, it is important for courts to reconcile the relationship among the RPRCIN and Copyright Law, Tort Liability Law, and relevant judicial interpretations when interpreting safe harbor rules.\footnote{See Qian Wang, *Xinxi Wangluo Chuanboquan Baohu Tiaoli Zhong Bifeng-gang Guize De Xiaoali* (The Effects of the Safe Harbor Rules in the RPRCIN), 343 FAXUE 128, 140 (2010).}