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# Online Intermediary Liability for Defamation under Chinese Laws

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Internet is a part of Chinese everyday life and defamation moves on to cyberspace. As a corollary, liability of online intermediaries for defamation is emerging as a prominent legal issue in China. By the end of 2014, China had 668 million Internet users, accounting for 49.1% of the population.<sup>1</sup> The Internet has empowered every user as a potential independent publisher, downplaying the traditional Chinese censorship system. As a corollary, a person could easily post vilifying comments on the Internet, defaming his target through Internet service providers (“ISPs”). While Internet service providers are technologically equipped to stop online libel, they should not be treated as traditional publishers responsible for all content they circulate. Facing a myriad of information flow in their service, the nascent Chinese ISPs would be forced to shut down, owing to the huge cost of policing them and the high risk of lawsuits. Balancing interests is essential to protect private rights and keep the Internet as an efficient social vehicle for searching and exchanging ideas at the same time. The extent to which ISPs should be held liable for defamation acts by their users is thus a noteworthy legal issue under Chinese laws.

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<sup>1</sup> *Asia Internet Stats and 2015 Population Statistics*, INTERNET WORLD STATS, <http://www.Internetworldstats.com/asia.htm#cn> (last visited Dec. 30, 2015).

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## I. THE RIGHT TO REPUTATION AND DEFAMATION IN GENERAL UNDER CHINESE LAWS

In any society, reputation is an essential part of human dignity. In the wake of the poignant Culture Revolution, this value was keenly recognized in China. The Chinese Constitution<sup>2</sup> enacted in 1982 establishes the right to reputation and personal dignity. The Article 38 proclaims that "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited."<sup>3</sup>

Under Chinese laws, defamation is tort to the right to reputation, which may be enforced through civil action, administrative regulation, or criminal action. It is primarily protected under Chinese civil law and the liabilities are fault-based. As early as 1986, this right was specifically provided for in the General Principles of the Civil Law of the People's Republic of China (hereafter "GPCL").<sup>4</sup> Article 101 of the GPCL states that "Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited." Further, Article 102 GPCL states that both "Citizens and legal persons shall enjoy the right of honor. It shall be prohibited to unlawfully divest citizens and legal persons of their honorary titles." *Zhonghua Renmin Gongheguo qin quan ze ren fa* 中华人民共

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<sup>2</sup> *Zhonghua Renmin Gongheguo xian fa* (中华人民共和国宪法) [Constitution Law of People's Republic of China], promulgated by *Zhonghua Renmin Gongheguo quan guo ren min dai biao da hui* (中华人民共和国全国人民代表大会) [National People's Congress of the People's Republic of China, NPC], Dec. 4, 1982, in *Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao* (中华人民共和国全国人民代表大会常务委员会公报) [Gazette of the Standing Committee of the National People's Congress of the People's Republic of China, Standing Comm. Nat'l People's Cong. Gaz.] STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. Dec.2004, at 1; amended Apr. 12, 1988, effective Apr. 12, 1988, in STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. Dec.2004, at 49; amended Mar. 29, 1993, effective Mar. 29, 1993, in STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. Dec.2004, at 51; amended Mar. 15, 1999, effective Mar. 15, 1999, in 1999 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 93; amended Mar. 14, 2004, effective Mar. 14, 2004, in STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. Dec.2004, at 64.

<sup>3</sup> XIANFA art. 38 (2004) (P. R. China), translated at [http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content\\_1372964.htm](http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm) (last visited Jan. 16, 2016).

<sup>4</sup> *Zhonghua Renmin Gongheguo min fa tong ze* (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China], promulgated by National People's Congress (NPC), Apr. 12, 1986, effective Jan. 1, 1987, translated at: [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383941.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm) (last visited Jan.16, 2016).

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和国侵权责任法) [Law on Tort Liabilities Law of the People's Republic of China ] (hereafter "LTL" )<sup>5</sup> reaffirms that infringement upon the right to reputation is subject to tort remedies based on fault.<sup>6</sup>

Privacy can be protected through the right to reputation in some instances. There is no explicit provision for privacy in the GPCL. In 1993, Zui gao ren min fa yuan (最高人民法院) [Supreme People's Court] promulgated the Zui gao ren min fa yuan guan yu shen li ming yu quan an jian ruo gan wen ti de jie da (最高人民法院关于审理名誉权案件若干问题的解答) [Supreme People's Court's Reply to Questions in Adjudicating Disputes on Torts to the Right of Reputation] (hereafter "Judicial Reply 1993").<sup>7</sup> The Section 7 of Judicial Reply of 1993 extends the right to reputation to cover unauthorized disclosure of privacy which damage reputation.

As the provisions for the right to reputation are general, Chinese courts have developed concrete rules to in their application. Most important, the Section 7 of Judicial Reply of 1993 provides that to establish defamation, a plaintiff must prove the four-prong test: (1) the defendant committed a tortious act; (2) the plaintiff

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<sup>5</sup> Promulgated by Zhonghua Renmin Gongheguo Quan guo ren min dai biao da hui chang wu wei yuan hui (中华人民共和国全国人民代表大会常务委员会)[the National People's Congress Standing Committee (NPCSC)], Dec. 26, 2009, effective July 1, 20, in 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 4, translated at: [http://english.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474983043584.htm](http://english.gov.cn/archive/laws_regulations/2014/08/23/content_281474983043584.htm) (last visited Jan. 2, 2016)

<sup>6</sup> Article 2 and Article 6 LTL.

<sup>7</sup> Promulgated by the Zui gao ren min fa yuan (最高人民法院) [Supreme People's Court], June 23, 2014, effective Oct. 10, 2014, in Zhonghua Renmin Gongheguo Zui gaor ren min fa yuan gong bao (中华人民共和国最高人民法院公报) [Gazette of the Supreme People's Court of the People's Republic of China] SUP. PEOPLE'S CT. GAZ., No.3, 102 (1993).

When the GPCL was enacted in 1986, China was embarking on economic reform of planning economy. The GPCL was outstanding for it recognizes formally private rights. At that time, Chinese courts were inexperienced in adjudicating civil disputes. Lower courts frequently referred civil law legal issues to the Supreme People's Court for answers.

Judicial precedents do not bind Chinese courts. However, the Supreme People's Court (Zui gao ren min fa yuan 最高人民法院) and the Supreme People's Procuratorate (Zui gao ren min jian cha yuan 最高人民法院检察院) both are empowered to issue Judicial Interpretations on specific application of laws enacted by the National People's Congress according to the Standing Committee of National People's Congress Decision on Interpretations of Laws as of 1981. Judicial Interpretations are binding courts, with equal force to the law interpreted. See Article 2 of Zuigao ren min fa yuan guan yu cai pan wen shu yin yong fa lu, fa gui deng gui fan xing fa lü wen jian de guiding (最高人民法院关于裁判文书引用法律、法规等规范性法律文件的规定) [Supreme People's Court's Provisions for Citing Laws, Regulations and so on in Judgments] (promulgated by Zuigao ren min fa yuan shen pan wei yuan hui (最高人民法院法院审判委员会) [The Supreme People's Court Judicial Committee], July 13, 2009, effective Nov. 14, 2009, in SUP. PEOPLE'S CT. GAZ., No.12, 8(2009).

For a detailed discussion on Judicial Reply of 1993, see Richard Cullen and Fu Hualing, Defamation Law in the People's Republic of China, 11 The Transnational Lawyer 1 (1998), available at: <http://ssrn.com/abstract=2145137> (last visited Jan. 2, 2016).

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suffered damage to his reputation; (3) causation between the tortious act and the damage; and (4) fault on the part of the defendant.

The Judicial Reply of 1993 sets forth an important defense against defamation: truth and fair comments. The Section 8 provides that where news reports are basically true and include no insulting comments, there is no tort liability for violating the right of reputation. Nevertheless, where news reports are basically true but include insulting comments that damage another's reputation, there is tort liability for violating the right of reputation. This principle also applies to comments on products and service.<sup>8</sup>

In practice, where one's reputation is not implicated, even untrue reports flowing from hearsay may not be relied on to establish tort liability for violating the right of reputation.<sup>9</sup> On the other hand, when reputation is harmed, a defendant who fails to prove truth of his comments will be held liable.<sup>10</sup> Where the defendant proves that an alleged fact is true, even though it damages the plaintiff's reputation, there is no tort liability. For instance, in *Shu yang xian Xin'an fang di chan you xian gong si Su Shu yang xian Cheng guan jian zhu an zhuang you xian gong si ming yu shang su an* (沭阳县信安房地产有限公司诉沭阳县城关建筑安装工程有限公司名誉权侵权上诉案) [*Xin'an (Shuyang County) Housing Development Co., Ltd. v. Chengguan (Shuyang County) Construction Engineering Co., Ltd.* ], the plaintiff acknowledged bribery and conspiracy when bidding for a construction project. The court held that the defendant was not liable for publishing those facts even though they could damage the plaintiff's reputation.<sup>11</sup>

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<sup>8</sup> See *Zuigao ren min fa yuan guan yu shen li ming yu quan an jian ruo gan wen ti de jie da* (最高人民法院关于审理名誉权案件若干问题的解答)[Supreme People's Court's Opinions on Adjudicating Torts to Right of Reputation] (hereafter "Judicial Reply of 1998"), promulgated by Sup. People's Ct., July 14, 1998, effective Sept. 15, 1993, Section 9, in *SUP. PEOPLE'S CT. GAZ.*, No.4, 197 (1998).

<sup>9</sup> *Yu Qiuyu Su Xiao Xialin ming yu qin quan an* (余秋雨诉肖夏林名誉权侵权案) [*Yu Qiuyu v. Xiao Xialin*], *Beijing dong cheng qu ren min fa yuan* (北京东城区人民法院)[*Beijing East District People's Ct.*] 2003, *affirmed* by *Beijing di er zhong ji ren min fa yuan* (北京第二中级人民法院) [*Beijing No.2 Intern. People's Ct.*] 2003.

<sup>10</sup> *Gao Xiaosong Su Yahu Xiang guang kong gu you xian gong si ming yu qin quan an* (高晓松诉雅虎香港控股有限公司名誉侵权案) [*Gao Xiaosong v. Yahoo! Hong Kong Ltd. Co.*], *Beijing chao yang qu ren min fa yuan* (北京市朝阳区人民法院)[*Beijing Chaoyang Dist. People's Ct.*] 2002.

<sup>11</sup> *Jiangsu sheng gao ji ren min fa yuan* (江苏省高级人民法院) [*Jiangsu High People's Ct.*] 2014.

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Besides civil law, the right of reputation is also protected through administrative regulations. For instance, Article 56 (3) of *Zhonghua Renmin Gongheguo dian xin guan li tiao li* (中华人民共和国电信管理条例) [Regulation on Telecommunications of the People's Republic of China, as amended in 2014]<sup>12</sup> prohibits anyone from making, reproducing, publicizing and circulating any insulting or libeling materials through telecommunication networks. Article 25 of the *Zhonghua Renmin Gongheguo chu ban guan li tiao li* (中华人民共和国出版管理条例) [Regulation on Publication of the People's Republic of China, as amended in 2011],<sup>13</sup> Article 3 of the *Zhonghua Renmin Gongheguo yin xiang zhi pin guan li tiao li* (中华人民共和国音像制品管理条例) [Regulation on Audio-Video Recordings of the People's Republic of China as amended 2011],<sup>14</sup> Article 25 of the *Zhonghua Renmin Gongheguo dian ying guan li tiao li* (中华人民共和国电影管理条例) [Regulation on Movies of the People's Republic of China],<sup>15</sup> and so on, include exactly the same provisions. Those who violate the regulations face administrative punishment.

These regulations may implicate civil action against online defamation. Relying on them, courts may find that an ISP has a duty to identify and stop defamatory comments or face civil liability. This important point will be discussed in detail in Section II.

Furthermore, the right of reputation is protected through the *Zhonghua Renmin Gongheguo xing fa* (中华人民共和国刑法) [Criminal Law of the People's Republic

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<sup>12</sup> Promulgated by the State Council, Sept. 20, 2000, effective Sept. 25, 2000, in *Zhonghua Renmin Gongheguo guo wu yuan gong bao* (中华人民共和国国务院公报) [ST. COUNCIL GAZ.], No. 291 (2000), amended July 29, 2014, effective July 29, 2014, in ST. COUNCIL GAZ., No. 653 (2014).

<sup>13</sup> Promulgated by the State Council, Dec. 12, 2001, effective Feb. 1, 2002, amended July 29, 2014, effective July 29, 2014, in ST. COUNCIL GAZ., No. 343 (2001), amended Mar. 16, 2011, effective Mar. 19, 2011, in ST. COUNCIL GAZ., No. 594 (2014), amended July 29, 2014, effective July 29, 2014, in ST. COUNCIL GAZ., No. 653 (2014).

<sup>14</sup> Promulgated by the State Council, Dec. 12, 2001, effective Feb. 1, 2002, in ST. COUNCIL GAZ., No. 341 (2001) , amended Mar. 16, 2011, effective Mar. 19, 2011, in ST. COUNCIL GAZ., No.595 (2013), amended Dec. 4, 2013, effective Dec. 7, 2013, in ST. COUNCIL GAZ., No. 645 (2013).

<sup>15</sup> Promulgated by the State Council, Dec. 12, 2001, effective Feb. 1, 2002, in ST. COUNCIL GAZ., No. 342 (2001).

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of China],<sup>16</sup> The criminal liabilities for online defamation will be discussed in Section III.

## **II. ONLINE INTERMEDIARY CIVIL LIABILITY FOR DEFAMATION UNDER CHINESE LAWS**

Under Chinese laws, an ISP should be liable for faultily contributing to online defamation. Technologically, Internet service expands greatly the audience of defamatory comments. This fact, however, does not make the ISP culpable because defamation is not a strict liability offense. To hold an ISP liable for online defamation under Chinese laws, the person defamed must establish that the ISP was at fault. In a typical scenario, an ISP does not make or circulate defamatory comments; but an Internet user uploads and disseminates them via the service provided by an ISP. In this event, the ISP will be held liable if it knew or should have known of the wrongdoing. With this requisite knowledge, the ISP will be characterized as contributing to the defamation. Under Article 9 of the LTL, the ISP is jointly and severally liable for the part of the infringement which it could have prevented.

While there is no specific civil rule governing online defamation, there are general rules governing online infringement of private rights, in particular Article 36 LTL.<sup>17</sup>

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<sup>16</sup> Promulgated by the National People's Congress, July 1, 1979, effective Jan. 1, 1980, amended Mar. 14, 1997, effective Dec. 15, 1997, in 1997 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.138 (P.R.C); amended Dec. 25, 1999, effective Dec. 25, 1999; amended Aug. 31, 2001, effective Aug. 31, 2001, in 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 467 (P.R.C); amended Dec. 29, 2001, effective Dec. 29, 2001, in 2002 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.16 (P.R.C); amended Dec. 28, 2002, effective Dec. 28, 2002, in 2003 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.62 (P.R.C); amended Feb. 28, 2005, effective Feb. 28, 2005, in 2005 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.113 (P.R.C); amended June 29, 2006, effective June 29, 2006, in 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.423 (P.R.C); amended Feb. 28, 2009, effective Feb. 28, 2009, in 2009 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.187 (P.R.C); amended Feb. 25, 2011, effective May 1, 2011, in 2011 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.129 (P.R.C); amended Aug. 29, 2015, effective Nov. 11, 2015.

<sup>17</sup> See Article 36 TLL:

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According to Article 36, paragraph 3 of the LTL, ISPs who know network users are infringing other's rights through their service but fail to take necessary corrective measures must be jointly and severally liable with the wrongdoer. Furthermore, according to the paragraph 2 of the same article, where a network user commits infringement through network services, the person whose rights are infringed may send a notification to the network service provider, requesting the provider to take necessary corrective measures, such as removing or disabling access to the infringing materials. Where the provider fails to take the necessary measures expeditiously upon receiving the notification, to the extent that further damages is caused by its inaction, it must be jointly and severally liable with the wrongdoer.

In terms of the notification and taking down procedures, these provisions are reminiscent of the "safe harbor" in the US Digital Millennium Copyright Act ("DMCA"). In fact, they are borrowed from the *Zhonghua Renmin Gongheguo xin xi wang lu chuan bo quan bao hu tiao li* (中华人民共和国共和国信息网络传播权保护条例) [Regulation on the Protection of the Right of Communication Through Information Network of the People's Republic of China] (hereafter "RCIN Regulation").<sup>18</sup> This regulation is the counterpart to the DMCA. Under the Chinese legal system, regulations issued by *Guowuyuan* (国务院) [State Council of PRC] are not subject to judicial review, but are binding on all Chinese courts. Only when regulations are contrary to laws promulgated by the *Quanguo ren min dai biao da hui* (全国人民代表大会) [National People's Congress, NPC] or its Standing Committee *Quan guo ren min dai biao da hui chang wu wei yuan hui* (全国人民代表大会常务委

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[...] Where a user engages in online infringing activity, a right holder so harmed has a right to notify the corresponding service provider, requesting the latter to take necessary measures, such as deleting, screening, removing, references or links to the online infringing material or activity. Where the service provider upon receipt of the notification fails to take prompt measures, the service provider shall be jointly liable for the harm resulted from this failure.

When the service provider knows that a user injures other person's rights and interests and does not take necessary measures, the service providers shall be jointly liable with the user.

<sup>18</sup> Promulgated by the State Council, May 10, 2006, effective July 1, 2006, in ST. COUNCIL GAZ., No. 468 (2006), amended Jan. 16, 2013, effective Mar. 1, 2013, in ST. COUNCIL GAZ., No. 634 (2013).

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员会) [National People's Congress Standing Committee] (hereafter NPCSC), and corresponding judiciary interpretations of the laws, Chinese courts may refuse to apply them.

It should be noted, however, that personal rights are distinct in nature from proprietary rights such as copyright. The RCIN Regulation is inapplicable to online torts involving personal rights, including cyberspace defamation. Article 36 of the LTL sets forth a highly general skeleton than those applicable to online copyright infringement as provided in the RCIN Regulation. To promote judicial consistency in online defamation cases, the Supreme People's Court issued the *Zuigao ren min fa yuan guan yu shen li li yong xin xi wang luo qin hai ren shen quan yi min shi jiu fen an jian shi yong fa lv ruo gan wen ti de gui ding* (最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定) [Supreme People's Court's Judiciary Interpretation for Law Application in Adjudicating Torts to Personal Rights Through Information Networks ] (hereafter referred as "Judiciary Interpretation for Online Torts to Personal Rights").<sup>19</sup> Under Chinese legal system, judiciary interpretations issued by the Supreme People's Court have equal force to laws. Therefore, it is this judiciary interpretation that fleshes out the elements of Article 36 of the LTL and shapes the regime for assessing online tort liability for violations of personal rights in China.

## **A. Notification and take down**

### **1. Notification**

While Article 36, paragraph 2 of the LTL provides a DMCA-like safe harbor, it does not define what qualifies as an effective "notification" which obliges the ISP to take proper corrective measures to avoid joint and several liabilities. According to Article

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<sup>19</sup> Promulgated by the Supreme People's Court, June 23, 2014, effective Oct. 10, 2014, in SUP. PEOPLE'S CT. GAZ., No.12, 3 (2014).

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5 of the Judiciary Interpretation for Online Torts to Personal Rights, a notification must include the following information in order to be an effective notification:

- (1) Identification information of the informant;
- (2) The web address which is the target of remedial measures or necessary information to identify infringing materials;
- (3) The grounds for removing the target materials.

Upon receiving an effective notification, if the ISP expeditiously takes measures to disable the allegedly infringing online material, it may be exempt from liability. For instance, in *Chen Gengxin deng yu Beijing Baidu wang xu ke ji you xian gong si ming yu quan jiu fen shang su an* (陈更新等与北京百度网讯科技有限公司名誉权纠纷上诉案) [*Chen Gengxin Chen, et al. v. Baidu (Beijing) Network Tech. Co. Ltd.*],<sup>20</sup> the defendant Baidu is the leading search engine in China. After receiving a notification from the plaintiff, Baidu removed the defaming hyperlink. While finding that the plaintiff's reputation was damaged, the court held that the damage was not caused by Baidu and thus Baidu was not liable.

Where the ISP is slow to take corrective measures after receiving an effective notification, it will be held liable for the delay. To assess whether the ISP is expeditious in taking corrective measures, courts must consider the entire circumstances of the case. This issue will be explored in depth in Section II.3.

Where the ISP removes, or disables access to, allegedly infringing materials after receiving an effective notification, the corrective measures taken by the ISP may be used as a defense against any claim of tort or breach of contract against the network user who posted the content.<sup>21</sup> Upon the request of the user, the ISP is required to provide the content of the notification so that the user may bring lawsuit against the sender for damages. Where the user wins the litigation against the sender, he or she

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<sup>20</sup> (Jiangsu sheng Nanjing shi zhong ji ren min fa yuan (江苏省南京市中级人民法院) [*Jiangsu Province Nanjing City Intern. Ct.*] 2014).

<sup>21</sup> Para.1, Article 7 of Judiciary Interpretation for Online Torts to Personal Rights.

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may require the ISP to restore access to the allegedly infringing material or the removed material.<sup>22</sup>

## 2. Defective Notification

Upon receiving a defective notification, the ISP is not liable for failing to remove the allegedly infringing materials. For instance, in *Shanghai mi chun yi liao shi pin you xian gong si yu Beijing qi hu ke ji you xian gong si deng ming yu quan jiu fen shang su an* (上海密纯饮料食品有限公司与北京奇虎科技有限公司等名誉权纠纷上诉案) [*Michun (Shanghai) Beverage & Food Co. Ltd. v. Qihu (Beijing) Tech. Co. Ltd., et al.*],<sup>23</sup> the plaintiff sent a notification to the defendant, stating:

Our company, as the holder of the registered mark “密顺”, has learned recently that there are comments posted on Youdao Search saying bottled water sold under the trademark “密顺” is of shoddy quality. Nevertheless, we received no complaints from our clients. As there is little proof that our product is of poor quality, you should remove the infringing materials within 24 hours. Actually, it is a commonplace unfair competition practice to fabricate and circulate product quality problems to defame a competitor's product. If the infringing materials are not removed timely, we will hold you to liabilities.

The defendant responded, asking the plaintiff to identify the allegedly online infringing material. The plaintiff did not provide proof but brought a lawsuit. The court of second instance held that the plaintiff failed to provide evidence identifying the allegedly infringing material and thus the notification was invalid. In so holding, the court reaffirmed that the defendants were not liable for the continuing online presence of the infringing materials after receiving the invalid notification.

But this does not mean that a defective notification is without any evidentiary value for the purpose of online intermediary liability for network user caused defamation.

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<sup>22</sup> See Para.2, Article 7 and Article 8 of Judiciary Interpretation for Online Torts to Personal Rights.

<sup>23</sup> *Bei da fa bao* (北大法宝) [pkulaw.cn] CLI.C.4275913, (Shanghai shi di er zhong ji ren min fa yuan (上海市第二中级人民法院) [Shanghai No. 2 Interm. People's Ct.] 2015).

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While this is no case in this point, there is Chinese case law affirming that there is some duty on the part of the ISP to respond to defective notification as to online copyright infringement. For instance, in *Zhejiang fan ya dian zi shang wu you xian gong si yu Beijing Baidu wang xu ke ji you xian gong si, Baidu zai xian wang luo ji shu (Beijing) you xian gong si qin fan zhu zuo quan jiu fen shang su an* (浙江泛亚电子商务有限公司与北京百度网讯科技有限公司、百度在线网络技术(北京)有限公司侵犯著作权纠纷上诉案) [*Fanya e-Commerce Co. Ltd. v. Baidu (Beijing) Network Tech. Co. Ltd.*],<sup>24</sup> Fanya was the copyright holder of disputed songs. Fanya sent a notification to Baidu, requesting that the latter remove infringing links. The notification listed more than 700 titles of songs without identifying the corresponding singers. The notification did not provide the infringing web addresses as required by the Judiciary Interpretation for Online Torts to Personal Rights. The Supreme People's Court, when rehearing the case on *certiorari*, found the notification defective because Baidu could not rely on the titles to identify the infringing links. Nevertheless, the court held that the defective notification should not be disregarded. In this situation, because of the defective notification, Baidu was aware that there were online materials infringing Fanya's copyright. The court found that Baidu, as a responsible search engine, should have promptly attempted to contact Fanya to obtain a valid notification or information sufficient to locate the infringing links so as to remove them. In so holding, the Supreme People's Court held that Baidu was at fault and thus liable for damages. By analogy, when it comes to online infringement of personal rights, even if a notification is defective, the recipient ISP should not disregard it. The ISP must take reasonable steps to assist in receipt of an effective notification in order to avoid liability. For instance, in the above mentioned *Michun v. Qihu* case, the defendant contacted the plaintiff asking for proof of identification upon receiving the defective notification. While the court did not note this point in finding *Qihu* was not held liable, it might well rely on this import fact.

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<sup>24</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.1766439 (Sup. People's Ct. 2009).

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Furthermore, a defective notification may also serve as circumstantial evidence to establish an ISP's knowledge as to online defamation. Where a notification lacks proof of identification but contains enough information to alert an ISP of apparent ongoing online libel, the ISP may not avoid liability by simply asking for proof of identification. For instance, in *Chen Tangfa su Hangzhou bo ke xin xi ji shu you xian gong si ming yu quan jiu fen an* (陈堂发诉杭州博客信息技术有限公司名誉权纠纷案) [*Chen Tangfa v. Blog Information Tech. (Hangzhou) Co., Ltd.*],<sup>25</sup> the plaintiff called the defendant ISP, complaining that a third party posted nefarious insulting comments and requesting that the ISP disable access to the infringing material. The defendant, relying on the RCIN Regulation, asked the plaintiff to file a valid notification in writing along with effective proof of identification, just as a copyright holder would have done under Article 14 of the regulation.<sup>26</sup> The court held that the ISP was required by laws and regulations to police nefarious materials hosted on its service. Because the right of reputation has much more lenient requirements than copyright, the ISP was required by law to remove or disable access to the apparently defamatory materials even where there was no proof of identification. On appeal, the court of second instance reaffirmed that the ISP should have disabled access to the infringing material expeditiously upon receiving the telephone complaint.<sup>27</sup> By asking for identification proof from the plaintiff, the court considered that the ISP was

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<sup>25</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.1436674, (Nanjing shi gu lou ren min fa yuan (南京市鼓楼区人民法院) [Nanjing City Gulou Dist. Ct.] 2006).

<sup>26</sup> Article 14 of RCIN Regulation:

Where a right owner believes that a work, performance, or sound or video recording involved in the service of a network service provider who provides information storage space or provides searching or linking service has infringed on the right owner's right of communication through information network, or that the right owner's electronic rights management information attached to such work, performance, or sound or video recording has been removed or altered, the right owner may deliver a written notification to the network service provider, requesting it to remove the work, performance, or sound or video recording, or disconnect the link to such work, performance, or sound or video recording. The written notification shall contain the following particulars: (1) the name, contact means and address of the right owner; (2) the title and network address of the infringing work, performance, or sound or video recording which is requested to be removed or to which the link is requested to be disconnected; and (3) the material constituting preliminary proof of infringement.

The right owner shall be responsible for the authenticity of the written notification.

<sup>27</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.1436674, (Jiangsu sheng Nanjing shi zhong ji ren min fa yuan (江苏省南京市中级人民法院) [Jiangsu Province Nanjing City Intern. Ct.] 2006).

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slow in taking measures and the slowness contributed to further damage to the plaintiff's reputation. To this extent, the court found the defendant to be jointly and severally liable with the Internet user who initiated the defamation.

### **3. Expeditious Taking-Down**

Article 36, paragraph 2 of the LTL requires an ISP to “expeditiously” take corrective measures upon receiving a valid notification, but does not prescribe what period of time constitutes “expeditiously.” The Judiciary Interpretation for Online Torts to Personal Rights provides a multifactor test to assess “expeditiousness.” Specifically, the Article 6 of this judicial interpretation instructs courts to consider the following factors: (1) the nature of the network service; (2) the form of the notification and its accuracy; (3) the nature of the right infringed and the extent of damage to the right; and (4) other relevant factors.

The list of four factors is not exhaustive. It is interesting to explore the factors that courts may consider as the "other relevant factors" in the list. Unfortunately, there is no case in this point. To get some guidance, it is useful to look at judicial practices in the area of online copyright infringement. In 2012, the Supreme People's Court issued the *Zui gao ren min fa yuan guan yu shen li qin hai xin xi wang luo chuan bo quan min shi jiu fen an jian shi yong fa lv ruo gan wen ti de gui ding* (最高人民法院关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定) [Supreme People's Court's Judiciary Interpretation for Law Application in Adjudicating Infringement upon the Right of Communication through Information Networks] (hereafter “Judiciary Interpretation for Online Copyright Infringement”).<sup>28</sup> The Article 40 of Judiciary Interpretation for Online Copyright Infringement adds the following factors to the above list: (1) the means of the notification; (2) the time and efforts needed to take the measures; and (3) the fame of the copyrighted work

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<sup>28</sup> Promulgated by Sup. People's Ct., Dec. 17, 2012, effective Jan. 1, 2013, in SUP. PEOPLE'S CT. GAZ., NO.3, 11 (2013).

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infringed. In the copyright context, courts typically find that an ISP is not acting expeditiously when they do not perform corrective measures within three months after receiving an effective notification.<sup>29</sup> However, it is not uncommon for courts to find one month too long where the notification specifically identifies the infringement.<sup>30</sup> Because reputation is invaluable to a natural person's essential social life, Chinese courts might well think that an ISP takes action in one month upon notification of ongoing defamation is slow and should be liable.

#### **4. Counter Notification**

Under the LTL, the ISP does not have a duty to notify network service subscribers of receiving a notification from a right holder accusing him of infringement. To protect network service subscribers from unwarranted claims of copyright infringement, the safe harbor regime under the DMCA requires an ISP receiving an effective notification from a copyright holder to take reasonable steps to promptly notify the subscriber that it has removed or disabled access to the material. Where the subscriber presents a valid counter notification that includes "A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled," the ISP should replace the removed material or cease disabling access to it within 10 days.<sup>31</sup> Otherwise, the ISP could be held liable if it turns out that the material removed or blocked did not infringe upon the sender's copyright.<sup>32</sup> While the RCIN Regulation of PRC includes similar procedures,<sup>33</sup> this is not the case for

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<sup>29</sup> See, e.g., *LeTV Information Tech. Co., Ltd. v. China Telecommunication Co., Ltd.*, High Court of Chongqing City, Civil Judgment (2011) Yu-Gao-Fa-Min-Zhong-Zi No.142; *Heyi Information Tech. Co., Ltd. v. Haisha Ni*, High Court of Beijing City, Civil Judgment (2011) Gao-Min-Zhong-Zi No.3103.

<sup>30</sup> See, e.g., *Zhiqian (Beijing) Finance Counseling Co., Ltd. v. Taobao (Zhejiang) Network Co., Ltd.*, First Intermediary Court of Beijing City, Civil Judgment (2011) Yi-Zhong-Min-Zhong-Zi No.2223.

<sup>31</sup> 17 USC § 512 (g).

<sup>32</sup> See *id*

<sup>33</sup> See Article 16 of RCIN Regulation:

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Article 36, paragraph 2 of the LTL. The Judiciary Interpretation for Online Torts to Personal Rights simply provides that the ISP may rely on effective notifications to claim good faith. In this event, the ISP will not be held liable by a subscriber who allegedly posted infringing content that was removed or its access was disabled. Any damage to the subscriber is deemed not to be caused by the ISP, but was legally caused by the sender of the notification. The sender is thus liable for any resulting damages.

Consequently, once materials are removed or access is blocked by an ISP after receiving effective notice of alleged defamation, they cannot be restored by a counter notification. The allegedly defaming content may only be reinstated if the subscriber launch a civil action against the sender of the notification and win a court order to the effect. For this purpose, the subscriber may require the ISP to disclose the notification which it relied on in taking down the subscriber's materials.<sup>34</sup>

## **B. ISP's knowledge of online defamation**

Despite the statutory schemes discusses above, Article 36, paragraph 2 of the LTL does not require right holders to file a notification with an ISP in order to enforce their

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Where a service recipient, upon receiving a notification transferred from a network service provider, believes that the work, performance, or sound or video recording made available thereby does not infringe on the right of another person, the service recipient may deliver a written explanatory statement to the network service provider, requesting it to replace the removed work, performance, or sound or video recording, or to replace the disconnected link to such work, performance, or sound or video recording. The written explanatory statement shall contain the following particulars: (1) the name, contact means and address of the service recipient; (2) the title and network address of the work, performance, or sound or video recording which is requested to be replaced; and (3) the material constituting preliminary proof of non-infringement.

The service recipient shall be responsible for the authenticity of the written explanatory statement.

And Article 17 of RCIN Regulation:

Upon receiving a written explanatory statement delivered by a service recipient, a network service provider shall promptly replace the removed work, performance, or sound or video recording, or may replace the disconnected link to such work, performance, or sound or video recording and, at the same time, transfer the written explanatory statement delivered by the service recipient to the right owner. The right owner shall not notify the network service provider anew to remove the work, performance, or sound or video recording, or to disconnect the link to such work, performance, or sound or video recording.

<sup>34</sup> Paragraph 2 of Article 7 of Judiciary Interpretation of Online Torts to Personal Rights.

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rights. Specifically, according to Article 36, paragraph 3 of the LTL, an ISP who "knows" network users infringe another's rights through their service but fails to take necessary corrective measures may be held jointly and severally liable for the infringement. For the purpose of this provision, "knowledge" includes not only actual knowledge but also constructive knowledge. Where the ISP should have known that a network user was infringing another's personal rights, he is deemed to know the infringement and thus is under a duty to take corrective measure to avoid joint and several liabilities.

Nevertheless, Chinese courts are cautious in finding constructive knowledge for online intermediary liabilities for ISPs. For instance, in *Ma Weiyong su Beijing Weimeng ke chuang ke wang luo ji shu you xian gong si deng ming yu quan jiu fen an* (马伟英诉北京微梦创科网络技术有限公司等名誉权纠纷案) [*Ma Weiyong v. Weimeng Kechuang (Beijing) Network Tech. Co., Ltd.*],<sup>35</sup> the defendant provided a blog service. The court held that:

The defendant provides a platform and channel for users to communicate ideas. To safeguard smooth operation of such platforms and channels, it is not suitable to demand such Internet service providers to organize, screen and police the contents, for they lack the capabilities. Meanwhile, to protect rights and lawful interests of natural and legal persons, when an ISP know an Internet user is doing infringement or tort against other's rights or lawful interests, it must take necessary measures. But the knowledge on the part of the ISP must be assessed according to the cognizant capability of a normal reasonable person. In the present case, the disputed blog did not include any obvious vilifying, insulting, denigrating or tarnishing words ... the defendant could not learn that the disputed blog infringed any private rights.....

This reasoning is widely accepted. It is safe to say that Chinese courts normally consider that an ISP does not have an *ex ante* duty to police online torts infringing on

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<sup>35</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.2680424, ( Zhejiang sheng shao xing shi yue cheng qu ren min fa yuan (浙江省绍兴市越城区人民法) [Zhejiang Province Shaoxing City Dist. Ct.] 2012).

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personal rights.<sup>36</sup> It should be noted, however, that the regulations mentioned in Section I of this paper expressly forbid ISPs from circulating defamatory information. Relying on them, where apparent instances of defamation are involved, courts do find that ISPs have an *ex ante* duty to police its service.<sup>37</sup>

This sort of holdings is reminiscent of the “red flag” test under the DMCA. Section 512 (c)(1)(A)(ii) of US Copyright Act states that an ISP’s duty to remove infringing content is triggered when the service provider becomes aware of “facts or circumstances from which infringing activity is apparent.” This test was mentioned in the U.S. Senate Report on the Digital Millennium Copyright Act of 1998 as a “red flag.” The same test, while not provided in laws, is recognized in the Beijing shi gao ji ren min fa yuan shen li she ji wang luo huan jing xia zhu zuo quan jiu fen an jian ruo gan wen ti de zhi dao yi jian (北京市高级人民法院审理涉及网络环境下著作权纠纷案件若干问题的指导意见) [Beijing High Court's Judicial Communication on Adjudicating Disputes Related to Online Copyright Infringement],<sup>38</sup> which is persuasive only but widely accepted by Chinese courts. According to the Section 16 thereof, a service provider should be found liable for taking no action with regard to infringing activity where the circumstances are so obvious that the service provider should have knew there was infringing activity.

The red flag test works in a similar way in both the copyright and defamation contexts. For instance, publicity of the work or the person infringed play a similar important role is assessing red flags. In Bao mi hua (Hangzhou) ke ji you xian gong si yu Hua yi xiong di chuan mei gu fen you xian gong si qin fan xin xi wang luo chuan bo quan jiu fen shang su an (爆米花(杭州)科技有限公司与华谊兄弟传媒股份有限公司侵

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<sup>36</sup> See, e.g., Michun (Shanghai) Beverage & Food Co. Ltd. v. Qihu (Beijing) Tech. Co. Ltd., et al, Putuo District court of Shanghai City, Civil Judgment (2014) Pu-Min-Chu-Zi No. 1035; Ms. Yin v. Baidu (Beijing) Network Information Co. Ltd., Second Intermediate Court of Shanghai City, Civil Judgment (2010) Hu-Er-Zhong-Min-Yi (Min)-Zhong-Zi No.1593.

<sup>37</sup> See, e.g., Ms. Yin v. Baidu (Beijing) Network Information Co. Ltd., Second Intermediate Court of Shanghai City, Civil Judgment (2010) Hu-Er-Zhong-Min-Yi (Min)-Zhong-Zi No.1593.

<sup>38</sup> Promulgated by Beijing shi gao ji ren min fa yuan (北京市高级人民法院) [Beijing People's High Court], May 19, 2010, effective May 19, 2010.

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犯信息网络传播权纠纷上诉案) [Huayi Bros. Media Group v. Pomoho],<sup>39</sup> the Plaintiff was the sole licensee of a popular Chinese film and the Defendant was a service provider running a website similar to Youtube, where Internet users could upload and share videos. The court reasoned that the well-known copyrighted film, once released, was made known to the public. Within six months of its release, the film was uploaded and made available to the public for free on the Pomoho website. The court determined that Pomoho should have known of these conditions. Therefore, the court came to the conclusion that Pomoho was at fault for not promptly monitoring and taking corresponding corrective action with regard to the online material infringing the copyrighted film, and held Pomoho liable for copyright infringement.

In the context of online torts infringing a personal right, publicity plays a similar role in finding a “red flag”. For example, in Beijing Baidu wang xu ke ji you xian gong si yu Yin Hong ming yu quan, ren ge quan qin quan jiu fen shang su an (北京百度网讯科技有限公司与殷虹名誉权、人格权侵权纠纷上诉案) [Yin Hong v. Baidu (Beijing) Network Information Co. Ltd.],<sup>40</sup> the Plaintiff Ms. Yin's nude pictures were posted online. Without sending any form of notification to Baidu, she brought a lawsuit against search engine for not disabling access to the infringing photos. The court found that those pictures could have been characterized as pornography, being of no scientific or artistic value, and from the pictures the plaintiff could be easily identified. By regulations, Baidu was required to remove or disable the obviously infringing photos. The court also noted that Ms. Yin was involved in an affair that gained widespread public attention. In conclusion, the court held that Baidu should have

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<sup>39</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.188931, Beijing shi di er zhong ji ren min fa yuan (北京市第二中级人民法院)[Beijing No.2 Interm. People's Ct.] 2009).

<sup>40</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.1765615, Shanghai shi di er zhong ji ren min fa yuan (上海市第二中级人民法院)[Shanghai No.2 Interm. People's Ct.] 2009).

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known the infringing activity and was liable for not disabling access to those infringing materials.<sup>41</sup>

Additionally, this case demonstrates that an ISP has a higher duty of care to police its service with regard to online defamation compared to online copyright infringement. In copyright cases, infringement might well be less obvious to ISPs. An ISP may sincerely doubt whether a disputed work is infringing, or suspect that the disputed use may constitute fair use or be authorized by the copyright holder. There is a perceived grey area. In contrast, defamation is easier to identify and ascertain. Where comments are defamatory and offensive to ordinary persons, it is unlikely that the person involved is willing to consent to them. Without this doubt, an ISP must be more diligent to police online defamatory information and comments in order to avoid potential liability.

In determining ISPs duty of care as to online defamation, the conventional reasonable person test is applicable. Specifically, Article 9 of the Judiciary Interpretation of Online Torts to Personal Rights instructs courts to consider the following factors in determining whether an ISP "knows" of the infringement under Article 36, paragraph 3 of the LTL:

- (1) Whether the ISP through automatic technological process or manual methods dealt with the disputed information by recommendation, ranking, choice, arrangement, editing, or modification and so on;
- (2) The expected capabilities of the ISP in monitoring and policing information, the nature of the Internet service and its probability of infringement;
- (3) The nature of the personal rights infringed and the infringing materials;
- (4) The social impact of the infringing materials or the counts of its page views;
- (5) The technological capabilities of the ISP to take measures to prevent infringement and what did the ISP do;

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<sup>41</sup> Jingan District Court of Shanghai City, Civil Judgment (2009) Jing-Min-Yi (Min)-Chu-Zi No.1780.

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- (6) Any measures the ISP take towards repeated infringing activities by the same user or towards repeated infringing materials;
  - (7) Any other relevant factors.

A simple comparison shows that this list of factors to be considered in assessing an ISP's liabilities is similar to that included in Article 9 of the Judiciary Interpretation for Online Copyright Infringement.<sup>42</sup>

### **C. Domain Name Registrar as an ISP under Article 36 LTL**

A domain name registrar may be characterized as an ISP under Article 36 of the LTL. For instance, in *Hangzhou ai ming wang luo you xian gong si yu Cui Hailiang deng ming yu quan qin quan jiu fen an* (杭州爱名网络有限公司与崔海亮等名誉权纠纷案)[*Aiming(Hangzhou) Network Co., Ltd. v. Cui Hailiang*],<sup>43</sup> Mr. Cui learned that there were defamatory comments against himself on six websites. He did not file warning notifications to any of the websites. Rather, he sent a notification to their common domain name registrar, requesting that the registrar disable access to the infringing materials. The court of first instance found for Mr. Cui. On appeal, Aiming claimed that it was only a domain name registrar, having no control over the contents of the websites hosting the allegedly infringing content and thus should not be held liable. The court of second instance, however, held that Aiming had control over the

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<sup>42</sup> Article 9 of Judiciary Interpretation of Right of Communication through Information Networks: Courts should consider the following factors in assessing whether an ISP should know an Internet user was using its service to infringe other's right of communication through information networks:  
(1) The nature of the Internet service involved, its probabilities of being used to infringe the right, and the capabilities of the ISP to police the service;  
(2) The nature and publicity of the disputed work of authorship, performance or video/audio recording, and whether they can be easily characterized as infringing materials;  
(3) Whether the ISP selected, edited, modified or recommended the disputed work of authorship, performance or video/audio recording;  
(4) Whether the ISP takes reasonable measures to prevent infringement;  
(5) Whether the ISP designated convenient procedures to receive notifications of infringement and to take expeditious measures to check infringement upon notification;  
(6) Whether the ISP took reasonable measures towards repeated infringing activities by the same Internet user;  
(7) Other relevant factors

<sup>43</sup> *Bei da fa bao* (北大法宝) [pkulaw.cn] CLI.C.2044410, *Henan sheng Xin xiang shi zhong ji ren min fa yuan* (河南省新乡市中级人民法院) [Henan Province Xin Xiang City Interm. People's Ct.] 2013).

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access to the websites and thus should be characterized as an ISP under Article 36 of the LTL. By failing to disable access to the websites, Aiming contributed to the continuing infringement upon Mr. Cui's right to reputation. Therefore, the court found that Aiming was jointly and severally liable for the infringement.

This case shows that the safe harbor under the Judiciary Interpretation for Online Torts to Personal Rights is distinct from that in the DMCA and its Chinese counterpart, the RCIN Regulation. The RCIN Regulation provides DMCA-like limitations on liability for online copyright infringement, in particular with regard to Transitory Digital Network Communications,<sup>44</sup> System Caching,<sup>45</sup> Information Residing on Systems or Networks at Direction of Users,<sup>46</sup> and Information Location Tools. In contrast, Article 36 of the LTL does not confine itself to specific Internet services. It thus captures all services provided through information networks so long as the provider has control either over the infringing materials or access to them.

#### **D. Remedies**

Once plaintiffs have established tort liability for a violation of their right of reputation, they have "the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also

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<sup>44</sup> Compare 17 U.S.C. § 512(a) with Article 20 of the RCIN Regulation (A network service provider is not liable for damages by reason of automatically connecting or transmitting according to a user's instructions works, performance and video/sound recordings (collectively called "material"), if the service provider meets the following conditions: (1) the material is transmitted without selection or modification; and (2) the material is provided to anticipated recipients and other persons are prevented from access to that material) (author's translation).

<sup>45</sup> Compare 17 U.S.C. § 512(b) with Article 21 of the RCIN Regulation (A network service provider is not liable for damages by reason of storage of works, performance and video/sound recordings (collectively called "material") which it receives from another network service provider through an automatic technical process for the purpose of efficient transmission, if the service provider meets the following conditions : (1) does not modify the automatically stored material ; (2) does not interfere with the original network service provider of the material in getting information as to its usage; and (3) When the original network service provider revises, deletes or screens the material, effects the same through an automatic technical process) (author's translation).

<sup>46</sup> Compare 17 U.S.C. § 512(c) with Article 22 of the RCIN Regulation (A network service is not liable for damages by reason of storage of works, performance, sound recordings/video recordings (collectively called "material") at the direction of a user who makes the material available to the public through the information network, if the service provider meets the following conditions: (1) clearly represents itself as a provider of storage service and post its name, the contact person and its web address; (2) does not modify the stored material; (3) does not know and has no reasonable ground to know that the stored material is infringing; (4) does not obtain financial benefit directly from the user who make available to the public the stored material; and (5) upon receiving a notification from a copyright owner, delete the stored material according to the Regulation) (author's translation).

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demand compensation for losses."<sup>47</sup> The LTL further prescribes that the wrongdoer is responsible, *inter alia*, for Ting zhi qin hai (停止侵害) [cessation of infringement], Pei li dao qian (赔礼道歉) [apology], Xiao chu ying xiang (消除影响) [elimination of ill effects], Hui fu ming yu (恢复名誉) [restoration of reputation], and Pei chang sun shi (赔偿损失) [compensation for losses].<sup>48</sup> In particular, the wrongdoer must compensate not only for serious mental distress inflicted,<sup>49</sup> but also economic loss resulting from the tortious acts.<sup>50</sup> Where the economic loss is difficult to assess, he may be required to disgorge any benefit gained from the tortuous acts.<sup>51</sup> Where the unlawful benefits are also difficult to assess, the court may determine damages, taking into account the whole circumstances of the tortious act.<sup>52</sup>

Consequently, once the plaintiff establishes that an ISP failed to remove or disable access to defamatory comments after gaining knowledge of the comments, the ISP is jointly and severally liable with those who initiated the defamation for any harm caused after its knowledge. Because the right to reputation is a personal right, rather than a proprietary right, non-monetary the reliefs play a predominant role under Chinese laws. Of them, apology, elimination of ill effects and compensation for mental distress is special in the context of infringement of the right of reputation and thus is discussed below in turn.

## 1. Apology

Apology as a redress has wider application in the context of defamation than infringement upon moral rights under Chinese copyright law. In case of infringement of moral rights, if an infringer is not at fault or is merely negligent, he will not be ordered to issue an apology. For instance, in Li Jianchen su Jing mao shi dai deng qin hai zhu zuo quan an (李建琛诉经贸时代报社等侵害著作权案)[Li Jianchen v. Trade

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<sup>47</sup> Art. 20 GPCL.

<sup>48</sup> Art.15 TLL.

<sup>49</sup> Art.22 TLL.

<sup>50</sup> Art.23 TLL.

<sup>51</sup> Art.23 TLL.

<sup>52</sup> Art.23 TLL.

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Times Newspaper],<sup>53</sup> the plaintiff Mr. Li is one of the author for a film script titled Blood Shed on Kunlun Pass (Tie xue kun lun guan 铁血昆仑关). In a film synopsis published by the defendant Trade Times Newspaper (Jiang mao shi dai bao she 经贸时代报社), the newspaper failed to credit Jianchen Li as one of the screenwriter. The plaintiff asked the court to order the defendant to issue apologies in Trade Times Newspaper. While finding infringement of the right of attribution, the court did not order an apology. The court noted that "the defendant did not commit the infringement on purpose, and took corrective measures when the plaintiff raised objection..." For another instance, in Tan Xiaojing su Beijing shi xin hua shu dian wang fu jing shu dian deng qin hai zhu zuo quan jiu fen an (谈笑靖诉北京市新华书店王府井书店等侵害著作权纷案) [Xiaojing Tan v. Wangfujing Branch of Beijing Xinhua Bookstore et al.],<sup>54</sup> the plaintiff Mr. Tan authored the well-known the poem Ban zha gu lu bai ma de chen mo (班扎古鲁白玛的沉默) [The Silence of Vajra Guru Pema] and posted it on her own blog. Zhu hai chu ban she (珠海出版社) [Zhu hai Publishing House] published a book named Na yi tian, Na yi yue, Na yi nian (《那一天那一个月那一年》 [The Day, The Month and The Year], which included this poem without permission and mistakenly attributed it to "Tsangyang Gyatso," sixth Dalai Lama, a religious leader in Tibet. The court held:<sup>55</sup>

In view that the publications in association with Tsangyang Gyatso and his works are numerous and disputed, and some magazines like Readers mistakenly attributed the disputed poem to Tsangyang Gyatso, there was an objective reason for the wrong attribution of the poem *The Silence of Vajra Guru Pema* in the disputed book to Tsangyang Gyatso, which can hardly be avoided by the defendant through reasonable care. The plaintiff's claim that the defendant Zhuhai Publishing House shall make an apology.....should not be allowed.

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<sup>53</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.233802, (Guangxi zhuang zu zi zhi qu nan ning shi zhong ji ren min fa yuan (广西壮族自治区南宁市中级人民法院) [Guangxi Zhuang Autonomous Region Nanning City Intern. Ct.] 1995).

<sup>54</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.1784043, (Beijing shi dong cheng qu ren min fa yuan (北京市东城区人民法院) [Beijing City Eastern Dist. Ct.] 2011).

<sup>55</sup> Eastern District Court of Beijing City, Civil Judgment (2011) Dong-Min-Chu-Zi No. 5321, selected by Supreme People's Court as 50 Leading Intellectual Property Cases of 2011.

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When infringement upon moral rights is intentional, courts may order the infringer to issue an apology as a remedy. For instance, in *Li Jiahong su Guangxi ren min chu ban she shu ming quan jiu fen an* (李家鸿诉广西人民出版社署名权纠纷案) [*Jiahong Li v. Guangxi People Publishing House*],<sup>56</sup> the defendant knew the author of the disputed book was Li Jiahong (李家鸿), but published his name as Li Jiahung (李家洪). The court found infringement of right of attribution, and ordered the defendant to make an apology to the plaintiff for its intentional misprint of the name of the author.<sup>57</sup>

In contrast, even negligence in online torts to personal rights is sufficient for courts to order an apology. For instance, in *Chen Tangfa su Hangzhou bo ke xin xi ji shu you xian gong si ming yu quan jiu fen an* (陈堂发诉杭州博客信息技术有限公司名誉权纠纷案) [*Chen Tangfa v. Blog Information Tech. (Hangzhou) Co., Ltd.*],<sup>58</sup> while recognizing that the defendant did not post the nefarious insulting comments and were only slightly at fault, the court of first instance ordered the defendant to post an apology on the home page of its website for ten days. On appeal, the court of second instance affirmed this judgment.<sup>59</sup>

When ordered to make apology to the victim, an wrongdoer is only required to admit to his infringing acts. There is no requirement to demonstrate regret or repentance for what he has done. For instance, in *He Mingfang su Nanjing dan ni zhi yi gong si zhu zuo quan jiu fen an* (何鸣芳诉南京丹妮制衣公司著作权侵权案) [*He Mingfang v. Nanjing Danny Clothing Co.*], the defendant made an apology in *Nanjing ri bao* (南京日报) [*Nanjing Daily*] on December 1<sup>st</sup>, 2000, stating that "Nanjing Danny Clothing Co. makes a special apology to He Mingfang for its logo infringed her copyright." In

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<sup>56</sup> *Bei da fa bao* (北大法宝) [pkulaw.cn] CLI.C.26690, (Guangxi Zhuang zu zi zhi qu nan ning shi zhong ji ren min fa yuan (广西壮族自治区南宁市中级人民法院) [Guangxi Zhuang Autonomous Region Nanning City Interim Ct.] 1994).

<sup>57</sup> *Jiahong Li v. Guangxi People's Publishing House*, decided by Intermediate Court of Nanning City, in *Selection of Cases of People's Court*, Issue 3, p.102 (Beijing City: People's Court Publishing House, 1995)

<sup>58</sup> *Bei da fa bao* (北大法宝) [pkulaw.cn] CLI.C.1436674, (Nanjing shi gu lou ren min fa yuan (南京市鼓楼区人民法院) [Nanjing City Gulou Dist. Ct.] 2006).

<sup>59</sup> Intermediate Court of Nanjing City, Civil Judgment (2006) Ning-Min-Yi-Zhong-Zi No. 1421.

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another example, Hangzhou si li er fu zhuang you xian gong si (杭州斯尔丽服饰有限公司) [Hangzhou Sierli Dress Co., Ltd.], the defendant made the following formal apology in Hangzhou ri bao (杭州日报) [Hangzhou Daily] on July 26<sup>th</sup>, 2008:

Owing to mistakes by the employee, this company published advertisements and products manuals incorporating jacket pictures which infringed Ailaiyi Company's copyright. This statement is published in order to apologize and eliminate possible ill effects coming from the infringement.

Even where the court reviews the defendant's Statement of Apology, it only pays attention to the defendant's acknowledgement of the infringing acts but does not require the defendant to make public his intention in the infringement. For instance, in Li Xiangyun su Du zhe bao bao she zhu zuo quan jiu fen an (李祥云诉《读者报》报社著作权纠纷案) [Li Xiangyun v. Reader Newspaper Office],<sup>60</sup> Reader Newspaper republished an article without crediting the author, while indicating its title, the newspaper it was initially printed in, and the date of its original publication. The court found that the defendant infringed Mr. Li's right of attribution. When reviewing the statement to be published in the Reader Newspaper as the required "apology" for the infringement, the court only remarked that the statement "fails to include apology to Li Yunxiang from the perspective of infringement of the right of attribution and thus cannot eliminate the ill effects of the infringement upon Li Xiangyun's moral rights."

The order to make apology to victim is not strong at all. In theory, where the defendant fails to make the required apology, the ruling court may find contempt of court order or punish the defendant. But in practices, the court will only publish the judgment at the defendant's expense. Indeed, Chinese courts normally included publication of judgment as a substitute remedy for apology. For instance, Tan Yuqing su Beijing guang ming wang ye ke ji zhong xin deng zhu zuo quan qin quan jiu fen an (谈宇清诉北京光明网业科技中心等著作权侵权纠纷案)[ Tan Yuqing v. Beijing

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<sup>60</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.95456, (Sichun sheng Chengdu shi zhong ji ren min fa yuan (四川省成都市中级人民法院) [Sichuan Province Chengdu City Interm. People's Ct.] 1999).

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Bright Network Science & Tech. Centre et al.],<sup>61</sup> the defendant infringed the plaintiff's moral rights, in particular the right of attribution. The court ordered that:

The defendant Bright Daily shall publish a statement in Sheng huo shi dai (《生活时代》)[Life Times] within 30 days from the effective date of this judgment so as to eliminate the ill effects caused by its infringing acts and apologize publicly to the plaintiff Tan Yuqing. The content of the Statement shall be approved by this court. If the defendant defaults, the court will publish this judgment at the expense of the defendant.

The reason for this practice is simple: apology is essentially a moral liability. Compelled apologies and enforcement of such apologies may run contrary to a person's basic freedom. An apology only makes sense when the guilty party intends to apologize on his own initiative, and feels repentant from his heart. As such, an apology as a remedy cannot be truly enforced. In recognizing this simple fact, Chinese courts treat "apology" as requiring the defendant to announce his acceptance of the judgment publicly.

## **2. Elimination of Ill Effects**

Defamation has lasting effect upon reputation even when defamatory comments have been checked. The remedy elimination of ill effects is a corrective measure, having a wider applicable scope than apology.<sup>62</sup> While apology is applicable only to personal rights (including moral rights under copyright law), elimination of ill effects may be applied to both the infringement of personal rights and the infringement of proprietary rights (including economic rights under copyright). So long as the defendant has injured the right holder's reputation, harmed the right holder's goodwill, or misled consumers, the infringer should make their best effort to correct the adverse situation resulting from the infringement, regardless of whether the infringement was

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<sup>61</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.123930 (Beijing shi di yi zhong ji ren min fa yua (北京市第一中级人民法院) [Beijing No.1 Interm. People's Ct.], 2002).

<sup>62</sup> For a detailed discussion about distinction between apology and elimination of prejudicial effects under Chinese laws, please see Ruwen Chen, Huaiwen He, "Apology as Remedy under Chinese Copyright Law", China Patent & Trademark, Issue 2, p.79 (2015), available at: <http://www.cpt.cn/uploadfiles/20150713162025128.Pdf> (accessed on Aug. 26, 2015).

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intentional or inadvertent. It is thus unsurprising that this redress is applicable to online defamation,<sup>63</sup> especially where the defamation involved the fabrication of facts.<sup>64</sup>

There are few cases where an ISP has been ordered to eliminate ill effects flowing from his involvement in online defamation. The reason is simple. An ISP is typically not the direct infringer with knowledge of the underlying facts. Ill effects of defamation could only be cured by those who know the truth and thus can publish the correct fact.

### 3. Compensation for Mental Distress

Jing shen sun hai pei chang (精神损害赔偿) [compensation for mental distress], while not provided in either the GPCL or the LTL, is widely recognized in judicial practice. In 2001, the Supreme People's Court addressed the issue in *Zuigao ren min fa yuan guan yu que ding min shi qin quan jing shen sun hai pei chang ze ren ruo gan wen ti de jie shi* (最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释) [Supreme People's Court's Judiciary Interpretation for Compensation for Mental Distress Coming from Torts of Privates Right].<sup>65</sup> Article 8 provides:

When torts cause mental distress but does not result in serious consequence, courts should not allow claims for compensation for the distress. Instead, courts should award cease and desist order, restoration of reputation, and elimination of ill effects or apology, in isolation or in combination.

When torts cause mental distress but result in serious consequence, courts may award compensation for the distress, in addition to

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<sup>63</sup> Wu Jianyuan su Ma Jianshe ming yu quan jiu fen zai shen an (吴剑元诉马建设名誉权纠纷再审案) [Wu Jianyuan v. Ma Jianshe Ma], *Bei da fa bao* (北大法宝) [pkulaw.cn] CLI.C.3987346, (Jiangsu sheng gao ji ren min fa yuan (江苏省高级人民法院)[Jiangsu Province High People's Ct.] 2013).

<sup>64</sup> Ma Mingxin su Jilin guo mao fang di chan kai fa you xian gong si ming yu quan jiu fen an (马明欣与吉林国贸房地产开发有限责任公司名誉权纠纷案) [National Trade Housing Development Co., Ltd. v. Ma Mingxin], *Bei da fa bao* (北大法宝) [pkulaw.cn] CLI.C.3834002, (Jilin sheng Jilin shi zhong ji ren min fa yuan (吉林省吉林市中级人民法院) [Jilin Province Jilin City Interm. People's Ct.] 2014).

<sup>65</sup> Promulgated by the Sup. People's Ct., Mar. 8, 2001, effective Mar. 10, 2001, in SUP. PEOPLE'S CT. GAZ. NO.2, 51 (2001).

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cease and desist order, restoration of reputation, elimination of ill effects and apology.

Article 10 further provides that courts should consider the following factors when assessing compensation for mental distress:

- (1) Seriousness of fault on the part of the tortfeasor, unless otherwise provided by laws;
- (2) Circumstances of the wrongdoing, including the manners, the setting and the tortious acts;
- (3) Consequences of the wrongdoing;
- (4) Profit made by the tortfeasor from the tort;
- (5) Economic capabilities of the tortfeasor;
- (6) Average local living expense of the hearing court.

Conventionally Chinese courts were conservative in allowing compensation for mental distress and rely more heavily on non-monetary reliefs such as apology and elimination of ill effects. The reason is simple. Mental distress is incalculable. And claims for compensation for mental distress might well involve moral hazards. The victim might well inflate harm, and claim more than warranted.

Now, Chinese courts are cautious in allowing claims for compensation for mental distress flowing from defamation. For instance, in Hangzhou ai ming wang luo you xian gong si yu Cui Hailiang deng ming yu quan qin quan jiu fen an (杭州爱名网络科技有限公司与崔海亮等名誉权纠纷案)[Aiming(Hangzhou) Network Co., Ltd. v. Cui Hailiang],<sup>66</sup> a third party vilified Mr. Cui for bribing officers to receive a promotion. Mr. Cui established violations of his right to reputation, and requested the court to assess 50,000 Chinese Yuan (about 8,000 USD) as compensation for mental distress. Without requiring Mr. Cui to prove serious consequence flowing from the tort, the court required the defendant ISP to pay 5,000 Chinese Yuan (about 800 USD) in mental distress damages.

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<sup>66</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.2044410, Henan sheng Xin xiang shi zhong ji ren min fa yuan(河南省新乡市中级人民法院) [Henan Province Xin Xiang City Interm. People's Ct.] 2013).

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Nevertheless, where courts find torts infringing personal rights caused no serious harm, they will not allow any compensation for mental distress. For instance, in *Chen Tangfa su Hangzhou bo ke xin xi ji shu you xian gong si ming yu quan jiu fen an* (陈堂发诉杭州博客信息技术有限公司名誉权纠纷案) [*Chen Tangfa v. Blog Information Tech. (Hangzhou) Co., Ltd.*],<sup>67</sup> in recognizing that the defendant ISP did not posted the nefarious insulting comments and were only slightly at fault, the court of first instance only ordered the defendant ISP to post an apology on the home page of its website for ten days and did not award the claim for compensation for mental distress. On appeal, the court of second instance affirmed this judgment.

However, there is an exception in cases that don't involve serious harm. Where the plaintiff claims a nominal amount of money as compensation for mental distress, courts are willing to allow it without inquiring into the seriousness of the consequences of the defamation. For instance, *Shanghai mi chun yi liao shi pin you xian gong si yu Beijing qi hu ke ji you xian gong si deng ming yu quan jiu fen shang su an* (上海密纯饮料食品有限公司与北京奇虎科技有限公司等名誉权纠纷上诉案) [*Michun (Shanghai) Beverage & Food Co. Ltd. v. Qihu (Beijing) Tech. Co. Ltd., et al.*],<sup>68</sup> the defamed plaintiff only asked for one Chinese Yuan as compensation for mental distress. The court was quick to award this tiny amount of money. On appeal, the court of second instance affirmed the judgment.

### **III. ONLINE INTERMEDIARY CRIMINAL LIABILITY FOR DEFAMATION UNDER CHINESE LAWS**

Online defamation may incur criminal liabilities. Article 246 of Criminal Law of PRC provides:

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<sup>67</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.1436674, (Nanjing shi gu lou ren min fa yuan (南京市鼓楼区人民法院) [Nanjing City Gulou Dist. Ct.] 2006).

<sup>68</sup> Bei da fa bao (北大法宝) [pkulaw.cn] CLI.C.4275913, (Shanghai shi di er zhong ji ren min fa yuan (上海市第二中级人民法院) [Shanghai No. 2 Interm. People's Ct.] 2015).

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Those who openly insult others by force or other methods, or fabricate facts to vilify others, if the circumstances are serious, shall be sentenced to prison for up to three years, kept in criminal detention or under surveillance, or deprived of their political rights, according to the seriousness of his acts.

Except that social order or national interests are seriously harmed, courts shall admit the above acts as criminal cases only when the person defamed brings criminal action against the wrongdoer.

In particular, with regard to vilifying persons through the Internet, the Supreme People's Court and the Zuigao ren min jian cha yuan (最高人民法院) [Supreme People's Procuratorate] issued the Zuigao ren min fa yuan he Zui gao ren min jian cha yuan guan yuan ban li li yong xin xi wang luo shi shi fei bang deng xing shi an jian fa lü shi yong wen ti de jie shi (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事案件适用法律若干问题的解释) [Supreme People's Court and Supreme People's Procuratorate's Interpretation of Law Application Regarding Criminal Defamation Through Information Networks ] (hereafter "Joint Interpretation").<sup>69</sup>

The Joint Interpretation takes a broad view about information networks as including networks comprising computers, TV sets, phones, mobile phones and other electronic devices, and local area networks that open to the public.<sup>70</sup> It also fleshes out the elements of the Article 246. According to Article 1 of this Joint Interpretation, the following acts are considered as "fabricate facts to vilify others" under Article 246 of Chinese Criminal Law:

- (1) Fabricate facts that defame other's reputation, and circulate, or organize or direct others to circulate, the fabricated facts through information networks
- (2) Distort original information into defaming facts, and circulate, or organize or direct others to circulate, the distorted facts through information networks.

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<sup>69</sup> Promulgated by the Supreme People's Court and the Supreme People's Procuratorate, Sept. 9, 2013, effective Sept. 10, 2013, in Promulgated by the Zuigao Renmin Fayuan (最高人民法院) [Supreme People's Court], June 23, 2014, effective Oct. 10, 2014, in SUP. PEOPLE'S CT. GAZ., No.3, 9 (2014).

<sup>70</sup> See Article 10 of the Joint Interpretation.

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Those who know facts are fabricated to defame other's reputation but nevertheless circulate them, where the circumstances are serious, shall be deemed as "fabricate facts to vilify others".

Article 2 of the Joint Interpretation provides that the following shall be deemed as "the circumstances are serious" under the Paragraph 1 of the Article 246 of Chinese Criminal Law:

- (1) The defamatory information were clicked or browsed for more than 5000 times, or reposted for more than 500 times;
- (2) The person defamed or his/her next of kin became insane or self-sabotaging, committed suicide or suffered other severe consequences;
- (3) The wrongdoer was punished by administrative agencies for vilifying others in the preceding two years;
- (4) Other serious circumstances

For the purpose of counting the times under the first item, those who vilified others several times within one year but were not prosecuted shall be prosecuted if the accumulated counts of the defamatory information as clicked, browsed, or reposted satisfy the prescribed numbers.<sup>71</sup> Moreover, Article 3 of the Joint Interpretation provides that the following shall be deemed as "social order or national interests are seriously harmed" under the Paragraph 2 of the Article 246 of Chinese Criminal Law:

- (1) Instigate mass group incidents;
- (2) Instigate public disorder;
- (3) Instigate racial or religious clash;
- (4) Vilify multiple persons, leading to serious influences on the society;
- (5) Prejudice national prestige, seriously harm national interests;
- (6) Leading to seriously bad international influences;
- (7) Other circumstances that seriously harm social order or national interests.

Internet service providers, while not fabricating defamatory facts themselves, may be held criminally liable when they had knowledge of the criminal acts but failed to take corrective measures. In this situation, the ISPs knowingly contributed to the criminal

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<sup>71</sup> Article 4 of the Joint Interpretation.

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defamation. According to Article 8 of the Joint Interpretation, those who know the wrongdoers are committing criminal defamation through information networks and help them with money, housing, technology, or similar resources shall be held as an accomplice.

While there were a lot of natural person sentenced to prison for circulating defamatory information through networks, ISPs are seldom held criminally liable. Therefore, the precise impact of the Joint Interpretation on ISPs can only be evaluated through prospective case law. (The end)