

A STRATEGIC APPROACH TO THE IMPLEMENTATION OF SECTION J, CHAPTER 18, TRANS-PACIFIC PARTNERSHIP AGREEMENT ON INTERNET SERVICE PROVIDERS

Pham Thi Mai Khanh*

Abstract:

Section J, Chapter 18 of the Trans-Pacific Partnership (TPP) Agreement on Internet Service Providers (ISP), with the objectives of providing copyright holders with effective legal remedies against online copyright infringement whereas properly limit the scope of liability of ISPs for copyright infringements committed through their platforms that they do not control, initiate or direct. The later objective is to be achieved via the so-called Safe Harbours for ISPs. To prepare Vietnam for the implementation of ISP provisions of the TPP Agreement, this paper shall provide: (i) a overview of the evolution of ISP liability regimes and Safe Harbours (ii) an examination of the legal, technological and economic foundations for the development of ISP liability regimes and statutory Safe Harbours; (ii) A comparative comparison among Vietnam's current limitations on copyright liability of ISP with the Safe Harbor provisions in TPP Agreement; and (iii) recommendations on a strategic approach to the implementation of TPP's Safe Harbor provisions.

Keywords: TPP Agreement, Copyright Infringement, ISP, Copyright Liability, Safe Harbours.

Date of submission: 15rd February 2016 – **Date of approval:** 20th March 2016.

Section J, Chapter 18 of the Trans-Pacific Partnership (TPP) Agreement on Internet Service Providers (ISP), with the objectives of providing copyright holders with effective legal remedies against online copyright infringement whereas properly limit the scope of liability of ISPs for copyright infringements committed through their platforms that they do not control, initiate or direct. The later objective is to be achieved via the provision of conditions to be met by an ISP in order to be exempted from liability, or the so-called Safe Harbours for ISPs. To prepare Vietnam for the implementation of ISP provisions of the TPP Agreement, this paper shall provide:

(i) a overview of the evolution of ISP liability regimes and Safe Harbours (ii) an examination of the legal, technological and economic foundations for the development of ISP liability regimes and statutory Safe Harbours; (ii) A comparative comparison among Vietnam's current limitations on copyright liability of ISP with the Safe Harbor provisions in TPP Agreement; and (iii) recommendations on a strategic approach to the implementation of TPP's Safe Harbor provisions.

1. The Evolution of Safe Harbours

In retrospect, the evolution of copyright liability of ISPs and limitations thereof has well reflected the tensions between copyright

* PhD candidate, Foreign Trade University, HCM City campus; Email: phamthimaikhanh@yahoo.com

holders and online intermediaries or between the content industry and Internet industry. To cope with the proliferation of online piracy, copyright holders have sought several doctrines to hold ISPs liable for the infringing acts of third parties committed through their online system or networks. Theories on copyright liability of Internet Service Providers (ISP), such as theories contributory liability, vicarious liability and inducement, have been used as supplements to traditional copyright law to facilitate making available quickly and conveniently via the Internet of creative works. Meanwhile, the uncertainty in the application of those somehow-overlap and unpredictable doctrines¹ had made them hesitate to make the necessary investment in the expansion of the Internet (Hollaar, 2008). In the USA, with intensive efforts to reach consensus with copyright holders on limitations of liability, by 1998, ISPs had succeeded with the adoption of the Digital Millennium Copyright Act (DMCA), which provides various statutory safe harbors with respect to the liability of online providers. In Title II of the DMCA, based on functions, the Safe Harbour provisions define the conditions under which an ISP will be exempted from monetary damages for copyright infringement. The four functions in the coverage of the rules are: (i) automatic caching; (ii) innocent storage (hosting) and (iv) information location tools. Also based on functions, the EC Electronic Commerce

Directive (ECD) No. 2000/31/EC, adopts the “horizontal“ approach when provide limited liability of online intermediaries across all types of content, except gambling and privacy/data protection (Art. 12 to 15). Many others countries have develop their own regimes of immunity, limited liability or “safe harbours” for ISP, following either of the two models. Efforts have been made to harmonize the liability regimes via a modern generation of US-negotiated Free Trade Agreements (FTA). The mega Trans-Pacific Partnership (TPP) Agreement is the most recent of the kind².

2. Legal, Technological and Economic Foundations for the Development of Safe Harbours

Legal foundations for ISP liability regime can be found in Article 41, The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) on intellectual property enforcement. Article 41.1 of TRIPS requires member states to ensure that IP right holders can take effective action against IP infringement. A regime that holds ISP liable for copyright infringement committed on their systems or networks might well serve as a new remedy for IP right holders to fight against copyright infringement in the online environment. However, it is noteworthy to point out that, TRIPS member states are also required to design fair and equitable enforcement procedures and to apply them in “*a manner as to avoid the creation of barriers to legitimate*

¹ Before the adoption of DMCA in 1998, courts in the US had used several methodologies to impose direct liability on ISP for copyright infringement of third parties. For example, a very rigid approach was employed in *Playboy Enterprises v. Frena* (839 F.Supp. 1552 (M.D.Fla.1993)). In which, the Bulletin Board Service operation, though did not make the work available online and know about the infringement, was held liable for direct copyright infringement. In the holding, the Court stated that intention or knowledge is not element of infringement.

² Nuances of US DMCA might be found in the choice of language (Safe Harbours) and structure of the functions, the reference to Notice and Takedown protocol, and even the fact that Annex 18-F refers to Art. 17.11.23 of the USA-Chile FTA as an alternative for Section J, Chapter 18, TPP Agreement.

trade and to provide for safeguards against their abuse” (Art 41.1). Such required criteria of IP enforcement procedures provide foundation for the provision of limitations on ISP liability as a way to avoid unreasonable burdens on the ISP acting as intermediaries. The adoption of Safe Harbours can also help to prevent the ISP liability regime from being unnecessarily complicated or costly, or entailing unreasonable time-limits or unwarranted delays, and to satisfy the requirement set in Article 41.2 of TRIPS.

Technically, in the ordinary course of their operations, ISPs engage in all kinds of acts that expose them to potential copyright infringement liability. At users’ requests, ISPs automatically and routinely reproduce and distribute copyrighted materials. A subscriber can upload material to web pages by instructing the hosting service provider to make and store a copy of the uploaded material on its server. In response to the request of a user to view the subscriber’s homepage, the ISP’s computer then makes copies of the material and sends them through the Internet to the viewing party. When these files pass through intermediary computers over the Internet to the requesting party, each of which may make a copy of the files before transmitting them along the network. To speed up the delivery of information to users, an access provider might choose to cache content in its system so that subscribers can access the content directly. Cached copies are then made and stored in the ISP’s server. Inquired by users,

ISP’s search engines engage in directing users to sites that might contain infringing material. The fact that all of their activities arguably infringes the copyright holder’s exclusive right of reproduction and distribution combined with their exclusive technical control over user misconduct, and thus their ability to prevent copyright infringement by users has justified the imposition of copyright liability on ISPs. However, the passive roles of ISPs as online intermediaries and their inability to distinguish between legitimate and illegitimate user activities make ISP strict liability undesirable (Hamdani 2002, p. 915), thus call for of limitations on ISP liability.

Economic theories also support the formulation of ISP copyright liability regimes with defined limitations. The natural right and personality theories of copyrights support the imposing of liability on ISPs for direct or indirect infringement³. The assumption in economic literature that “*liability should make users internalize the social cost of their wrongdoing*”, then supports secondary liability regime over strict one for ISPs for direct infringing behaviors of their users (Hamdani 2002, p.912). Welfare theory to copyright (Landes and Posner, 1989), or more broadly, the utilitarian approach to law, combined with the “gate-keepers” theory (Kraakman, 1986)⁴ help to justify the shaping of limited liability regimes. The “gate-keepers” approach argues, to suppress online copyright infringement by user, legal penalties should be imposed on a ISP *only if*: (i) otherwise, the incidence of

³ The natural right theory (or fairness theory, based on Locke’s labour theory of property, 1690) and the personality theory (deprived from Helgel’s theory of property, 1821), founded in part on moral consideration, respectively assert that authors deserve either rewards for their labour or continuing control over projection of their personalities (Huges, 1988). Conduct that fails to respect their rights is immoral. Encouraging or providing facilities to conducts that fails to respect other’s rights is also immoral nonetheless and thus properly subject to legal penalties (Fisher, 2013).

⁴ Kraakman (1986) examines considerations on the costs and benefits of imposing secondary liability on a contracting party in order to deter or prevent the misconduct of the other party in the contractual relationship.

copyright infringement would be unacceptable high; (ii) the ISP, let to its own device, would not intervene to prevent infringement; (iii) the ISP is in a position to curb infringement and (iv) the social and economic costs of penalizing the ISP are not unacceptably high (Fisher, 2013). In many of the context, the first two requirements are property met. Taking into consideration ISP's lack of effective and legal control of users' infringement⁵, the third requirement help to justify the provision of Safe Harbours. The forth requires countries, when design their Safe Harbours, to balance between industry needs, user rights and freedoms.

ISPs' unique position on the Internet and their technological, social-economic roles put the issue of ISP copyright liability in the overlap among different fields of law, including copyright law, information technology law and e-commerce law (Please see Figure 1).

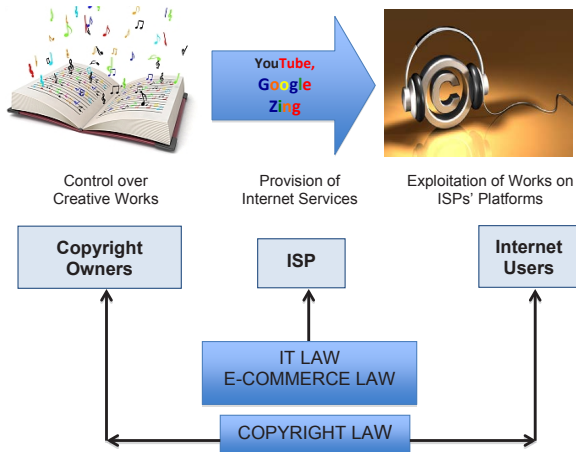


Figure 1: Legal Framework on IP liability over copyright infringement

Source: Author

3. ISP Copyright Liability Provisions as Provided in TPP Agreement and in Vietnam

ISP liability regime, as provided in Section J, Chapter 18 on Intellectual Property, TPP Agreement, is bearing some traits of US DMCA but no paper-copy of this model. In the TPP Agreement, a more generalized model of limitations of copyright liability of ISPs and certain flexibilities in the formation of conditions for the enjoyment of liability limitations have been reached. TPP Agreement, provides a functionally-driven definition of "Internet Service Provider" (18.81), which covers four main technical functions (acting as mere conduits, caching, storage/hosting, and linking) (18.82.2), and offers exemption from monetary damages (Safe Harbours) (18.82.1(b)) for ISPs that meet certain conditions (18.82.3). Among those conditions, applied mainly to ISPs with hosting and referring/linking functions, TPP agreement requires ISPs to expeditiously remove or disable access to allegedly infringing material (takedown) upon acquiring knowledge of the material's existence on their systems (18.82.3(a)). Such knowledge includes (i) actual knowledge, (ii) "redflags" knowledge⁶, and (iii) knowledge come from a copyright holder's notice of infringement (*notice*) (18.82.3(a)). In its notice and takedown protocol (NTD), TPP Agreement clarifies some requirements for the contents of a takedown notice (18.82.3(a), n.156). A counter-notice and put-back protocol is optional for TPP's member states (18.82.4).

⁵ ISPs are unable to distinguish between legitimate and illegitimate user conduct without monitoring the information disseminated through their networks. The vast amount of data transmitted through the Internet makes such monitoring very costly and creates unwarranted delays. More importantly, they cannot do so without invading the privacy and confidentiality of their subscribers (Edwards 2011, p.5)

⁶ To be aware of facts or circumstances from which the infringement is apparent.

To avoid abuse of the NTD protocol, the TPP Agreement requires member states to make available monetary damages for knowing material misrepresentation in takedown notices and counter-notices (18.82.5). In the NTD protocol, ISPs are exempt from liability for takedown if they do so in good faith and notify users when material is taken down (18.82.3(b)). As regards conditions upon all four functions, TPP Agreement contains no-duty-to-monitor rule (18.82.6) that prohibits member states from conditioning safe harbor on an ISP's duty of monitoring its service for infringement. It also requires member states to provide an administrative or a judicial process by which a copyright owner can compel an ISP to identify an alleged infringer who is the ISP's customer (18.82.7). The TPP Agreement does not require ISPs to adopt, implement and inform subscribers of a policy for the termination in appropriate circumstances of subscribers who are repeat infringers as a condition for Safe Harbours⁷.

In Vietnam, whereas the Intellectual Property Law No. 50/2005/QH11 and No. 36/2009/QH12 as well as the Electronic Transaction Act No. 51/2005/QH11 remain silent on the issue, the liability regime of ISP for third parties's illegal content on their systems/networks can be found in the Law on Information Technology (LoIT) dated Jun 29th, 2006, and Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL jointly formulated by the Ministry of Information and Communication and the Ministry of Culture, Sports and Tourism, dated Jun 19, 2012 (Circular 07).

The LoIT, as a "horizontal" regulation – similar to ECD – regulate online intermediary

liability across all types of digital information. With the same functional approach adopted in TPP Agreement, LoIT provides certain liability exemption conditions for ISPs which transmit, temporarily store, host, and provide tools to search digital information (Art.16-19). The no-duty-to-monitor rule is also provided in LoIT (Art. 20). However, several provisions in LoIT are incompatible with those in Section J, Chapter 18, TPP Agreement. Most notably is, in LoIT, the hosting and referring/linking ISPs are obliged to takedown the information upon request by competent state agencies. Actual knowledge, "redflags" knowledge or takedown notice from right holders are not listed as factors that trigger the NTD protocol. Under the current framework of LoIT, hosting, sites like zing.mp3.vn, chacha.vn (6th and 7th most accessed site in Vietnam), or search engines locating copyright infringing materials like Baamboo.com, Socbay.com, and forum website like forum.trasua.vn; kenh14.vn, can easily avoid liability by taking down content upon requests by authorities and ignoring notices from right holders. Though the takedown rate is reported by the music industry to increase dramatically from 34% in 2013 to 82% in 2014 and then to 85% in 2015, there remain a large number of sites that "knowingly distributing infringing music or whose business practice are based on the distribution of infringing music, and which therefore promote infringement" (IIPA 2015 p.66, 2016 p.59)". Music site mp3.zing.vn, recorded as a pioneer in efforts to obtain licenses with record companies and to operate an voluntary NTD mechanism (accessible at <http://mp3.zing.vn/copyright>), continues

⁷ Which is a general requirement for limitations of liability provided in Section 512(i), US DMCA..

to provide access to unlicensed copies or streaming of music as a core part of its business (IIPA 2015, p. 65). VNG, the operator of website mp3.zing.vn was the defendant in a number of cases brought by copyright holders such as Viet Entertainment Company and famous rock singer Tran Lap (2014) for hosting infringing musica and non-responding to righ holders' cease and desist notices. However, none of the cases was official settled, partly due to the lack of NTD implementation obligation in the relevant legal framework. The level of cooperation by Zing is, therefore, far les than this of YouTube, which governed by the DMCA model. The implementation of NTD combined with Content ID regimes⁸ by YouTube was a crucial factor to help its operator successfully avoid liability in cases such as *Viacom v. YouTube*⁹. The similarities as well as imcompatibles between the ISP Safe Harbours provided in the LoIT of Vietnam and the one required by the TPP Agreement can be observed from Table 1.

Circular 07, formulated as a “vertical” regulation which lays down ISP liability rules only for the domain of copyright and related rights, provides a chaper on ISPs' rights and obligations (Chapter III). However, the no-duty-to-monitor is not mentioned in either artciles in the Chapter. Besides, the right of ISPs to set up the system of inspection, supervision, process of information being made available, stored, transmitted in their network to prevent

infringing activities (Art. 4) is unrealistic and undesirable taken into consideration the inverstion of interests between ISPs and copyright holders as well privacy concerns. ISPs' obligations (Art.5), applied cross-funcionally, are also impracticable. For example, the obligation to store content of digital information in their system “*only for transmitting, caching and automatic and contemporary storage, in a sufficient duration to meet technical requirement of transmitting digital information content*” is unsuitable for hosting and referring/linking ISPs. Similarly, the takedown requirement upon requests by competent state agencies can not be applied to mere conduits. Most importantly, Safe Harbours, as a regime to balance between ISPs' interests and the needs to suppress copyright iningements, are missing in Circular 07.

4. Recommendations on a Strategic Approach to the Implementation of TPP's Safe Harbour Provisions

The implementation of the ISP provisions of the TPP Agreement in national law is left to the discretion of each Parties. Taking into consideration the TPP incompatibilities of the existing ISP liability regime in Vietnam, to support Vietnam in the implementation of TPP ISP Provisions, the author would like to propose:

(i) ISP liability regime is a supplement regime to support the online enforcement of copyright which subject to the fair and equitable principle

⁸ Content ID allows IP rightsholders to submit a copyright video they wish protected to YouTube, who then encode it into a unique hash file, against which user-uploaded videos are compared. If the content to be uploaded matches, then the rights-holder can ask YouTube to reject it entirely, allow it to stay up (perhaps as advertising) or alternately to monetize it by placing ads next to it, with the rightsholder sharing in the from the idea that unlawful content can only be take down or filtered out, to transforming it into a money making prospect. YouTube thus have voluntarily made available a system, which combines conventional NTD with a degree of pre-emptive filtering, plus an option for revenue-sharing between platform and rights-holder. (Edwards L. 2011, p.66)

⁹ *Viacom International v YouTube, Inc* NO 1:2007 – CV – 02103 (S.D.N.Y 13/3/2007)

Table 1: Safe Harbours as Provided in TPP Agreement and LoIT of Vietnam

	Section J, Chapter 18, TPP Agreement	IT Law, Vietnam (2012)
1. Safe Harbours per Functions:		
<i>Acting as a Mere Conduit</i>	<ul style="list-style-type: none"> - Without (i) control, initiate or direct the activity of transmitting, routing or providing of connections for material (18.82.1(b) and 18.82.2(a)); and (ii) without modification of content (18.82.2(a)). - The temporary, transient storage of that material is done automatically in a technical process (18.82.2(a)). 	<ul style="list-style-type: none"> - Without (i) initiating the transmission, (ii) selecting the recipients of transmitted information; and (iii) selecting and modifying content (16.4). - The automatic, intermediary, temporary information storage¹⁰ only to serve transmission (16.2). - Takedown at competent state agencies' requests (16.3).
<i>System Caching¹¹</i>	<ul style="list-style-type: none"> - Carried out through an automated process (18.82.2(b)). - Takedown upon redflags knowledge or notice is optional (18.82.3, n. 157). 	<ul style="list-style-type: none"> - Without modification of content (17.2).¹²
<i>Hosting (Storage)</i>	<ul style="list-style-type: none"> - At the direction of users (18.82.2(c)). - Takedown expeditiously upon obtaining actual or reflag knowledge, including the knowledge obtained through receiving a qualified notice¹³ from right holder or its authorized person (18.82.3(a)). - Takedown in good faith and notify users when material is taken down (18.82.3(b)). - Counter-notice and put back protocol is optional (18.82.4). - Monetary damages for knowing material misrepresentation in takedown notices and counter-notices (18.82.5). 	<ul style="list-style-type: none"> - Takedown at competent state agencies' requests. - Refrain from providing hosting service when detect themselves or or are informed by competent state agencies that the stored information is illegal (18.3(c)).¹⁴
<i>Referring or Linking (Information Locating)</i>	<ul style="list-style-type: none"> - Similar to those of hosting ISPs (18.82.3, 4 and 5). 	<ul style="list-style-type: none"> - Refrain from providing information location tools to digital information sources when themselves detect or are informed by competent state agencies that the information at the sources is illegal (19.3)
2. Cross-Function Requirements		
<i>Subject to Administrative or Judicial Injunctions</i>	<ul style="list-style-type: none"> - Provide the right holders with information to identify an alleged infringer who is the ISP's customer, consistent with principles of due process and privacy (18.82.7) 	
<i>Duty to Monitor</i>	No (18.82.6)	No, unless required by competent state agencies (20)

Source: Author, 2016

¹⁰ Temporary means the duration of information storage is just long enough for the transmission (16.2).

¹¹ Caching is a ubiquitous technical process whereby local copies of remote web pages are made by hosts when requested, in order to speed up delivery of those pages on subsequent request to speed up the Web for all users (Edwards 2011, p. 9).

¹² The other conditions for limitations of liability, such as (i) comply to the provisions on accessing or updating information contents; (ii) do not collect data illegal by temporarily storing information; and do not disclose confidential information are irrelevant in the context of copyright. Therefore, are not mentioned in the framework.

¹³ Content of the notice must be sufficient to identify the allegedly infringed material and its online location; and to provide indicia of reliability with respect to the authority of the person sending the notice (18.82.3(a), n. 156)

¹⁴ Those two requirement for hosting ISPs and the requirement for referring/linking ISPs are in the form of obligations but conditions for safe harbours.

with an aim to balanced the interests of all stakeholders (Art. 18.82.1 and 18.82.8, TPP Agreement). Therefore, to avoid unnecessary changes, Vietnam should keep its current framework with a horizontal ISP liability regime in LoIT and a vertical regulation in the overlap between IT law and IP/copyright law. Considered the impracticability of Circular 07, efforts to implement Section J, Chapter 18, TPP Agreement should focus first on the modification of ISP liability as provided in LoIT. The formulation of a new vertical regulation in the field of copyright and related right would then be done correspondingly. It is noteworthy that a Party can choose one of the two methods to implement the TPP ISP provisions: (i) prescribing in their laws conditions for ISP to enjoy safe harbours or (ii) providing circumstances under which ISPs do not qualify for the limitations (Art. 18.82.3). Vietnam, however, should adopt the first approach, which would provide ISP with more clarification on copyright liability and, therefore, better encourage them to invest in the expansion of the speed and capacity of ISP service and business models.

(ii) With the not-yet-existence of a domestic content industry, applying the argument of Maskus (2000, p. 34) on welfare effect of providing IP protection to foreign right owners in a small open economy¹⁵, the author also would like to stress the potential straightforward loss in welfare due to the protection of foreign copyright holders at

the expense of domestic ISPs in Vietnam. With welfare concerns, the author would like to propose a “minimalist approach” in the modification of ISP liability regime as provided in LoIT, which exploits the “flexibilities” in the TPP Agreement and increase access to information via ISP functions:

a) As regards Safe Harbour conditions per Functions:

For ISPs acting as mere conduits, general conditions on a mere conduit (16.4 and 16.2) can be kept while takedown requirement (16.3) should be eliminated to avoid unnecessary burden for mere conduits. For caching ISPs, the minimal no-modification requirement (17.2) should be kept and linked with the new requirement of caching done via an automated process.

For hosting and referring/linking ISPs, the adoption of a NTD protocol is mandatory, thus the current scope of liability of these ISPs would unavoidably be expanded. However, the adoption of requirements on content and verification of notices as well as legal penalties for those who send notice with false content will help to narrow down the actual obligation of these ISPs. Though the counter-notice and put-back protocol is optional under TPP and the adoption of such protocol would result in more burdens on the ISPs¹⁶, the proposed adoption of this protocol in Vietnam aims at a higher level of protection for users from having their content wrongfully

¹⁵ Applied the economic model of welfare theory, Maskus (2000) argued that, in a country that imports or produces an imitative product or technology at the competitive price, IP protection transfers monopoly rents to foreign firms. IP protection for foreign holders also reduces output by local firms that the right holders don't authorise. If the country is too small for such a transfer to induce foreign firms to spend more on R&D of products that meet local demands, there is a straightforward loss in welfare.

¹⁶ With such provision, an ISP must maintain both notice and takedown (NTD) and counter-notice and put-back protocols to completely avoid liability. Implementation of a NTD protocol avoids liability to copyright owners for infringing material; implementation of a counter-notice and put-back protocol avoids liability to users for material wrongfully taken down.

Table 2: Proposed Changes to the ISP Liability Regime of Hosting, Referring/Linking ISPs as Provided in LoIT of Vietnam

No.	Proposed Changes to ISP Liability Provisions Provided in LoIT	Expected Impact on the Scope of Liability of Hosting, Referring/Linking ISPs	
		+	-
1.	Replacement of the current takedown requirement (18.3(b)) with the takedown requirement provided in Art.18.82.3(a) of the TPP Agreement.	To add actual and reflag knowledge, including knowledge obtained via copyright holder's notice, as factors to trigger takedown obligation.	
2.	Provision of liability exemption for ISPs for taking down material in good faith upon notifying users when material is taken down (18.82.3(b), TPP)		To protect ISP from liability for wrongful takedown.
3.	Stipulation of the requirements of a "qualified" right holder's notice content (18.82.3(b), n. 156, TPP) plus (i) the requirement of a good faith belief statement that the material identified in the notice is being used unlawfully, and (ii) the requirement that the notice must be verified by an competent state agencies (18.82.3, n.154, TPP)		To avoid unfounded notices and thus abuse of the NTD protocol.
4.	Provision of monetary remedies for false takedown notices and counter-notices, which cause injuries to interested parties (18.82.5, TPP).		To avoid abuse of the system and to protect ISP from liability for wrongful takedown/put-back
5.	Provision of a Counter-Notice and Put-back protocol (18.82.4, TPP)	Put-back obligation upon receiving qualified counter-notices.	

Source: *Author, 2016* 

taken down. Proposed changes to current ISP liability regime in LoIT and expected impact of ISPs' scope of liability are presented in Table 2.

b) As regards general requirements for Safe Harbours:

To limit ISP liability, the provision on the obligation to provide information to identify customers who are alleged infringers (18.82.7) should be drafted to limit the obligation by a verification process, such as the procedure through which a copyright owner may obtain a

¹⁷ Stipulated in Section 512(h), the US DMCA but omitted in the text of TPP Agreement.

subpoena through a court¹⁷. In the meantime, the no-duty-to-monitor rule (18.82.6) must be re-drafted so ISP would not be subject to monitor requests and fall in the tension between compliance to a state agency's request and privacy.

The development of a regime to stimulate ISP cooperation with copyright holders in suppressing rampant online infringement can be justified upon legal, technological and economic rationales. However, under the status quo of Vietnam, the uncertainty about ISP ability to prevent effectively online copyright infringement, and welfare effect

ambiguity require a prudent reform of current ISP liability regime. With focus on access to information, the paper proposed a "minimalist approach" to ISP liability as a starting point of a framework to analyze the TPP ISP provisions and possible compliance plan for Vietnam. Vietnam is required to fully implement its obligations under Section J, Chapter 18, TPP Agreement in three years. During the transition period, empirical studies on the impact on the suppression of online copyright infringement and welfare effect of possible ISP liability/Safe Harbour regimes are required to provide a well-founded ISP policy. □

References

1. Edwards L. (2011), Role and Responsibility of Internet Intermediaries in the field of copyright and related rights, WIPO Website, http://www.wipo.int/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf
2. Fisher W. (2001), Theories of Intellectual Property, *New Essays In Legal And Political Theory Of Property* 168 (2001) (ed. by Munze S.), Cambridge Studies in Philosophy and Law, 184-89
3. Fisher W. (2013), Lecture 11.1: Supplements to Copyright: Second Liability, CopyrightX program, Harvard University, http://wilkins.law.harvard.edu/courses/CopyrightX2015/11.1_hi.mp4
4. Hamdani A. (2002), Who's Liable for Cyberwongs?, *Connel Law Review*, Volume 87, Issue 4 May 2002
5. Hollar L. A. (2008), Legal Protection of Digital Information, Chapter 3: Copyright of Digital Information, <http://digital-law-online.info>
6. International Intellectual Property Alliance (IIPA), Special 301 Report on Copyright Protection and Enforcement in Vietnam, <http://www.iipa.com>, 2014-2016
7. Kraakman R. (1986), „Gate Keepers: The Anatomy of a Third-Party Enforcement Strategy“, *The Journal of Law Economics, and Organization* (JLEO) (1986) 2 (1), 53-104
8. Koelman K. J. (2000), *Online Intermediary Liability, Copyright and Electronic Commerce* (Ed. by P. Bernt Hugenholtz), NXB Kluwer Law International, London, UK, 7-57
9. Landes W. and Posner R. (1989), "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18.
10. Maskus (2000), *Intellectual Property Rights in the Global Economy*, Institute for International Economics, Washington DC, USA
11. WIPO (2002), *Intellectual Property on the Internet: A Survey of Issues*, <http://www.wipo.int/export/sites/www/copyright/en/ecommerce/pdf/survey.pdf>