

**MINI-DISSERTATION TOPIC:**

**“THE INDIRECT LIABILITY OF MOBILE SERVICE PROVIDERS IN  
SOUTH AFRICA: A COMPARATIVE STUDY”**

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by

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## DEDICATION

This dissertation is dedicated to:

- My late brother Dapo Aganga.
- My parents for their love and support.
- My older brother Tubosun and my sister Olaolu for their faith and trust in me.

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## List of acronyms and abbreviations

ECT Act	Electronic Communications and Transactions Act
EUCD	European Copyright Directive
MSP	Mobile Service Providers
IIPA	INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
ISP	Internet Service Provider
DMCA	Digital Millennium Copyright Act
IP	Internet Provider
EU	European Union
BEREC	Body of European Regulators of Electronic Communications
OCILLA	Online Copyright Infringement Liability Limitation Act
IRB	Industry Representative Body
PC	Personal Computer
SPA	Software Publishers Association
BBS	Bulletin Board Systems
RIA	Research ICT Africa
RTC	Religious Technology Center
WWW	World Wide Web
P2P	Peer to Peer
RIAA	Recording Industry Association of America
FB	Facebook
BBM	Blackberry Mobile
CEO	Chief Executive Officer
USA	United States of America

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## Part I:

### INTRODUCTION

#### General

My dissertation is a comparative study on the potential liability faced by Internet Service Providers for indirect copyright infringement. Copyright infringement across digital media in South Africa has taken a different face than that in the Developed world. In the South African context, mobile phones are especially a real challenge with regards to copyright infringement.

In a 2012 study conducted by UNICEF into how young South Africans use mobile phones, a South African University student stated: “I use my cellphone for everything”<sup>1</sup>. The university student goes on to explain that she uses her multi-function mobile phone to download and watch movies, access and pay bills, and receive bank account information online and through text message notifications<sup>2</sup>. This behavior cited in the report is not just indicative of this one student. many South Africans

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<sup>1</sup> Gerrit Beger, Akshay Sinha UNICEF New York, Division of Communication, Social and Civic Media Collaborators: UNICEF South Africa, Division of Communication Kate Pawelczyk Contributors: Priscillia Kounkou Hoveyda, Erin Garcia, Melanie Zuch “South African mobile generation: Study on South African young people on mobiles” pdf. Page 15. (2012) See also Bryson, Donna, ‘Africa is the Fastest Growing Cell Phone Market’, Daily News, 13 November 2011, <http://www.iol.co.za/dailynews/opinion/africa-is-fastest-growing-cellphone-market-1.1176766> (accessed 5 February 2013).

<sup>2</sup> Gerrit Beger, Akshay Sinha UNICEF New York, Division of Communication, Social and Civic Media Collaborators: UNICEF South Africa, Division of Communication Kate Pawelczyk Contributors: Priscillia Kounkou Hoveyda, Erin Garcia, Melanie Zuch “South African mobile generation: Study on South African young people on mobiles” pdf. Page 15. (2012) See also Bryson, Donna, ‘Africa is the Fastest Growing Cell Phone Market’, Daily News, 13 November 2011, <http://www.iol.co.za/dailynews/opinion/africa-is-fastest-growing-cellphone-market-1.1176766> (accessed 5 February 2013).

in both urban and rural communities can share, and access digital information through mobile and computer Internet connectivity . Further as of 2011 South Africa now experiences a rate of over 100.48% per cent mobile penetration in comparison to the percentage of the country's population<sup>3</sup>.

According to the Miniwatts Marketing Group, South Africa's computer internet penetration as a percentage of the population is 13.9%<sup>4</sup>. Mobile phones in South Africa account for the majority of this internet connectivity and by bringing to the "hands of the mass market"<sup>5</sup>. Further according to Research ICT Africa (RIA) statistics more South Africans access mobile internet to communicate via social networking than email<sup>6</sup>. Quite simply the way in which South Africa accesses the internet is more social than even her African counterparts. The act of file sharing on this medium is not only possible but functional.

Copyright law entails national laws and rights for the copyright holder. The foremost authority on copyright in South Africa is the Copyright Act. However, the Electronic Communications and Transactions Act (the ECT Act) specifically deals with the liability of Internet Service Providers<sup>7</sup>. In this context the protection of Internet Service Providers provided by the ECT Act is pivotal. The Act under Chapter XI provides

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<sup>3</sup> International Telecommunication Union (ITU), "Mobile cellular subscriptions", 2010, <http://www.itu.int/ITU-D/ict/statistics/material/excel/2010/MobileCellularSubscriptions00-10.xls> (accessed 6 February 2013).

<sup>4</sup> <http://www.internetworldstats.com/africa.htm#za> (accessed on 5<sup>th</sup> February 2013)

<sup>5</sup> <http://www.southafrica.info/business/trends/newbusiness/internet-180512.htm> (accessed on 5<sup>th</sup> February 2013)

<sup>6</sup> RIA Policy Brief No 2 2012pdf page 3 <http://www.researchICTafrica.net> (accessed on 5<sup>th</sup> December 2012)

<sup>7</sup> ECT Act 25 of 2002, Chapter XI

indemnity from liability to Internet Service Providers for the infringements of their users under specific conditions<sup>8</sup>.

Social and mobile networking in South Africa may have severe ramifications on copyright infringement<sup>9</sup>. A 2009 TNS report conducted a study involving South Africans aged 16 years and older. The study was on how South Africans use social networking sites. The study found that 74 per cent of those surveyed used Social networks<sup>10</sup>. According to the study, 61 per cent upload photo and video content with 46 percent of those surveyed accessing these social networking sites through mobile devices<sup>11</sup>. This has huge ramifications for copyright law. The rapid development of mobile and social networking creates a situation where online piracy in South Africa can thrive. The internet and the nature of digital copyright infringement are simply expanding faster than the law.

In South Africa there have been no court cases involving the liability of an Internet Service Provider. As such I compare the ECT Act with Digital Millennium Copyright Act in the United States and the European Copyright Directive (EUCD) and reference relevant case law. In so doing I reach a conclusion. This conclusion is not only on the liability an

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<sup>8</sup> ECT Act 25 of 2002, Chapter XI

<sup>9</sup> Gerrit Beger, Akshay Sinha UNICEF New York, Division of Communication, Social and Civic Media Collaborators: UNICEF South Africa, Division of Communication Kate Pawelczyk Contributors: Priscillia Kounkou Hoveyda, Erin Garcia, Melanie Zuch "South African mobile generation: Study on South African young people on mobiles" pdf. Page 20.

<sup>10</sup> TNS Research Surveys, 'Friendship 2.0', 2009,  
<http://www.mweb.co.za/services/friendship/downloads/Friendship%202.0%20presentation%20for%20Microsite.pdf>  
(accessed 5th February 2013).

<sup>11</sup> TNS Research Surveys, 'Friendship 2.0', 2009,  
<http://www.mweb.co.za/services/friendship/downloads/Friendship%202.0%20presentation%20for%20Microsite.pdf>  
(accessed 5th February 2013).

Internet Service Provider faces in our country but also the liability that I believe Internet Service Providers should face the world over.

Mobile Service Providers (MSPs) are now Internet Service Providers on its own. According to the World Wide Worx Mobility there are over 9.5 million mobile internet users in South Africa (South Africa) alone<sup>12</sup>. These figures nearly double that of people who use their desktops to access the internet in South Africa. The same report cites that only 0.36% of mobile users use their phones to conduct online purchases<sup>13</sup>. With smartphones having inbuilt social networking and file sharing capability one can only take a guess as to what so many in South Africa use their mobile internet access for. In South Africa mobile users are capable of downloading not only music but also larger file content on their phones as well.

Mobile Internet Service Providers in South Africa act as, in the very least, “conduits” for copyright infringement. The question being is “mere conduits” under the ECT Act or other comparable legislation indirectly liable for the infringements of their users? Further if they are not, should they be? Further what happens when an Internet Service Provider acts as more than a “mere conduit”? What if an Internet Service Provider is involved in storing, linking, caching or hosting content? Under what circumstances will the Internet Service Provider be liable and under what circumstances will the Internet Service Provider escape liability?

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<sup>12</sup> World Wide Worx Mobility Report 2011

<sup>13</sup> World Wide Worx Mobility Report 2011

## 1. The Nature of Infringements over the internet

The internet allows copyright infringers a great deal of anonymity<sup>14</sup>. The American Judge, Judge Posner's opinion in the Aimster case summarized the background to the problem created by contributory infringement in digital file sharing technology:

“Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright...firms that facilitate their infringement, even if they are not themselves infringers because they are not making copies of the music that is shared, may be liable to the copyright owners as contributory infringers... the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor”<sup>15</sup>

While ours is a country where so many are accessing the internet using mobile phones, the scope of Internet Service Provider liability has never been truly addressed. In a testament to the current download ability of

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<sup>14</sup> Longworth “*The Possibilities for a legal framework for Cyberspace-including a New Zealand perspective*” in Fuentes-Camacho (ed) *Law of Cyberspace Series Volume 1: The International Dimensions of Cyberspace Law* (2000) 9 9; Powers *The Internet Legal Guide: Everything you need to know when doing business online* (2002) 1-3; Nel “*Freedom of expression and the Internet*” in Buys (ed) *Cyberlaw @ SA II: The Law of the Internet in South Africa 2 ed* (2004) 197 197; Van der Merwe “*Telecommunications Law*” in Van der Merwe (ed) *Information and Communications Technology Law* (2008) 9 13; Tambini, Leonardi & Marsden *Codifying Cyberspace: Communications self-regulation in the age of Internet convergence* (2008) 2.

<sup>15</sup> 334 F.3d 643 (7th Cir. 2003).

mobile phones a News24 survey found that 88% children in South Africa that access pornography do so through their mobile phones<sup>16</sup>.

Historically, mobile phones had only restricted memory, data communication competences. For these reasons, mobile devices were protected to file-sharing applications in the past. But current generation memory-intensive smart phones have several connectivity options previous generations lacked such as GPRS, UMTS, Wi-Fi, Bluetooth<sup>17</sup>. Operating open software platforms like Symbian and Windows Mobile, peer-to-peer (P2P) systems” have changed this dynamic . Phone users are already exchanging files, pictures, videos, and ring tones through Bluetooth connectivity for example. The culture of copyright infringement in South Africa is rife with the International Intellectual Property Alliance (IIPA) advising the country be placed on an international watch-list in 2002<sup>18</sup>. In 2007 the IIPA, further issued a report highlighting concerns over internet downloads in South Africa leading to dvd discs being burned<sup>19</sup>. The spread of the internet in South Africa has raised concerns over the rise of internet piracy in the country. The functionality of modern phones combined with prevailing view in South Africa of piracy being a “victimless crime” makes this modern forefront in the war against piracy a major concern for all interested parties<sup>20</sup>.

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<sup>16</sup> <http://www.news24.com/News24/SouthAfrica/News/Cells-net-are-porn-ponces-20080513> (accessed on 10 November 2012).

<sup>17</sup> Claudio E. Palazzi, Armir Bujari, Emanuele Cervi “P2P File Sharing on Mobile Phones: Design and Implementation of a Prototype” Department of Mathematics, University of Padova

<sup>18</sup> International Intellectual Property Alliance 2002 Special 301: South Africa Issued February 12, 2007, page 551

<sup>19</sup> International Intellectual Property Alliance 2007 Special 301: South Africa Issued February 12, 2007, Page 520

<sup>20</sup> International Intellectual Property Alliance 2007 Special 301: South Africa Issued February 12, 2007, Page 520

## 2. The Limitation of Internet Service Provider liability: a global issue

The liability of Internet Service Providers is one of the most controversial issues not in our Copyright law as such but globally<sup>21</sup>. Copyright holders famously look for internet intermediaries with “deep pockets” to sue when their rights are infringed. However legislators around the world have moved to limit Internet Service Provider liability. Legislation based on the American Digital Millennium Copyright Act of 1998 (DMCA) does provide some balance. While there is legislation in regards to Internet Service Provider liability in American and European jurisdictions, some court precedents conflict with one another. Subsequently not all cases ever make it to a decision in court. ISP’s routinely settle copyright infringement suits brought against them<sup>22</sup>. This discourse on ISP liability is not particularly prevalent in South Africa.

The nature of Copyright infringement is always evolving based on technology, all while the law that governs it is rigid, often taking years to catch up to the issues surrounding copyright. The nature of infringement has already outpaced recent copyright legislation. As the author shall argue this includes not only our 1978 Copyright Act but also potentially the ECT Act as well.

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<sup>21</sup> Hennie Klopper, Tana Pistorius, Brian Rutherford, Lee-Ann Tong, Pieter Van der Spuy, Andries Van Der Merve. “*Law of Intellectual Property in South Africa*” Lexis Nexis. p205

<sup>22</sup> [www.cyber.law.harvard.edu/property99/liability/main.html](http://www.cyber.law.harvard.edu/property99/liability/main.html) (assessed 5th February 2013)



### 3. The history of “Safe Harbor”

The term “Safe harbor” refers to the legislative protection of Internet Service Providers. Safe Harbor places specific legal requirements on Internet Service Providers in exchange for indemnity. Safe Harbors provide for “take down notices” that require Internet Service Providers to take down infringing content on their servers which are reported to them. Further safe harbors provide for simplified procedures for copyright holders to get the name of Internet Service Provider subscribers using a particular IP (Internet Provider) violating their copyright. The ECT Act provides Internet Service Providers safe harbor in regards to<sup>23</sup>:

- 1) Hosting
- 2) Acting as “Mere Conduit”
- 3) System-Caching
- 4) Linking

These safe harbors provide that if Internet Service Providers follow legislative procedures they would not face liability for infringements committed by their users. However safe harbors are not an excuse for abuse of protection.

If found to be in abuse of this safe harbor, Internet Service Providers may be liable for each reproduction of a work on their sites constituting a

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<sup>23</sup> ECT Act 25 of 2002, Chapter XI

potential infringement. While globally many Internet Service Providers have “safe harbors” the uncertainty of the protection in practice leads to nervous behavior from Internet Service Providers<sup>24</sup>. In the EU for example a recent EU report released on May 30th 2012 found that European Service providers have responded to the threat of liability by restricting open internet use. The EU report addressed to the Body of European Regulators of Electronic Communications (BEREC) found that EU mobile Internet Service Providers restricted up to 36% of Peer to peer traffic<sup>25</sup>.

Needless to say Internet Service Provider liability and the limitations to ISP liability is a very big issue. One that both sides of the argument have their own opinions on, whether too much protection is provided to Internet Service Providers, or not enough. The limitation of Internet Service Providers responsibility was first handled by the California district court in *Religious Technology Center v Netcom*<sup>26</sup>. Codification of the principles of limitation of Internet Service Provider liability followed in 1998 with the Digital Millennium Copyright Act (DMCA)<sup>27</sup>. The DMCA under Title II, the **Online Copyright Infringement Liability Limitation Act** (OCILLA), provided a degree of amnesty to Internet Service Providers for infringements made over their sites. The European Union followed the lead of the DMCA. The Union, EUCD provides measures

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<sup>24</sup> Niva Elkin-Koren “Liability of Internet Service Providers for Peer-to-Peer Traffic” pdf. P17 see [www.law.nyu.edu/emc\\_dlv4/groups/public/%40nyu\\_law\\_website\\_journals.html](http://www.law.nyu.edu/emc_dlv4/groups/public/%40nyu_law_website_journals.html) (assessed November 10 2012)

<sup>25</sup> [Erg.eu.int/doc/consult/bor\\_12\\_30\\_tm-i\\_snapshot.pdf](http://Erg.eu.int/doc/consult/bor_12_30_tm-i_snapshot.pdf) (accessed 10 December 2012)

<sup>26</sup> *Religious Technology Center v Netcom On-Line Communication Services Inc* 907 F Supp 1361 N.D Cal. 1995)

<sup>27</sup> Digital Millennium Copyright Act (17 U.S.C ss117, 512, 1201 et. Seq) (1998)

that correspond to its American counterpart for the protection for Internet Service Providers<sup>28</sup>.

#### 4. Copyright Protection in South Africa

In the cultural context of South Africa, copyright holders seeking enforcement of their rights rely mainly on the **Copyright Act** and the **Counterfeit Goods Act**<sup>29</sup> for protection. There has as such never been a case in our courts against an Internet Service Providers in South Africa. According to **Section 44(1)** of the Copyright Act-

“Subject to the preceding provisions of this section, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf”<sup>30</sup>

The Copyright Act makes a distinction between a "musical work", a "sound recording" and a "literary work" among others<sup>31</sup>. The Act defines what circumstances would make one an author of a literary or musical work under Section 1 of the Copyright Act. In respect of each of these works, the Act defines several "restricted acts". These acts are reserved for only the copyright owner or a party permitted by the copyright holder who has exclusive rights to the work.

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<sup>28</sup> Directive 2001/29/EC

<sup>29</sup> Copyright Act No. 98 of 1978; Counterfeit Goods Act no. 37 of 1997

<sup>30</sup> s44(1)

<sup>31</sup> Copyright Act No. 98 of 1978 s(1)

The protection provided for by the Copyright Act holds that should any person other than the author of the work perform these acts, such person will be guilty of direct copyright infringement. Copyright infringement entails taking a 'substantial part' of a work. This assessment of what a substantial part is, is determined by the quality of the part taken more so than the quantity of the work taken. The Act goes further to provide several exemptions to infringement, generally known as "fair dealing" provisions. Fair dealing allows one who is not the copyright holder to use the work of the copyright holder. Work used for fair dealing is used for the purpose of research or private study, or to criticize or review, or to report on current events, or to quote from or use the work for the purpose of teaching without it constituting copyright infringement<sup>32</sup>.

The terms of **Section 23** of the Copyright Act deals with direct and indirect infringements. Copyright holders in South Africa tend to pursue physically pirated infringements under this section. The Act deals with vicarious liability in **Section 23(2)** and could construe the liability of Internet Service Providers. However practically speaking no Internet Service Provider in South Africa has ever been brought to justice in our courts under this section. The reality is the Copyright Act was never envisioned for Internet Service Providers. The South Africa Copyright Act is much older than the internet. Lawmakers around the world have

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<sup>32</sup> s(12)

been faced with the problem of applying copyright principles developed with the invention of the Gutenberg Press to activity on the internet<sup>33</sup>.

## 5. Electronic Communications and Transactions Act

This is where Chapter XI of the ECT Act comes in, to regulate Internet Service Provider liability. However the ECT Act regulation of Internet Service Provider liability is not without its own qualifications. For one the scope of Chapter XI's protection is limited to Internet Service Providers that are members of an Industry Representative Body (IRB) and implement the body's code of conduct<sup>34</sup>. In South Africa the organization or IRB that represents Internet Service Providers is the Internet Service Providers Association (Internet Service Provider) which was formed in 1996<sup>35</sup>. The ECT Act provides a framework (takedown procedures) for when Internet Service Providers are approached by interested parties with a takedown notice over content that infringes copyright on one of their sites<sup>36</sup>.

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<sup>33</sup> Burchell Personality Rights 121; Burns Communications Law 379; Trudel "*Liability in Cyberspace*" in Law of Cyberspace 189, 193-194; Hofman Cyberlaw: A guide for South Africans doing business online (1999) 126.

<sup>34</sup> *Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers* (GN 1283 in Government Gazette 29474 of 14 December 2006)

<sup>35</sup> [www.InternetServiceProvidera.org.za](http://www.InternetServiceProvidera.org.za) (assessed 06 December 2012)

<sup>36</sup> S74 (1) of Act 25 of 2002

Chapter XI is based on the DMCA and EUCD's on the topic. But there are some differences which will be explored as this dissertation progresses.

## 6. Research Objectives

The objective of this dissertation is to determine the extent of Internet Service Provider liability for South Africa MSP's and compare it with Internet Service Providers from other legal jurisdictions.

## 7. Methodology

- 1) **Part II** will carry out an examination of the history of digital piracy. This shall involve the history of the development of the technology used for online piracy as well as the development of the legal history.
- 2) **Part III** discusses ways in which Internet Service Providers may incur liability. That being linking, caching and hosting.
- 3) **Part IV** will examine specific sections of the Electronic Communications and Transactions Act in South Africa. Further, this section will examine South Africa's context of digital infringement that being mobile internet infringement.
- 4) **Part V** will examine the DMCA, EUCD and relevant case law.
- 5) **Part VI** will conclude with the author's view on the type of liability that mobile Internet Service Providers in South Africa face, if any.

Further the author will provide proposed changes to current legislation.

## **Part II:**

# **THE HISTORICAL AND LEGAL DEVELOPMENT OF DIGITAL PIRACY**

## **1. The rise of digital piracy**

According to Bell, computer technology development was spurred on as a result of different classes of customers<sup>37</sup>. The American military were the first class of customers for this new technology. The military needed grand networks of super computers and the technology developed according to this need. The need at the time spurred on the technology. In the opinion of the author, the current need of society should also shape modern copyright legislation.

Regardless, the customer base of computers expanded to large institutions and companies with mega computer mainframes. Medium sized business saw the potential of computers. Mini computers were developed for this class of customer<sup>38</sup>. Personal computers and individual computer use at this stage was rare. Computers further diversified the customer base and opened up the world of computers to

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<sup>37</sup> C. G. Bell *et al.*, A New Architecture for Mini-Computers -- The DEC PDP-11, Sprint Joint Computer Conference (1970), pp. 657-675.

<sup>38</sup> C. G. Bell *et al.*, A New Architecture for Mini-Computers -- The DEC PDP-11, Sprint Joint Computer Conference (1970), pp. 657-675.



the general public. Once computer technology opened up to the general public computer piracy suddenly became a problem.

In the early 1970's the general view of the public on anything "digital" was that it should be "open"<sup>39</sup>. What many in the public sector meant by "open" was that it seemed free and accessible for whoever wished to utilize the technology. Many believed computer software should have been freely distributed for the sake of the development of the industry. Home users tinkered with computers as a hobby, and in the late 1970s, the PC market was dominated by hobbyists. The 1970s also saw the development of computer software which hobbyists distributed amongst themselves<sup>40</sup>.

What was the only constraint to prevent the viral transfer of technology? Ironically what limited the transfer of data were the technological limitations of the time. Compression agents were practically non-existent and the size of software was large. Users were not able to compress large software programs. Transfers were not as easy as it is today.

Microsoft BASIC for the Altair (an early hobbyist computer) was very successful as it was one of the first applications for the fledgling PC market. At this time, BASIC was distributed on paper tapes, which were

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<sup>39</sup> C. G. Bell et al., A New Architecture for Mini-Computers -- The DEC PDP-11, Sprint Joint Computer Conference (1970), pp. 657-675.

<sup>40</sup> Dana Dahlstrom, Nathan Farrington, Daniel Gobera, Ryan Roemer, Nabil Schear, "Piracy in the Digital Age" University of California, San Diego CSE 291 (D00) – History of Computing December 6, (2006)

difficult, but possible to copy<sup>41</sup>. In *Apple v Franklin* the Appellate court in the United States held that a computer's operating system could be protected by copyright. Prior to this, computer programs were not defined in US Copyright law<sup>42</sup>. This case made the computer industry realize just how much money could be made from the sale of software. The industry also realized just how much free distribution was costing them. As Bill Gates said, in perhaps the first public acknowledgement of a computer piracy problem "you steal your software"<sup>43</sup>.

The Software Publishers Association (SPA) was formed in 1984 with the aim of preventing software piracy. Thereafter the Business Software Alliance was formed in 1988. Both organizations were geared towards combating software piracy. In 1992 SPA launched an anti-piracy campaign entitled "Don't Copy that floppy"<sup>44</sup>.

## 2. The development of contributory infringement

Users however would ultimately go on to "copy that floppy". However, with the limitation of resources of individual violators, right-holders tried to make third parties facilitators of such violations. Third party

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<sup>41</sup>Dana Dahlstrom, Nathan Farrington, Daniel Gobera, Ryan Roemer, Nabil Schear, "*Piracy in the Digital Age*" University of California, San Diego CSE 291 (D00) – History of Computing December 6, (2006)

<sup>42</sup> 714 F, 2d 1240 (3d Cir. 1983)

<sup>43</sup> Bill Gates, *An Open Letter to Hobbyists*, *Homebrew Computer Club Newsletter* (Feb. 3, 1976), available at [http://www.digibarn.com/collections/newsletters/homebrew/V2\\_01/gatesletter.html](http://www.digibarn.com/collections/newsletters/homebrew/V2_01/gatesletter.html) (assessed 4th December 2012)

<sup>44</sup> [www.en.wikipedia.org/wiki/Don't\\_Copy\\_That\\_Floppy](http://www.en.wikipedia.org/wiki/Don't_Copy_That_Floppy) (assessed 3rd December 2012)

infringement involves vicarious liability and or contributory infringement. There is a lack of understanding as to the nature of third party liability which affects Internet Service Providers. Vicarious liability is often used synonymously or mixed with contributory liability. As, the American 9th Circuit Court in Napster stated:

“Lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn<sup>45</sup>”

Vicarious liability is determined by the relationship between the direct infringer and the 3rd intermediary<sup>46</sup>. The focus is the relationship between the direct infringer and the 3rd party, not the 3rd party and the actual infringement. The 3rd party need not have knowledge of the actual infringement conducted by the direct infringer. It can be further stated that the 3rd party intermediary need not induce the infringing activity. It is this relationship that determines the “right and ability” of the intermediary to police and control the infringing activity. In order for a plaintiff to be successful in a suit involving vicarious liability the intermediary must have a financial interest in the infringement<sup>47</sup>.

While when it comes to contributory infringement in copyright this doctrine has been largely developed strictly through case law. Contributory liability delineates strict liability to a third party for the infringing activity of a direct infringer for a specific infringing act.

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<sup>45</sup> 239 F.3d 1004 (9th Cir. 2001)

<sup>46</sup> See *Metro-Goldwyn-Mayer Studios Inc. v. Gokster, Ltd.*, 545 U.S. 913, 930 (2005).

<sup>47</sup> Alfred C Yen, “Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment”, the *Georgetown Journal*, Vol 88 page 10

While often used synonymously the doctrine of contributory liability differs in material aspects from vicarious liability. The intermediary ought to have knowledge of the activity and in some way materially induce the activity.

In 1984, there was a case that has since dominated the contributory liability in copyright, that being of *Sony v. Universal*, the Sony Betamax decision<sup>48</sup>. The case did not deal with software sharing over networked computers but rather with the hardware aspect of copyright. While there has been no such case in South Africa to date, the Sony decision in the USA might have implications on the liability of Internet Service Provider hardware providers<sup>49</sup>.

In the case, users of the Sony Betamax VHS recorder were using the product to copy material subject to copyright protection. The Betamax was a VHS recording machine capable of “time shifting” thus recording programming set for a certain time<sup>50</sup>. The plaintiff, Universal studios, sued Sony for direct and contributory infringement. The Court in Sony developed the doctrine of contributory liability in copyright law. The case may have somewhat warped the doctrine of contributory 3<sup>rd</sup> party liability. The court decided the case on the grounds of the primary non infringing

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<sup>48</sup> 464 U.S. at 440, 220 USPQ at 677.(1984)

<sup>49</sup> Lee A. Hollaar Professor, “Sony Revisited: A new look at contributory copyright infringement”, School of Computing University of Utah, June 6

<sup>50</sup> Lee A. Hollaar Professor, “Sony Revisited: A new look at contributory copyright infringement”, School of Computing University of Utah, June 6

uses of the Betamax. A non-infringing use is a doctrine imported from patent law into copyright law.

The court held “time shifting” to have primary non infringing uses, and the finding was that there was no infringement. Instead of relying on the copyright doctrine of “fair-use” the American court imported the concept of non-infringing uses from contributory infringement in patent law<sup>51</sup>.

### 3. Bulletin Board Sites

The internet is a collection of computer networks that may interact and operate together. These collections of networks are held together by software protocols called Transmission Control Protocol/ Internet Protocol (TCP/IP)<sup>52</sup>. Service Providers use these transmission protocols to host, link and cache their users’ content on their servers<sup>53</sup>. Bulletin boards were the first kind of sites to open this kind of networking up to the general public. This was prior to the www sites we have today or even their mobile phone versions. Before www sites Bulletin Board

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<sup>51</sup> [www.en.wikipedia.org/wiki/Time\\_shifting](http://www.en.wikipedia.org/wiki/Time_shifting) (assessed on 3rd December 2012)

<sup>52</sup> *Journal of Intellectual Property Rights*. Vol 14, July 2009, pp321-329. *Striking a balance between liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour*. Priyambada Mishra and Angsuman Dutta. National Law institute University, Kerwa Dam Road, Bhopal 462 044.

<sup>53</sup> *Journal of Intellectual Property Rights*. Vol 14, July 2009, pp321-329. *Striking a balance between liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour*. Priyambada Mishra and Angsuman Dutta. National Law institute University, Kerwa Dam Road, Bhopal 462 044.

Systems ("BBS") dominated inter-networking in the 1980s and early 1990s<sup>54</sup>.

BBS users could post files on the bulletin board network and share them with other users. BBS systems were especially used by PC hobbyists to share software applications and computer games. This rampant file sharing came at a cost. Copyright stakeholders took notice of BBS operators and the threat they posed to their rights. The explosion of BBS sites led to perhaps the first questions on 3<sup>rd</sup> party liability of Internet Service Providers anywhere in the world. The California court had to confront the question of whether a BBS operator could be indirectly liable for the infringements of their users.

In *Playboy v Frena* an online billboard operator's subscribers posted pictures that violated the copyright of various copyright holders including playboy magazine<sup>55</sup>. The defendant testified that he did not have the permission of the plaintiff, he however stated that he did not directly place the pictures himself on the billboard. The defendant claimed that he was unaware of the presence of the infringing pictures until he was summoned to court. Prior to *Frena*, actual knowledge of infringement was the standard in order to establish a case of contributory infringement, as opposed to constructive knowledge.

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<sup>54</sup> Dana Dahlstrom, Nathan Farrington, Daniel Gobera, Ryan Roemer, Nabil Schear, *Piracy in the Digital Age* University of California, San Diego CSE 291 (D00) – *History of Computing* December 6, 2006

<sup>55</sup> 839 F.Supp. 1552 (M.D. Fla. 1993)

While the case of the plaintiff hinged on contributory infringement the American court oddly applied the test of direct infringement. The court made inquiries into the requirements for direct infringement:

- 1) Whether the plaintiff had a valid copyright in the work
- 2) Whether the defendant had “copied” the work under copyright
- 3) Whether the defendant had violated one of the rights guaranteed under the Copyright Act

The defendant however had not acted directly in the infringement. The approach in *Playboy v Frena* has been largely debunked by the courts since this decision.

#### **4. BBS Sites develop 3rd party liability**

In the United States, a string of cases involving such BBS site operators helped to develop the doctrine of 3<sup>rd</sup> party Internet Service Provider liability that we know today<sup>56</sup>. These cases in America led to the legislation that governed Internet Service Provider liability in America and it influenced South Africa’s legislation that is in place today. The *Religious Technology Center v Netcom case* (RTC) was another case

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<sup>56</sup> See, e.g., *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004); *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1178 (N.D. Ill.1997); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 931–32 (N.D. Cal. 1996); see also 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12B.05[C] (1997); 2 PAUL GOLDSTEIN, *COPYRIGHT* § 6.4 n.93 (2d ed. 2005 Supp.).

that dealt with the contributory liability of a BBS operator. In the matter the plaintiff was the copyright holder of the published and unpublished writings of the late founder of a scientific religious sect “the Church of Scientology”<sup>57</sup>

The defendant was a vocal critic of the church and he would post his outspoken criticism onto a BBS page for comment, for example sections of the work of the late founder. The plaintiff approached the BBS operator and asked that he remove the infringing posts or to find a way to exclude the defendant from his site. The BBS operator, Netcom refused to comply with this demand and the suit followed as a result. The plaintiff claimed that the defendant Netcom was a direct and contributory infringer and filed a motion for summary judgment.

In its defense the defendant argued that it was not a contributory infringer. Further, the defendant claimed that the postings were a “fair use”<sup>58</sup>. The defendant tried to invoke the First Amendment, Right of free speech as provided by the American constitution<sup>59</sup>. The process whereby the defendant stored data was the same as that of all other BBS sites. The data would be stored on the BBS operator’s server for a few days of temporary storage before being transferred to the site. The plaintiff used this system of storage and argued that because the BBS operator stored the data for such a period of time, it made the operator even further liable.

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<sup>57</sup> 907 Supp 1361 (N.D. Cal. 1995)

<sup>58</sup> 907 Supp 1361 (N.D. Cal. 1995)

<sup>59</sup> 1<sup>st</sup> amend US. Const.



The court however, disagreed stating the function played by the BBS operator in this case was the same as that of every other UseNet server. The court found that finding the defendant liable would open up liability for all other BBS server operators conducting potentially non infringing activities. That would have only served to limit the scope of a then new technology<sup>60</sup>.

According to Fairfield doctrine of contributory infringement holds that a defendant would only be liable if the defendant has knowledge of the infringing activity and induces it or causes it in some way<sup>61</sup>. In order for a defendant to be vicariously liable he must have to the ability to control the actions of the direct infringer and must financially benefit from that<sup>62</sup>. The court in RTC doubted that Netcom had such ability to control its system. Also, according to the court, the plaintiff failed to prove that Netcom benefited financially.

The court held that Netcom may have a valid defense for fair use and it could not reach a conclusion on whether Netcom was a contributory infringer without trial<sup>63</sup>.

According to the court in *Sega v Maphia*,

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<sup>60</sup> 907 F Supp 1361 N.D Cal. 11995

<sup>61</sup> Joshua A.T Fairfield "The God Paradox" Boston University Law Review Vol. 89:1017

<sup>62</sup> Alfred C Yen, "Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment", the Georgetown Journal, Vol 88

<sup>63</sup> 907 F Supp 1361 N.D Cal. 11995

“even if defendants do not know exactly when games will be uploaded to or downloaded from the MAPHIA bulletin board, their role in the copying, including provision of facilities, direction, knowledge and encouragement, amount to contributory infringement”<sup>64</sup>.

Maphia is important as it developed the doctrine of constructive knowledge in contributory infringement. The court placed the burden of constructive knowledge on Internet Service Providers as opposed to actual knowledge. According to the case, actual knowledge of specific infringements was unnecessary<sup>65</sup>. All that was needed was a general impression or general knowledge of infringement. This reasoning is based on the concept of “should know” more than actual knowledge of a specific infringement<sup>66</sup>.

## 5. The rise of the World Wide Web (WWW)

The BBS sites operated out of a central location and could be tracked down to a central server. BBS operators were fairly straight forward to prosecute but www sites were different matter entirely. BBS sites operated on smaller local networks that relied on modems and telephone lines with download speeds that averaged at 56kp. The internet bubble of the 1990's saw new sites and shareware sites designed to store content like **I Drive and Driveway**. These were the

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<sup>64</sup> 30 U.S.P.Q.2d 1921, 1926 (N.D. Cal. 1994)

<sup>65</sup> 30 U.S.P.Q.2d 1921, 1926 (N.D. Cal. 1994)

<sup>66</sup> 30 U.S.P.Q.2d 1921, 1926 (N.D. Cal. 1994)

first WWW sites. WWW site operators used software known as shareware or warez and it was often used to store pirated content<sup>67</sup>.

These sites were similar to BBS as they also required a central server and infringers could also be easily tracked down. As the hosting of pirated material was becoming heavily policed in the first world using WWW, sites quickly lost favor as it shared the same failings as the BBS. Many shareware operators were quickly found and prosecuted.

## 6. Peer to Peer (P2P)

In the 1990's, Peer to Peer networks (P2P) developed as a result of central servers that hosted pirated content being shut down. A peer to peer computer network is one in which each computer in the network can act as a client or server for the other computers in the network, allowing shared access to files and peripherals without the need for a central server<sup>68</sup>. Further p2p networks developed alongside file compression technology. As the technology developed software piracy also became rampant as digital compression software became prominent. P2P replaced BBS sites and WWW sites as the leading medium of file transfer.

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<sup>67</sup> Richard Spann, *Black Warez: Software Piracy and Internet Distribution* (Dec. 7, 2000), at <http://www.dawnsky.com/raspdf/blackwarez.pdf> (last assessed 6th February 2013)

<sup>68</sup> Rudiger Schollmeier, "A Definition of Peer-to-Peer Networking for the Classification of Peer-to-Peer Architectures and Applications", *Proceedings of the First International Conference on Peer-to-Peer Computing*, IEEE (2002)

P2P networks were used to exchange files such as music and videos. The old pattern in piracy involved a central server however P2P networks were different. P2P as the term suggests allowed individuals with computers to connect with each other without a central server. Users downloaded P2P software onto their personal computers<sup>69</sup>. This allowed them to search the computer files of other users who shared the same software.

Users of P2P could access files on other users' computers and download directly from there. This type of network made it difficult to prosecute copyright infringement. There was no central server, where each computer became a central server in theory. As a result, there was no easy central party to arrest or sue for the infringement as was the case with BBS operators. Violating individuals were hard to find and it was too costly to litigate against millions of infringers.

## **7. Napster: the aiding and abetting Internet Service Provider**

In *A&M Records, Inc. v. Napster, Inc* the defendant ran a p2p network<sup>70</sup>. The network stored the data of its users, compressed mp3 files and allowed users to transfer files such as music and movies between each other. The plaintiffs in the matter were a compilation of record companies, all members of the Recording Industry Association of

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<sup>69</sup> Landes, William; Lichtman, Douglas (2003). "Indirect Liability for Copyright Infringement: Napster and Beyond". *Journal of Economic Perspectives* 17 (2): 113–124

<sup>70</sup> 239 F.3d 1004 (9th Cir. 2001)

America (RIAA). File sharing had reached record heights in the 1990's. As the technology for file compression and transfer became more effective and accessible, online copyright infringement started to become permissive. The plaintiffs, as some of the world's biggest record labels, were to say the least, greatly concerned about the sheer magnitude of infringement that was facilitated by the defendant<sup>71</sup>.

Napster used a central server wherein the defendant listed and indexed music. Napster's ease of use quickly made it a popular go to P2P for downloaders. The plaintiffs filled a motion with the California district court to interdict the defendant from continuing with his service. The defendant's defense was one of "fair use" where the defendant claimed that users were exchanging files for the purpose of assessing whether they would continue and buy the product.

Napster argued that some users were "space shifting" (much like Sony's Betamax). This was because some users already legally owned audio disks and simply wanted the files in the new compressed mp3 format<sup>72</sup>. An interesting side to this was that if the court agreed with this argument, the same protection that makers of hardware get from American courts for copyright infringement established in the Sony decision would have been applicable to makers of software. However the courts did not agree with this particular argument by the defendant.

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<sup>71</sup> 239 F.3d 1004 (9th Cir. 2001)

<sup>72</sup> Landes, William; Lichtman, Douglas (2003). "Indirect Liability for Copyright Infringement: Napster and Beyond". *Journal of Economic Perspectives* 17 (2): 113–124

Regardless, the defendant argued that mp3s of new artists that were exchanged only enhanced the profile of new artists<sup>73</sup>. This argument fell on deaf ears in the district court and the plaintiff's motion was granted<sup>74</sup>. The court found that Napster users were direct infringers and that while Napster did not have a direct financial interest in the exchange of files the share size of the exchange could be qualified as commercial use and not fair use.

The court acknowledged that in certain instances whole-sale copying of a product under copyright could leave the defendant not liable but not this time.

Ultimately the defendant could not show that it could stamp out infringements 100% on its system. Napster collapsed under the weight of the responsibility placed upon it by the court and ultimately filed for bankruptcy<sup>75</sup>.

## 8. Generation 2.0 Internet Service Providers

It is in the context of Internet Service Providers like Napster that legislation such as the DMCA was passed in 1998. This is in fact the

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<sup>73</sup> Landes, William; Lichtman, Douglas (2003). "Indirect Liability for Copyright Infringement: Napster and Beyond". *Journal of Economic Perspectives* 17 (2): 113–124

<sup>74</sup> Spencer Ante, *Shawn Fanning's Struggle*, *BusinessWeek* (May 1, 2000).

<sup>75</sup> Matt Richtel, "Napster Is Told to Remain Shut", *New York Times* (July 11, 2001).

crux of the problem. The EUCD was in part based on the DMCA. In South Africa in enacting Chapter XI legislators looked to the DMCA and the EUCD. These pieces of legislation do attempt to deal with the global problem however they were passed with a different generation of Internet Service Provider in mind. Technology has long since developed from where things stood then.

The present motif of online indirect liability is far more complicated than it used to be. The Napster Internet Service Provider laid the genesis of the new paradigm affecting indirect copyright infringement. However Napster was just the beginning. Peer to peer networks have only developed and deepened since Napster. The prominent examples of Grokster, Bit Torrent and Pirate Bay have followed Napster<sup>76</sup>.

File sharing over social networks such as Facebook, and mobile networks such as BBM (Blackberry Mobile) is now a reality. People turn to social networks not only to chat but to also exchange pictures, videos and music. Social networks tend not to be sites of origin for download. However the share mass of humanity present on social and mobile networks are aided further by such technology now having in built compression and transfer technology.

In America new legislation is currently in the pipeline to combat this. The **Stop Online Piracy Act** and the **Protect Intellectual Property Act** are

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<sup>76</sup> 545 U.S. 913 (2005); Pirate Bay B13301-06;

believed to pose challenges for such formats<sup>77</sup>. These proposed laws are reportedly worded to enable copyright holders whose rights have been infringed to petition the American government to shut down the site on which the infringement has occurred. Facebook Founder/ CEO Mark Zuckerberg was quoted as saying these laws “could create very real problems for internet companies”. Further Zuckerberg said “we can’t let poorly thought out laws get in the way of the internet’s development”<sup>78</sup>.

## 9. The History of Telecommunications in South Africa

With the global view on the development of telecommunications in mind it is now appropriate to look at the development of communications in South Africa. During apartheid, infrastructure for fixed-line telephony was developed largely in affluent residential areas. These areas had only less than 10 per cent of the country’s total population leaving the rest of the country for the most part without landline capabilities<sup>79</sup>. After the rise of mobile telephony in South Africa, ICT access began to expand and wide range of communication. It is this history as well as the development of mobile technology that spurred the mobile boom in South Africa. Mobile infrastructure in the country is much higher than South Africa’s neighboring countries. According to a 2005 study mobile technology in the region conducted by Professor Esselaar and Professor Stork, from the University of the Witwatersrand and Namibian Economic

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<sup>77</sup> [www.uvureview.com/.../sopa-and-pipa-might-deter-piracy-but-at-a-cost/](http://www.uvureview.com/.../sopa-and-pipa-might-deter-piracy-but-at-a-cost/) (last assessed 10<sup>th</sup> December 2012)

<sup>78</sup> [www.uvureview.com/.../sopa-and-pipa-might-deter-piracy-but-at-a-cost/](http://www.uvureview.com/.../sopa-and-pipa-might-deter-piracy-but-at-a-cost/) (last assessed 10<sup>th</sup> December 2012)

<sup>79</sup> Kreutzer, Tino, “Generation Mobile: Online and Digital Media Usage on Mobile Phones among Low-Income Urban Young people in South Africa”, University of Cape Town, 2009.



Policy Research Unit, compared to its African counterparts South Africa has the highest number of households with one or more mobile phones (56.7 per cent)<sup>80</sup>. Partially due to historical reasons Fixed-line telephone penetration, in South Africa, remains below 10 percent<sup>81</sup>.

Since the end of Apartheid there has been a great deal of privatization that has occurred in the telecommunications industry. The major mobile-phone companies in South Africa Vodacom, MTN, Cell-C, Virgin Mobile are all private enterprises with Telkom being the only major company that is partially government owned.

The first computer based Internet connection was established in South Africa in 1988<sup>82</sup>. However the general public's access to such stationary lines has always been historically low with figures on internet penetration remaining below 10 per cent until as recent as 2010 when it climbed to 12.30 per cent<sup>83</sup>. This leaves mobile technology as the primary way South African access the world wide web. This consumer trend towards mobile communications in the country is fairly recent. Combined with the less litigious culture in South Africa when compared to countries such as the United States of America it is no surprise that there have been cases brought before court in regards to Internet Service Provider liability for copyright infringement in the country.

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<sup>80</sup> Steve Esselaar and Christoph Stark, "Mobile Cellular Telephone: Fixed-line Substitution in Sub-Saharan Africa" 2005, <http://link.wits.ac.za/journal/j06-esselaar.pdf> (accessed 7 February 2013).

<sup>81</sup> 8.43%. International Telecommunication Union (ITU), 'Fixed telephone subscriptions', 2010, [http://www.itu.int/ITU-D/ict/statistics/material/excel/2010/FixedTelephone\\_00-10.xls](http://www.itu.int/ITU-D/ict/statistics/material/excel/2010/FixedTelephone_00-10.xls) (accessed 7 February 2013).

<sup>82</sup> Lawrie, Mike, 'The History of the Internet in South Africa: How it Began', 1997, <http://archive.hmvh.net/txtfiles/interbbs/SAINternetHistory.pdf> (accessed 7 February 2013).

<sup>83</sup> International Telecommunication Union (ITU), 'Internet Users', 2010, <[http://www.itu.int/ITU-D/ict/statistics/material/excel/2010/IndividualsUsingInternet\\_00-10.xls](http://www.itu.int/ITU-D/ict/statistics/material/excel/2010/IndividualsUsingInternet_00-10.xls)> (accessed 10 November 2012).

### **Part III:**

## **WHAT CAUSES INTERNET SERVICE PROVIDER LIABILITY?**

### **1. Internet Service Provider standards under THE ECT ACT**

The ECT Act Chapter XI was enacted with acknowledgement that copyright infringement is a problem. Regardless there has been no actual case law in South Africa on the topic. In South Africa plaintiffs do not tend to seek relief from deep pocketed 3<sup>rd</sup> parties over infringements. Regardless now that digital technology has become more pervasive in South Africa the protection of Internet Service Providers from liability has started to become a bigger issue. The question must be asked what kind of acts or activity leads to Internet Service Provider liability under the ECT Act?

According to Section 70 of the ECT Act, a “service provider” is “any person providing information system services”<sup>84</sup>. This wide definition is further supplemented by the definition of the meaning of “information system”. According to the Act this is “a system for generating, sending, receiving, storing, Internet Service Provider laying or otherwise processing data messages, which system includes the internet”<sup>85</sup>. By

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<sup>84</sup> S70 of Act 25 of 2002

<sup>85</sup> S1 of Act 25 of 2002

virtue of this, all services that may provide in relation to the internet may make a service provider an Internet Service Provider in South Africa. This means an Internet Service Provider according to the ECT Act also includes quite possibly mobile networks and social networks.

However it is not as if just any provider of an internet service in South Africa can be protected by liability limitation. Section 72 of the Act provides the requirements and standards of the provision of Internet Service Provider protection. Section 72 to 79 actually serves to limit the liability of Internet Service Providers<sup>86</sup>. To gain such protection an Internet Service Provider needs to meet certain threshold requirements. That being:

- 1) The Internet Service Provider must be a member of the representative body referred to in Section 71<sup>87</sup>.
- 2) The Internet Service Provider must have enacted and implemented the official code of conduct of that body and be held accountable to those standards<sup>88</sup>.

Furthermore, Internet Service Providers will be entitled to protection only if they have a designated agent tasked to receive notifications from the public of data stored by the Internet Service Provider that constitutes

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<sup>86</sup> *Information and communication technology law*. Dana Van Der Merve. Lexis Nexis Durban 2008. P257

<sup>87</sup> S71 of Act 25 of 2002

<sup>88</sup> S72 of Act 25 of 2002

infringement. The name of such an agent must be made available to the public. Otherwise the Internet Service Provider will not be covered for protection in terms of the ECT Act.

While these standards do provide protection to Internet Service Providers in South Africa in theory, Chapter XI of The ECT Act does not affect any obligation founded on an agreement. It also does not affect obligations on Internet Service Providers placed by licensing or other regulatory authority established by or under any law, common law, court or the constitution<sup>89</sup>.

## **2. Acts that lead to Internet Service Provider liability under the ECT Act**

There are various acts that could lead to the liability of an Internet Service Provider. Further the Internet Service Provider has several responsibilities in order to limit that noted liability towards a plaintiff. In order for a plaintiff to have delictual remedies against an Internet Service Provider, the Internet Service Provider must have performed one of several activities as stated in the Act. That being:

- 1) Transmission, routing and provision of connections to unlawful material (the “mere conduit” limitation)
- 2) System caching

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<sup>89</sup> S79 of Act 25 of 2002

- 3) Storing infringing material at the direction of a user (the “hosting liability)
- 4) Linking or referring users to infringing material (the linking limitation)<sup>90</sup>

### 3. Mere Conduits

Under the ECT Act an Internet Service Provider is not liable if the Internet Service Provider acts as a “mere conduit”<sup>91</sup>. “The mere conduit” limitation for one allows Internet Service Providers to escape liability where they simply act as a conduit through which data passes and are not more involved in the process. If an Internet Service Provider for example does not initiate the transmission or select the addressee then it is only a mere conduit. Also if the action or function is performed in an automatic, technical manner without selection of the data and the Internet Service Provider does not modify the data contained in the transmission it may be considered a mere conduit<sup>92</sup>.

The activities of most mobile and social network service providers in South Africa may be considered to be those of being a “mere conduit” under the ECT Act. This is as it does not engage in sending and transmission. However should this be the case? Mobile service providers in South Africa arguably gain financially from providing the format from which many of their users exchange files.

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<sup>90</sup> Dana Van Der Merve. *“Information and communication technology law”* Lexis Nexis Durban 2008. P233

<sup>91</sup> S73(1) of Act 25 of 2002

<sup>92</sup> S73(a)-(d) of Act 25 of 2002

According to the New Scientist publication in 2004 Nokia developed a file sharing network for its users of Nokia phones<sup>93</sup>. This allowed and Nokia users to exchange files among each other. SymTorrent, the first BitTorrent client for mobile phones, was released in 2006, prior to social networking helping mobile users to share files across vast distances. It was a generic BitTorrent client that allowed the users to both download and share files on their mobile phones<sup>94</sup>. Such activity may not have been envisioned by the ECT Act and its blanket mere conduit coverage. For example Blackberry is one of South Africa's most popular phone brands. While on this format it is possible through the BBM instant messenger to send and receive files. This is an inbuilt service for which local Internet Service Providers have a financial interest as it attracts customers. Does the ECT Act as blanket coverage to such activity? To some degree that seems to be the case.

However, even if an Internet Service Provider is not liable as a mere conduit this does not mean that such an Internet Service Provider does not have responsibilities. If infringing activity is going on on the network of the Internet Service Provider, a competent court may still order an Internet Service Provider to “terminate or prevent unlawful activity in terms of any other law”<sup>95</sup>. The refusal to adhere to such a court's ruling in itself may lead to liability on the part of an Internet Service Provider.

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<sup>93</sup> [www.newscientist.com](http://www.newscientist.com) (last assessed 3<sup>rd</sup> February 2013)

<sup>94</sup> Imre Kelényi, Péter Ekler, Bertalan Forst “A Comparison of Mobile Peer-to-peer File-sharing Clients” Budapest University of Technology and Economics Department of Automation and Applied Informatics

<sup>95</sup> S73(3) of Act 25 of 2002

Therefore, even as a mere conduit an Internet Service Provider may in fact be liable under certain circumstances.

#### **4. System-Caching limitation**

Caching is the storage of copies of material from an original source site, such as a web page, for later use<sup>96</sup>. This was once a preserve of only computers but can now also be performed as a function by smartphones. Caching in itself under certain circumstances can also lead to copyright infringement. This is when the material is requested again, then the user can circumvent the original source site and go to the backup storage site and download the content.

The ECT Act limits the liability Internet Service Providers can face in terms of caching. The delictual remedies of complainants are limited in terms of the ECT Act. This is in situations where the Internet Service Provider transmits data provided by a recipient and stores data on a temporary basis provided that the purpose of storing the data is to make the onward transmission more efficient upon request<sup>97</sup>.

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<sup>96</sup> Pardis Moslemzadeh Tehrani1, Tahereh Amoozegar “How Is The Liability Of Internet Service Providers Limited Under The Digital Millennium Copyright Act?” 2012 International Conference on Economics Marketing and Management IPEDR Vol.28 (2012) © (2012) IACSIT Press, Singapore p256

<sup>97</sup> S74 (1) of Act 25 of 2002

However, in order to gain protection, the Internet Service Provider, according to the ECT Act, should not be engaged in certain acts in caching. This involves the Internet Service Provider:

- 1) Doesn't modify data;
- 2) Complies with conditions on access to the data;
- 3) Complies with rules regarding the updating of the data, specified in a manner widely recognized and used by industry;
- 4) Does not interfere with the lawful use of technology, widely recognized and used by industry to obtain information on the use of the data;
- 5) Removes or disables access to the data it has stored upon receiving a takedown notice"<sup>98</sup>.

Furthermore, much like in the case of being a "mere conduit" a competent court may still order an Internet Service Provider to "terminate or prevent unlawful activity in terms of any other law"<sup>99</sup>

Caching can infringe upon copyright. The ECT Act's provisions on caching are becoming increasingly important in South Africa. While not a South Africa case, *Copiepresse SCRL v Google Inc* for example demonstrates the risk caching poses to copyright<sup>100</sup>. The court found

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<sup>98</sup> S74 (1) of Act 25 of 2002

<sup>99</sup> S74(2) of Act 25 of 2002

<sup>100</sup> [2007] ECDR 5



Google's cache service infringed the author's rights of reproduction and communication. Google infringed these rights by storing a copy of each page in the cached memory of Google's servers. The user could click on a cached hyperlink and this would take them to the cached contents on Google's own website<sup>101</sup>. In the South Africa today all the information cached anywhere in the world can also be accessed, even over a phone.

## 5. The Linking Limitation

Linking is a method of using third party content available on the internet. When it comes to linking of content, a "link" from one webpage to another is created by means of a hypertext link<sup>102</sup>. Section 1 of the ECT Act defines a hyperlink as a "reference or link from some point on one data message directing a browser or other technology or functionality to another data message or point therein or to another place in the same data message"<sup>103</sup>.

Author Lai's explanation on the technical background to linking is as follows" "the world wide web (www) operates on a text-based language called HTML hypertext mark-up language<sup>104</sup>. The text is contained in

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<sup>101</sup> Anon "Copyright law" 20078 (4) *international review of industrial property and copyright law* 491

<sup>102</sup> Anon "Copyright law" 20078 (4) *international review of industrial property and copyright law* 491

<sup>103</sup> S1 of Act 25 of 2002

<sup>104</sup> Stanley Lai. "The copyright protection of computer software in the United Kingdom" Hart Publishing. Oxford. 2000. 232-233 (appendix 50)

triangular bracket and is the html directives that determine how the text is to be formatted and the points of insertion of graphics into the text”<sup>105</sup>.

The mere creation of a link does not in itself infringe copyright. Deep hyperlinking often contains advertising and bypasses the content of the providers’ page. The ECT Act provides protection to Internet Service Providers where the Internet Service Provider is genuinely ignorant to its commission and acts swiftly upon receipt of a takedown notice<sup>106</sup>. The Internet Service Provider must not be aware of circumstances from which the infringing act is apparent, receive financial benefit, or have actual knowledge of the activity<sup>107</sup>. It should be noted however that the requirement involves the term actual knowledge, and not constructive knowledge. Even if an Internet Service Provider has constructive knowledge of general infringement the Internet Service Provider may still garner protection in regards to linking<sup>108</sup>.

## 6. The hosting limitation

Under the ECT Act where an Internet Service Provider provides a hosting service the Internet Service Provider may receive legal

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<sup>105</sup> Stanley Lai. *“The copyright protection of computer software in the United Kingdom”* Hart Publishing. Oxford. 2000. 232-233 (appendix 50)

<sup>106</sup> S76(1)(a)-(d) of Act 25 of 2002

<sup>107</sup> S76 a-d of Act 25 of 2002

<sup>108</sup> S76 a-d of Act 25 of 2002

protection from delictual liability. Liability limitation may occur under certain circumstances. That being that the Internet Service Provider

“does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of a third party; or is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent; and upon receipt of a take-down notification acts expeditiously to remove or to disable access to the data”<sup>109</sup>.

To qualify for this hosting indemnity however the Service Provider needs to appoint an agent to receive notifications and make sure that this agents details are readily available to the public <sup>110</sup>. Everything considered, a competent court may still order an Internet Service Provider to act against any offending material they may be hosting<sup>111</sup>.

## 7. Takedown Notifications

If an Internet Service Provider in the South Africa is not a member of a representative body it won't be capable of getting protection in terms of Chapter XI<sup>112</sup>. This means that even if the Internet Service Provider acts only as a mere conduit and complies with a takedown notification, as

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<sup>109</sup> S75 (1) of Act 25 of 2002

<sup>110</sup> S75 (2) of Act 25 of 2002

<sup>111</sup> S75(3) of Act 25 of 2002

<sup>112</sup> Internet Service Providers' Association, Code of Conduct, <http://www.ispa.org.za/code-ofconduct>

(accessed 3<sup>rd</sup> February 2013)

long as it is not a member of an IRB then it may be liable<sup>113</sup>. The ECT Act requires that in order for an Internet Service Provider to get protection from liability it should comply with the taking down procedure stipulated in take down notices. Take down notices must be in compliance with the ECT Act.

Arguably takedown notifications are important for interested parties as they are easier than injunctive relief. However, it must be noted for takedown notifications to allow Internet Service Providers the opportunity to take down infringing content, this does not provide economic relief for downloads already made. Internet Service Providers should provide a form containing the required elements which can be downloaded from their web sites<sup>114</sup>. The requirements for a takedown notification under the ECT Act are as follows:

- 1) The full names and address of the complainant;
- 2) The written or electronic signature of the complainant;
- 3) Identification of the right that has allegedly been infringed;
- 4) Identification of the material or activity that is claimed to be the subject of
- 5) The remedial action required to be taken by the service provider in respect of the complaint
- 6) Telephonic and electronic contact details, if any, of the complainant;

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<sup>113</sup> “*What INTERNET SERVICE PROVIDERS can do about undesirable content*” Paul Esselaar. 2008. A paper commissioned by the Internet Service Providers Association.

<sup>114</sup> It should be noted that INTERNET SERVICE PROVIDERA already provides this on its web site. See <http://www.InternetServiceProvidera.org.za/code/index.shtml> (Accessed 07 November 2012)

- 7) A statement that the complainant is acting in good faith;
- 8) A statement by the complainant that the information in the notification is to his knowledge correct and true<sup>115</sup>.

However interested parties should not lodge fraudulent takedown notifications. The ECT Act provides that any person who lodges a notification of unlawful activity with a service provider knowing that it materially misrepresents the facts is liable for damages for wrongful take-down<sup>116</sup>. However the Internet Service Provider will face no liability in the case where it acted on a wrongful notification. In this respect The ECT Act is very similar to the EUCD in that Internet Service Providers may find it a safer practice to simply takedown content without even looking if the content infringes copyright<sup>117</sup>.

## **Part VI:**

### **THE LIMITATION OF INTERNET SERVICE PROVIDER LIABILITY: COMPARISONS BETWEEN THE ECT ACT DMCA AND EUCD**

#### **1. Introduction**

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<sup>115</sup> S77(1) a-h of Act 25 2002

<sup>116</sup> S77 (2) of Act 25 of 2002

<sup>117</sup> S77(3) of Act 25 of 2002

The ECT Act, limitation on liability for Internet Service Providers was based upon the DMCA and EUCD<sup>118</sup>. These pieces of legislation just like The ECT Act provide for the limitation of liability of Internet Service Providers in regards to hosting, linking, mere conduits and caching.

The DMCA, the ECT Act and the EUCD all create safe harbor for hosting Services<sup>119</sup>. They are all very similar but also differ in certain material respects. For one the ECT Act requires Service Providers to appoint agents for takedown notifications and be members of an industry representative body in order to garner protection whereas the DMCA only requires Service providers to appoint agents<sup>120</sup>.

**The EUCD classifies online intermediaries as follows:**

- 1) The network-operator that provides the facilities, such cables and routers, for the dissemination of the material.
- 2) The access provider that provides access to the Internet.
- 3) The host service provider provides a server on which it rents space to users to host content.
- 4) News groups and chat room operators provide space for users to read information sent by other users and to post their own message.

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<sup>118</sup> “Daniel Seng Comparative Analysis of the National to the liability of Internet Intermediaries” page 44. prepared by Daniel Seng, Associate Professor, Faculty of Law, National University of Singapore for the World Intellectual Property Organization

<sup>119</sup> 17 U.S.C. § 512(c) (2000); Art. 14. Directive 2001/29/EC

<sup>120</sup> 17 U.S.C. § 512(c)(2).

5) Information location tool providers make tools available to Internet users for finding web sites where information they seek is located, often referred to as “search engines”<sup>121</sup>.

While the DMCA unlike the ECT Act seems to provide only injunctive relief with regards to takedown notifications and damages<sup>122</sup>.

## 2. Mere Conduits

In cases where Internet Service Providers simply provide Internet connectivity, they are considered “mere conduits” under **s512(a)** of the DMCA. To make use of that safe harbor, Internet Service Providers must have implemented a policy of terminating subscribers who are “repeat infringers”<sup>123</sup>.

In other words if an Internet Service Provider facilitates the passing of data and does not store, cache or host data for the user according to the DMCA the Internet Service Provider is protected from liability. The Ect Act provides that so long as Internet Service Providers follow take down notification procedures in regards to being a mere conduit and caching

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<sup>121</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178) 1 (June 8, 2000) [hereinafter EC E-Commerce Directive].

<sup>122</sup> *Information and communication technology law*. Dana Van Der Merve. Lexis Nexis Durban 2008.

<sup>123</sup> 17 U.S.C. § 512(a) (2000).

an Internet Service Provider should not face liability whereas the DMCA seems to suggest only liability limitation<sup>124</sup>.

According to the American decision in *RIAA v. Verizon*, it was reasoned that in regards to takedown notices for mere conduits “any notice to an Internet Service Provider concerning its activity as a mere conduit that does not satisfy the condition of **s512(c)(3)(A)(iii)** is therefore ineffective,”<sup>125</sup>, Which is also the position under the ECT Act for notifications that do not satisfy the requirements of the Act<sup>126</sup>.

**S512(h)** of the American Act necessitates that an Internet Service Provider hand over the details of a user once information comes to its attention of the infringement<sup>127</sup>. The European Directive has no such requirement. Instead E-Commerce Directive differs to the National laws of member states. According to the Directive-

“[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”.<sup>128</sup>

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<sup>124</sup> S74 (1) of Act 25 of 2002

<sup>125</sup> 351 F.3d 1229 (DC Cir. 2003)

<sup>126</sup> S74 (1) of Act 25 of 2002

<sup>127</sup> 17 U.S.C. § 512(h)(1)(B) (2000).

<sup>128</sup> Art. 15.2 Directive 2001/29/EC



Ultimately under the EUCD national law determines a copyright owner's ability to obtain information from a European service provider to identify individuals allegedly using its services to infringe upon his copyright. Thus the ability of the copyright holder to identify such infringers with the aid of the Internet Service Provider would differ and ultimately does differ from EU members from country to country. The European Court of Justice has held that EU member States are not excluded from imposing an obligation on Internet Service Providers to disclose personal data. In the context of civil proceedings for copyright infringement, they are not required to establish such an obligation either<sup>129</sup>.

### 3. The European Horizontal Approach

The EUCD's safe harbor is dealt with under the E-Commerce Directive. Much like the South African Ect Act, the E-Commerce Directive of EUCD is described as having a "Horizontal Approach" to Service Provider liability<sup>130</sup>. This approach includes providing the drive for EU member states to provide protection for Internet Service Providers in terms of liability in "copyright infringement, trademark infringement, defamation, unfair competition, hate speech or any other type of illicit material. This approach is broader than that of both the DMCA and the ECT Act.

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<sup>129</sup> European Court of Justice, Case C-275/06, *Productores de Música de España (Promusicae)*-

<sup>130</sup> S79 of Act 25 of 2002

#### 4. Wide definition of Internet Service Providers

The DMCA ensures that an Internet Service Provider provides “online services” as opposed to the ECT Act which describes “information system providers”. According to **s512(k)** of the DMCA an Internet Service Provider is “a provider of online services or network access, or the operator of facilities therefor.”<sup>131</sup> The European Directive differs in this definition. The EUCD provides for “information society services” instead of “online services” which is more in line with the ECT Act’s information description. The term “information society services” in the EUCD is legally defined by the Directive and is a prerequisite for the insurance of limitation of Internet Service Provider liability. According **Article 14.1:**

“[w]here an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service.”<sup>132</sup>

The ECT Act, EUCD and the DMCA though all provide for a wide ranging definition of Internet Service Providers. Regardless of the difference in definition in practice the result of application of both sections seems to be tantamount to the same thing. Further it means that a mobile service provider may be deemed to be an Internet Service Provider in America, Europe and also the South Africa.

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<sup>131</sup> 17 U.S.C. § 512(k)(1)(B) (2000).

<sup>132</sup> Art 14 (1) Directive 2001/29/EC

## 5. Take Down Notices

The ECT Act, DMCA and the EUCD all provide for clear “takedown notice” procedures<sup>133</sup>. Upon being notified of the infringement Internet Service Providers are to notify alleged infringers to take down the infringing material. In practice American and European Internet Service Providers tend to send takedown notices in an attempt to avoid litigation. In theory this is also the case of South Africa Internet Service Providers. However, in South Africa this generally has not been a concern as while infringements do occur, local Internet Service Providers do not often receive notices in practice.

In America and Europe such notices tend to be sent out immediately. This has led some, practitioners and academics alike, to claim that this system of take down notices under the DMCA for one is subject to abuse<sup>134</sup>. Service Providers have protected themselves, by quickly responding to copyright infringement claims. It can be argued either way whether this is a failure or a success on the part of the DMCA and EUCD. However as far as the ECT Act, takedown notices are under used.

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<sup>133</sup> S74(1)(e) of Act 25 of 2002

<sup>134</sup> Tiffany Rad, Christopher Mooney “The DMCA & ACTA vs. Academic & Professional Research: How Misuse of this Intellectual Property Legislation Chills Research, Disclosure and Innovation” pdf p2

Google has asserted abuses of the takedown notice procedure in application of the DMCA in relation to the New Zealand Copyright Act 92A<sup>135</sup>. According to Google over a third of the notices were “not even copyright claims”. Regardless s512(g) of the American Copyright Act places a good faith requirement in relation to takedown notices on Internet Service Providers. According to the Section-

“to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts and circumstances from which infringing activity is apparent regardless of whether the material or activity is ultimately determined to be infringing”<sup>136</sup>

In *Lenz v Universal Music Group* the defendant’s child danced and performed a song under copyright to Universal and posted the video on Youtube<sup>137</sup>. Universal sent a takedown notice to Google. The plaintiff took on the suit in court and argued that Universal was encroaching on her “fair use” of the song. The California Appeals Court held that Universal, prior to the take down, should have made an inquiry into fair use.<sup>138</sup>

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<sup>135</sup> “Google Submission Hammers Section 92A” New Zealand PCWorld. 2009-03-16

<sup>136</sup> 17 USC s512(g)

<sup>137</sup> 572 F. Supp. 2d 1150, 1154-55 (N.D. Cal. 2008)

<sup>138</sup> 572 F. Supp 2d 1150

Users of the Internet Service Providers seem to be far less happy about it as they are forced to takedown the material without a chance to respond to the allegations of infringement. For the sake of contrast the system in Japan under the Japanese “Provider Liability Law” is far less stringent<sup>139</sup>. The Japanese Act allows for the user subject of the takedown notice to have 7 days to respond to the infringement allegations<sup>140</sup>.

## 6. Criminal and Civil liability

The ECT Act provides for civil liability, however, the EUCD does not limit the ambit of its language and provides for requirements for both civil and criminal liability<sup>141</sup>. In South Africa, criminal liability tends to be dealt with under the Copyright Act and Counterfeiting Act, and not the ECT Act<sup>142</sup>. Copyright legislation tends to concentrate more on the Copyright Act in South Africa. The European E-Commerce Directive, exempts providers from both civil and criminal liability. According to the Directive “The limitations on liability provided for by the Directive are established in a horizontal manner, meaning that they cover liability, both civil and criminal, for all types of illegal activities initiated by third parties.”<sup>143</sup>

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<sup>139</sup> Act on the Limitation of Liability for Damaged of Specified Telecommunications Service Providers 2001”

<sup>140</sup> Tian Yi Jun, Wipo Treaties, *Free Trade Agreement and Implications for INTERNET SERVICE PROVIDER Safe Harbour Provisions (The Role of INTERNET SERVICE PROVIDER in Australian Copyright Law)*, Bond Law Review, 16 (2004) 198 & 204

<sup>141</sup> Article 6(2) Directive 2001/29/EC

<sup>142</sup> S1 of Act No 37 of 1997

<sup>143</sup> *Commission First Report on the application of Directive 2000/31/EC*, at 12, COM (2003) 702 final (Nov. 21 2003) See [www.eur-lex.europa.eu/lexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML](http://www.eur-lex.europa.eu/lexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML) (last assessed 5<sup>th</sup> February 2013)

The European Directive provides different sets of requirements for providers to escape civil liability and also different criteria for criminal liability<sup>144</sup>. Furthermore, the two envision similar sets of thresholds for liability<sup>145</sup>. In order to escape civil liability the facts of the infringement must not be apparent while for criminal the Service provider must have no actual knowledge in order to escape liability Both the DMCA and the European Directive are somewhat unclear as to what would constitute actual knowledge.

## 7. The Legislative impact on WEB 2.0

The impact of the ECT Act and comparable legislation seems to be minimal at best. It is common knowledge that downloading and copyright infringement on the internet is generally permissive despite the legislation. This is further spurred by the attitudes of mobile and social media users in jurisdictions such as South Africa in treating data subject to copyright as if it should be free.

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<sup>144</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain aspects of copyright and related rights in the information society See [www.eur-lex.europa.eu/lexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML](http://www.eur-lex.europa.eu/lexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML) (last assessed 5th February 2013)

<sup>145</sup> Jonina S. Larusdottir "Liability of Intermediaries for Copyright Infringement in the Case of Hosting on the Internet" Stockholm Institute for Scandianvian Law (2010)

What makes things worse is the technology of today allows users to behave this way. Web 2.0 technologies cover various forms of web services that were not provided for in the 1990's. Such services include but are not limited to auction sites, mobile services and social network sites. Such 2<sup>nd</sup> generation sites rely on user generated content as opposed to generating content themselves.

The 2003 European Commission Report on the Directive commented in a footnote that “the limitation on liability for hosting in **Article 14** covers different scenarios in which third party content is stored, apart from the hosting of web-sites, for example, also bulletin boards or “chat-rooms”<sup>146</sup>.

## **Part VII:**

### **AN ARGUMENT FOR ABSOLUTE LIABILITY**

#### **1. Introduction**

It is quite clear that the issue of Internet Service Provider liability is a massive topic worldwide. Further that despite the legislation present in South Africa there is little application of the law in this regard. Further statistics on the topic of take down notification in South Africa are hard to come by. This author looked at the issue of Internet Service Providers' liability through a wide lens and found that other jurisdictions outside of the ECT Act have had a problem dealing with this issue as

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<sup>146</sup> *Internet Law and Regulation*. Graham J.H Smith. Bird & Bird. 4<sup>th</sup> Ed. Thompson. Sweet and Maxwell. p382

well. Mobile Internet Service Providers in South Africa have escaped with little to know scrutiny as far as Internet Service Provider liability. While internationally Internet Service Providers are under the spotlight.

## 2. “Blurred lines”

As already stated, lines between vicarious liability and contributory liability are “not clearly drawn”<sup>147</sup>. The courts mix and match the tests somewhat and treat both forms as indirect liability. As far as vicarious liability, in analyzing the relationship that might exist between intermediaries and users, it is this author’s belief that intermediaries serve as online landlords. Where an intermediary has the responsibility or ability to control the actions of users and derives a financial interest it is this author’s belief that liability should follow. It is this author’s belief that such financial interest also encompasses where an Internet Service Provider does not derive a direct financial interest but also where an Internet Service Provider receives financial benefit from allowing illegal downloads, as was the finding of the court in the Napster case<sup>148</sup>.

## 3. Legislative Breakdown

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<sup>147</sup> 239 F.3d 1004 (9th Cir. 2001)

<sup>148</sup> 239 F.3d 1004 (9th Cir. 2001)



While “internet service provider” do provide for a wide definition, the technology and ability infringe copyright on platforms such as social networks and mobile networks is a fast evolving dynamic<sup>149</sup>.

Legislation has provided a framework for notifications to Internet Service Providers by copyright holders in regards to taking action against users who infringe. This legislation provides take down procedures for Internet Service Providers for infringing content. This legislation has defined conditions under which Internet Service Providers are subject to safe harbor. But what can be done where there is no content to takedown? We are at a point technologically where users can connect directly to each other. Competition between mobile internet service providers compels them to provide greater download bandwidth and devices with the ability to handle such mobile internet access. Mobile phones store their own content. In which case a takedown notice may have little meaning.

The DMCA, EUCD and the ECT Act offer no real solution on how to best deal with future and some present internet platforms. The DMCA, related Acts and our courts have struggled to deal with sites like *Youtube*, where the Internet Service Provider does not always have control. Legislation does not adequately deal with the new Web 2.0 generation.

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<sup>149</sup> Lawrie, Mike, ‘The History of the Internet in South Africa: How it Began’, 1997, <http://archive.hmvh.net/txtfiles/interbbs/SAInternetHistory.pdf> (accessed 7 February 2013).

This indecision is only further compounded by how often Internet Service Providers and copyright holder's settle out of court, thereby preventing our courts to set precedents. On the ECT Act this author finds that in practical application, legislators need to work to enable actors in the field to apply the law.

Internet Service Providers of today cover far more services than those originally envisioned when the DMCA was promulgated. According to the American Judge Ginsburg-

“[t]he examples of service providers given in the House Report consist entirely of enterprises who provide ‘space’ for third-party websites and *fora*, not the operators of the websites themselves,” but concluding that “even if Congress may not have had website operators in mind (much less the emerging Web 2.0 businesses), the language it chose to define ‘service providers’ may be broad enough to encompass more internet entities than Congress specifically contemplated in 1998”<sup>150</sup>.

The truth of the current technology that is out there is that legislation has created as many questions as there are answers.

#### **4. Mere Conduits**

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<sup>150</sup> Ginsburg, *supra* note 60, at 594

This author argues that the provision of “mere conduits” under The ECT Act is ill conceived and ill-suited to current, modern circumstances<sup>151</sup>. This author argues that while actual knowledge is necessary, constructive knowledge should be the standard by which liability would be judged. This is when an Internet Service Provider (be it an Internet Service Provider, mobile Internet Service Provider or social network) facilitates infringing behavior and is generally aware that such behavior is permissive on their network. They, in this author’s opinion, should be held responsible for the infringements. However this is not currently the case. The present standard is actual knowledge of specific infringements.

The ECT Act on “mere conduit” provision may be abused by Internet Service Providers who do not store, cache or keep the data or their users<sup>152</sup>. As demonstrated for example with the RIM, Blackberry Messenger (BBM) network this motif is no longer necessary. But what about where the Internet Service Provider has a constructive knowledge of the kind of permissive behavior that occurs on his network? What if this Internet Service Provider advertises download speeds and the ability for users to share files? What if the intermediary has the ability to control the actions of users by putting in blocks through software updates? In this situation surely the Internet Service Provider would be deriving financial benefit through its possible competitive advantage over other mobile Internet Service Providers even if not directly. In that

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<sup>151</sup> S73(1) of Act 25 of 2002

<sup>152</sup> Chapter XI No 25 of 2002

case under the ECT Act such an Internet Service Provider would not be liable as it would still constitute being a “mere conduit”<sup>153</sup>.

## 5. Libelous Relationship

This author contends that our courts should look at the American *Fonovisa case*<sup>154</sup>. The case did not deal with Internet Service Provider liability as such. It is also an older American case. However it dealt with landlord liability where the intermediary had a general knowledge of infringement. If considered in the context of the relationship between a user and Internet Service Provider, it is a relevant case. The relationship between an Internet Service Provider and user is similar to that of a landlord and tenant. That being if the Internet Service Provider has the ability control and monitor their users of course. Regardless the current level of our technology in South Africa, safe guards can be placed by mobile Internet Service Providers to effect such restrictions.

In *Fonovisa v Cherry Auction*, the defendant was a landlord who rented out booths where counterfeit music was sold. The plaintiff was the owner of copyright in titles of Latin music that was being counterfeit and sold in these booths. In the matter the California appeals court found that the intermediary landlord was aware of the infringement thus in that situation liability was possible<sup>155</sup>. Section 23(2) of South Africa’s

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<sup>153</sup> S73(1) of Act 25 of 2002

<sup>154</sup> 76 F.3d 259 (9th Cir. 1996)

<sup>155</sup> 76 F.3d 259 (9th Cir. 1996)

Copyright Act provides some basis for this kind of indirect liability as well<sup>156</sup>. No reported Internet Service Provider in South Africa has ever been brought to justice in our courts under this section.

## **6. Conclusion**

The position of the ECT Act is quite clear. In considering the requirements for vicarious liability and contributory liability as well as legislation (no matter how remiss this author thinks this might be) it would be difficult to find a mobile Internet Service Provider in South Africa liable for indirect infringement.

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<sup>156</sup> S23(2) No. 98 of 1978

## BIBLIOGRAPHY

### Acts

Act on the Limitation of Liability for Damaged of Specified Telecommunications Service Providers 2001”

Copyright Act No. 98 of 1978,

Counterfeit Goods Act no. 37 of 1997

Digital Millennium Copyright Act (17 U.S.C ss117, 512, 1201 et. Seq) (1998)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain aspects of copyright and related rights in the information society See [www.eur-lex.europa.eu/lexUriServ/LexUirServ.do?uri=CELEX:31995L0046:EN:HTML](http://www.eur-lex.europa.eu/lexUriServ/LexUirServ.do?uri=CELEX:31995L0046:EN:HTML) (last assessed 5th February 2013)

Electronic Communications and Transactions Act 25 of 2002, Chapter XI

H.Rep. No. 94-1476 at 61. 1 U.S.C. §1

Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers (GN 1283 in Government Gazette 29474 of 14 December 2006)

1<sup>st</sup> Amend US Const

## Books

Goldstein, supra note 1, at 829.

Hennie Klopper, Tana Pistorius, Brian Rutherford, Lee-Ann Tong, Pieter Van der Spuy, Andries Van Der Merve. "Law of Intellectual Property in South Africa" Lexis Nexis. Durban

Stanley Lai. "*The copyright protection of computer software in the United Kingdom*" Hart Publishing. Oxford. 2000. 232-233

William R Buckley, Cathy J Okrent. "Torts and Personal Injury Law" Appendix C. Supplementary Cases. P477

## Cases

*A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001)

*Apple Computer, Inc. v Franklin Computer Corp* 714 F, 2d 1240 (3d Cir. 1983)

*Atari Inc v JB Radio Parts (Pty) Ltd* unreported TPD case no 17419/83

*Bradbury v. Columbia Broadcasting System, Inc* 287 F.2d 478 (9th Cir.1961).

*Buck v. Russo*, 25 F.Supp. 317, 321

*Copiepresse SCRL v Google Inc* [2007] ECDR 5

*Dargaud Lombard, Lucky Comics v. Tiscali Média, Tribunal de grande instance* [T.G.I.] [ordinary court of original jurisdiction] Paris 3e ch., 1e sec., Feb. 16, 2005, available at [http://www.legalis.net/jurInternet\\_Service\\_Providerrudence-decision.php?id\\_article=1420.html](http://www.legalis.net/jurInternet_Service_Providerrudence-decision.php?id_article=1420.html) (last visited February 10 2013).

*Deutsch v. Arnold* 98 F.2d 686 (2d Cir.1938)

European Court of Justice, Case C-275/06, *Productores de Música de España (Promusicae)*-

*Fonovisa Inc v Cherry Auction Inc* 76 F.3d 259 (9th Cir. 1996)

*Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154-55 (N.D. Cal. 2008)

In Re: Aimster Court of Appeals 334 F.3d 643 (7th Cir. 2003).

*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005);

*M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470, 475 (D.C.N.C.), aff'd, 2 F.2d 1020 (4th Cir.1924)

Pirate Bay B13301-06

*Playboy v Frena* 839 F.Supp. 1552 (M.D. Fla. 1993)

*Religious Technology Center v Netcom On-Line Communication Services Inc* 907 F Supp 1361 N.D Cal. 11995)

*RIAA v Verizon Internet Services*, 351 F.3d 1229 (DC Cir. 2003)

*Sega Enters., Ltd. v. Maphia*, 30 U.S.P.Q.2d 1921, 1926 (N.D. Cal. 1994)

*Sony Corp. of America v. Universal City Studios*, 464 U.S. at 440, 220 USPQ at 677.(1984)

*Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 220 USPQ 665 (1984).

*Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (2) SA 582 (W)



## Journals

Alfred C Yen, “*Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*”, the Georgetown Journal, Vol 88

Anon “Copyright law” 20078 (4) international review of industrial property and copyright law 491

C. G. Bell *et al.*,” *A New Architecture for Mini-Computers* “-- The DEC PDP-11, Sprint Joint Computer Conference (1970), pp. 657-675.

Claudio E. Palazzi, Armir Bujari, Emanuele Cervi “P2P File Sharing on Mobile Phones: Design and Implementation of a Prototype” Department of Mathematics, University of Padova

Dana Dahlstrom, Nathan Farrington, Daniel Gobera, Ryan Roemer, Nabil Schear, “*Piracy in the Digital Age*” University of California, San Diego CSE 291 (D00) – History of Computing December 6, 2006

Joshua A.T Fairfield “The God Paradox” Boston University Law Review Vol. 89:1017

Niva Elkin-Koren “Liability of Internet Service Providers for Peer-to-Peer Traffic” pdf. P17 see  
[www.law.nyu.edu/emc\\_dlv4/groups/public/%40nyu\\_law\\_website\\_journals.html](http://www.law.nyu.edu/emc_dlv4/groups/public/%40nyu_law_website_journals.html) (assessed November 10 2012)

Steve Esselaar and Christoph Stark, “Mobile Cellular Telephone: Fixed-line Substitution in Sub-Saharan Africa” 2005,  
<http://link.wits.ac.za/journal/j06-esselaar.pdf> (accessed 7 February 2013).

Gerrit Beger, Akshay Sinha UNICEF New York, Division of Communication, Social and Civic Media Collaborators: UNICEF South Africa, Division of Communication Kate Pawelczyk Contributors: Priscillia Kounkou Hoveyda, Erin Garcia, Melanie Zuch “South African mobile generation: Study on South African young people on mobiles” pdf. Page 15. (2012) See also Bryson, Donna, ‘Africa is the Fastest Growing Cell Phone Market’, Daily News, 13 November 2011,

Imre Kelényi, Péter Ekler , Bertalan Forst “A Comparison of Mobile Peer-to-peer File-sharing Clients” Budapest University of Technology and Economics Department of Automation and Applied Informatics

Kelly Tickle, “*The vicarious liability of electronic bulletin board operators for the copyright infringement occurring on their bulletin boards*” [1995] (Iowa Law Review)p12 pdf

Lee A. Hollaar Professor, “*Sony Revisited: A new look at contributory copyright infringement*”, School of Computing University of Utah, June 6, 2004 Draft

Landes, William; Lichtman, Douglas (2003). "*Indirect Liability for Copyright Infringement: Napster and Beyond*". Journal of Economic Perspectives 17 (2): 113–124

Miquel Peguera. *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems* pdf p481

Pardis Moslemzadeh Tehrani<sup>1</sup>, Tahereh Amoozegar “How Is The Liability Of Internet Service Providers Limited Under The Digital Millennium Copyright Act?” 2012 International Conference on Economics Marketing and Management IPEDR Vol.28 (2012) © (2012) IACSIT Press, Singapore p256

Priyambada Mishra and Angsuman Dutta “*Striking a balance between liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour*”. Journal of Intellectual Property Rights. Vol 14, July 2009, pp321-329.. National Law institute University, Kerwa Dam Road, Bhopal 462 044.

Tian Yi Jun, Wipo Treaties, “*Free Trade Agreement and Implications for Internet Service Provider Safe Harbour Provisions (The Role of Internet Service Provider in Australian Copyright Law)*”, Bond Law Review, 16 (2004) 198 & 204

Tiffany Rad, Christopher Mooney “The DMCA & ACTA vs. Academic & Professional Research: How Misuse of this

Intellectual Property Legislation Chills Research, Disclosure and Innovation”pdf p2

## **Publications**

Bill Gates, An Open Letter to Hobbyists, Homebrew Computer Club Newsletter (Feb. 3, 1976), available at [http://www.digibarn.com/collections/newsletters/homebrew/V2\\_01/gatesletter.html](http://www.digibarn.com/collections/newsletters/homebrew/V2_01/gatesletter.html) (assessed 4th December 2012)

Commission First Report on the application of Directive 2000/31/EC, at 12, COM (2003) 702 final (Nov. 21 2003)

What INTERNET SERVICE PROVIDERS can do about undesirable content” Paul Esselaar. 2008. A paper commissioned by the Internet Service Providers Association.

International Herald Tribune of 10 June 2011

International Intellectual Property Alliance 2002 Special 301: South Africa Issued February 12, 2007

Ginsburg, *supra* note 60, at 594

“Google Submission Hammers Section 92A” New Zealand PCWorld. 2009-03-16

Kreutzer, Tino, “Generation Mobile: Online and Digital Media Usage on Mobile Phones among Low-Income Urban Young people in South Africa”, University of Cape Town, 2009.

Letter of January 24, 1983 from Justice Stevens to Justice Blackmun.

Longworth “The Possibilities for a legal framework for Cyberspace- including a New Zealand perspective” in Fuentes-Camacho (*ed*) Law of Cyberspace Series Volume 1: The International Dimensions of Cyberspace Law (2000); Powers “The Internet Legal Guide: Everything you need to know when doing business online” (2002); Nel “Freedom of expression and the Internet” in Buys (*ed*) Cyberlaw @ SA II: The Law of the Internet in South Africa 2 *ed* (2004) 197 197; Van der Merwe “Telecommunications Law” in Van der Merwe (*ed*) Information and Communications Technology Law (2008); Tambini, Leonardi & Marsden Codifying Cyberspace: Communications self-regulation in the age of Internet convergence (2008) 2.

Matt Richtel, “*Napster Is Told to Remain Shut*”, New York Times (July 11, 2001).

Richard Spann, “Black Ware: Software Piracy and Internet Distribution” (Dec. 7, 2000), at <http://www.dawnsky.com/raspdf/blackwarez.pdf> (last assessed 6th February 2013)

Rudiger Schollmeier, "A Definition of Peer-to-Peer Networking for the Classification of Peer-to-Peer Architectures and Applications", Proceedings of the First International Conference on Peer-to-Peer Computing, IEEE (2002)

Shumani L. Gereda "The Electronic Communications and Transactions Act" pdf p286

Spencer Ante, Shawn Fanning's Struggle, BusinessWeek (May 1, 2000).

World Wide Worx Mobility Report 2011

### **Websites**

International Telecommunication Union (ITU), "Mobile cellular subscriptions",

2010 <http://www.itu.int/ITU-D/ict/statistics/material/excel/2010/MobileCellularSubscriptions00-10.xls> (accessed 6 February 2013).

<http://www.internetworldstats.com/africa.htm#za> (accessed on 5th February 2013)

[www.Internetserviceprovidera.org.za](http://www.Internetserviceprovidera.org.za) (assessed 06 December 2012)

<http://www.southafrica.info/business/trends/newbusiness/internet-180512.html> (accessed on 5th February 2013)

[www.en.wikipedia.org/wiki/Don't\\_Copy\\_That\\_Floppy](http://www.en.wikipedia.org/wiki/Don't_Copy_That_Floppy) (assessed on 3rd December 2012)

[www.en.wikipedia.org/wiki/Time\\_shifting](http://www.en.wikipedia.org/wiki/Time_shifting) (assessed on 3rd December 2012)

[www.erg.eu.int/doc/consult/bor\\_12\\_30\\_tm-i\\_snapshot.pdf](http://www.erg.eu.int/doc/consult/bor_12_30_tm-i_snapshot.pdf)

[www.uvureview.com/.../sopa-and-pipa-might-deter-piracy-but-at-a-cost](http://www.uvureview.com/.../sopa-and-pipa-might-deter-piracy-but-at-a-cost)  
(last assessed 10th December 2012)

[www.newscientist.com](http://www.newscientist.com) (last accessed 3rd February 2013)

TNS Research Surveys, 'Friendship 2.0', 2009,  
<http://www.mweb.co.za/services/friendship/downloads/Friendship%20200%20presentation%20for%20Microsite.pdf> (accessed 5th February 2013).