

COPYRIGHT AND NEW TECHNOLOGIES
(COMPARATIVE COPYRIGHT IN THE
21ST CENTURY)

FALL 2008

Cardozo School of Law

Prof. Hughes

Take Home Examination

INTRODUCTION

This is a twenty-four (24) hour, take-home examination.

Conditions and your professional commitments

Once you have received this examination, you may not discuss it with anyone prior to the end of the examination period. Nor may you collaborate on the exam.

Professor Hughes permits you to use any and all inanimate resources. **The only limitations on outside resources are those established by the law school for take home examinations.**

By turning in your answers you certify that you did not gain advance knowledge of the contents of the examination, that the answers are entirely your own work, and that you complied with all relevant Cardozo School of Law rules. Violations of any of these requirements will lead to discipline by the Academic Standing Committee.

General examination logistics

You have 24 hours from the time you receive this examination until you return your answers to the “drop box” on the ANGEL system.

Format of your answers

Please answer the True/False questions with a simple printed list of the question numbers followed by “True” or “False”, i.e.,

- 10. True
- 11. False
- 12. False
- 13. True

This list should come BEFORE your essay answers and BE ON A SEPARATE PAGE FROM YOUR ESSAY ANSWERS.

Please include a word count (such as “This essay is 687 words”) at the end of your essay answer.

GOOD LUCK

A great winter break to everyone. Best wishes for those graduating. Thanks for a very enjoyable class.

PART I. TRUE/FALSE QUESTIONS

(30 points)

This part of the exam is worth 30 points. Each answer is worth 2 points. Note that there are 17 questions, so in the same spirit as the LSAT and other standardized tests, you can get 2 wrong and still get a maximum score on this section.

Again, your list of T/F answers should come BEFORE your essay answers and BE ON A SEPARATE PAGE FROM YOUR ESSAY ANSWERS.

If you are concerned about a question, you may write a note at the beginning of your essay answers, but only do so if you believe that there is a fundamental ambiguity in the question.

TRUE OR FALSE

01. The 2004 MULTATULI PROJECT is very critical of “take-downs” by European ISPs who are trying to enjoy the safe harbors of the E-Commerce Directive and recommends more rigorous procedures for take-down notices as well as penalties for ISPs in cases of wrongful takedown.
02. In the 2007 *Perfect 10 v. Amazon* decision the Ninth Circuit Court of Appeals concluded that Google could be contributorily liable for infringement of Perfect 10’s images if Google had actual knowledge that specific infringing material was available using Google’s systems, could take simple measures to prevent further harm to Perfect 10, and yet continued to provide access to the infringing material.
03. Although the U.S. Senate apparently believed in 1998 that the 17 U.S.C. 106 right of “distribution” already provided a right of “making available” as required by the WIPO Copyright Treaty, a number of district courts have concluded that merely making unauthorized copies available to the public does not violate a copyright holder’s right of distribution under U.S. law.
04. According to the *Universal Music Australia v. Sharman Licence Holdings* decision, liability for “authorizing” copyright infringement in Australia is strictly limited to situations like the 1988 UK decision in *CBS Songs v. Amstrad Consumer Electronics*, despite the amendment of the Australian Copyright Act with Section 101(1A) in 2000.
05. The 1996 WIPO Copyright Treaty (WCT) is the first multilateral intellectual property agreement or treaty calling for the protection of computer programs under copyright law as literary works.
06. Of all the laws we examined limiting ISP liability, copyright owners probably *most* like Japan’s Provider Liability Limitation Act (2001) for its strict handling of infringers and short time limits.
07. Under Article L. 331-7 of the French “DADVSI” Law of August 2006, when technological protection measures are used to protect copyrighted works, only another “publisher of a software product,

manufacturer of a technical system or service provider” can make a request to the new “Technological Measures Regulatory Authority” for “access to information essential for interoperability.”

08. Singaporean copyright law provides a “safe harbor” provision for “information location tools” (such as search engines) that has the same scope as Article 15 of the EU E-Commerce Directive (2000).
09. The administrative procedures provided under Norwegian, French, and Greek copyright laws for “unlocking” technological protection measures do not apply when the protected work has been made available to the public on agreed (contractual) terms through the Internet.
10. Generally speaking, if Article 5 of the EU Copyright Directive permits an EU Member State to create an exception to the right of reproduction (Article 2) and the right of making available to the public (Article 3), the Directive also permits the exception to be extended to the right of distribution (Article 4).
11. In *Online Policy Group v. Diebold*, the judge determined that Diebold had not violated section 512(f) because the Swarthmore student’s posting of internal Diebold documents would have an adverse market impact on sales of copies of those office documents under the fourth factor of 17 U.S.C. 107.
12. Article 8 of the Chinese Supreme People’s Court “Interpretation” provides that if a copyright owner is unable to provide adequate support for its take-down request (“proof of his identification, ownership of the copyright and the circumstances of the infringement”), then the “request [for take-down] is deemed not to have been made” – a legal provision roughly similar to 17 U.S.C. 512(c)(3)(B)(i), which provides that where a take-down notice “fails to comply substantially” with the 512(c) information requirements, the notice shall not be considered in determining whether the ISP knows or should have known about the infringing activity.
13. The different understanding of “access” to a copyrighted work in the *Universal City Studios v. Reimerdes* and the *Lexmark International v. Static Control Components* decisions is at least partly a function of the

- works in the *Reimerdes* case being digital audiovisual works that have both reproducible digital data and separate audiovisual images.
14. The orphan works laws in Canada (Canadian Copyright Act, section 77) and Japan (Japan Copyright Act, Article 67) as well as the proposed legislation in the United States all require that all copies and public performances of the work claiming the orphan work privilege include a clear notice of the orphan work license/claim.
 15. While Article 5 of the 2001 EU Copyright Directive establishes a variety of limitations and exceptions to copyright law for EU Member States, the only mandatory exception (or limitation) is Article 5(1) which exempts temporary acts of reproduction that “are transient or incidental,” as long as those acts are “integral and essential” to network transmissions.
 16. In the *Rogue File* case, the Tokyo district court developed a three part test that looked at (i) the content and nature of the defendant’s conduct, (ii) the degree of the defendant’s control and supervision of P2P users’ conduct in making music files available for download, and (iii) the defendant’s profits from these activities.
 17. While Japanese copyright law has a mechanism (Article 104quater) for a person to avoid copyright levies on blank media or receive a refund when that person establishes that she is not using the blank media to copy copyrighted works, German law has no similar provisions to avoid the copyright levy and everyone must pay the levy.

PART II – ESSAY QUESTIONS

In this part of the Examination, you may chose any two (2) of the four (4) topics. Each of the two essays should be no less than 750 words and no more than 1000 words. At the end of each essay, **please indicate the word count of that essay**. I take on no obligation to read any essay beyond the 1000 word limit. The essays will count equally.

ESSAY A
COMPARATIVE REGULATION OF
TECHNOLOGICAL PROTECTION MEASURES –
GERMANY AND AUSTRALIA

Early this year, on January 10, 2008, the Regional Court of Munich issued an opinion in *Sony Computer Entertainment v. Dretschler*, concerning the same “mod chip” technology used to defeat the technological protection measures used in Sony PlayStations that was the subject of a 2003 litigation in Australia, *Sony Computer Entertainment v. Eddy Stevens*, Federal Court of Australia, [2003] FCAFC 157.

Write an essay comparing the respective decisions of the German and Australian courts. Of course, you will want to consider German and Australian law in respect to the WIPO Copyright Treaty, but also compare the various issues and arguments raised by the two courts.

The *Sony Computer Entertainment v. Eddy Stevens* decision is in Coursepack #2; the German *Sony Computer Entertainment v. Dretschler* decision is available on ANGEL under the Coursepack #2 materials and is attached at the end of this exam document as Exhibit A.

ESSAY B
FILTERING TECHNOLOGY

Two of the issues in the 2007 *SABAM v. S.A. Scarlet* case in Belgium was whether a court order requiring the ISP to install filtering technology [a] would jeopardize the ISP’s “safe harbor” under Article 12 of the EU E-Commerce Directive and/or [b] would violate Article 15 of the EU E-Commerce Directive (“no general obligation to monitor”).

Evaluate whether an American court could issue an injunction against an ISP in the US parallel to the injunction granted in *SABAM v. S.A. Scarlet*. In particular, evaluate two parallel issues: [a] whether such an order would jeopardize the ISPs safe harbors under section 512 of the DMCA (17 U.S.C. 512(a)) and [b] whether such an order is compatible with 17 U.S.C. 512 (j) [at page 256-257].

Your essay can also discuss broader issues of ways in which you think the DMCA or E-Commerce Directive provisions should or should NOT be amended in light of developments in filtering technology.

ESSAY C
COMPARATIVE ISP LAW –
HOW WILL CHINESE LAW DEVELOP?

We have briefly discussed the investigative news report on the Chinese search engine Baidu (Andrew Orłowski, *China's nonstop music machine*, THE REGISTER, 13 September 2008 [Baidu – the nonstop music machine.pdf]).

That investigation demonstrates that Baidu does not work like other search engines in China; searches for music on Baidu produce only infringing copies – from websites that seem to be available only to Baidu. The news report details other ways that Baidu seems “programmed” to cause, increase, or – perhaps – induce copyright infringement.

Your optional readings also included the 2007 decision from the Beijing appellate court, *Go East Entertainment Company v. Yahoo!* (Beijing Alibaba Information and Technology), Beijing Higher People's Court, (2007) Gaominzhongzi No. 1191, December 20, 2007. [Available in Individual pdf & doc files for COURSEPACK #3]. In that decision, the appeals court affirmed a trial court ruling that Yahoo's Chinese subsidiary, Alibaba Company, was [a] not directly liable for links to infringing music that it did not host, but [b] was jointly/contributorily liable for the copyright infringement caused by its search engine offering links to infringing music *after* Alibaba had received take-down notices. Alibaba had argued that its only obligation was to disable the specific URLs identified in the copyright owners notice, but the copyright owners argued that once they had identified the sound recording by title and artist, Alibaba should delete all links matching that title/artist. The court agreed with the copyright owners. The Alibaba music search engine shares some characteristics with Baidu – in that it Alibaba “carries out organization and classification of the [music] tracks” and offers to search music files by detailed classification categories.

Selected passages from the *Go East Entertainment Company v. Yahoo* decision are attached here as Exhibit B, although you may want to look at the whole of the opinion.

Based on what you know about Baidu's operations, the reasoning of the court in *Go East Entertainment Company v. Yahoo*, and various ISP and P2P decisions in other countries, write an essay offering some ideas on how Chinese courts might handle Baidu. (Assume for purposes of the essay that Chinese judges will be amenable to the reasoning of their American, Japanese, and Australian colleagues.)

ESSAY D THE IDEAL ORPHAN WORKS LAW

We have studied three statutory schemes for the problem of "orphan works" – existing laws in Japan and Canada as well as proposed legislation in the United States. The Japanese law (in English translation) is 182 words; the Canadian law is less than 200 words. The statutory language in the proposed US law is approximately 2,000 words.

We have also looked at private initiatives to elaborate on how to handle orphan work situations, including the proper conditions for "diligent searches" for copyright owners.

Draft your vision of an ideal "orphan works" statute for a medium-sized economy – like Australia or Singapore. Allocate your 1,000 words between the actual statutory language and what the Australians would call the "explanatory memorandum," that is the legislative history explaining how your proposed law will ameliorate the orphan works problem.

That's all, folks.

Thanks for an enjoyable class.

*Congratulations to anyone graduating, and
best wishes to everyone for the holiday season.*

EXHIBIT A

Convenience Translation from the German Language



Regional Court of Munich I

Lenbachplatz 7 80316 Munich

Record No: 7 O 16830/07

Pronounced on 10 January 2008

Clerk of the Court

IN THE NAME OF THE PEOPLE
JUDGMENT

In the matter of

- 1) Kabushiki Kaisha Sony Computer Entertainment Inc., 2-6-21, Minamiaoyama, Minato-ku, Tokyo, 107-0062 Japan, represented by its President
- Plaintiff -

- 2) Sony Computer Entertainment Europe Ltd., 10 Great Marlborough Street, W1F 7LP London, Great Britain, represented by its President David Reeves
- Plaintiff -

Legal counsel(s) for Plaintiffs 1) and 2): All lawyers of the law firm Freshfields Bruckhaus Deringer, Feldmühleplatz 1, 40545 Düsseldorf Gz: DAC 1967399/3,

Versus

- 1) Dretschler.com.sarl., represented by its Managing Director Sven Strowig, 1, rue de l'Étang, Z.A.E. Weiergewan, L-5326 Contern, Luxembourg
- Defendant -

- 2) Sven Strowig, c/o Dretschler.com.sarl, rue de l'Étang, Z.A.E.
Weiergewan, L-5326 Contern Luxembourg
- Defendant –

Legal Counsel(s) for Defendants 1) and 2): Münster & Tholl,
Saargemünder Straße 39, 66119 Saarbrücken Gz: 1094207/11/TH

for claim to cease and desist

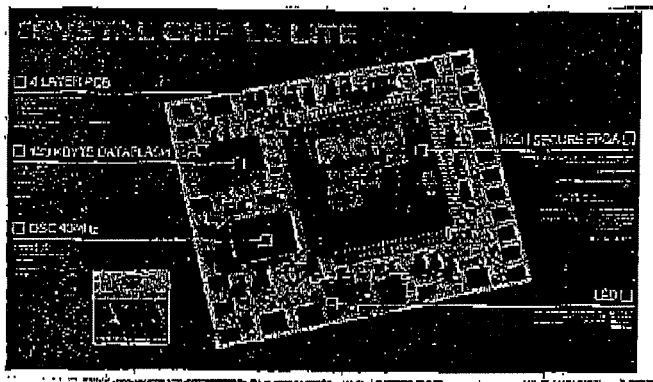
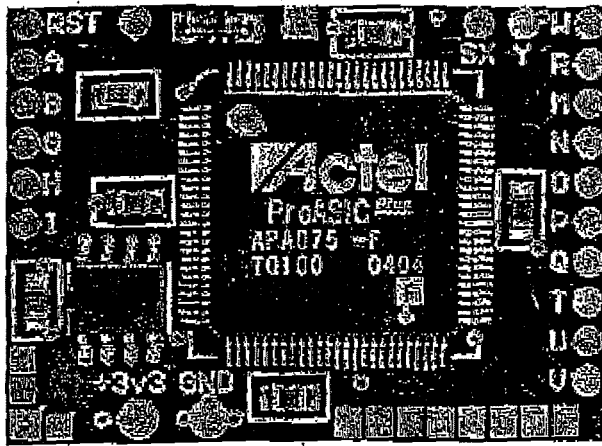
the 1st Chamber for Civil Matters of Munich Regional Court I, by virtue of the oral hearing of 22 November 2007 hereby pronounces through its Presiding Judge Retzer and Judges Dr. Zigann and Dr. Brodesser, the following

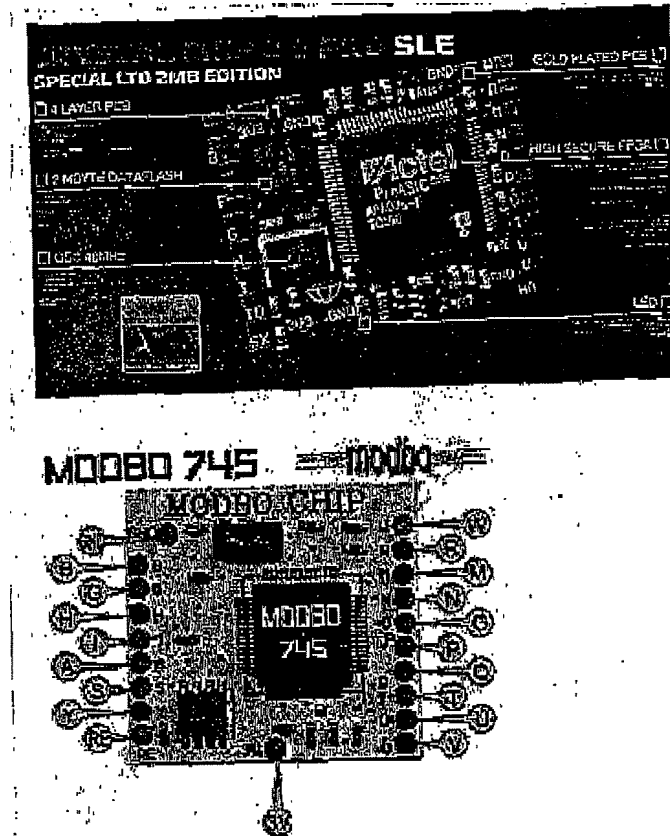
Judgment

1. For each case of infringement, the Defendants are under penalty of an administrative fine of Euro 5 up to Euro 250,000.00, in lieu thereof in case of impossibility of collection arrest up to six months, or arrest up to six months, in case of Defendant 1) the arrest must be enforced against the Defendant 2), prohibited,

From offering, selling, distributing and/or causing others to offer, sell or distribute, products such as modchips with the help of which the user can carry out an intervention in a game console such as the PlayStation2 which allows or facilitates the abolition or circumvention of copy-protection mechanisms in the game consoles and games of the Plaintiffs so that unauthorised copies of console games can be played, namely the following modchips listed and illustrated below:

- Matrix Infinity
- Crystal
- Modbo





II. The Defendants shall bear 9/10 of the costs of the lawsuit, the Plaintiffs 1/10

And the following

Resolution

The value in dispute shall be fixed for the period up to 22 November 2007 at € 500,000.00, for the subsequent period that follows at € 450,000.00.

The Facts of the Case

The Plaintiff 1) is a company registered under the laws of Japan in the legal form of a "Kabushiki Kaisha". It produces game consoles and in particular "PlayStation", "PSone", "PlayStation2" and "PSP" (PlayStation Portable). The Plaintiff 2) distributes games produced by Plaintiff 1) in Europe under an exclusive licence; in addition Plaintiff 1) also produces own games.

The Defendant 1) is a company registered under the laws of Luxembourg in the legal form of a SARL and engaged in the distribution of home entertainment equipment of all kinds, in particular to Germany. Defendant 2) is the Managing Director of Defendant 1).

The PlayStation2 game console manufactured by Plaintiff 1) and obtainable in Germany since November 2000, is controlled by a so-called controller, an input device including joysticks and key switches. The image and sound generated by PlayStation2 are connected to a usual television set. The basic model of PlayStation2 does not have any games stored on it. Rather it is a mere player device into which a video game must be loaded via a CD / DVD drive. The operating system installed in the platform verifies whether the inserted data carrier is an original game. If so, the data parts of the programme required for execution of the game are loaded into and executed in the internal memory of the console, the user can now play the video game.

In order to prevent games other than original ones being played on PlayStation2, each CD/DVD of an original game has a so-called "lead-in area", which contains additional coded information. The remaining area of the data carriers, where the actual games software is stored, essentially corresponds to the structure of conventional DVD-ROMs . It is possible to produce copies of this data part on blank DVDs by using customary DVD burning equipment. These copies are frequently called "back-ups" in the piracy scene. The widely available burning devices are, however, not able to write the coded information in the lead-in area.

Each time a new data carrier is inserted, the PlayStation2 will verify whether or not the coded information exists in the lead-in area. If it does

not, the data carrier is rejected. Consequently, copies of original games are as a rule not able to be played on PlayStation2.

Polyphony Digital Inc., Japan, which is the subsidiary company of Plaintiff 1), developed the game Gran Turismo 3. Plaintiff 1) owns the relevant exclusive copyrights that it has licensed to Plaintiff 2) for Europe. There is a copyright notice on the game with the text "Copyright 2001 Sony Computer Entertainment". The game Eye Toy Play was developed by Plaintiff 2) and it owns the relevant exclusive copyright to this game which bears the copyright notice "Copyright 2003 Sony Computer Entertainment Europe Ltd.". There are also third party companies that produce and offer games for PlayStation2 on an independent basis and that pay a corresponding royalty to Plaintiff 1.

The games are based upon graphics, individually composed elements of music and video sequences as well as – in particular as regards adventure and role plays – narrative elements. Each game consists of software that controls the combination and sequence of the stored graphics, sounds, video sequences and stories depending on the player's input and other parameters.

By purchasing the data carrier containing a game, the user acquires a licence to use such game. The conditions of the licence can be inferred from the copyright notice printed visibly on each game package; the notice on the game Gran Turismo 3 reads as follows:

"Game © 2001 Sony Computer Entertainment Inc. Library programs © 1997-2001 Sony Computer Entertainment Inc. exclusively licensed to Sony Computer Entertainment Europe. FOR HOME USE ONLY. Unauthorised copying, adaptation, rental, lending, distribution, extraction, re-sale, arcade use, charging for use, broadcast, public performance and internet, cable or any telecommunications transmission, access or use of this product or any trademark or copyright work that forms part of this product are prohibited. Published by Sony Computer Entertainment Europe. Developed by Polyphony Digital Inc. ... All rights reserved."

A corresponding note can also be found on the game Eye Toy Play.

Copies of hundreds of PlayStation2 games are in circulation on the Internet via the well-known exchange platforms, which can be downloaded illegally there. Any such copies can, however, not be played in a PlayStation2 in its original state.

Defendant 1) offers so-called "modchips" for sale. These are circuit boards to be installed as hardware in the game consoles. Many of these modchips consist materially of an integrated switching circuit, colloquially called chip. Modchips are, as a general rule, connected to the circuit board of the console with the help of short wires. As a rule, between 4 and 25 points on the circuit board of the console have to be soldered. Illustrative instructions for installation are available on the Internet (Annex Ast 7). The modchips contain either permanently programmed micro controllers or programmable logical components. If and to the extent the modchips are programmable, they are either distributed as ready programmed chips or are programmed by the user himself with the help of the instructions available on the Internet.

The modchips in dispute are programmed in a way that they deceive the operating system of PlayStation2. If a copied game is inserted, the Modchip feigns for the operating system the presence of the coded information that is additionally located in the lead-in area in case of original DVDs. The copy of the game can then be played like an original one. The price of a Modchip plus installation is in the region of € 70-80.

On 31 March 2007, the Plaintiffs sent a warning letter to the company Media-Extreme, owned by Lars Werner, on account of offering modchips for sale. On 1 August 2007, Lars Werner sent a cease and desist declaration (Annex Ast 8) by facsimile to the legal counsels of the Plaintiffs. In a letter of that same date (Annex Ast 8), received by the Plaintiffs' legal counsels on 8 August 2007, he gave notification to the effect that he had sourced the modchips from the Game World company. This company operates an online shop under the address www.the-gamers-world.de. On the sub-page "PS2 Conversion", a link was given for conversion of consoles to the web page of the Defendant 1) www.shoxx.com (Annex Ast 9). On this page, the Defendant 1) offered diverse modchips for sale for PlayStation2, including the modchips at dispute (Annex Ast 10).

In addition to allowing copies of games to be played, the modchips in dispute also permit playing of so-called import games, i.e. of original

games published in another region of the world, and the playing of so-called homebrew software. There is no technical connection between the playing of copies with these functions and, according to the pleading of the Plaintiffs, they can be realised separately.

On 27 August 2007, the legal counsels of the Plaintiffs sent a warning letter (Annex Ast 11) to the Defendant 1), who in a letter from its legal counsels of 3 September 2007 (Annex Ast 12) refused to submit a cease and desist declaration.

The Plaintiffs contend that the playing of pirate copies was the main reason for buying modchips. This could be seen in advertising (Annexes Ast 13, Ast 14) as well as forum contributions from Modchip users (Annexes Ast 15 - Ast 17). The purposes that can be pursued with modchips and that do not constitute a circumvention of effective technical measures are not only limited under economic aspects but can all in all be neglected. The Defendant 2) was aware that the playing of pirate copies was the main purpose of modchips.

The Plaintiffs are of the opinion that distribution of modchips constitutes aiding and abetting infringement of copyright. The Defendants would at least be knowingly disregarding the fact that the products distributed by them were being used to a considerable extent also to violate the Plaintiffs' rights. In addition thereto, the Defendants are also liable under the aspect of a contributory infringement of copyright. It was probable that the use of modchips constituted a violation of rights and a liability could be reasonably expected of the suppliers of the product. The modchips are designed in such a way that their conventional use does usually bring about an encroachment upon third party rights. Moreover, the use of the product usually occurs in a private sphere that is, to a large extent, not subject to an effective control that can be expected from the general public.

With the modchips, the Defendants were unlawfully offering a means that was designed for circumventing the copy-protection for original games. Thereby, the Defendants were in breach of Section 95 a (3) of the German Copyright Act (UrhG). This regulation is applicable since the games contain numerous sequences of music and image data that are, as

a matter of course, protected under copyright law. The circumvention of technical protection measures was the sole relevant economic purpose of modchips and they had been mainly designed with this in mind.

PlayStation2 contains effective technical measures in terms of Section 95 a (3) UrhG. The special coded information in the lead-in area of original data carriers served towards the PlayStation2 identifying and rejecting copied data carriers. Not being able to play copied games led ultimately to copies not being produced at all. The measures also prevented any further copy from a copied data carrier being copied into the main memory of the PlayStation2 that was required for the game. This was not opposed by any exemptions under copyright law. Section 95 a UrhG prohibited circumvention of technical protection measures even if these prevented use otherwise justified by exemptions.

Pursuant to Sections 69 a, 69 f (2), 97 UrhG, 823 (2), 1004 of the German Civil Code (BGB), the Plaintiffs could also demand cease and desist of the distribution of modchips. The regulations for software were applicable since the console games were, to a considerable extent, controlled by software that was protected as such by copyright law. The device in PlayStation2 that distinguishes copies from originals is a technical programme protection mechanism since the unauthorised reproduction and copying into the main memory is suppressed. The wording of Section 69 f (2) UrhG "sole intended purpose" in this respect must not be interpreted in the way that the adding of minor functions not related to the circumvention would legalise the possession of a means of circumvention. An exclusive or almost exclusive specification of the purpose is therefore sufficient. The adding of legal functions without any connection must, at least, be considered to be a circumvention of Section 69 f (2) UrhG.

In addition thereto, the distribution of the products in dispute also constitutes an individual impairment of sales under Sections 3, 4 No. 10, 8 of the German Unfair Competition Act (UWG). The indirect impact upon products of a competitor is unfair if they make services offered against remuneration available for free by way of a circumvention of limitations. The Plaintiffs constantly suffered very high losses by the multiple unauthorised use of their games. The distribution is also anticompetitive

under the aspect of an unfair assumption of services, Sections 3, 4 No. 9 b UWG. The Defendants place end customers in the position to be able to play games produced by the Plaintiffs. For this purpose, the Defendants make use of the Plaintiffs' work without adding any own performance. The violation of Section 95 a (3) UrhG also constitutes a breach of competition pursuant to Sections 3,4 No. 11 UWG since the protection against circumvention wants to protect the users of technical protection measures against illegal competition. The Parties are competitors since both of them are offering products in the field of game consoles and accessories for game consoles. As regards the modchips, Defendant 1) was competing with the Plaintiffs in particular because end customers - merely under economic aspects - can choose whether they buy games produced by the Plaintiffs or install a Modchip distributed by Defendant 1) which allows them to play pirate copies. Due to the purposeful impairment of the Plaintiffs' business, an intentional illegal interference with the Plaintiffs' established and performed trade was present at the same time.

After partial withdrawal of the motion – Motion III (third party information) pursuant to the brief containing the motion of 7 July 2007 was not made in the oral hearing – the Plaintiffs now move that

- I. the Defendants be prohibited with immediate effect from offering, selling, distributing and/or causing others to offer, sell or distribute products such as modchips with the help of which the user can carry out an intervention in a game console such as the PlayStation2 which allows or facilitates the abolition or circumvention of copy protection mechanisms in the game consoles or games of the Plaintiffs so that unauthorised copies of console games can be played, namely the following modchips listed below:
 - Matrix Infinity
 - Crystal
 - Modbo(illustrations as provided in the operative part of the judgment).
- II For each case of infringement of Item I, the Defendants be under penalty of an administrative fine of up to Euro 250,000.00, alternately arrest of up to six months, in the event of a repeated infringement of up to two years altogether, or arrest of up to six

months. In the case of Defendant 1), the arrest must be enforced against all its relevant legal representatives.

The Defendants move that the motion for issuance of an interim injunction be dismissed.

The Defendants are of the opinion that distribution of the modchips in dispute has not violated any copyright or ancillary copyright of the Plaintiffs. Admittedly, the burning of PlayStation games did in principle constitute an act of reproduction. However, the modchips did not render the burning operation possible but instead the playing of such games. Playing did not per se constitute an act of reproduction as in the process only an insignificant volume of data was read into the working memory of the PlayStation. The loading of this insignificant volume of data was not to be understood as an act subject to authorisation as set forth in Section 69 c No. 1 UrhG since insofar as reference was to be made to the legal concept of Section 24 UrhG under which in the event of the individual characteristics of a work becoming less distinct, no reproduction was present. The loading into the working memory was moreover required for the use as provided and, therefore, did not require any authorisation under Section 69 d UrhG.

The modchips do not constitute any prohibited act of circumvention of technical protection measures. Such an act would not be present particularly if via the modchips the regional code were to be surmounted as reproduction is not prevented by the regional code but instead only the performance of the work that is not protected by copyright. Likewise, surmounting the limitation to the original game by the modchips does not constitute any infringement of Section 95 a UrhG. It ensues from the protective framework of Section 95a UrhG that control of access is ultimately only to be protected if thereby acts should be rendered more difficult for protecting the exclusive rights of the author. Playing the work constituted a mere exercise of performance that did not come within the scope of the exclusive rights of the author. In addition thereto, modchips are not purchased primarily for reproducing works protected by copyright. Problems experienced in playing original film DVDs were also removed through using modchips. In any case, the Defendants are not answerable as the proper parties because the modchips are at least also suited for admissible acts. Furthermore, no retroactive participation is possible in any violation of copyright constituted by the producing of the copy of the game.

For supplementation of the facts of the case, reference is made to the exchange of written documents as well as the written record of the meeting on 22 November 2007 Bl. 73/75.

Reasons

The motion for issuance of an interim injunction is justified. The Plaintiffs have substantiated the prerequisites for entitlement thereto by prima facie evidence.

A

The Plaintiffs are entitled to issuance of an interim injunction pursuant to Sections 97 (1) S. 1 UrhG, 95 a (3) S. 1 UrhG, 823 (2), 1004 BGB.

- I. In accordance with Section 97 (1) S. 1 UrhG, the Plaintiffs can however demand that the Defendants cease and desist from the acts described in the operative provisions relating to Matrix Infinity, Crystal and Modbo. The Plaintiffs are entitled to the claim, danger of first infringement is at least present with regard to a violation of the rights of the Plaintiffs.
 1. The Plaintiffs are entitled to the claim. Plaintiff 2) is the owner of the exclusive right of exploitation to the games Gran Turismo 3 and Eye Toy Play as well as to further games for PlayStation2 in the territory of the Federal Republic of Germany. Plaintiff 1) is the licensor of the game Gran Turismo 3 and further games. It has in interest of its own in addition to Plaintiff 2) in asserting the cease and desist claim belonging to the case, since at least through its holding under corporate law in Plaintiff 2) it is involved in the evaluation of the rights of exploitation that have been granted. The games distributed by the Plaintiffs contain graphics, texts and music works protected by copyright, Section 2 (1) No. 1, No. 6 (2) UrhG and this is not denied by the Defendants. Pursuant to Art. 1, Art. 2 (1), Art. 3 (1) lit. a of the Revised Berne Convention (R.B.Ü.), in Germany the works in

dispute created by foreign nationals are protected by UrhG.

2. By aiding and abetting unlawful reproduction, admittedly the Defendants have not so far not demonstrably violated exclusive rights of exploitation of the Plaintiffs under copyright in an unlawful manner, Section 97 (1) S. 1 UrhG, nevertheless a danger of first infringement does at least exist (c.f also BGH GRUR 2007, 708 Tz 30, 41 – Internet Versteigerung II). The fact that a definite risk does exist of those very games being reproduced for which the Plaintiffs have the rights has not been denied by the Defendants.
 - a) The use as provided by the owners of game consoles of the modchips offered by the Defendants constitutes a breach of the right to reproduction of Plaintiff 2) in terms of Section 15 (1) No. 1, Section 16 UrhG. Admittedly, the Modchip is not used in producing a so-called back-up, i.e. a copy of an original game on a CD or DVD. The fact that the copy is made at all only with regard to possibilities of being used via Modchip does not justify any participation of the Defendants in this reproduction operation.

By making modchips available, the Defendants are nevertheless aiding and abetting illegal reproduction of the games in the memory of the game console. Likewise, the loading of works stored electronically into the memory of a computer constitutes an act of reproduction pursuant to Section 16 (1) UrhG. Admittedly this is not clear from the wording of the act which in addition also includes temporary acts of reproduction, but results nonetheless from an appraising interpretation of the text of the law (left open in BGH GRUR 1991, 449, 453 – Betriebssystem; GRUR 1994, 363, 365 – Holzhandelsprogramm). The interpretation must be oriented on the legitimate interest of the holder of the right in participating in the economic advantages involved in

the use of its work. Accordingly, in the legal sense a reproduction is always present if the technical reproduction operation leads to increased utilisation of the work (c.f. zu Computerprogrammen Dreier/Schulze, UrhG. 2. Aufl., § 69 Rz. 8; Schricker/Loewenheim, Urheberrecht, 3. Aufl., § 69 c Rz. 6). This is required for protection of the author. Increased utilisation shall precisely be present if, as in this case, by loading the game into the memory it is possible for an additional user to utilise the game.

The fact that the game is not in each case loaded in its entirety into the working memory is harmless. For one, as already stated the Defendants have not denied that the Plaintiffs' games also contain individual components protected by copyright such as graphics, images and works of music. Secondly, also in respect of the total work of the game, irrespective of its classification into a certain type of work, no fading of the individual characteristics as set forth in the concept policy of Section 24 UrhG is to be assumed with regard to the respective part loaded into the working memory. This is already opposed by the fact that the user of a certain game has to be able to identify individual game sequences as definitely belonging to the overall context as otherwise the game would be unable to be sold in the market for console games due to the chain of irrelevant game sequences. Whether at a later date renewed access to the contents of the working memory will be required, is not the decisive factor according to the basic facts as described.

The act of reproduction is also not admissible pursuant to Section 44 a UrhG. Under Section 44 a UrhG, as an exception such acts of reproduction are permitted that are of a transient or accompanying nature and constitute an integral or essential part of a technical process and whose sole purpose is to render possible a transmission

in a network between third parties by means of an intermediary or a legitimate utilisation of a work. Such acts do not have any independent economic significance. In the case in point, the definitional element of the lack of independent economic significance is not fulfilled. The independent significance constituted by the loading of a copied game into the working memory can already be recognised by the fact that the users of copied games save the considerable outlay involved in buying games of their own.

- b) The Defendants are aiding and abetting these unlawful acts of reproduction by distributing the modchips which render these very acts possible. The Defendants are also acting with conditional intent of aiding and abetting these unlawful acts of reproduction. The Defendants are aware that the modchips in dispute are as a rule used to run so-called back-ups on PlayStation2 (c.f. BGH GRUR loc.cit. Tz 31 – Internet Versteigerung II).
- c) The claim is not opposed by the fact that the modchips in dispute contain other functions besides the playing of copies of games. Admittedly, according to case law (BGH GRUR 1965, 104, 106 – Personalausweise), the assertion of a cease and desist claim under copyright law can be excluded under the precept of good faith if it cannot be ruled out that a - possibly only slight yet unable to be completely disregarded – part of the acquiring parties uses the items (in the decision in question tape recorders were concerned) for purposes not affecting the rights of the Petitioners. In the case in point, this prerequisite is not fulfilled. The part of the acquiring parties using modchips for purposes not affecting the rights of the Plaintiffs may be disregarded. In practice, no importance can be ascribed to the functions of playing import games and “Homebrew”. The Plaintiffs have presented well-founded arguments that virtually no user would purchase a

Modchip solely for this purpose. Own import of imported games does not take place sufficiently often for this and, in view of the indisputably slight difference in price, does not provide enough incentive for purchasing and installing a Modchip at a cost incurred of Euro 70 – 80. Any programming of own games by the user hardly took place all. Insofar as PlayStation2 only complies with the function of a DVD player to an insufficient degree, it is cheaper to buy a separate player than to install a Modchip. The Defendants did not counter this argument with an adequate line of reasoning. Merely stating that the problematic functions tend rather to be discussed on the Internet is not sufficient in the case at issue.

- II. The Plaintiffs are also entitled to a cease and desist claim with the same content under Sections 95 a (3) No. 2 and No. 3 UrhG. According to Section 95 a (3) No. 2 UrhG, it is prohibited to produce, import, distribute, sell and use for advertising and commercial purposes any devices that apart from circumventing effective technical measures only have a restricted economic purpose or use. Pursuant to No. 3 of the regulation, such items are prohibited that were mainly designed, produced or modified to render possible or facilitate the circumvention of technical measures. Under Section 95 a (2) UrhG, technical measures shall mean such technologies, devices or components, which are designed in normal operation to prevent or restrict acts relating to works protected by copyright that have not been authorised by the holder of the right. Compliance with these prerequisites is made by the distribution of the modchips in dispute.
 1. The games Gran Turismo 3 and Eye Toy Play constitute works protected under the law on copyright (see above). The reproducing of copies of these games in the working memory of the PlayStation2 is not authorised by the Plaintiffs as the holders of rights.
 2. The software and hardware components of PlayStation2, which verify the presence of the so-called lead-in area, comply with the requirements on technical

measures as they prevent the reproduction of the games in the working memory that was not authorised by the Plaintiffs (see above I.2). They are also effective even if they can be circumvented by the use of a Modchip. In this context, the law does not require any control to one hundred percent, since in this case a circumvention would be impossible anyway and legal protection against circumvention not required (Dreier/Schulze, UrhG. 2. Aufl., § 95 a Rz. 15).

3. The modchips in dispute are designated for circumventing control of the presence of a lead-in area. As already stated, apart from this, they have virtually no economic purpose or use (Section 95 a (3) No. 2). They were also mainly produced to this end (Section 95 a (3) No. 3).
- III. As under the legal aspects referred to, the Plaintiffs are already entitled to the sole cease and desist claim now asserted, it can remain open whether such a claim would continue to originate from Sections 69 f UrhG, 823 II, 1004 BGB or from Sections 8 (1, 3, 4) No. 9 b) UrhG, No. 10 of the German Unfair Competition Act (UWG).

B.

Substantiation is also given for an injunction, Sections 935, 940 of the German Code of Civil Procedure (ZPO). The Plaintiffs have substantiated by prima facie evidence that they constantly suffer very high losses from the distribution of the modchips in dispute. They have a considerable interest in stopping the unlawful reproduction of games, i.e. to take action against the distribution of modchips. Insofar as the Defendants remonstrate that the subject matter of the present lawsuit is not suited to interim injunction proceedings because complex legal issues must be clarified, this is unable to be complied with. Equally, the line of reasoning of the Defendant 1) does not take effect, i.e. that considerable economic injury would originate for it if the prohibition should turn out to be unjustified since competitors of Defendant 1) could continue to distribute modchips.

The motion was duly filed within the space of one month from cognizance of the infringement.

The consequence as to costs results from Sections 92 (1) S. 1 269 (2) S. 3 ZPO. A value was fixed at € 50,000.00 for the application for information that had been withdrawn, for the interim injunction at € 450,000.00.

Retzer
Presiding Judge
at the Regional Court
Regional Court

Dr. Zigann
Judge
at the Regional Court

Dr. Brodherr
Judge
at the

--- Go to next page for EXHIBIT B

EXHIBIT B

The People's Republic of China
Beijing Higher People's Court
Civil Judgment

(2007) Gaominzhongzi No. 1191

The Appellant (the Claimant for the 1st instance): GO EAST
ENTERTAINMENT COMPANY LIMITED

Domicile: 15th Floor, 1 Peking Road, Tsimshatsui, Kowloon, Hong
Kong

Legal representative: Hong Di, Director

Attorney: Zhang Zaiping, Attorney at Law, Beijing Lusheng Law Firm

Attorney: Jiang Nandi, Paralegal, Beijing Lusheng Law Firm; Female,
born in October 4, 1984; Ethnic Group: Han; address: English
Institution, No. 2 Xisanhuan Bei Road, Haidian District, Beijing

The Appellee (the Defendant for the 1st instance): Beijing Alibaba
Information and Technology Co., Ltd.

Domicile: 9th-15th Floor, Tower A, Winterless Center, No.1 Beijing
Xidawang Road, Chaoyang District, Beijing 100026

Legal Representative: Xie Shihuang, General Manager

Attorney: Li Jun, Attorney at Law, Beijing Global Law Firm

Attorney: Xie Guanbin, Attorney at Law, Beijing Jinxinlifang Law Firm.

The Appellant GO EAST ENTERTAINMENT COMPANY LIMITED (herein-
after referred to as "GO EAST HK"), the Appellant Beijing Alibaba
Information and Technology Co., Ltd. (hereinafter referred to as
"Alibaba Company"), disputed the judgment of (2007)erzhongminchuzi
No.2627 by Beijing No. 2 Intermediate People's Court on infringement

to sound recording producer's right, and herewith lodged an appeal to this Court. This Court accepted the case on 30 July, 2007, set up the collegial trial tribunal, and heard the case publicly on 12 November 2007. The Attorneys Li Jun, Xie Guanbin of the appellant Alibaba Company, and the Attorneys Zhang Zaiping, Jiang Nandi of the Appellant GO EAST HK presented in court. The case is now concluded.

* * *

In April and May, 2006, the attorneys of IFPI Beijing Representative Office applied for notarisation as evidence preservation, searching, try-listening to and downloading of the 26 interested tracks in the Yahoo China website. After comparison, the interested sound recordings downloaded during the notarisation are identical to the original sound recordings which GO EAST HK claims rights for. When interested sound recordings are selected for try-listening, in the address bar of try-listening windows appeared 3 addresses which belong to the China Netcom Corporation Hebei Province Net. "Track Try-listening: Track Name, Artist, Download Tracks", Player, and Lyrics are also displayed. Source of the tracks are displayed in downloading windows. Alibaba asserted that the purpose for setting up try-listening windows had nothing to do with the links and no control had ever happened, the linking happened directly between user terminal and a third party website; Yahoo China website only applied the re-direction technology in the advertisement bar. GO EAST HK dissented with the above mentioned assertion and suggested that Alibaba Company controlled music try-listening and downloading process by setting up the try-listening windows, so that network users were able to download or listen to relevant tracks without leaving its website; Alibaba thus was able to gain economic benefits through this way.

* * *

On 4 July 2006, GO EAST HK sent a Lawyer's Letter to the operator of Yahoo China website, providing a list of the interested singers and the interested albums, illustrating the detailed infringing URL addresses of 136 tracks (one address as sample for one track), and screenshots which displayed infringing links, and requesting to remove all infringing links related to the above mentioned artists and albums. Since then, Alibaba Company replied to GO EAST HK, asking for the electronic version of the URL addresses, and meanwhile also started to remove the links by manual input.

On 28 July 2006, the attorneys of IFPI Beijing Representative Office applied for notarisation as evidence preservation, notarising the fact that Yahoo China website did not remove all infringing links related to 18 tracks involved in this case. The interested sound recordings downloaded during the notarisation are identical to the original sound recordings which GO EAST HK claims rights for.

On 2 August 2006, Alibaba Company sent a letter to GO EAST HK, indicating that only the URL addresses provided in the Notice were able to be removed. From then on, GO EAST HK replied twice the letter, emphasising all links related to the interested sound recordings were infringing, and requesting to remove all searching results related to the mentioned works in the Lawyer's Letter. Alibaba Company protested that it had been removing the links with URL addresses. The Claimant agreed that the above mentioned URL addresses had not been displayed at present on Yahoo China website.

* * *

Beijing No.2 Intermediate Court held that GO EAST HK enjoys sound recording producer's rights to the interested sound recordings, and the above said sound recording producer's rights shall be protected. The

music search service and Music Box service provided on the Yahoo China website merely involve in the links to the interested sound recordings and the saving of such links, but not the interested sound recordings per se. It can not be concluded that the Yahoo China website provides the interested sound recordings per se; further the sources of the interested sound recordings are displayed in the downloading processing window, which would not mislead users to think that the interested sound recordings are sourced from the Yahoo China website. Therefore, the act of Alibaba Company does not constitute reproduction or disseminating the interested sound recordings via network.

* * *

[NONETHELESS] GO EAST HK has sent the letters to Alibaba Company to inform its infringing facts, by providing the related information of the interested sound recordings, and requested Alibaba Company to remove all infringing links related to interested albums. Alibaba Company acquired the information of sound recording producer's right of GO EAST HK and information regarding interested sound recordings claimed as infringing, thus shall be aware that the search results through its music search service contains contents infringing sound recording producer's right of GO EAST HK. However, Alibaba Company only removed the URL addresses provided by GO EAST HK, and neglected the duties of removing all other infringing links related to the interested sound recordings, which has indulged the infringing acts. Alibaba Company has subjective faults and its act shall be deemed as assisting others on infringement via network, which infringes the sound recording producer's right of GO EAST HK, in particular the right of dissemination through information network and right of receiving remuneration regarding the interested sound recordings, and shall therefore be jointly liable for the infringement.

GO EAST HK's order to request Alibaba Company to stop the infringing act and compensate the loss of GO EAST HK is justifiable. The first instance court decides the specific manner to stop the infringement according to specific circumstances of the case. The Court decides the exact compensation sum by taking into consideration factors as the nature and lasting time of the Defendant's infringement, extent of the Defendant's bad-faith, the Claimant's losses etc..

* * *

[TRIAL COURT ORDERED]

Alibaba shall remove all the links related to the 26 pieces of interested sound recordings, including WEN XIA LIU REN, of Yahoo China website; □. Alibaba Company shall pay compensation of RMB 10,400 to GO EAST HK, and reasonable disbursements prepaid by GO EAST HK for the this litigation, at RMB 11,000; □. Other requests of GO EAST HK are rejected.

* * *

[ON APPEAL THE COPYRIGHT HOLDER SEEKS AND HIGHER DAMAGES AND DESCRIBES ALIBABA AS FOLLOWS]

The download and try-listen to services of tracks provided on Alibaba Company's website can be reached from within that website: the entire possibility of downloading/try-listening is created by Alibaba Company and the entire process of downloading/try-listening is guided and controlled by Alibaba Company at each step; the tracks for download have already been modified and organized by Alibaba Company. Alibaba Company has devoted itself to providing a full-time professional music service all the time, rather than only providing a search engine service.

* * *

[ALIBABA ARGUES ON APPEAL]

Alibaba Company's reasons for appeal are: most of the contents in the notices respectively sent on April 10 2006 and July 4 2006 do not meet the requirements for Notice of Legal Rights. Therefore, it should be deemed that GO EAST HK failed to make the notice. Alibaba Company has already deleted the URL links mentioned in the lawyer's notices, and therefore fulfilled its due obligations. GO EAST HK demanded that all the search results of the names of the singers and album were to be deleted without the need of indicating specific URL addresses of songs of infringement by the copyright holder. This demand is absolutely unreasonable, as it at once may infringes on the legitimate interests of the third party that is not involved in such infringement and is against the stipulations of relevant law. The aforementioned two notices cannot become the basis for a joint liability for infringement to be borne by Alibaba Company on the alleged grounds that Alibaba Company "knows or should know" of the infringement. The first instance judgment errs in its interpretation of the legal meaning of "knows or ought to know". Legal meanings of "know or ought to know" should be interpreted as meaning that "the network service provider is able to take appropriate measures based on such knowledge." Based on current technical knowledge, the judgment of the first instance is illogical. If the Court upholds the reasoning of the first instance judgment, the search engine industry will suffer a disaster. Alibaba Company requests to cancel the first instance judgment made by the original court, and amend the judgment and dismiss all the claims of GO EAST HK according

* * *

[APPELLATE COURT AFFIRMS TRIAL COURT DECISION ON DIRECT LIABILITY]

The music search, try-listening, and downloading services provided by the Yahoo China website are achieved through the links of different URL addresses in relation to the interested sound recordings. Upon

clicking of these links by users, the computer terminal will be linked to the third party websites using the certain URL addresses, and when downloading the interested sound recordings by clicking the button from the download window or try-listening window, the downloading processing window would display the source of the tracks. Therefore, though the music search result displays on the Yahoo China Website in the manner with Alibaba Company's organisation and classification, Alibaba Company is not able to control the interested sound recordings linked from third party websites, and it is the third party websites who upload and provide the interested sound recordings. The Music Box service provided in the Yahoo China website saves relevant URL addresses searched by the Yahoo China website, rather than saving the interested sound recordings per se to the website itself. In this regard, the music search service provided by Alibaba Company is providing equipments and facilities for users to try-listen to and download tracks uploaded by third party websites, and the Music Box service only provides facilities to save relevant internet addresses of links. Hence, the aforesaid service of Alibaba Company still belongs to search, linking service, and it does not reproduce or disseminate to public the alleged infringing sound recordings on its server, while its service pattern would not mislead network users to think that the interested sound recordings are sourced from the Yahoo China website. The act of Alibaba Company does not constitute infringement of sound recording producer's rights of Go East HK in respect of the 26 interested tracks in this regard.

* * *

[APPELLATE COURT AFFIRMS TRIAL COURT DECISION ON
JOINT/CONTRIBUTORY LIABILITY]

According to Art.23 of the Regulation on Protections of the Dissemination Right through Information Network, "Internet services provider shall not be liable for compensations if it disconnects the link to the

infringing work, performance or phonogram product according to the provisions of the Regulation after the receipt of the notice from the Right Owner when providing the searching or linking services to the served; however, it shall be jointly liable for infringement if it knows or is ought to know that the linked work, performance or phonogram product constitute an infringement". based on this, even if the right owners did not send notice meeting the requirements of Art.14 of the Regulation on Protections of the Dissemination Right through Information Network, the internet service provider shall still bear infringement liability if it knows or ought to know the infringement, but still provides search and link service. Further, having subjective fault is also a condition for internet service provider to bear infringement liability. To judge whether the party has subjective fault or not, it should be considered whether the party is able to and should foresee the negative results to be caused by its act, based on the competence and extent of the party's foreseeability, as well as distinguishing the average level of foreseeability and professional level and so on. The aforesaid criteria for judging subjective fault also apply for internet service providers which provide search and link services.

The search of sound recordings on the Yahoo China website would display a result comprising contents of "Track Name, Artist, Album, Lyrics, Try-Listening, Ring Tone, Music Box, Format, Size, Connecting Speed" etc.. Besides, Alibaba Company carries out organisation and classification to the tracks, music information searched out, categorises the information depending on criteria as music genre, popularity, artist gender and so on, and provides users with searching columns such as "Search Track", "Search Lyrics", 18 classification columns including "All Male Artists", "All Female Artists", "New Tracks", "Golden Movie and TV Tracks", "Classic European and American Tracks" etc., and specific sections as "Hot New Track Rank", "Hot Searched Track

Rank" and so on. Obviously, Alibaba Company, out of its own mind, collect, organise and categorise relevant music information, and sets up corresponding classifications according to various criteria. As a search engine provider, Alibaba Company conducts business including music search service, provides professional music search service to users and gains profits from it, and its website belongs to specialised music website. With all the above concerns, according to the criteria to judge subjective fault, Alibaba Company should have known and is able to know the legal status of the sound recordings searched and linked by it. Especially after that Go East HK had notified Alibaba Company in written several times, that the various sorts of music search service provided on its Yahoo China website in respect of the interested sound recordings were all infringing, and requested Alibaba Company for removal, Alibaba Company should pay even more attention to the legal status of the sound recordings of the 26 tracks, and take relevant measures. However, Alibaba Company only deleted the links for which Go East HK provided specific URL addresses, but let alone other search links in relation to the interested sound recordings. It is obvious that Alibaba Company has neglected its due diligence and indulged the infringement, and it should be deemed that Y!C has subjective fault.

With the above concerns, Alibaba in fact has participated in, assisted the linked third party websites to conduct infringement, it has obvious subjective fault, and constitutes infringement to the sound recording producer's rights of Go East HK, in terms of the dissemination right via information network and right of receiving remuneration, and shall bear legal liability for infringement.

End of excerpt

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END OF EXAMINATION MATERIALS
Copyright and New Technologies
Comparative Copyright in the 21st Century
Fall 2008/Professor Justin Hughes

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