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Sound Policy and Practice in Applying Doctrines of Secondary Liability Under U.S. Copyright and Trademark Law to Online Trading Platforms: A Case Study

R. Bruce Rich and David Ho

The explosive growth and popularity of online e-commerce platforms has dramatically opened and expanded global markets for the purchase and sale of merchandise of all kinds. It has, at the same time, spawned ongoing debate over the proper allocation of legal responsibility for the misuse of those platforms by sellers offering products that infringe upon intellectual property rights of third parties. Pre-internet case law in the copyright and trademark fields established reasonably discernible standards for determining when parties other than the direct infringers responsible for placing infringing matter into the stream of commerce could be liable under one or both of the doctrines of contributory and vicarious infringement. Those precedents established that the primary obligation to identify and take proactive measures to avert, address, and remediate instances of infringement rests with the intellectual property owner. They also defined the limited circumstances in which a third party also can be liable, namely, where the third party knowingly and materially assists in acts of infringement or has the right and ability to control infringing conduct and financially benefits therefrom.

The advent of online marketplaces has opened up extraordinary new opportunities for merchants—ranging from international "name brands" to the smallest entrepreneurs—to reach potentially vast audiences of consumers in a cost-effective manner; for consumers to be exposed to the widest array of merchandise; and for this community of buyers and sellers to transact business efficiently. The popularity of e-commerce platforms like eBay, Amazon, and Alibaba speaks for itself.

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Notwithstanding the success of such online marketplaces, concerted attacks on their legitimacy have been mounted in certain quarters, predicated on a

R. Bruce Rich is a partner at Weil, Gotshal & Manges LLP, where he co-heads the firm's IP/Media practice. The views expressed in this article are those of the author, and are not intended to reflect those of the firm or clients other than Alibaba more generally. **David Ho** is a member of Alibaba Group's legal department in charge of international dispute resolution as well as that department's interface on platform governance issues. The authors gratefully acknowledge the assistance of Jonathan Bloom, Sarah Ryu, and Danielle Falls in the preparation of this article.

mistaken leap from the undeniable fact that counterfeit listings can and do appear on these sites to the facile conclusion that the platform operators have the technical ability and resources to systematically prevent such listings but refuse to do so because they wish to continue to profit from the infringement. These attacks have played out in costly litigation, in the legislative arena, and in sometimes successful efforts to enlist Executive branch agencies to brand some platforms as havens for piracy. To date, U.S. law generally has deemed the activities of e-commerce enablers to be legitimate and has sensibly refused to equate the existence of counterfeiting on their platforms with legal responsibility for it.

The forceful views of those who criticize online platforms for assertedly fostering infringement have had a tendency to drown out important considerations that cast significant doubt on the soundness of their arguments. Left uncorrected, this imbalance in the dialogue can hinder the sensible shaping of the law and have undesirable consequences for molding public perception of these economically important entities, as well as, conceivably, for their long-term commercial viability. This article represents an effort to begin to right that imbalance. Beginning from a baseline discussion of current U.S. law of secondary copyright and trademark liability, it then presents basic facts concerning how, by way of example, one of the largest e-commerce facilitators in the world, Alibaba, operates; the significant measures it undertakes to combat infringement on its platforms; and the real-world challenges it faces in doing so. The article concludes with a discussion of the policy considerations that dictate leaving in place the existing legal framework that governs the potential secondary infringement liability of such e-commerce sites.

LEGAL BACKGROUND

Copyright Law

Direct Infringement

The copyright owner of a protected work holds a bundle of exclusive rights enumerated in Section 106 of the Copyright Act of 1976, including the right to reproduce the work, to display the work publicly, to distribute copies of the work, and to prepare derivative works (new works based on a preexisting work).[1] In order to prove a claim of direct copyright infringement, a plaintiff must demonstrate (1) ownership of the allegedly infringed work; (2) violation of at least one of the exclusive copyright rights; and (3) causation (or "volitional conduct") by the defendant.[2]

Copyright ownership typically is established by a U.S. copyright registration, which (if made within five years of first publication) is prima facie evidence of validity of the copyright and of the facts stated in the certificate, including ownership of the copyright.[3] Registration is also a prerequisite to bringing a copyright infringement action and to recovering statutory damages and attorneys' fees (assuming the work is registered prior to infringement or within three months of first publication).[4]

In online infringement cases, related acts with respect to allegedly infringing copies can implicate different exclusive rights.

In online infringement cases, related acts with respect to allegedly infringing copies can implicate different exclusive rights. For example, violation of the reproduction right is established if an unauthorized copy of the work was made, whereas violation of the distribution right occurs when copies of the work are distributed to others without authorization.[5]

Because copyright infringement is a strict liability tort, the concept of volitional conduct has emerged as an important limit on the direct infringement liability of online platforms that host infringing user-generated content.[6] This requirement "stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts."[7] Accordingly, the plaintiff must demonstrate that the defendant was not a purely passive actor but rather that the defendant's actions directly caused the alleged infringement.[8]

Defenses to direct infringement include fair use,[9] which is intended to "encourage[] and allow[] the development of new ideas that build on earlier ones,"[10] and the first sale doctrine,[11] which is aimed at, among other things, promoting competition in the marketplace.[12] Under the first sale doctrine, the owner of a lawfully acquired copy of a copyrighted work is entitled to sell or otherwise dispose of that copy without permission of the copyright owner—a common phenomenon in online marketplaces. Both defenses help strike the balance between rewarding the creators of copyrightable works and protecting the public interest in having access to copyrighted works.

Secondary Liability

Secondary copyright infringement liability cannot exist in the absence of direct liability.[13] Where direct infringement is established, secondary liability can arise under two common-law theories: contributory infringement and vicarious infringement.

Contributory Infringement

Contributory copyright infringement occurs when, with knowledge of direct infringement, the defendant materially contributes to and/or induces the infringement.[14] A defendant "materially contributes" to direct infringement when, while supplying the "site and facilities" for the infringement, it has actual or constructive knowledge of specific infringing material (or is willfully blind to it) and fails to act.[15] Alternatively, the U.S. Court of Appeals for the Ninth Circuit asks whether the defendant could have taken "simple measures" to prevent further infringement of the copyrighted work.[16] A defendant "induces" direct infringement when it affirmatively encourages or promotes the infringing conduct, such as by advertising or providing instructions for an infringing use.[17]

Vicarious Infringement

Vicarious copyright infringement occurs when a defendant has (a) the right and ability to control the infringing conduct and (b) a direct financial interest in the infringing conduct.[18] Reflecting its roots in the employer-employee theory of *respondeat superior*, the requisite level of control exists only where the defendant has "both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so."[19] As for the financial benefit prong, the "essential aspect" is whether there is a causal relationship between the infringing conduct and any financial benefit that inures to the defendant.[20]

Application of Copyright Law to Internet Commerce

Under the foregoing legal framework, online platforms that host user-generated content can be held accountable for participating directly in infringing conduct, such as by selecting and copying material without authorization, for actively encouraging infringement by users, or for turning a blind eye to specific known infringements. These principles impose meaningful limits on the activities that can be undertaken by content hosting platforms while, at the same time, circumscribing their potential infringement liability when they act responsibly.

Because of the volitional conduct requirement, online e-commerce platforms are more likely to be subject to secondary copyright liability claims than to direct liability claims. The provision of an online platform and associated services to third parties—at least where it does not involve selecting the allegedly infringing content—is generally considered to be passive, not volitional, conduct and thus does not give rise to direct liability. In *Giganews*, for example, Giganews, an online bulletin board service provider, operated servers on which plaintiff Perfect 10's adult images were allegedly displayed, distributed, and reproduced without the plaintiff's authorization. The Ninth Circuit found that Giganews' actions amounted to "passively storing material at the direction of users" and "automatically copying, storing, and transmitting materials upon instigation by others" and that there was no evidence that it had "any direct role" in the alleged infringing conduct.[21] Accordingly, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's direct infringement claims against Giganews.[22]

Because of the volitional conduct requirement, online e-commerce platforms are more likely to be subject to secondary copyright liability claims than to direct liability claims.

With respect to contributory copyright infringement claims, as noted, the plaintiff must demonstrate that the online platform failed to act or was willfully blind where it had actual or constructive knowledge of specific infringing content. As the Ninth Circuit held in *Napster*, "absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material."[23] Subsequent decisions have reaffirmed this rule, which rests on the principles that copyright owners have the burden of policing their rights in the first instance and that platform operators, for their part, have no legal obligation to seek out and proactively address infringing material on their systems.[24]

With respect to vicarious infringement, the plaintiff must show that the service provider (a) had a level of supervision and control over the infringing conduct such that the defendant could have prevented it from occurring and (b) received a direct financial benefit from the infringement.[25] Although the plaintiff need not establish the defendant's knowledge of the infringement, as it must to prove contributory infringement, it is not enough to show that the defendant failed to implement post-hoc policing measures. In *Perfect 10 v. Visa*, for example, the court acknowledged that the defendant credit card companies were made aware of the alleged infringement and that defendants could have stopped processing credit card payments to the infringing websites after being put on notice, but it held that "the mere ability to withdraw a financial 'carrot' does not create the 'stick' of 'right and ability to control' that vicarious infringement requires."[26] Instead, the law requires the legal and practical ability to stop infringement *before* it occurs. In *Perfect 10. v. Amazon.com*, the Ninth Circuit found that Google lacked control over direct infringers where, with respect to legal control, there were no contracts with third-party websites that "empower[ed] Google to stop or limit them from reproducing, displaying, and distributing infringing copies," and with respect to practical control, Google lacked image-recognition technology that would enable Google to "analyze every image on the [I]nternet, compare each image to all the other copyrighted images that exist in the world . . . and determine whether a certain image on the web infringes someone's copyright."[27] Accordingly, the court of appeals agreed with the district court's finding that Google was not vicariously liable.

A core requirement for the imposition of liability for direct trademark infringement is establishing that the defendant used the mark in commerce.

With respect to the financial benefit prong, that the platform may benefit financially from infringements on its site does not necessarily demonstrate the requisite direct financial benefit from infringement of *the plaintiff's* works.[28]

Inducement is a viable theory only with respect to genuinely bad actors who actively encourage infringement. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, for example, distributors of file-sharing software sought to capitalize on the popularity (and notoriety) of Napster after Napster was sued for copyright infringement and at risk of being shut down.[29] Internal documents demonstrated plans to attract soon-to-be-former Napster users, and some of their promotional material featured the software's ability to provide popular copyrighted materials (as Napster did); conversely, there was no evidence that the defendants ever sought to filter out copyrighted content or otherwise combat potential infringement.[30] The Supreme Court found inducement liability proper in light of such clear evidence of "words and deeds . . . show[ing] a purpose to cause and profit from third-party acts of copyright infringement."[31]

In addition to these common-law limitations on potential liability, Section 512 of the Digital Millennium Copyright Act ("DMCA") provides statutory safe harbors against liability for damages arising from infringing user-generated content. Failure to qualify for a safe harbor (which can result from failure to comply with procedural prerequisites such as filing designated agent contact information with the Copyright Office) does not establish liability; the plaintiff still must establish the elements of a secondary infringement claim. The DMCA safe harbors merely offer an affirmative defense to online service providers that, among other things, diligently maintain a notice-and-takedown process, act expeditiously in response to proper notices of alleged infringement, and reasonably implement a repeat-infringer termination policy.[32] Notably, the statute provides that safe-harbor protection does not require an online service provider to proactively monitor its sites for infringement, echoing the common law.[33]

Trademark Law

Trademarks are designations used to identify and distinguish the source of goods or services of a person or company. Sufficiently distinctive trademarks are a form of property protectable by their owners against the use of confusingly similar marks by unauthorized third parties. Trademarks serve the important societal function of avoiding consumer confusion as to the source or sponsorship of particular goods and services.

Direct Infringement

A core requirement for the imposition of liability for direct trademark infringement is establishing that the defendant used the mark in commerce. "Only a 'person who, or in connection with any goods or services, or any container for goods, uses in commerce' a trademark or false designation of origin, can be found liable for trademark infringement."[34] Thus, a complaint fails to state a claim under the Lanham Act "unless it alleges that the defendant has made 'use in commerce' of the plaintiff's trademark."[35] Where a platform operator does not itself manufacture, distribute, or offer to sell goods bearing trademark designations, it cannot be directly liable for any infringements that result from offers for sale of such goods, as it has not itself used the challenged marks in commerce.[36] A cause of action for direct trademark infringement in connection with an online marketplace will lie only against the persons or entities that are responsible for the manufacture or sale of the items bearing the infringing marks.

Secondary Infringement

As with copyright law, courts have defined a limited set of circumstances in which parties beyond those who use trademarks in commerce may be liable as secondary trademark infringers. The principal such basis for ascribing secondary lability is the doctrine of contributory infringement, the elements of which were set forth by the U.S. Supreme Court in *Inwood Labs., Inc. v. Ives Labs., Inc.*[37] The Court held in *Inwood* that a defendant is liable for contributory trademark infringement if it "continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement."[38] Subsequent cases have clarified the proper application of this test.

The standard for contributory trademark infringement is narrower than for contributory copyright infringement because trademark rights are narrower than copyright rights.[39]

A fundamental principle of trademark law is that it is "the trademark owner's burden to police its mark."[40] Among the reasons for this rule is that the trademark owner, which has superior knowledge of its own products and the strongest incentive to protect them, is in the best position to identify and seek to remedy infringements.

Accordingly, it is *not* the responsibility of a hosting platform to seek out infringements or otherwise police its site, even where it may be generally aware—or has been put on general notice—of potentially infringing listings. In *Inwood*, the majority rejected a "reasonable anticipation" knowledge standard as "watered down" and "incorrect."[41] In *Hard Rock Café Licensing Corp. v. Concession Serv., Inc.*,[42] the U.S. Court of Appeals for the Seventh Circuit held that the operators of a flea market at which allegedly obvious counterfeit t-shirts were being sold had "no affirmative duty to take precautions against the sale of counterfeits," as the law "does not impose any duty to seek out and prevent violations."[43] In *Tiffany II*, the U.S. Court of Appeals for the Second Circuit agreed with the district court that evidence of eBay's "knowledge of the widespread sale of counterfeit Tiffany products on its website" was not a sufficient basis to hold eBay contributorily liable.[44]

The court in *Tiffany I* found that even if eBay was best situated to "staunch the tide of trademark infringement," shifting the burden to police Tiffany's trademark to eBay on that basis was "not the law."

Demand letters alleging in general terms that counterfeit goods can be found on a platform; purported survey evidence showing the prevalence of infringing merchandise on a site; and the claimed technical ability of a platform operator to monitor listings for infringement or prophylactically bar "bad" sellers from its site also do not trigger a duty on the part of a platform operator to engage in proactive policing.[45] The court in *Tiffany I* found that even if eBay was best situated to "staunch the tide of trademark infringement," shifting the burden to police Tiffany's trademark to eBay on that basis was "not the law."[46] Rather, to trigger *Inwood's* "narrow standard for contributory trademark infringement,"[47] a service provider must have "more than a general knowledge or reason to know that its service is being used to sell counterfeit goods"; it must instead be provided with "[s]ome contemporary knowledge of *which particular listings are infringing* or will infringe in the future."[48]

In shaping the contours of contributory trademark liability in the internet age, courts have recognized the adverse consequences of holding online service providers responsible for preventing any infringing use of their platforms—of, in effect, shifting the primary burden of policing infringement onto the platform operator by subjecting it to strict liability. The district court in *Tiffany* noted that if a "generalized knowledge" standard were sufficient to impute to eBay knowledge of all infringing acts on its website, Tiffany's rights in its mark "would dramatically expand, potentially stifling legitimate sales of Tiffany goods on eBay."[49] For its part, the Second Circuit found that imposing secondary liability because eBay "cannot guarantee the genuineness of all of the purported Tiffany products offered on its website" would "unduly inhibit the lawful resale of genuine Tiffany goods."[50]

The specificity of the *Inwood/Tiffany* knowledge requirement accords with the commonsense proposition that liability for contributory trademark infringement should not arise where there is uncertainty as to the extent or nature of the infringing activity.[51] Were it otherwise, the viability of e-commerce sites would be imperiled by an obligation to guarantee the authenticity of third-party merchandise despite not being in a position to do so with confidence (even assuming resource constraints did not bar the effort, as they surely do). As the Seventh Circuit has stated, the doctrine of contributory trademark infringement does not make defendants "dutiful guardians" of rights holders' commercial interests.[52]

The foregoing contours of contributory trademark infringement do not permit online service providers to turn a blind eye to blatant infringement; the requisite knowledge of infringement can take the form of willful blindness.[53] However, actionable willful blindness "requires more than mere negligence or mistake," and does not exist where the defendant did not "know of a high probability of illegal conduct and purposefully contrive to avoid learning of it" or "fail to inquire further out of fear of the result of its inquiry."[54] In short, willful blindness requires a showing of bad-faith indifference to infringement.

Applying this concept to the ISP setting, the Second Circuit observed in *Tiffany II* that if eBay "had reason to suspect that counterfeit Tiffany goods were being sold through its website, and intentionally shielded itself from discovering the offending listings or the identity of the sellers behind them," then eBay "might very well [be] charged with knowledge of those sales sufficient to satisfy *Inwood*'s 'knows or has reason to know' prong."[55] But eBay's prompt removal of listings for which it received notices of infringement and its "efforts to combat counterfeiting" more generally demonstrated that it was not willfully blind.[56]

Also relevant in assessing willful blindness is the setting in which infringements occur. The facts as to online service providers like eBay and Alibaba are distinguishable from those concerning flea market operators such as the defendant in *Fonovisa, Inc. v. Cherry Auction, Inc.*[57] The defendant there had been given specific written notice by the local sheriff of the results of a raid in which thousands of counterfeit records had been confiscated at the flea market venue and nevertheless did nothing to crack down on the vendors, despite having control over the premises, and failed to assist the sheriff's department by providing requested information about the vendors. In contrast to controlling a physical venue at which goods can be inspected, entities like Alibaba that operate online platforms with millions of sellers could not function if they were required—unrealistically—to inspect every listing as if they were flea market operators.

Also relevant in assessing willful blindness is the setting in which infringements occur.

Beyond the requirement of establishing specific knowledge by the defendant of allegedly infringing works and listings, a finding of contributory infringement also requires sufficient evidence that the service provider failed to take reasonably prompt remedial steps in response to such knowledge. There is no hard-and-fast rule governing how quickly remedial action must be taken in response to an infringement notice; the inquiry takes the specific circumstances into account in assessing the defendant's conduct.[58] Courts applying Section 512 of the DMCA have similarly adopted a "reasonable under the circumstances" approach to evaluating the promptness of takedowns.[59]

The absence of a "one size fits all" standard is illustrated by DMCA caselaw. In *Io Grp., Inc.*

v. Veoh Networks, Inc.,[60] for example, the court found that, whenever Veoh received a DMCA-compliant notice of copyright infringement, it responded and removed the noticed content on the same day the notice was received or within a few days thereafter, and that this constituted an expeditious response.[61] The court found, with respect to a letter identifying approximately 170 infringing videos, that given the number of infringing videos at issue, "the three and one-half week period it took Vimeo to comply with this notice constitute[d] expeditious removal."[62] This wide range of acceptable response times indicates that sensitivity to context is necessary in evaluating the adequacy of the defendant's response to infringement notices.

Common Legal Misconceptions

As the preceding discussion makes clear, neither U.S. copyright nor trademark law supports imposing secondary liability based on the failure of a platform operator to implement proactive anti-infringement measures. Instead, the law embodies a sensible balancing of responsibilities as between rights owners and platform operators, giving platform operators latitude to go beyond that which the law requires by voluntarily implementing enforcement tools and measures that respond to the needs of their businesses, to current industry practices, to feedback from rights owners, and to specific types of infringement without those voluntary measures subjecting them to liability for user-created infringements that may nevertheless appear on their sites. There are, however, a number of common misconceptions concerning the legal obligations of platform operators that are at odds with the case law discussed above.

1. *Knowledge of widespread infringement on the site gives rise to secondary liability*. *Napster* and *Tiffany* make clear with respect to secondary copyright infringement and secondary trademark infringement, respectively, that this proposition—which is tantamount to making online service providers strictly liable for infringements they fail to prevent—is contrary to law. Absent notice of specific infringing material and a failure to take appropriate remedial action after receiving such notice, there is no viable secondary liability claim.

2. *Online platforms have an obligation to proactively monitor their sites for infringement*. As noted, the DMCA codifies the common-law principle that online platforms have no duty to proactively monitor their sites for copyright infringement, a principle equally applicable to trademark infringement. It is the intellectual property owner's burden to police its rights; as stated in *Tiffany I*, a platform operator "is under *no affirmative duty to ferret out potential infringement*."[63] Nor are service providers required to develop technology to prevent infringement from occurring; a defendant's failure to "change its operations to avoid assisting websites to distribute their infringing content" is "not the same as declining to exercise a right and ability to make [third parties] stop their direct infringement." [64]

3. *The law requires a "three-strikes-and-you're-out" policy with respect to repeat infringers.* Although some sites have adopted such a policy, it is not legally required. A handful of cases have examined, and found to be reasonable, a platform's three-strikes policy.[65] None of these cases holds that such a policy constitutes an outer limit of permissible repeat infringement. Courts instead consider the facts and circumstances presented to make a determination as to the reasonableness of a repeat infringer policy and its implementation.[66] Infringing listings can be inadvertent by a seller who lacked knowledge of the infringing nature of the merchandise or an isolated error amidst hundreds or thousands of legitimate listings by an otherwise reputable merchant. These circumstances call for different treatment than when the seller is a proven bad actor, typically demonstrated by repeatedly offering infringing merchandise.

4. *The law requires removal of allegedly infringing content within a certain time following receipt of a proper takedown notice*. Again, there is no hard-and-fast rule as to what qualifies as timely removal. Some courts have said that, in the DMCA context, the same day or within a few days of receiving notice is prompt,[67] while at least one court held that two months was not.[68] In between, courts generally have looked at the facts and circumstances (e.g., the nature of the copyrighted materials, the number of claimed infringements,

the adequacy of the infringement notices) to make an assessment of timeliness.

5. *Providing general assistance to its users is evidence of the platform facilitating infringing conduct.* The provision of services or assistance to users in the ordinary course is insufficient to establish secondary liability of a platform operator. In order to impose secondary copyright liability, the law requires either (a) a "material contribution" to, or active encouragement and promotion of, infringing conduct by the online platform or (b) a deeply "intertwined" relationship between the online platform and the direct infringer. Similarly, secondary trademark liability does not arise from the mere provision of services (including seminars and workshops, marketing advice, consulting services, specific promotions, etc.) to users who may or may not be engaged in infringement; rather, contemporary, specific knowledge of the users' infringing activities and a failure to take appropriate remedial action must be shown. To impose liability for general assistance would be vastly overreaching and would significantly impair the efficiency and effectiveness of the commerce enabled by online platform operators.

LITTLE UNDERSTOOD FACTS ABOUT THE CHALLENGES OF COMBATTING INFRINGEMENT: ALIBABA'S SIGNIFICANT IP ENFORCEMENT EFFORTS

Appreciation of the degree to which the law of secondary liability sensibly balances the legal obligations of intellectual property owners and online platform operators can be enhanced by a clearer understanding of the practical constraints under which such service providers operate. The following discussion of Alibaba's intellectual property protection efforts provides a real-world perspective on the challenges of policing vast global online marketplaces and a more realistic sense of how the law should, and should not, allocate the burdens of combatting online infringement.

It is a myth, as some elements of the rights holder community profess, that e-commerce platforms as large as Alibaba's can systematically detect and root out listings for the sale of infringing merchandise (or listings that are themselves infringing) without significant support from, and collaboration with, the rights holders themselves. The scale of the commerce involved—Alibaba currently has over two billion product and service listings on its China retail marketplaces, generating more than RMB five thousand billion (more than US$700 billion) in GMV—belies that proposition. Even more fundamental is the limited involvement of the e-commerce platform in proposed sales transactions. Alibaba is neither the manufacturer nor the seller of the listed goods; it does not inspect or physically possess them; it does not create or edit the listings; and it lacks the technical product knowledge possessed by the rights owners that would enable detection of infringement solely from the description and depiction of the products. In such circumstances, imposing upon the e-commerce platform the obligation to ensure against infringing listings and/or sales would be to tantamount to establishing strict liability. To steer clear of potential legal jeopardy, such platform operators would need to radically contract the range of legitimate product offerings featured by their online marketplaces—to the detriment of legitimate small and medium-sized enterprises that sell on such marketplaces as well as consumers.

The law requires a "three-strikes-and-you're-out" policy with respect to repeat infringers.

It is, at the same time, unfair to portray legitimate online trading platforms as passive in the face of inevitable counterfeiting or other infringement or, worse, as somehow complicit in the interest of earning illicit profits. For Alibaba, protecting intellectual property rights on its e-commerce platforms is a high priority that Alibaba backs with a commitment of enormous resources and dedicated manpower to create a safe trading environment for Alibaba's more than 860 million annual active consumers worldwide.

Alibaba has developed state-of-the-art technology to enable it to operate in the unique environment presented by its vast online trading platforms. Technology is key to achieving efficiency, improving user experience, and enabling innovation. Alibaba's proprietary technology supports peak order volumes of up to hundreds of thousands per second, delivers tens of billions of online marketing impressions per day, and enables millions of merchants, brands, and other businesses to conduct their operations efficiently and effectively. Without this investment in technology, e-commerce facilitators would not be able to provide the reliable and speedy platforms to which users have grown accustomed.

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Alibaba also harnesses technology to combat infringement; it is a leader in applying new technologies, including semantic-recognition algorithms and bio-identification, in the effort to keep up with counterfeiters. The level of investment in such technology is significant, and the intent behind it is sincere.

At the same time, advanced technology is no panacea for infringement; as noted, there are important limits to Alibaba's ability to detect infringing merchandise on its own. For one, the ingenuity of counterfeiters cannot be overstated. There are and always will be bad actors with the resources to engineer workarounds to even the most state-of-the-art anti-counterfeiting technology and systems. Platforms often have difficulty uncovering the identity of the infringer. In addition to anonymity, platforms face a repeat infringer problem, including the challenge of implementing effective measures to prevent terminated users from reappearing on the site under a different name or account.

For another, Alibaba has to cope with users who intend to harm competing merchants by making false infringement claims. The damaging consequences of such abusive and malicious takedown submissions are not widely recognized. Merchants on e-commerce platforms must invest in advertising and work hard to accumulate positive user feedback ratings. Wrongful removals of product listings can undermine those efforts and be highly damaging to legitimate merchants. In 2018, nearly 25 percent of Alibaba's complaints were suspected of being malicious.

Finally—and of paramount importance—no matter how sophisticated their technology, given their limited knowledge of the products appearing in their listings, platforms like Alibaba must rely on the expertise of rights owners in order to more systematically detect infringement. That said, the feedback from rights holders is often case-specific, requiring platforms to evaluate the scalability of proposed anti-infringement measures across the entire site.

Confronted with these challenges, Alibaba has leveraged advanced technologies in combination with close collaboration with stakeholders (including rights holders, trade associations, and government bodies) to create a maximally efficient set of IP enforcement policies and processes. It has implemented best practices around a three-pronged strategy: (i) maintaining an efficient and effective notice-and-takedown system; (ii) proactive monitoring; and (iii) offline enforcement. The notice-and-takedown system, which is the heart of any likely-be-effective IP enforcement program, allows rights holders to request the removal of potentially infringing listings through a dedicated intellectual property protection portal. Consistent with U.S. law, this system reflects shared responsibility for monitoring and addressing infringing listings. Rights holders first must identify and report problematic listings; the platform operator is then obligated to take appropriate action to address legitimate notices. This is not a purely mechanical task, as the prevalence of malicious takedown submissions underscores the importance of diligence on behalf of the platform in vetting notice-and-takedown requests before removing listings.[69] Despite the enormity of this undertaking, in 2018, 96 percent of the removal requests submitted through Alibaba's portal during business days were processed within 24 hours.

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Alibaba couples this notice-and-takedown system with its use of advanced technology (namely, text and logo filtering) to detect suspicious listings proactively and to remove them from Alibaba's marketplaces. Subject to the practical limitations discussed above, Alibaba flags such listings during a merchant's listing creation process, which helps prevent merchants from uploading infringing content in the first place. In 2018, 96 percent of proactive removals occurred before a single sale took place.

Alibaba also works closely with brands and law enforcement authorities to assist in offline investigations, using insights drawn from its data analytics, to help law enforcement authorities identify manufacturers of and dealers in suspicious goods. During 2018, Alibaba referred more than 1,600 infringement leads to law enforcement, which led to more than 1,500 arrests and the closure of a similar number of facilities.

Alibaba imposes penalties, up to permanent bans from the platforms, on sellers who abuse their trading privileges. In 2017, some 240,000 storefronts on Taobao were shut down pursuant to Alibaba's penalty system. Alibaba also uses an array of tools to prevent, detect, and reduce the occurrence of fictitious transactions by unscrupulous merchants. These mechanisms include requiring the use of merchants' real identities when opening accounts; analyzing transaction patterns to identify anomalies; enabling consumers and merchants to report suspicious transactions; maintaining a "blacklist" of merchants who have previously been involved in fictitious transactions; and collaborating with law enforcement authorities to combat fictitious activities by merchants and websites and mobile apps that enable fictitious activities.

On top of these efforts, Alibaba engages with intellectual property rights holders in an effort to continually improve the information it obtains and the processes it employs to root out infringements. Alibaba collaborates with individual rights holders in a constructive manner, testing innovative proactive enforcement measure to protect intellectual property rights while fostering legitimate businesses. In addition, along with 30 domestic and international intellectual property rights holders, Alibaba founded the Alibaba Anti-Counterfeiting Alliance ("AACA"), the first alliance of its kind. After more than two years, AACA membership has expanded to 155 rights holder members from 16 different countries and regions; it also encompasses 12 industries, including electronics, automotive, pharmaceuticals, and luxury goods, which regularly collaborate through industry working groups. The AACA facilitates the sharing of best practices among its members as well as with the wider society via educational programs for public bodies and consumers about the damage counterfeit products cause, including with respect to health, the environment, and safety. The AACA has also established an Advisory Board consisting of rights owners from all working groups that acts as a channel for rights holders to provide feedback on significant intellectual property enforcement-related strategies and policies to each other, to Alibaba, and to other parties. The Advisory Board acts as a leading industry forum for discussion of new trends in online intellectual property infringement activities, litigation, and platform practices. These initiatives reflect the powerful business incentives that compel Alibaba to go beyond what the law requires in effort to prevent infringing conduct on its platforms.[70]

The effectiveness of Alibaba's enforcement efforts has been recognized by the various communities of interest. In May 2019, for example, Alibaba was named World Trademark Review's Asia Pacific Team of the Year for its work in brand protection, and the UK Government's City of London Police gave Alibaba the first ever Award for Excellence in IPR Enforcement in October 2019.

POLICY ARGUMENTS FOR RETAINING THE CURRENT LAW OF SECONDARY LIABILITY

As earlier discussed, the law of copyright and trademark secondary liability, while still evolving, has proven more than adequate in balancing the legal and policy interests implicated by those bodies of law. Rights owners retain the primary responsibility for policing their intellectual property, in which they are financially invested and as to which they are far better positioned to identify infringements than intermediaries such as Alibaba, which does not possess or inspect the products offered on its sites. Accordingly, the suggestion that platforms operators be required to proactively identify and remove potentially infringing listings, even where the rights owner has failed to provide notice of such listings, seems improper and unwise.

Without the guidance from rights owners that is now a predicate for secondary liability, imposing a duty of proactive monitoring would not make the platform operator more knowledgeable about the legality of the listings on its platform. It would instead pressure legitimate platform operators to err on the side of caution by eliminating listings wherever there was a potential for an infringement claim, thus inevitably suppressing legitimate commerce. The ultimate losers would be consumers, who would be deprived of access to a wide array of legitimate merchandise on platforms that have increasingly become mainstream shopping destinations. It also would reduce the incentives of rights owners to police infringements and pursue the actual wrongdoers—the direct infringers—who are the root of the problem. In addition, such a regime would not meaningfully reduce counterfeiting; it would displace it onto pirate and other illicit venues that lack the serious commercial motivations of operators like Alibaba and eBay to rid their sites of infringing content.

The suggestion that platforms operators be required to proactively identify and remove potentially infringing listings, even where the rights owner has failed to provide notice of such listings, seems improper and unwise.

Experience to date cautions against shifting legal burdens for an additional reason: Vibrant marketplaces such as Alibaba's feature a mix of new and used products for sale. It is understandable that certain rights owners would prefer to limit the channels of sales and distribution of their products to and through authorized retail outlets (which sell solely new goods) and their own websites (same). Sales of authentic used merchandise cut into such new sales. This is, of course, a legitimate means for consumers to acquire products. Wholly apart from concerns of counterfeiting, such efforts to thwart merchandise resales should be discouraged.

A common refrain from complaining rights owners has been that large online trading platforms promote sales of counterfeit merchandise, presumably because it is in their business interest to do so. This argument—linking the admittedly serious problem of online counterfeiting with a supposed economic incentive on the part of hosting platforms to promote such illicit activity—has surface appeal as an "explanation" for what is in reality a far more complex phenomenon. Attempting to pin responsibility for the acts of direct infringers on online platform operators tends to deflect the attention of courts, public policy makers, and the public away from other issues that require close examination, including the degree of policing activity conducted by rights holders as well as the extent to which rights holders have availed themselves of self-help and collaborative response mechanisms made available by platform operators.

In truth, the presence of infringing activity on their sites is contrary to the business interests of entities like Alibaba. Instilling consumer confidence in the integrity of their marketplaces is critical. Consumers who cannot trust the authenticity of the merchandise listed on a site will not long remain customers. This is why Alibaba devotes enormous resources to preventing and eliminating infringements on its online platforms. The intellectual property protection measures Alibaba undertakes, ranging from notice-and-takedown policies and procedures to proactive filtering to active coordination with law enforcement to innovative collaborations with rights owners and trade organizations, belies the suggestion that it benefits from tolerating or even facilitating infringement. To the contrary, the positive feedback and recognition Alibaba has earned from prominent rights owners and key rights-protection organizations attests to the common interest Alibaba shares with intellectual property owners to combat online infringement.

The claim that it is unfair to require rights owners to incur the expense of monitoring potentially large numbers of online listings for infringements is effectively a plea to overturn settled law allocating the respective obligations of rights owners and platform operators. Accommodating this complaint would, in the end, be self-defeating insofar as countless infringing listings would go undetected no matter how advanced Alibaba's intellectual property protection program might be and how extensive the resources expended on it, without the benefit of the rights holder's unique ability to detect and report such listings.

The argument that rights owners are unfairly burdened relative to platform operators also overlooks the huge expenses being borne by platform operators like Alibaba to protect intellectual property. Alibaba deploys a team of brand cooperation/intellectual property professionals to interact with rights owners to facilitate the efficient submission of infringement notices, to respond to such notices promptly, and to take appropriate actions with respect to offending sellers. Alibaba works with hundreds of individual rights owners to learn more about their product offerings so as to be better able to detect infringements. As earlier noted, Alibaba removes far more problematic listings proactively than as a result of rights owner notifications. The bottom line for an entity like Alibaba is that it is bearing more than its fair (or even legally mandated) burden in combatting infringements on its platform.

CONCLUSION

The competing interests at stake understandably raise issues as to the proper parameters of secondary liability under U.S. law as applied to online e-commerce platforms. To date, the law has trended toward a pragmatic and reasonable interpretation of such potential liability, but this approach is regularly being challenged. What is more, similar issues are being addressed internationally in ways that could influence U.S. jurisprudence.[71] Continued application of sound jurisprudential principles dictates a balanced appreciation of the complex realities of the online e-commerce marketplace.

Notes

1. *See* 17 U.S.C. § 106.
2. *See Perfect 10, Inc. v. Giganews*, 847 F.3d 657, 666 (9th Cir. 2017).
3. *See* 17 U.S.C. § 410(c); *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 477 (6th Cir. 2015), *aff'd*, 137 S. Ct. 1002 (2017).
4. *See* 17 U.S.C. §§ 411(a), 412; *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).
5. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.").
6. *See BWP Media USA, Inc. v. Polyvore, Inc.*, 922 F.3d 42, 47 (2d Cir. 2019); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 (2d Cir. 2016).
7. *Giganews*, 847 F.3d at 666 (quoting *Nimmer on Copyright*).
8. *See id*.
9. Codified in 17 U.S.C. § 107.
10. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007).
11. Codified in 17 U.S.C. § 109(a).
12. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013).
13. *Napster,* 239 F.3d at 1013 n.2.
14. *See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007).
15. *See, e.g.*, *Napster*, 239 F.3d at 1021-22; *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 658-59 (S.D.N.Y. 2013), *aff'd* 910 F.3d 649 (2d Cir. 2018).
16. *See VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 745 (9th Cir. 2019).
17. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1034-37 (9th Cir. 2013).
18. *See Visa*, 494 F.3d at 802.
19. *Perfect 10 v. Amazon.com*, 508 F.3d at 1173.
20. *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).
21. *Giganews*, 847 F.3d at 668-69.
22. *See id*.
23. 239 F.3d at 1021.
24. *See, e.g.*, *VHT, Inc. v. Zillow Grp. Inc.*, 918 F.3d at 745 (9th Cir. 2019) ("Asking for the URLs was not Zillow's duty under the contributory liability standard: Zillow must have '*actual* knowledge that *specific* infringing material is available using its system'") (citation omitted; emphasis in original)); *cf. Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) (potential liability arising from willful blindness "cannot be defined as an affirmative duty to monitor").
25. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996).
26. 494 F.3d at 803.
27. *Perfect 10 v. Amazon.com*, 508 F.3d at 1173-74.
28. *See Giganews*, 847 F.3d at 674 ("Perfect 10 was required to provide evidence that customers were drawn to Giganews's services because of the infringing Perfect 10 material at issue."); *see also Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 591 F. Supp. 2d 1098, 1110 (N.D. Cal. 2008) (rejecting vicarious infringement claim where plaintiff "[did] not offer any evidence showing that Defendants made more money when they allowed infringement to continue or less money when they did not").
29. *See Grokster*, 545 U.S. at 923-24.
30. *See id*. at 924-26.
31. *See id*. at 934-37, 941.
32. *See* 17 U.S.C. § 512(c), (i).
33. *See id*. § 512(m).
34. *Charles Atlas Ltd. v. DC Comics, Inc.*, 112 F. Supp. 2d 330, 336 (S.D.N.Y. 2000) (quoting Lanham Act, 15 U.S.C. § 1125(a)).
35. *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009).

36. *See, e.g.*, *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App'x 879, 886 (Fed. Cir.), *cert. denied*, 138 S. Ct. 335 (2017) (holding that Amazon was not a "seller" of the plaintiff's products where it did not pass title to the goods at issue; providing an online platform that could be used to facilitate sales between other parties did not make Amazon a "seller" of allegedly infringing products); *Ohio State Univ. v. Redbubble, Inc.*, No. 17 Civ. 1092, 2019 WL 1429255, at *5 (S.D. Ohio Mar. 29, 2019) (online platform not liable for direct trademark infringement where it neither created nor sold allegedly infringing goods even though goods created and sold by third-party users were delivered in packaging and with an invoice, product tag, and care instructions bearing defendant's branding).
37. 456 U.S. 844 (1982).
38. *Id.* at 854.
39. *See Tiffany (NJ) Inc. v. eBay Inc.*, 576 F. Supp. 2d 463, 510 n.37 (S.D.N.Y. 2008) ("*Tiffany I*"), *aff'd in part, rev'd in part*, 600 F.3d 93 (2d Cir. 2010) ("*Tiffany II*"); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 965 (C.D. Cal. 1997) ("Because the property right protected by trademark law is narrower than that protected by copyright law, liability for contributory infringement of a trademark is narrower than liability for contributory infringement of a copyright.").
40. *Tiffany I*, 576 F. Supp. 2d at 527; *id.* at 518 ("rights holders bear the principal responsibility to police their trademarks"); *see also Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) (recognizing the "duty of the holder of a trademark to take reasonable efforts to police infringement of his mark").
41. 456 U.S. at 854 n.13.
42. 955 F.2d 1143 (7th Cir. 1992).
43. *Id.* at 1149; *see also id.* (criticizing district court's focus on flea market's "duty to take reasonable precautions" against counterfeiting); *Lockheed Martin*, 985 F. Supp. at 967 ("Lockheed's evidence would only establish liability for contributory infringement if NSI had an affirmative duty to police the Internet for infringing uses of Lockheed's service mark. No such duty exists."); *Tiffany I*, 576 F. Supp. 2d at 515 ("without specific knowledge or reason to know, eBay is under no affirmative duty to ferret out potential infringement").
44. 600 F.3d at 106.
45. *See Tiffany I*, 576 F. Supp. 2d at 507, 511-14, 518.
46. *Id.* at 518.
47. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 n.19 (1984).
48. *Tiffany II*, 600 F.3d at 107 (emphasis added); *see also GMA Accessories, Inc. v. BOP, LLC*, 765 F. Supp. 2d 457, 465 (S.D.N.Y. 2011) (observing that the Second Circuit in *Tiffany* articulated "a narrow test" requiring "a significant degree of knowledge" to trigger contributory liability—one that "does not allow for imposition of liability . . . based merely on constructive notice").
49. 576 F. Supp. 2d at 510.
50. 600 F.3d at 103; *see also Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (noting that the fact that internet hosting services "may be used to carry out illegal activities does not justify condemning their provision whenever a given customer turns out to be crooked").
51. *See Lockheed Martin*, 985 F. Supp. at 964 ("Contributory infringement doctrine has always treated uncertainty of infringement as relevant to the question of an alleged contributory infringer's knowledge."); *see also Tiffany I*, 576 F. Supp. 2d at 517 (noting that Tiffany's infringement notices were merely "a good-faith assertion" that an item was infringing and that "without knowledge of actual counterfeiting" Tiffany could not demonstrate that eBay "should have permanently suspended a seller").
52. *Hard Rock*, 955 F.2d at 1149.
53. *See Tiffany II*, 600 F.3d at 109 (when a service provider "has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of the particular infringing transactions by looking the other way"); *Hard Rock Café*, 955 F.2d at 1149 ("willful blindness is equivalent to actual knowledge for purposes of the Lanham Act").
54. *Nike, Inc. v. Variety Wholesalers, Inc.*, 274 F. Supp. 2d 1352, 1370 (S.D. Ga. 2003), *aff'd mem.*, No. 03-14293, 107 F. App'x 183 (11th Cir. May 3, 2004). *See also Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (a willfully blind defendant "is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and can almost be said to have actually known the critical facts"); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34-35 (2d Cir. 2012) ("A person is 'willfully blind' or engage[d] in 'conscious avoidance' amounting to knowledge where the person 'was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" (citation omitted)).
55. 600 F.3d at 109.
56. *Id.* at 110 & n.17.
57. 76 F.3d 259 (9th Cir. 1996).
58. *See, e.g.*, *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 745 (9th Cir. 2019) ("Zillow . . . reasonably asked to see the licenses between VHT and the feed providers; otherwise, Zillow could not assess ownership and rights in the undefined images.").
59. *See, e.g.*, *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484, 2010 WL 9479059, at *10 (C.D. Cal. July 26, 2010) ("*Because the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action*" (emphasis in original),

and it is fair to conclude that the same approach applies to trademark cases (where the doctrine of contributory infringement is narrower)).

60. 586 F. Supp. 2d 1132 (N.D. Cal. 2008).
61. *See id.* at 1150. By contrast, in *Capitol Records, LLC v. Vimeo, LLC* 972 F. Supp. 2d 500 (S.D.N.Y. 2013), *aff'd in part, vacated in part*, 826 F.3d 78 (2d Cir. 2016).
62. *Id.* at 536.
63. 576 F. Supp. 2d at 515 (emphasis added).
64. *Perfect 10, Inc. v. Amazon.com*, 508 F.3d at 1175; *Io*, 586 F. Supp. 2d at 1154 ("Declining to change business operations is not the same as declining to exercise a right and ability to control infringing activity."); *Luvdarts, LLC v. AT&T Mobility LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013) (failure to implement a digital rights management system "cannot substitute for an allegation of a capacity to supervise").
65. *See, e.g.*, *Vimeo*, 972 F. Supp. 2d at 515.
66. *See, e.g.*, *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007) (requiring, at a minimum, "a working notification system, a procedure for dealing with DMCA-compliant notifications, and [that the platform operator] not actively prevent copyright owners from collecting information needed to issue such notifications."); *id.* at 1111 ("A service provider reasonably implements its repeat infringer policy if it terminates users when 'appropriate.'") (quoting *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1104 (W.D.Wash. 2004); *Io*, 586 F. Supp. 2d at 1144 (noting that online service providers have flexibility to implement a "variety of procedures" with respect to repeat infringers).
67. *See, e.g.*, *Io*, 586 F. Supp. 2d at 1150.
68. *See Rosen v. Global Net Access, LLC*, No. CV 10-2721, 2014 WL 2803752, at *5 (C.D. Cal. June 20, 2014).
69. *See* Alibaba Group, *Alibaba Group Intellectual Property Rights Protection Annual Report* (May 2019) at 15.
70. *See Tiffany II,* 600 F.3d at 109 (noting evidence suggesting that "private market forces give eBay and those operating similar businesses a strong incentive to minimize the counterfeit goods sold on their websites").
71. For example, the Beijing Haidian People's Court (one of the top IP courts in China) recently ruled on the notice-and-takedown liability of a domain name system service provider in a manner favorable to the service provider. *Aluk S.A. and Aluk Wall and Windows System (Shanghai) Co., Ltd. v. Alibaba Cloud Computing (Beijing) Co., Ltd.* ((2017) Jing 0108 Civil First Instance No. 3395).