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Alsudairy, S. and Basu, S. orcid.org/0000-0001-5863-854X (Accepted: 2025) Interpreting Sharia Law of Torts in Online Copyright Infringements: A Roadmap for Judges in Saudi Courts. Arab Law Quarterly. ISSN 0268-0556 (In Press)

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Interpreting Sharia Law of Torts in Online Copyright Infringements: A Roadmap for Judges in Saudi Courts

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Abstract

This paper analyses the interplay between Sharia law and copyright law in Saudi Arabia, focusing on the complexities of secondary liability for online infringements. The recent jurisdictional role of the commercial courts over copyright cases under Vision 2030 underscores the growing importance of Sharia law in the digital realm. The paper identifies a significant gap in Saudi Copyright law, namely its need for provisions to regulate the secondary liability of online service providers. The current legal framework, coupled with the stringent content removal policies of the Saudi Authority for Intellectual Property, creates uncertain environment, potentially discouraging online business investment in Saudi Arabia. The paper proposes a dual reform strategy to address these issues: integrating authorisation liability into Saudi law informed by UK precedents and develop Sharia tort law. These reforms aim to create a predictable legal environment, fostering technological innovation and economic development while respecting Saudi Arabia's legal and cultural heritage.

Keywords

Secondary liability – Saudi courts – Sharia law of torts – online copyright infringements -Vision 2030- Saudi Copyright law.

1 Introduction

Saudi Arabia's recent legal reforms, particularly those introduced under the Vision 2030 initiative, have significantly changed the Kingdom's legal and economic landscape.¹ One of the most critical shifts is the transfer of jurisdiction over copyright cases to the Commercial Courts, alongside the jurisdiction of a quasi-judicial committee that previously managed these cases under executive authority. This transition is not without its challenges, particularly given that the judges in these courts are predominantly trained in Sharia law. This raises crucial questions about how these judges will apply Sharia principles to modern issues such as online copyright infringements, especially in an era where digital technology is rapidly transforming the way content is created, distributed, and consumed.²

The integration of Sharia law with statutory copyright law in Saudi Arabia has always been complex, with Sharia principles historically playing a significant role in legal interpretations and enforcement. However, the current legal framework, particularly the Saudi Copyright Law of 2019, has significant gaps, most notably in the area of secondary liability for online infringements. This lack of clear regulation leaves online service providers vulnerable to legal uncertainty, which could stifle innovation and deter investment in Saudi Arabia's burgeoning digital economy. Furthermore, the strict content monitoring and removal policies enforced by the Saudi Authority of Intellectual Property (SAIP) add another layer of complexity, potentially creating a restrictive environment for digital businesses.³

This paper argues that addressing these legal gaps is not only necessary but also urgent. It tackles these pressing issues by proposing a comprehensive legal framework that effectively integrates Sharia tort law with modern copyright law, focusing specifically on secondary liability in the context of online infringements. The paper seeks to provide solutions that are legally sound while remaining culturally and religiously appropriate for Saudi Arabia. It aims to bridge the gap between traditional Sharia principles and the demands of a modern, technology-driven economy. The paper begins by analysing the relationship between Sharia and copyright law, providing the necessary background for developing a coherent and compatible legal framework suited to the digital age. This foundational analysis sets the stage for a detailed examination of how Sharia tort law regulates secondary liability. The paper explores the potential implications of integrating these Sharia principles into the adjudication of copyright cases involving online service providers, particularly in light of the new

¹ The Saudi Vision 2030 refers to the radical economic and social reform the Saudi government adopted in 2016. It aims to wean the country from its dependency on oil and diversify the economy in many ways, including encouraging international businesses to invest in Saudi Arabia.

Vision 2030 has a direct impact on the enforcement of the Copyright Law and changing the way it is handed by the judicial authority, for example: the Saudi Authority of Intellectual Property (SAIP) is a governmental authority that was created as a result of Vision 2030 to support the enforcement of the Copyright Law and encourage copyright industries to invest in Saudi Arabia. Saudi Government, 'Vision 2030 Official Document', online at: https://www.vision2030.gov.sa/media/rc0b5oy1/saudi_vision203.pdf, accessed 10 August 2024. P. 6, 13.

² The research focus on Saudi Arabia instead of other jurisdictions is based on the rising economic importance of the country after Vision 2030, which created major legal gaps, one of them is the secondary liability of intermediaries. In fact, Sharia law is applied in the country without exceptions, and any investors should comply with its rules. It is the right time for the Saudi regulator to reconsider the application of its current legal framework and how it can be developed to support the achievement of Vision 2030. This paper tries to fill the gap in one of the aspects that is need to be clarified and developed in the country.

³ See 2. The Impact of Sharia Law and the Saudi Economy on Copyright Law Enforcement by the Saudi Judicial System.

jurisdictional changes introduced as a result of Vision 2030. Furthermore, the paper offers a comprehensive comparative analysis of the United Kingdom's approach to authorisation liability within copyright law. The UK, with its well-established legal framework and extensive experience in addressing online copyright issues, provides valuable insights that could inform the development of Saudi Arabia's legal system. This comparative analysis underscores the importance of learning from global best practices, highlighting potential solutions for managing the complexities of secondary liability—an issue of increasing significance in the context of technological innovation and economic growth.

In the final section, the paper presents specific recommendations for modifying Saudi Arabia's existing legal framework. These recommendations are designed to address better the challenges posed by online copyright infringements while ensuring that the legal system remains consistent with Sharia principles. The proposed modifications include the introduction of clearer legal definitions, adapting relevant aspects of the UK's approach to authorisation liability, and refining Sharia tort principles to better align with the realities of digital interactions. The paper, by providing a roadmap, aims to equip judicial and legislative bodies in Saudi Arabia with the tools needed to develop a balanced and equitable legal framework. This framework would not only support technological innovation but also uphold the Kingdom's cultural and religious values.

2 The Impact of Sharia Law and the Saudi Economy on Copyright Law Enforcement by the Saudi Judicial System

The evolution of copyright protection in Saudi Arabia has been significantly influenced by various economic phases and, more recently, by the ambitious reforms of Vision 2030. These reforms, aimed at diversifying the economy and reducing its dependence on oil, have also impacted the enforcement of Copyright Law. Before Vision 2030, copyright enforcement faced substantial challenges, largely due to the pervasive influence of Sharia law on the judicial system. Despite the government's efforts to establish robust copyright protection regimes, the influence of Sharia law remained a dominant force, particularly in the enforcement of commercial and intellectual property laws.⁴

The Saudi judicial system, while recognised as an independent authority,⁵ continues to be deeply influenced by Sharia law, which affects all branches of the judiciary. This influence has historically complicated the enforcement of copyright laws. For instance, copyright cases were typically managed by a Quasi-judicial Committee under the Ministry of Media rather than by courts operating under judicial authority. These committees were originally established to address the reluctance of Sharia courts to handle disputes that they perceived as conflicting with Sharia principles.⁶ As a result, the government delegated the responsibility

⁴ David Price, "Politics, Piracy and Punishment: Copyright Protection in the Arabian Gulf," *The Journal of World Intellectual Property* 14, no. 3–4 (July 2011): 276–300, p. 287 <https://doi.org/10.1111/j.1747-1796.2011.00419.x>.

⁵ This was confirmed in Article 46 of the Basic Law: '*The Judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic Sharia*'.

⁶ Ayoub M. Al-Jarbou, "The Role of Traditionalists and Modernists on the Development of the Saudi Legal System," *Arab Law Quarterly* 21, no. 3 (2007): 191–229, p. 206. <https://doi.org/10.1163/026805507X226827>; Abdulrahman Baamir and Ilias Bantekas, 'The New Saudi Arbitration Act: Evaluation of the Theory and Practice' (2009) 25 *International Arbitration Law Review* 239.

for these cases to executive authorities, such as ministries, where the influence of Sharia was less direct.

The profound impact of Sharia law on the development of copyright protection in Saudi Arabia cannot be overstated. Although the country's legislation may appear secular, the interpretation and application of these laws are deeply rooted in Sharia principles.⁷ This is particularly evident in treating culturally sensitive issues, such as music and film, which are considered controversial under certain Sharia doctrines. For example, the Copyright Laws of 1989 and 2003 failed to adequately protect musical works. Notably, the term 'musical work', or in a broader sense 'audio work', was not included as part of the protected works in the 1989 Copyright Law.⁸ However, in 2003, the Copyright Law was amended⁹ to include the term 'audio' work, which could suggest that sound recordings are protected as works, notably as 'audio works' and/or as 'works ... prepared for broadcast'. However, the term 'musical work' was eventually added as a protected right under the Copyright Law Implementing Regulations (2005),¹⁰ and it was changed to 'musical plays' in the 2019 Implementing Regulations.¹¹ It is important to note that while it is difficult to directly link the uncertainty of terms used in Copyright Law to Sharia law, it suggests that Sharia has influenced Copyright Law, particularly concerning music and film, as these are controversial issues in some Sharia doctrines. When considering music as copyrighted work in Saudi Arabia, it is noteworthy that although not forbidden by the Saudi government and broadcasted on official State radio and TV channels, music is not entirely legitimate in religious terms.¹² The understanding of music's legality among Saudi religious experts has shown little variation over time. Consequently, many people have regarded the use of pirated works as a prudent choice despite a growing number of Saudis becoming accustomed to listening to music and expressing themselves through this medium.¹³

After adopting Vision 2030 in 2016, the Saudi government began to support various economic sectors to diversify the economy,¹⁴ including the knowledge-based economy,¹⁵ copyright, and creative industries.¹⁶ In alignment with this direction, the Saudi Authority of Intellectual

⁷ Hossein Esmaeili, 'On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System' (2009) 26 *Arizona Journal of International & Comparative Law* 1. P, 7; Al-Jarbou, *supra* note 5 at 192.

⁸ Copyright Law: Royal Decree No. M/11 of 1410AH (1989).

⁹ Copyright Law: Royal Decree No. M/41 2 Rajab, 1424, (2003).

¹⁰ Implementing Regulations of Copyright Law Issued by The Minister of Culture and Information's decision no. (1688/1) dated 10/04/1425H and amended by his Excellency's decision no. (1640) dated 15/05/1426H.

¹¹ Implementing regulation of Copyright Law, amended by the Board of Directors of the Saudi Authority for Intellectual Property No. (5/8/2019) dated on 04/09/1440 H, and No. (3/21/2022) dated on 17/11/1443 H.

¹² Official statement by the presidency of Scholarly and Ifta on the prohibition of singing and music 2001, no. 277/2.

¹³ Jonas Otterbeck, "Wahhabi Ideology of Social Control versus a New Publicness in Saudi Arabia," *Contemporary Islam* 6, no. 3 (October 2, 2012): 341–53, p. 342 <https://doi.org/10.1007/s11562-012-0223-x>.

¹⁴ Mohammad Nurunnabi, "Transformation from an Oil-Based Economy to a Knowledge-Based Economy in Saudi Arabia: The Direction of Saudi Vision 2030," *Journal of the Knowledge Economy* 8, no. 2 (June 28, 2017): 536–64, p. 536 <https://doi.org/10.1007/s13132-017-0479-8>.

¹⁵ Knowledge economy key component relies on intellectual capabilities more than on physical inputs or natural resources. It is defined as '*the production and services based on knowledge-intensive activities that contribute to an accelerated pace of technical and scientific advance, as well as rapid obsolescence*'. Walter Powell and Kaisa Snellman, "The Knowledge Economy," *Annual Review of Sociology* 30 (2004): 199–220, p. 199 <https://doi.org/10.1108/00400910110399184>.

¹⁶ Creative industries have been defined as '*those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of*

Property (SAIP) was established in 2017 to promote the use of intellectual property in building an advanced knowledge-based economy.¹⁷ The government initiated changes to protect all types of copyrighted works to support this goal. Consequently, copyright cases were assigned to a quasi-judicial committee under the supervision of SAIP, an executive authority, and the Commercial court under judicial authority.¹⁸ The role of the previous Ministry of Media's Quasi-judicial Committee in handling copyright cases was terminated following the economic reform.

The recent shift in how copyright cases are handled in Saudi Arabia raises significant concerns about the future influence of judicial authority on copyright protection. The background of Commercial Court judges could negatively impact these cases. For instance, judges under the judicial authority, including those in the Commercial Court, primarily have a background in Sharia law.¹⁹ This raises questions about their ability to impartially handle copyright cases for two reasons: Firstly, Sharia law contains reservations about specific types of copyright, such as those involving music, with which judges are inherently familiar. This could bias their rulings in cases involving these types of creative works. Secondly, there is a lack of depth in the legal training of these judges concerning specialised or technical cases, such as those involving artificial intelligence and online infringements. This gap in expertise casts doubt on their ability to make informed and balanced rulings in such complex areas.

On the other hand, the government's strong emphasis on IP laws and their potential to contribute to economic growth risks overlooking the possible adverse effects on other critical sectors, such as information technology and online business. Vision 2030 outlines ambitious goals for developing a wide range of sectors, not just those tied to copyright and creative industries. However, pursuing these dual objectives—enhancing copyright protection while simultaneously fostering innovation in technology and online business—could lead to legal conflicts that have not been adequately addressed. For example, as Saudi Arabia opens its economy to international investors and establishes the legal foundations for creative industries, it is also working to develop robust online businesses and build partnerships with information technology companies.²⁰ While individually beneficial, these efforts could clash, particularly where copyright enforcement may stifle the innovation and growth of online platforms.

intellectual property'. However, according to the United Nations Conference on Trade and Development creative economy has no single definition. It is an evolving concept that builds on the interplay between human creativity, ideas and IP, knowledge and technology, and is the knowledge-based economic activities upon which the 'creative industries' are based. This industry includes advertising, architecture, arts and crafts, design, fashion, film, video, photography, music, performing arts, publishing, research & development, software, computer games, electronic publishing, and TV/radio. UK Department for Culture Media and Sport, "Creative Industries Economic Estimates," *Creative Industries Economic Estimates*, 2016, <https://doi.org/10.1177/0002716204270505>; UNSTAD, 'Creative Economy Report' (2008) <<https://unctad.org/en/Pages/DITC/CreativeEconomy/Creative-Economy-Programme.aspx>> accessed 12 July 2022. Accessed 29-7-2024

¹⁷ Saudi Authority for Intellectual Property, 'SAIP's Objectives' (2023)

<<https://www.saip.gov.sa/en/about/brief/>> accessed 5 May 2023. Accessed 29-7-2024

¹⁸ The role of each authority depends on the severity of the case as clarified in article. 30(7) of the Copyright Law Implementing Regulations.

¹⁹ The Law of Judiciary, Article (31).

²⁰ Vision 2030 Official Document, *supra* note 1.

We argue that supporting different sectors is not inherently wrong; however, the radical changes in how Saudi copyright law has been enforced since the economic reforms, along with the ambiguity of the legal framework regarding the scope of secondary liability, are factors that could negatively impact online service providers, particularly those involved in new technologies and online businesses. Following the economic reforms, SAIP has taken on an increasingly active role in enforcing copyright law on the Internet, particularly through an internal monitoring policy that has blocked numerous websites and removed substantial amounts of content. For instance, SAIP's 2021 report revealed that it had blocked 866 websites and monitored nearly 4,000 platforms.²¹ By 2023, these numbers had risen sharply, with over 3,300 platforms blocked and more than 16,000 pieces of infringing content removed.²²

While these actions demonstrate SAIP's commitment to copyright enforcement, they also highlight a significant issue: businesses might still face legal challenges without clear guidance on their responsibilities regarding the content on their platforms. Moreover, Saudi courts often rely on Sharia law to justify their rulings, which can complicate cases involving modern technologies or contentious areas like music.²³ This raises concerns about how Sharia law will be interpreted and applied in these contexts, potentially leading to inconsistent or overly conservative rulings that could hinder innovation.

It is important to harmonise the provisions of Sharia law with the regulatory framework of copyright law to prevent contradictions and support the country's broader economic objectives. The concept of harmonisation, particularly concerning creators' defences against intellectual property claims, is not novel. It has been extensively explored within the United States and Europe, where scholars have debated how ownership rights in augmented creative output would be treated under imperfectly harmonised transatlantic copyright principles²⁴. This paper aims to harmonise two distinct legal systems—Sharia law and copyright law—within a single jurisdiction to ensure the economic sustainability of various sectors while maintaining doctrinal coherence and legal certainty.

We argue that while transferring copyright cases to commercial courts is not inherently problematic, the fundamental issue lies in the legal foundation upon which these cases will be adjudicated. The existing copyright law does not clearly delineate the obligations of online service providers, particularly concerning secondary liability. Consequently, this paper seeks

²¹ Saudi Authority for Intellectual Property (2021) Annual Report for Enforcement of Intellectual Property 2021. SAIP:12 <https://externalportal-backend-production.saip.gov.sa/sites/default/files/2022-05/IP%20respect-AR-7.pdf> accessed 10 August 2024.

²² Saudi Authority for Intellectual Property (2023) Annual Report for Enforcement of Intellectual Property 2022. SAIP:64 <https://externalportal-backend-production.saip.gov.sa/sites/default/files/2024-04/%D8%A7%D9%84%D8%AA%D9%82%D8%B1%D9%8A%D8%B1%20%D8%A7%D9%84%D8%B3%D9%86%D9%88%D9%8A%20%D8%A7%D9%84%D9%86%D8%B3%D8%AE%D8%A9%20%D8%A7%D9%84%D8%B9%D8%A7%D9%85%D8%A9%20%D8%A7%D9%84%D9%86%D9%87%D8%A7%D9%8A%D9%94%D9%8A%D8%A9%D9%A2.pdf> accessed 10 August 2024.

²³ Frank Vogel, *Saudi Business Law in Practice Law and Regulations as Applied in the Courts and Judicial Committees of Saudi Arabia* (1st edn, Hart Publishing Ltd 2019). P. 95, 224.

²⁴ Travis, Hannibal, *Augmented Creativity in a Harmonized Trans-Atlantic Knowledge Economy* (March 08, 2024). Florida International University Legal Studies Research Paper (forthcoming), *Harmonizing Intellectual Property for a Trans-Atlantic Knowledge Economy*, edited by Peter Mezei, Hannibal Travis, and Anett Pogacsas. Brill, 2024, pp. 67-84., Available at SSRN: <https://ssrn.com/abstract=5093285> or <http://dx.doi.org/10.2139/ssrn.5093285>

to develop a robust legal framework that enables judges to adjudicate copyright disputes involving the secondary liability of online service providers in a manner consistent with Sharia law. It is essential to examine the existing legal framework in both Sharia and copyright law thoroughly, assessing the principles judges currently rely upon. This analysis will help determine the adequacy of the current legal structure and identify areas that require clarification and reform. The paper aims to ensure that the Saudi legal system effectively safeguards intellectual property while fostering the growth of the digital economy, thereby aligning with the broader objectives of Vision 2030.

2.1 Secondary liability in the Saudi Copyright law

A precise evaluation of how Saudi copyright law delineates liability for online infringements is a necessary precursor to any substantive engagement with the role of Sharia law. This inquiry is particularly critical given that Saudi courts interpret statutory provisions within the framework of Sharia principles. Consequently, any prospective legal framework must be firmly anchored in the existing copyright regime to ensure doctrinal integrity, jurisprudential consistency, and practical enforceability.

Currently, Saudi Copyright Law has a significant gap in its regulation of the secondary liability of online service providers. The law lacks specific provisions that define the obligations of these providers or offer exceptions that could shield them from liability. This absence of clear guidelines leaves online service providers vulnerable to legal risks without a solid understanding of their legal responsibilities or protections. As Saudi Arabia's digital economy continues to grow, addressing these gaps is crucial for developing a legal framework that effectively manages the complexities of online copyright infringement while remaining consistent with Sharia principles.²⁵

Liability for copyright infringements was regulated in Article 11 of the 2005 Copyright Law Implementing Regulations as follows: *Article 11: Infringement Liability First: Any person who obtains an original copy of any intellectual work and exploits it by means of renting, adaptation or permitting others to copy or reproduce it or any other acts which affect or obstruct the author from exercising his rights shall be deemed to have infringed the Copyright.* Liability for permitting others to copy was the restricted act that courts assessed when reviewing cases linked to third-party online infringements. Secondary liability can be raised by providing a third party with permission to copy protected work without being licensed or having the right holder's approval. The word 'permit' linguistically is a synonym of 'authorise'.²⁶ The latter term is used in the UK, according to the Copyright, Designs and Patents Act (CDPA) 1988.²⁷ However, in contrast to 'authorise' in the UK,²⁸ 'permit' has not

²⁵ The first Saudi Copyright Law came into force in 1989 before the existence of the Internet in Saudi Arabia. However, neither the 2003 Copyright Law or the 2019 reform includes provisions regarding the secondary liability of online service providers.

²⁶ In the Cambridge Dictionary, one of the synonyms for the word 'authorise' is 'permit'. In fact, 'authorise' was explained as "to give official permission for something to happen, or to give someone official permission to do something".

Further, it has also been taken in some cases to mean, inter alia, 'permit'. This is found in some Australian cases, such as: *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12 (Gibbs J); *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1 at [25] (Emmett J). Cambridge University Press, 'Cambridge Dictionary' <<https://dictionary.cambridge.org/dictionary/english/authorize>> accessed 22 May 2024.

²⁷ CDPA, Article 16 (2).

²⁸ See 4.2.1 Defining Authorisation Liability.

been defined in Saudi Copyright Law nor by judicial authorities, meaning that the limitation of its scope is unclear.

Article 11 has been changed in the 2019 Copyright Law Implementing Regulations to be '*First: Any person who commits any of the violations set forth in the law shall be considered an infringer of the copyright.*'. The Copyright Law 2019 included eleven restricted acts in the article (21) none of them linked to secondary liability nor permitting or authorising online infringements, except section (1) which stated: '*Publishing a work not owned by the publisher, publishing it under the pretense of its ownership or without obtaining a written authorisation or a contract with the author of the work, his heirs or their representatives.*' However, online service providers' work cannot be considered publishing activity.

Cancelling the term "permit" and failing to address the regulation of secondary liability while simultaneously adopting stricter policies for content removal could stifle innovation and restrict the free flow of information, placing an undue burden on online service providers. Therefore, it is essential to introduce provisions for secondary liability within Saudi Copyright Law that align with the Sharia law of torts, ensuring consistency with religious principles.

3 Tort Liability in Sharia Law

This paper aims to establish a clear framework for judges to follow when interpreting Sharia tort law in conjunction with copyright law, particularly concerning secondary liability for online infringements. This section evaluates how the existing rules of Sharia tort law address secondary liability, intending to understand their potential impact when applied to copyright cases in their current form. As previously highlighted, Saudi courts rarely rely exclusively on statutory law; instead, they often integrate Sharia-based arguments to support their rulings.²⁹ Typically, this involves presenting a comprehensive Sharia-based rationale alongside the specific legal provisions pertinent to the case.

Understanding this dynamic is crucial because applying Sharia tort law to modern copyright issues, such as those involving online service providers, directly influences the consistency and fairness of judicial decisions. Moreover, as Saudi Arabia continues to expand its digital economy, ensuring that judges have a robust and coherent legal framework is essential for fostering an environment where innovation can thrive. Without clear guidance on how to balance Sharia principles with the demands of contemporary copyright law, there is a risk of inconsistent rulings that could deter investment and hinder the growth of the digital sector. Therefore, this paper's exploration of Sharia tort law's application to secondary liability is not just a theoretical exercise but a vital step toward ensuring that Saudi Arabia's legal system can effectively support its broader economic and technological ambitions.

3.1 The Concept of Tort Liability in Sharia Law

In tort, *Sharia* establishes moral and legal duties, which require that everyone conform to a duty of conduct, which may be recognised as what an ordinary person would do if faced with the same circumstances; this requires any person to protect others against unreasonable risks, with any violation of these duties rendering the tortfeasor liable. Besides *Sharia's* establishment of the legal duty in torts, Saudi judges have the right to establish a legal duty based on their interpretation of *Sharia* sources. Therefore, in Saudi courts, the existence of a

²⁹ Vogel, *supra* note 22 at 95, 224.

duty is sometimes a matter of the judge's discretion, whereby the judge ruling over a tort case can establish a legal duty.³⁰

The primary sources of *Sharia* law—notably the Quran (Muslims' holy book) and the Sunnah (the written traditions of the Prophet Mohammed)—only confirm the existence of tort liability as a concept without providing any details as to how and when it can be raised.³¹ These sources have set the foundation of liability to preserve lives and property and deter tortfeasors from engaging in wrongful acts, as can be seen in the following examples: "*The recompense for an injury is an injury equal thereto*"³² which indirectly mentions that aggression toward others is forbidden; injuring a victim by engaging in a wrongful act is seen as a form of aggression. Furthermore, the Prophet states, "*Nobody among you should take a chattel of his partner with or without serious intention. If anyone takes even the stick of his partner, he should return it to him.*"³³

As *Sharia* only acknowledges the existence of liability in general, the details and conditions of tort liability were set by jurists' books of torts from all four Islamic Sunni schools of law: the *Maliki*, *Shafi'i*, *Hanbali* and *Hanafi*.³⁴ Therefore, Saudi judges rely on these old books when assessing cases.³⁵ This has resulted in disagreement between judges over *Sharia* texts and different significations that address tort cases, with huge debates taking place amongst Saudi judges concerning what is and is not actionable in terms of damages and personal injuries. Therefore, the concept of torts has become ambiguous, mainly depending on the individual judge's understanding and interpretation of these significations.³⁶

Finally, in *Sharia*, a tort is raised following every wrongful act that results in damage occurring immediately or soon after its commission. In this regard, Saudi judges ensure that the elements of the tort are met, whether consisting of direct or secondary liability and then rely on their own interpretation of each element to resolve the issues.³⁷ Consequently, examining the three key elements of liability is crucial to fully understanding their scope and how judges apply them in practice. This examination is essential for grasping how *Sharia* principles are implemented in the context of tort law and how they influence judicial decision-making in Saudi Arabia.

3.2 *The Elements of Torts in Sharia Law*

The elements of a tort claim include the wrongful act, harm, and the causal connection between the act and the harm. In *Sharia* law, the application of these elements varies

³⁰ Wahabah AL-Zuhaili, *Theory of Daman, Civil and Criminal Liability Provisions in Islamic Torts* (1st ed, Dar Alfker 1998). P. 201.

³¹ AL-Zuhaili, *ibid.*, p. 251.

³² *The Holy Quran*, Al-Shura, verse 40.

³³ Mohhamed Altermidhi, *Jami Altirmidhi* (Abu Khaliyl ed, Dar Alsalam Publications 2007). P. 105.

³⁴ In *Sharia* there are four main schools of law. Each school has its own interpretation of the sources of *Sharia* law resulting from differences in the interpretation of Islamic *Sharia* texts, so they do not change the text but rather interpret the ambiguous parts of it. Abdulrahman Baamir, 'The New Saudi Arbitration Act: Evaluation of the Theory and Practice' (2012) 15 (6) *International Arbitration Law Review* 219. P. 139.

³⁵ Published judgements from general courts and the Board of Grievances show that judges are free to follow the view of any of these four schools, and are not obliged to adopt the Hanbali view only. Vogel, *supra* note 21 at 78.

³⁶ AL-Zuhaili, *supra* note 28 at 250; Baamir, *supra* note 32 at 139.

³⁷ Abdul Basir bin Mohammed, 'Vicarious Liability: A Study of the Liability of the Guardian and His Ward in the Islamic Law of Tort' (2002) 17 (1) *Arab Law Quarterly* 39. P. 39, 44.

depending on the type of causation—direct or indirect. Consequently, the causation element will be discussed alongside the element of wrongful acts to better understand its impact on how fault or torts are generally assessed under Sharia.

3.2.1 Causation and Wrongful Act or Fault

There is a direct relationship between causation and fault in Sharia law, where the type of causation can determine whether fault should be assessed by judges or disregarded.³⁸ Specifically, Sharia recognises two types of causation: direct causation, which involves personally creating the cause of destruction or damage, and indirect causation, which involves creating conditions that lead to damage or destruction³⁹ or being a cause of or reason for that damage.⁴⁰ On the other hand, a fault or wrongful act is interpreted as any action contravening the norm of conduct prescribed for the relevant situation by Sharia law. This norm encompasses not only universal duties of care but also specific duties relevant to the context of the act, including customary norms of conduct. Fault includes intentional wrongs, such as theft and fraud, and unintentional wrongs, such as negligence or inadvertence.⁴¹

In cases of direct causation by a tortfeasor, the fault element is not considered: a person will be held liable for all tort actions, regardless of whether this element exists. A direct tortfeasor is liable regardless of fault, meaning they will be responsible for any damages, even if the act was unintentional. However, in cases of indirect causation, the existence of a wrongful act or fault element is a prerequisite for raising liability. In other words, liability can only be imposed if the act causing harm constitutes a transgression. In such cases, liability is established based on the defendant's intentional or negligent actions, which have resulted in harm to the plaintiff's interests.⁴²

Judges in Saudi Arabia possess the authority to use analogy and deduction when evaluating wrongful acts, whether these acts stem from intention or negligence.⁴³ This capability raises critical questions about how judges will determine the intent of third parties in cases involving online copyright infringements, particularly concerning the scope of such assessments. The current copyright law does not explicitly impose a duty of care on online service providers. However, as previously discussed, Saudi judges can establish such a duty based on their interpretation of Sharia principles. The discretion to impose this duty lies entirely with the judge, which introduces variability and unpredictability into the legal process.

As the Commercial Court begins to handle copyright cases, it becomes essential to consider whether judges will exercise their discretion to impose a duty of care on online service providers and how consistently these duties will be applied across different cases. This variability is significant because it could lead to inconsistent rulings, affecting the predictability of legal outcomes for online businesses. Moreover, judges have considerable latitude and flexibility to draw upon their backgrounds and knowledge when evaluating these

³⁸ Bin Mohammed, *ibid.*, p. 449.

³⁹ Abdul Basir Bin Mohammed, 'Strict Liability in the Islamic Law of Tort' (2000) 39 (3) *Islamic Studies* 445. P. 462.

⁴⁰ Vogel, *supra* note 22 at 244.

⁴¹ Vogel, *ibid.*, p. 241.

⁴² Yanagihashi Hiroyuki, *A History of the Early Islamic Law of Property: Reconstructing the Legal Development, 7Th-9Th Centuries* (Vol 20, Brill 2004). P. 21; Islamic Cultural Centre, *The Islamic Quarterly* (Vol 44, London: Islamic Cultural Centre 2000). P. 508.

⁴³ Vogel, *supra* note 22 at 241.

cases. To prevent misinterpretations, it is crucial that the element of fault concerning online service providers is clearly linked to intent. Without this clarity, actions by service providers intended to enhance user experiences could be misconstrued as intentional efforts to facilitate copyright infringements. Therefore, reviewing and incorporating insights from the UK legal framework's interpretation of this element is vital for establishing clear boundaries. Doing so will help ensure that the Saudi legal system can provide consistent rulings, fostering a stable environment for digital innovation and investment.

3.2.2 Harm

The third element of tort in Sharia law is the occurrence of harm. Sharia encompasses not only physical damage or destruction but also extends to compensation for non-physical pecuniary losses and damages. However, Sharia law narrowly defines harm, excluding most forms of damage except those that result in realised, tangible losses. Specifically, it excludes counterfactual and hypothetical losses, such as lost profits, missed opportunities, and damages that are difficult or impossible to quantify with certainty.⁴⁴ While courts may accept damages fixed by estimation, this is an exception applied with significant limitations; for instance, courts typically do not award more than 10 percent of the value of the damaged items.⁴⁵

This narrow definition of harm, requiring actual damage to be realised, could be advantageous when applied to online service providers. Limiting claims to those involving concrete, measurable harm reduces the risk of excessive or speculative claims by rights holders, thereby ensuring that justice is focused on actual harm rather than theoretical losses. However, this raises an important question: how will judges link actual damage to the actions of specific online service providers?

The existing elements of tort need to be more precisely defined and tailored to the context of online service providers. The current scope is broad, allowing judges considerable flexibility in interpreting Sharia law, which could lead to inconsistent rulings. By specifying the scope of tort elements concerning online service providers, there is the potential to limit the discretionary power of judges, particularly in imposing legal duties or inferring knowledge in cases involving fault or wrongful acts.⁴⁶

Before proceeding with such modifications, however, it is crucial to consider whether Sharia law permits these changes and, if so, to what extent amendments would be acceptable. Understanding the boundaries within which Sharia can be adapted is essential for ensuring that any proposed changes are legally sound and culturally appropriate. This examination is vital to developing a legal framework that balances the demands of modern online commerce with the foundational principles of Sharia law.

⁴⁴ Vogel, *ibid.*, p. 242.

⁴⁵ Some of the Board of Grievances' decisions in both administrative and commercial branches used estimation to determine damages, when they found that damage had occurred but could not be quantified; however, the estimation was limited to a specific percentage. For example: Board of Grievances, administrative branch: Decision No 22, Riyadh, 1413 (1992). See: <https://www.bog.gov.sa/ScientificContent/JudicialBlogs/AA1402-1426/Pages/default.aspx> accessed 2-5-2024.

⁴⁶ Majed Alshaibani, *Compensatory Damages Granted in Personal Injuries: Supplementing Islamic Jurisprudence with Elements of Common Law* (Maurer School of Law: Indiana University 2017). P. 40

3.3 *The Extent to Which Sharia Law of Torts May be Modified or Revised*

The extent to which the Sharia law of torts may be changed ultimately depends on the categorisation of tort rules within the sources of Sharia law, which determines whether they are binding or if modifications are acceptable. Sharia sources are divided into primary and secondary: primary sources, namely the Quran and Sunnah, regulate issues with immutable rules due to their divine origin. In contrast, secondary sources, which include jurists' interpretations, adapt to changing times and address areas where primary sources are either silent or have not provided comprehensive regulations.⁴⁷ These sources are grounded in specific methodologies that jurists must use to formulate their responses, including ijma (consensus among scholars on ambiguous legal points), qiyas (analogical reasoning comparing the teachings of the Sunnah with those of the Quran to derive and apply rules to new situations), and ijihad (critical personal reasoning for interpreting modern developments). This approach allows for adaptation in response to advances in knowledge and changes in societal conditions. The doctrine of public interest, prioritising the general public's best interests, also plays a crucial role.⁴⁸ It is important to acknowledge that while Sharia law is rooted in primary sources, its extensive development has largely stemmed from juridical activity based on secondary sources.⁴⁹

Regarding torts, primary sources establish the concept of tort liability but do not detail its application. Secondary sources, however, meticulously outline the conditions and situations of torts. Jurists from all four Sunni schools of law have employed tools like qiyas and ijihad, based on secondary sources, to establish detailed tort provisions. Therefore, the proposal to modify tort rules in Sharia law, particularly by refining their scope concerning online service providers, is acceptable in principle as long as such modifications do not contravene primary sources.⁵⁰

Moreover, any decision to amend torts in Sharia can be justified under the public interest doctrine, which empowers the State and the King to legislate for the public good. This doctrine has previously been utilised to introduce modern legislation in Saudi Arabia despite the country being governed by Sharia law.⁵¹

4 **The Scope of Secondary Liability for Copyright Infringements in the UK**

Copyright is primarily a creation of statute,⁵² meaning that legislation defines the rights of copyright owners and provides them with a statutory cause of action against those who infringe upon these rights.⁵³ However, copyright infringement is not solely a statutory concern; it is also recognised as a tortious act. This dual nature of liability forms the basis of this section's analysis.

⁴⁷ Onder Bakircioglu, 'The Principal Sources of Islamic Law' in Tallyn Gray (ed), *Islam and International Criminal Law and Justice* (Torkel Opsahl Academic EPublisher 2018). P, 16, 32.

⁴⁸ Bakircioglu, *ibid.*, 16, 34; Ahmad Hasan, 'The Definition of Qiyās in Islamic Jurisprudence' (1980) 19 *Islamic Studies* 28. P, 2.

⁴⁹ Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press 1982). P, 11; Bakircioglu, *supra* note 42 at 34.

⁵⁰ Bakircioglu, *supra* note 42 at 34.

⁵¹ Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 (3) *Arab Law Quarterly* 272. P. 289; Mohammed Alnabhan and Kathryn Lydiatt, 'The Islamic View of the Legislative Role of the State' (1986) 1(5) *Arab Law Quarterly* 561.

⁵² See CDPA s. 171(2).

⁵³ See CDPA s.16 (2), s. 96(1) and s. 101(2).

In this section, we examine the UK legal framework concerning secondary liability for copyright infringements to derive insights that could be effectively applied to the Saudi legal system. Focusing on the UK's approach to secondary liability for online service providers is particularly relevant for two reasons. First, in Saudi Arabia, the concept of secondary liability, especially in the context of online copyright infringements, remains unclear and insufficiently developed. Second, studying the UK's legal framework provides a valuable opportunity to understand how secondary liability is applied, to identify shortcomings within Saudi Arabia's existing legal structure, and to propose informed policies and legal strategies for future enhancement.

The decision to analyse the UK legal framework is grounded in its continuous evolution and the extensive judicial experience it offers in copyright protection.⁵⁴ These attributes make the UK an exemplary model for understanding and developing effective legal frameworks.⁵⁵ The scope of secondary liability discussed here includes tort doctrines related to authorisation liability, which expand the boundaries of responsibility beyond the direct actions of the primary infringer to include third parties who may also be held accountable.

This section explores the UK approach and highlights the importance of adopting clear and well-defined legal standards in Saudi Arabia to manage the complexities of online copyright infringement. Drawing on the UK's experience can guide the development of a more coherent and effective legal framework in Saudi Arabia, thereby strengthening the protection of intellectual property rights and promoting a conducive environment for digital innovation and economic progress.

4.1 Authorisation Liability

The concept of authorisation was well established in tort law, particularly in the context of nuisance, by the late nineteenth century. It was primarily used to hold landlords liable for the actions of their tenants.⁵⁶ This principle was later incorporated into copyright law with the 1911 Copyright Act. Thus, authorisation is not a concept unique to copyright issues; rather, it predates its application in copyright law and has been utilised for different legal purposes. This historical foundation highlights its broader legal significance and its adaptability across various areas of law.

In the Copyright Act (1911), section 1(2) provided that copyright included the exclusive right to engage in various restricted activities – specified in paragraphs (a) to (d) – and '*to authorise any such acts as aforesaid.*' Meanwhile, section 2(1) provided that copyright in a work '*shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the*

⁵⁴ The legal framework around copyright laws in Gulf States that share a similar culture and religion face criticism regarding the enforcement of their copyright laws. Therefore, other developing countries and Gulf States do not offer an ideal legal model from which to derive lessons and solutions for the purposes of this paper. For example, although Bahrain enacted detailed provisions for the proper conduct of internet service providers, based on its obligations under the Free Trade Agreement (Bahrain, Law No. 22 of 2006 Article 46-56), it still faces criticism regarding the enforcement of its copyright laws. David Price and Alhanoof Aldebasi, *Intellectual Property Rights: Development and Enforcement in the Arab States of the Gulf* (1st edn, Gerlach Press 2017). P. 110.

⁵⁵ Martin Kretschmer, Lionel Bently and Ronan Deazley, 'The History of Copyright History: Notes from an Emerging Discipline' in Martin Kretschmer, Lionel Bently and Ronan Deazley (eds), *Privilege and Property: Essays on the History of Copyright* (1st edn, Open Book Publishers 2010).

⁵⁶ For example: *Harris v James*, (1876) 45 L.J.Q.B. 545.

copyrig'. Since 1911, authorisation liability has continued to exist in subsequent legislation, preserving many views and expanding to cover many copyright issues; more importantly, it has become a separate form of infringement, which stands equivalently with theories of direct infringement and joint tortfeasorship.⁵⁷

The scope of authorisation liability has been progressively enlarged in response to new technologies through particular phases, but few cases have considered the secondary liability of online service providers. Therefore, it is important to review the development of authorisation liability to understand how it was reflected in cases linked to online service providers.

4.2 The Development of the Scope of Authorisation Liability

Before the 1911 Copyright Act, the scope of secondary liability was limited despite several provisions making it an infringement to 'cause' a restricted act to be committed. However, these provisions were narrowly applied, leaving little room for secondary liability to be effectively enforced.⁵⁸

The introduction of "authorisation" in the 1911 Copyright Act significantly expanded the scope of secondary liability, offering greater protection to copyright holders. This broadened interpretation of authorisation allowed courts to hold theatre proprietors and vendors liable for authorising infringements committed by third parties. The courts' willingness to impose such liability stemmed from the practical difficulties associated with pursuing legal action against the primary wrongdoers, such as nomadic and financially unstable performers. Suing a migratory entity, like a band, was often seen as futile, offering minimal benefit to plaintiffs.⁵⁹ This perspective is particularly relevant today, as it parallels the current approach to online intermediaries, who are often better positioned to compensate copyright holders when it is challenging to take action against the primary infringers.⁶⁰

Understanding the evolution of authorisation liability is essential, and this begins with a clear definition of "authorisation." Establishing this definition is crucial for comprehending the full scope of authorisation liability as it has developed over time and how it applies in modern copyright law. The historical expansion of authorisation liability underscores its importance in adapting to new challenges, such as those posed by digital platforms and online intermediaries, making it a key area of study for enhancing copyright protection today.

4.2.1 Defining Authorisation Liability

A pivotal case concerning authorisation under the 1911 Act is *Falcon v Famous Players Film Co.*⁶¹ This case is particularly significant as it established the definition of "authorisation,"

⁵⁷ Jane C Ginsburg and Sam Ricketson, 'Inducers and Authorisers: A Comparison of the US Supreme Court's Grokster Decision and the Australian Federal Court's Kazaa Ruling' (2006) 11 (1) Media & Arts Law Review Paper 144. P. 11; Robert Burrell, 'Copyright Reform in the Early Twentieth Century: The View from Australia' (2006) 27 (3) The Journal of Legal History 239. P. 240; Joachim Dietrich, 'Accessorial Liability in the Law of Torts' (2011) 31 Legal Studies 231. P. 239.

⁵⁸ For example: *Dramatic Literary Property Act 1833* (3 & 4 Will IV, c 15) s 2 (infringement by one who shall 'represent or cause to be represented' a work without consent).

⁵⁹ *Performing Right Society v Mitchell and Booker* [1924] 1 KB 762, 765 (McCardie J).

⁶⁰ Chris Reed, 'Think Global, Act Local: Extraterritoriality in Cyberspace' (2010) Queen Mary Legal Studies Research Paper no 58 2. Michael L Rustad and Thomas H Koenig, 'Rebooting Cybertort Law' (2005) 80 (2) Washington Law Review 335. P. 346, 350.

⁶¹ [1926] 2 K.B. 474. ('*Falcon*').

which has had a lasting influence on subsequent UK legal decisions. In this case, the plaintiff held the exclusive UK license for the copyright of a play written by the American author William Gillette. In this context, the court's interpretation of "authorisation" set a precedent that has shaped how courts handle similar cases involving third-party liability for copyright infringement in the UK. Following an agreement with the plaintiff, Gillette granted the first defendant worldwide motion picture rights to the play. Subsequently, the first defendant produced a film adaptation of the play and sent the film's negative to the second defendant, who made additional copies and distributed them to the third defendant. The third defendant then leased a copy of the film to the fourth defendant, a film theatre proprietor, granting the right to exhibit it for three days. The First Instance Court and the Court of Appeal found the defendants liable for authorising infringing screenings by a third-party cinema.

The interpretation of the meaning of authorisation was divided. Atkin LJ, in his dissenting judgment, provided a narrow interpretation (narrow test), stating that *'to "authorise" means to grant or purport to grant to a third person the right to do the act complained of'*.⁶² In contrast, Bankes LJ, provided a broad meaning by observing that resort might be had to the ordinary dictionary sense of *'sanction, approve, and countenance'*.⁶³

Each of these interpretations has its advantages and disadvantages. For example, Bankes LJ's definition suggests a wider range for the term 'authorise' compared to narrower interpretations. This broader definition extends the concept of infringement by authorisation to play a more significant role within the statutory framework protecting copyright holders.⁶⁴ This definition was criticised because authorisation simply cannot be resolved by recourse to a dictionary: *'it would be wrong to take one element of the definition such as "countenance", and by fixing upon the broadest dictionary meaning of that word to seek to expand the core notion of "authorise"'*.⁶⁵ Rightsholders might, accordingly, rely on the broad meaning in their claims when trying to include acts and means that courts consider authorisation.⁶⁶ Therefore, it was described as a vague interpretation of another vague expression, which made it difficult to apply.⁶⁷ Criticism can be mitigated if the definition of authorisation is linked to a multi-factor test for assessing authorisation liability.⁶⁸ The broad definition can be linked to various factors, allowing for its interpretation while ensuring that any understanding of authorisation liability aligns with specific criteria. Conversely, courts favouring a narrow interpretation are deemed correct, as they operate under the assumption that allowing a film to be screened in a cinema inherently implies permission to do so.⁶⁹

⁶² *Falcon*, [499] (Atkin LJ).

⁶³ *Falcon*, [491] (Bankes LJ).

⁶⁴ Cheng Lim Saw and Warren B Chik, 'Revisiting Authorisation Liability in Copyright Law' (2012) 24 Singapore Academy of Law Journal 698. P. 716.

⁶⁵ Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press 2016). P. 304; *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466 ('iiNet') [125].

⁶⁶ Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009). P. 154.

⁶⁷ Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Designs* (2nd ed, Butterworths 1995). P. 911.

⁶⁸ These factors will be explained in the following part.

⁶⁹ Richard G Kunkel, 'Indifference and Secondary Liability for Copyright Infringement' (2016) 33 Santa Clara High Technology Law Journal 1. P. 13, 14, 22; Jaani Riordan, *The Liability of Internet Intermediaries* (First, Oxford University Press 2016). P. 135; *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91, 110 (Whitford J) ('AMS').

However, Atkin LJ's definition was also described as confusing,⁷⁰ as no defendant would ever be able to confer on a third party the right or permission to do the act complained of⁷¹ because the defendant is not the principal who owns actual authority, which is capable of being granted, nor the holder of the copyright in the subject matter in question. Also, it is not practical to associate the multi-factor test with the narrow definition because if the court found that the defendant did not possess or purport to possess any authority to grant to a third party the right to do the act complained of, how can authorisation liability yet arise upon further consideration of the '*authorisation liability factors*'?⁷² Such factors seem only to become meaningful when a court adopts the broader dictionary meaning of "sanction, approve, countenance" for the word "authorise."⁷³

In both cases, the difference of opinion between those advocating a narrow interpretation and those advocating a broad one became a recurrent theme in subsequent case law in the UK.⁷⁴ Giving an exact meaning of 'authorisation' in UK law and approving or preferring one definition over another is difficult in this research since the issue depends on many factors, including the changing nature of technology. However, it is important to note that the discussion of having two definitions of authorisation is linked to the scope of authorisation only; it does not affect the acceptance of authorisation liability in this phase as conceptually distinct from the primary infringer's liability.⁷⁵

4.2.2 Application of Authorisation Liability to New Technologies

The enactment of the Copyright Act 1956 and the Copyright, Designs and Patents Act (CDPA) 1988 did not introduce any changes to the law regarding authorisation. However, as technology advanced, new debates emerged about the scope of authorisation liability. Copyright owners attempted to use authorisation liability to regulate those who supplied sound recording equipment, such as cassette recorders. Despite these efforts, UK courts generally rejected attempts to hold manufacturers of cassette recording equipment liable for the copying activities of their customers.⁷⁶ The significance of this period lies in the fact that authorisation liability was not expanded to cover new technologies. Instead, the courts drew a clear line, offering a detailed analysis of how such liability should be applied. This approach has had a lasting impact, particularly on cases involving online service providers, as will be discussed further.

⁷⁰ Saw and Chik, *supra* note 62 at 705.

⁷¹ *iiNet*, at [122].

⁷² Although the court in *Newzbin 1* applied the narrow definition as well as the multi factor test and liability was the appropriate result in this case. However, to apply the narrow definition based on members would wrongly assume permission to copy where none existed has the appearance of fiction, given many factors including the low cost of membership etc. Also, applying the narrow definition stands in contrast with the members' concerns about being identified in this case, meaning that they knew that what they were doing was unauthorised by copyright owners. Hence, it is illogical to imply the presence of authority and apply the narrow definition where both parties are aware that the copying is illegal. Eddy D Ventose and Javier J Forrester, 'Authorization and Infringement of Copyright on the Internet' (2010) 14 *Journal of Internet Law* 3. P. 12; *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21, 543 (Kitchin J). ('*Newzbin 1*')

⁷³ Saw and Chik, *supra* note 62 at 707, 715.

⁷⁴ Richard Arnold and Paul S Davies, 'Accessory Liability for Intellectual Property Infringement: The Case of Authorisation' (2017) 133 *The Law Quarterly Review* 442. P. 452.

⁷⁵ Saw and Chik, *supra* note 62 at 700, 720, 743.

⁷⁶ *A&M Records Inc v Audio Magnetics Incorporated (UK) Ltd*, [1979] FSR 1 ('*A&M Records*').

One illustrative case is *Ames*,⁷⁷ where the defendant operated a chain of record shops and set up a record lending library. The public could hire records for a fee, and library members received discounts on record and blank tape purchases. The plaintiff claimed that the defendant was liable for authorising the copying of recordings by encouraging home taping, which the plaintiff argued constituted unauthorised copying. However, the court dismissed the claim, finding that the defendant was not liable for the infringing copies made by customers. The court noted that, although the defendant was aware that customers might copy the cassettes, they did not grant any right to do so and had explicitly warned customers against such activities. Therefore, authorisation could not be established.⁷⁸ This case illustrates the courts' preference for the narrower interpretation of authorisation liability, as outlined by Atkin LJ in *Falcon v Famous Players Film Co*. The ruling underscores that mere knowledge of potential infringement is insufficient to establish authorisation; instead, there must be an explicit or implied grant of permission. This principle has played a crucial role in shaping the boundaries of authorisation liability, particularly in the context of emerging technologies and their impact on copyright law. Whitford J. said:⁷⁹

Any ordinary person would, I think, assume that an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act.

The decision of the House of Lords in *CBS Songs Ltd. v Amstrad Consumer Electronics Plc*,⁸⁰ is seen as the leading authority on the meaning or scope of authorisation. The House of Lords, in this case, held that the manufacturer and the retailer of dual-deck tape recorders had not authorised the infringements by their customers who used them to duplicate commercial recordings without permission. Indeed, they offered audio systems incorporating a double cassette recorder, which enabled a pre-recorded cassette to be copied onto a blank cassette tape at twice the average playback speed. Also, they advertised the virtues of their devices and explicitly stated that they enabled customers to '*make a copy of your favourite cassette*'.⁸¹ The Court of Appeal and House of Lords rejected authorisation liability and again endorsed Atkin LJ's narrow test of authorisation.⁸²

The lack of control by manufacturers over how their devices are used was a crucial factor in determining liability for authorisation. It was noted that actively promoting an infringing act does not constitute authorisation unless accompanied by behaviour implying the ability to grant the necessary permission for the infringing use. In this instance, the manufacturer had no control over the product's usage, influencing the decision.

Amstrad's advertisement was cynical because Amstrad advertised the increased efficiency of a facility capable of being employed to break the law. But the operator of an Amstrad tape recording facility ... can alone decide whether to record or play and

⁷⁷ *CBS Inc v Ames Records & Tapes Ltd* [1982] Ch 91 ('Ames').

⁷⁸ *Ames*, [118].

⁷⁹ *Ames*, [96].

⁸⁰ [1988] 1 AC 1013 ('CBS').

⁸¹ *CBS*, [1050] (Lord Templeman).

⁸² *CBS*, [207] (Lawton LJ), [211] (Slade LJ), [217–218] (Glidewell LJ); *CBS*, [1054–5] (Lord Templeman) (Lord Keith, Lord Griffiths, Lord Oliver and Lord Jauncey agreeing).

*what material is to be recorded. The Amstrad advertisement is open to severe criticism, but no purchaser of an Amstrad model could reasonably deduce from the facilities incorporated in the model or from Amstrad's advertisement that Amstrad possessed or purported to possess the authority to grant any required permission for a record to be copied.*⁸³

The unwillingness to enlarge authorisation liability to cover these technologies might raise the question of whether right holders can use the tort of negligence instead of considering the defendants liable. However, UK courts rejected the attempt to rely on torts of negligence, besides refusing to recognise a general duty not to facilitate customers' infringements. Regarding negligence, when courts rejected these attempts, they stressed that a person is not ordinarily under a duty to control another and prevent activities causing economic loss to a third party. At the same time, the refusal to recognise a general duty not to facilitate a purchaser's infringements was justified because such recognition would be "*unsatisfactory*" and "*far too heavy a burden*".⁸⁴ Hence, tort law will not assist a copyright owner to whom Parliament has not given a remedy.⁸⁵

The concept of authorisation liability differentiates between merely providing tools or devices capable of infringing use and having control over how these devices are utilised. The user, who has control over the device, ultimately determines whether its use constitutes infringement. In essence, while a manufacturer may produce a device that has the potential to violate the law, they cannot govern its usage; as a result, only the user can be held accountable for any infringing use. If manufacturers were to be held accountable for authorising infringements, as previously suggested, significant concerns would arise regarding the impact on innovation and the advancement of new technologies. Increasing authorisation liability would give right holders an unfair level of influence over the course of innovation. Consequently, court rulings have avoided strict control over these technologies, instead endorsing their development and widespread use over time. This is an aspect that the Saudi regulator should thoroughly consider when applying secondary liability to new technologies, particularly in relation to the broader impacts on other sectors and society.

The assessment of secondary liability in the context of generative AI must adhere to the analytical framework outlined above. Judges should distinguish between the mere provision of tools or systems capable of infringing use and the exercise of control over how these tools are deployed. In the case of AI, this distinction becomes particularly intricate, as liability considerations depend on the specific type of generative AI at issue. However, concerning secondary liability for copyright infringement, the end user's choice of usage remains the decisive factor. Accordingly, AI systems can be regarded as tools with the potential for

⁸³ *CBS*, [1053] (Lord Templeman).

⁸⁴ *Paterson Zochonis Ltd v Marfarken Packaging Ltd* [1983] FSR [290] (Fox LJ), [301] (Robert Goff LJ).

⁸⁵ *Amstrad Consumer Electronics plc v The British Phonographic Industry Ltd* [1986] FSR 213–14 (Slade LJ), 219 (Glidewell LJ) ('*Amstrad*'). Negligence can give rise to liability for individuals or entities that fail to adhere to a standard established by society to promote social welfare. See: Goold, Patrick Russell, Is Copyright Infringement a Strict Liability Tort? (8 December 2014), 30 *Berkeley Technology Law Journal* 305 (2015), p. 381. Available at SSRN: <https://ssrn.com/abstract=2535557>. However, applying this standard in the context of intermediaries presents significant challenges, as societal expectations often diverge from the standards adopted by technology companies and online platforms. Therefore, the normative benchmarks that shape legal liability in such cases are inherently complex and contested.

infringing use, akin to a tape recorder. The prevailing challenges surrounding copyright and AI—such as the risk of generative AI producing infringing content or being trained on unlicensed copyrighted material—do not fall within the scope of secondary liability. Instead, the broader legal dilemmas concerning AI and copyright extend beyond secondary liability considerations, which is why AI systems are excluded from the focus of this research.⁸⁶

4.2.3 Application of Authorisation Liability to Online Intermediaries

Cassette recording cases such as *Ames* and *CBS* narrowed the scope of authorisation liability. In contrast, jurisprudence concerning online platforms has expanded the doctrine by articulating key factors that courts should consider in its assessment. One of the most important decisions by the High Court is the *Twentieth Century Fox Film Corp v Newzbin Ltd*,⁸⁷ which has been very influential because of the list of factors to assess authorisation liability identified by Kitchin J. In this case, the defendant operated a Usenet site – a third-party server – called Newzbin, which provided a search facility for content on Usenet accessible to members. Members were enabled to search for content by type, genre and title, while the content was indexed by a team of editors who supplied information about each item. Premium members who paid a weekly subscription fee were allowed to download movies besides other content posted on Usenet, using a single bundle known as an 'NZB' package, which obviated the need to download hundreds of smaller archives and shaped the '*crucial element*' of the service.⁸⁸ The evidence showed that a large amount of the indexed content consisted of unauthorised copies of commercial films. Although the defendant had imposed policies and contractual restrictions on editors and members that prohibited them from infringing third-party copyright, these warnings and restrictions were not enforced.⁸⁹

The defendant argued that they simply provided a search engine service like Google, but Kitchin J rejected the argument. He chose to incorporate the broad definition of authorisation as '*sanctioned, approved and countenanced*' rather than the narrow grant-based test and was satisfied that the defendant did authorise the infringing activities, according to the five factors. First, *the nature of the relationship* between the defendant and its members, where they had a contractual relationship with the primary infringers 'for profit' to obtain the specified setup and access film categories; second, *the means used to infringe*, they created and supplied the means of infringement that made it much easier for users to access copyrighted works, since the structure and feature of the browsing system was designed for locating and copying copyrighted work; third, *the inevitability of infringement*, according to the way it was used, the NZB facility 'inevitably' infringed copyright; fourth, *the degree of control*, although they maintained control over its use, they did not terminate the infringing use at all; fifth, *steps taken to prevent infringement*, they failed to take reasonable steps to filter or prevent infringements, most of the content infringed copyright, their editors having been known to post reports on infringing materials, but they did not take reasonable steps to stop such reports by adopting a filtering system, which they could easily have done. Therefore, the defendant indeed encouraged unlawful activity.

⁸⁶ The exclusion of generative AI from the research scope is not based only on the aforementioned reasons. When focusing on the situation in Saudi Arabia, the way of regulating AI is different and separated from intellectual property rights, whether in terms of regulation or the responsible authorities to enforce the law. Therefore, the issues of AI in Saudi Arabia should be looked at independently from other systems and rights.

⁸⁷ [2010] EWHC 608 (Ch); FSR 21 ('*Newzbin 1*').

⁸⁸ *Newzbin 1*, [522] (Kitchin J).

⁸⁹ *Newzbin 1*, [526], [537] (Kitchin J).

The incorporation of the factors listed above has made this decision influential. The result in *Newzbin* is seen as satisfactory in terms of combatting online piracy, and the five factors identified by Kitchin J provide helpful guidance on the approach to be taken in that context.⁹⁰ These factors were applied again in *Dramatico Entertainment Ltd. v British Sky Broadcasting Ltd.*,⁹¹ holding The Pirate Bay (TPB) operators of a notorious BitTorrent tracker – liable for authorising infringement by their UK users. The claimants here applied for an order requiring the major UK internet service providers to block or hinder access to TPB, arguing that the operators authorised users' infringing acts.

Arnold J considered the five factors cited by Kitchin J in *Newzbin*; he started first by analysing the nature of the relationship between the operators and the users, where it was seen that the operator supplied a 'comprehensive service' allowing its users to search and download torrent files using BitTorrent. Second, looking at the means used to infringe, the court characterised the torrent files as the means of infringement in that they allowed the reassembling of many fragments of copyrighted work supplied only to their users.⁹² Third, when examining how inevitable the infringement was, the court found that it was the operators' objective and intention because of their name, mission and comments. Also, they explicitly told users that they could use the site to access material regardless of copyright protection and stated, 'You can get your free music here whatever copyright law may have to say about it'. Fourth, in terms of the degree of control, although the operators were able to remove torrents, as a matter of policy, the rights of copyright owners were excluded from the criteria upon which they chose to exercise this power. Finally, they did not take steps to prevent infringements. Therefore, Arnold J stated that the operators of TPB authorised its users' infringing acts of copying and went far beyond merely enabling or assisting. He was satisfied that not only did they "sanction, approve and countenance" the infringements committed but also purported to grant users the right to do so, which satisfied both narrow and broad tests of authorisation.⁹³

This approach has been followed in several subsequent cases against BitTorrent peer-to-peer file sharing and streaming websites.⁹⁴ There might be some concerns that technological innovation would be deterred;⁹⁵ However, assessing the five factors described above can help avoid such concerns. In more detail, it would ensure that defendants who run websites designed to facilitate online infringement will not escape liability by simply saying they only provided a means of infringement. For example, the devices in CBS were capable of substantial non-infringing use, while the websites in *Newzbin 1* and *Dramatico* were almost exclusively concerned with infringing content.

⁹⁰ Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (1st edn, Kluwer Law International BV 2017). P. 101; Arnold and Davies, supra note 72 at 455.

⁹¹ [2012] EWHC 268 (Ch), ('*Dramatico*').

⁹² *Dramatico*, [75]-[77] (Arnold J).

⁹³ *Dramatico*, [81] (Arnold J).

⁹⁴ For example: *EMI Records Ltd. v British Sky Broadcasting Ltd.* [2013] EWHC 379 (Ch); *Paramount Home Entertainment International Ltd. v British Sky Broadcasting Ltd.* [2014] EWHC 937 (Ch). Cf; and *Twentieth Century Fox Film Corp v Sky UK Ltd.* [2015] EWHC 1082 (Ch).

⁹⁵ For example: Michael A Carrier, 'Copyright and Innovation: The Untold Story' (2012) 4 Wisconsin Law Review 891. P. 945; Carole Deschamps, 'Peer-to-Peer (P2P) Networks and Copyright Law in France, Ireland and the UK' (2010) 17 Irish Student Law Review 155. P. 159; Paul Goldstein and others, 'Copyright's Long Arm: Enforcing U.S. Copyrights Abroad' (2004) 24 (1) Loyola of Los Angeles Entertainment Law Review 45. P. 70.

Finally, it is important to clarify how the differences between types of online service providers (platforms, internet service providers or search engines) can affect the application of authorisation liability. This is important to show the Saudi regulator how the assessment of authorisation liability can differ according to types of service provider intermediaries; for example, when examining how authorisation liability is applied on search engines, limited guidance is available.⁹⁶ However, by applying Atkin LJ's narrow test of authorisation, which is 'to grant or purport to grant ... the right to do the act complained of',⁹⁷ it is found, based on the way search engines work, that they do not authorise infringements, what they do is index general content that might include infringing or legitimate content. Therefore, when they direct users to available third-party content, that cannot mean that they 'purport to grant ... a right or licence' to copy the content; facilitating access should not be regarded as authorising infringement; the role of search engines is similar to a device manufacturer or lending library. More importantly, they are not even an essential means of doing the infringement. The infringing content can be accessed without using them. Therefore, search engines cannot fall within the scope of authorisation liability unless they are dedicated to piracy alone.⁹⁸ ISPs are another example. They only supply internet access, which is a necessary precondition for infringements, but they do not provide the means of infringement nor grant a right to use the Internet for tortious activities. So, it is difficult to consider them liable for authorising infringements in this situation.⁹⁹ This is how authorisation liability should be assessed.

5 Develop Secondary Liability Rules for Copyright Infringements in Saudi Arabia

Developing a clear and comprehensive legal framework for online service providers is essential to achieving a balanced protection of rights and to providing a clear roadmap for judges handling such cases. This paper recommends modifications to the current approach to secondary liability by focusing on two key legal aspects. First, it suggests incorporating elements of the UK's authorisation liability into the Saudi Copyright Law, carefully tailored to align with the specific requirements and context of the Saudi legal system, as will be elaborated later in the paper. Second, it advocates for broadening the scope of tort law under Sharia to include the secondary liability of online service providers.

These recommendations are vital because, without a well-defined legal framework, there is a risk of inconsistent judicial decisions and uncertainty for online businesses. By clarifying these legal aspects, Saudi Arabia can better protect intellectual property rights while fostering an environment that supports technological innovation and economic growth. The proposed changes aim to ensure that the legal system is equipped to handle the complexities of the

⁹⁶ Jaani Riordan has emphasised the limited guidance of the application of authorisation liability on search engines and gateways, therefore, relied on general observations in terms of to what extent authorisation liability can be applied on them. Riordan, *supra* note 67 at 147.

⁹⁷ *Falcon*, [499] (Atkin LJ).

⁹⁸ Faye Bohan, 'Liability of Internet Search Engines' (2006) 6 *Hibernian Law Journal* 181. P.182, 193, 194; B Fitzgerald, D O'Brien and A Fitzgerald, 'Search Engine Liability for Copyright Infringement' in Amanda Spink and Michael Zimmer (eds), *Web Search: Multidisciplinary Perspectives*, vol 14 (Springer Berlin Heidelberg 2008). p. 105, 106, 115; see: Sophie Stalla-Bourdillon, 'Liability Exemptions Wanted: Internet Intermediaries' Liability under UK Law' (2012) 7 *Journal of International Commercial Law and Technology* 289.p. 292, 293; Riordan, *supra* note 67 at 147.

⁹⁹ David Lindsay, 'Liability of ISPs for End-User Copyright Infringements: The First Instance Decision in Roadshow Films Pty Ltd v iiNet Ltd (No 3)' (2010) 60 *Telecommunications Journal of Australia* 1. P. 29; Daniel MacPherson, 'Case Note: The Implications of Roadshow v iiNet for Authorisation Liability in Copyright Law' (2013) 35 (2) *The Sydney Law Review* 467.

digital age, balancing the needs of copyright holders with the realities of modern online services.

5.1 *Authorisation Liability in the Context of the Saudi Copyright Law*

The first step in adopting authorisation liability within Saudi Copyright Law is to include the term authorise in the legislation. The second step is to provide a clear definition within the law rather than leaving it entirely open to judicial interpretation. Scott argues that the absence of a defined term for authorisation in copyright statutes has resulted in numerous formulations of the term in case law, leading to considerable uncertainty about the scope of authorisation.¹⁰⁰ If the Saudi regulator were to include the word authorisation without defining this concept, it would open the door to defining it in the same way as permit.

Authorisation in UK law has two definitions (broad and narrow), which were established in *Falcon*.¹⁰¹ The broad dictionary definition is 'sanction, approve, countenance' Bankes LJ gave. Atkin J formulated the narrow definition, stating that authorise means 'grant or purported grant ... the right to do the act complained of'. Each of these interpretations has pros and cons, with UK courts split on whether the broad or the narrow definition should be preferred.¹⁰² Therefore, any reimportation into Saudi copyright law must be undertaken cautiously, as the concept has flaws.¹⁰³ It is important to note that the paper aims to choose the most suitable definition that can work and fill the gap within the Saudi legal framework despite how widely it was criticised in the UK or the extent of its success there. In other words, the solutions are not going to be based only on transportation of the UK law but on the aspects that can fit and work within Saudi Arabia. Therefore, the broad dictionary meaning, 'sanction, approve, countenance', is the more suitable definition to introduce into Saudi copyright law when defining authorisation; however, adopting the broad definition is conditional on adopting authorisation liability factors that were introduced in *Newzbin 1*. Indeed, this definition indicates a broader definitional ambit for the word "authorise" in contrast to the narrow definition, which can cause the notion of infringement by authorisation to include a much broader role within the statutory framework protecting copyright holders.¹⁰⁴ However, it is criticised because authorisation simply cannot be resolved by recourse to a dictionary,¹⁰⁵ where right holders accordingly might rely on the broad meaning in their claims when trying to include acts and means to be qualified by courts as authorisation.¹⁰⁶ However, it is believed that the broad definition is still the more appropriate one to adopt within the Saudi context; the criticism can be avoided if the definition is linked and assessed according to the authorisation liability factors; in other words, the adoption of the broad definition is conditional on being linked with the multi-factor test. The importance of linking the broad definition to the factors within Saudi copyright law lies in giving judges

¹⁰⁰ Brendan Scott, 'Authorisation under Copyright Law and "The Nature of Any Relationship"' (2011) 22 Australian Intellectual Property Journal 172. P. 174.

¹⁰¹ [1926] 2 K.B. 474

¹⁰² For example: Forster J in *A & M Records* chose countenance, sanction, and approve, while Whitford J in *CBS* adopted grant or purport to grant.

¹⁰³ Dietrich and Ridge, *supra* note 63 at 314.

¹⁰⁴ Saw and Chik, *supra* note 62 at 716.

¹⁰⁵ In *Roadshow*, [125]: 'it would be wrong to take from it (definition) one element, such as 'countenance', and by fixing upon the broadest dictionary meaning of that word to seek to expand the core notion of "authorise"'

¹⁰⁶ Bently and Sherman, *supra* note 64 at 154.

space to interpret the definition while guaranteeing that any interpretations of the meaning of authorisation liability would fall within a specific criterion.

The narrow definition of 'grant or purported grant' is both vague and confusing,¹⁰⁷ making it unsuitable for application within the Saudi legal context. It is crucial to carefully examine how Saudi courts would interpret this narrow definition and consider how its scope might be developed. Under this definition, a defendant would be incapable of conferring upon a third party the right or permission to engage in the act complained of or of 'clothing [a third party] with authority, particularly legal authority, thereby giving a right to act.'¹⁰⁸ This is because the defendant is neither the "principal" with actual authority nor the copyright holder in question.¹⁰⁹ Therefore, there is a pressing need for a broader interpretation of authorise in the Saudi legal context.

It might be proposed that linking the narrow definition with the authorisation liability multi-factor test is a potential solution. However, suppose a court determined that the defendant did not possess, or did not purport to possess, any authority to grant a third party the right to perform the disputed act. In that case, a critical question arises: can authorisation liability still be established based on the multi-factor test? These factors seem only to become relevant when a court adopts the broader interpretation of authorise, which includes meanings such as 'sanction, approve, or countenance.'¹¹⁰

This consideration is essential because the narrow definition, as it stands, could limit the court's ability to hold parties accountable under authorisation liability. Adopting a broader definition would allow for a more flexible and contextually appropriate application of the law, better aligning with the complexities of modern copyright issues in Saudi Arabia. This approach ensures that the legal framework is coherent and effective in addressing the nuances of authorisation liability in the digital age.

5.1.1 Factors to Consider in Determining Authorisation Liability

As suggested above, adopting the broad definition of authorisation within Saudi copyright law should be linked with the factors assessed in *Newzbin 1*. Linking the definition to these factors aims to delineate clear limits of liability and reduce the scope for broad interpretations. If adopted, these factors would represent a radical change from the current situation in Saudi Arabia, helping to distinguish between mere enablement or assistance and authorisation.

Firstly, the nature of the relationship between the alleged authoriser and the primary infringer should be analysed. This is crucial as it provides a deeper and more realistic understanding of secondary liability: the interaction between a third party (the authoriser) and the primary infringer. The assessment may consider the existence of a contractual or implied relationship, for example, if the alleged authoriser creates a sophisticated/user-friendly environment enabling users to easily search for and locate content or if they facilitate and promote infringement through their actions. Such a relationship might also consider whether the defendant has a financial interest in the occurrences of infringements. These are examples of how an infringing relationship can be indicated; however, assessing the

¹⁰⁷ Saw and Chik, *supra* note 62 at 705.

¹⁰⁸ *Roadshow*, at [122].

¹⁰⁹ As Lord Templeman correctly observed in *Amstrad* at 1053 "No manufacturer and no machine confer on the purchaser authority to copy unlawfully."

¹¹⁰ Saw and Chik, *supra* note 62 at 707, 715.

relationship is not limited to these examples alone—it can be developed by courts as long as liability is not solely based on this factor.

Secondly, the means used to infringe; this factor analyses whether the equipment or other materials supplied by the alleged authoriser constitute the means used to infringe. This is a critical factor that would help reshape the understanding of Saudi courts on how online service providers function and, accordingly, the legal boundaries of their secondary liability. When adopting this factor, the court's assessment should exclude means that serve solely as part of the intermediary's operation or are essential functions facilitating the experience of the platform or network, even if they could also be used to infringe. For instance, intermediaries often have some degree of involvement in the information stored, at least in terms of providing tools for uploading, categorisation, and display¹¹¹. Such tools should not be viewed as providing infringing means.

The assessment of the factor that provides the means of infringement should focus not on the means itself but on how the authoriser has employed them. For example, in *Dramatico*, the torrent files indexed, arranged, and presented by TPB were considered the means employed by end-users to infringe by downloading protected works and making them available to others.¹¹²

It is not the BitTorrent system itself but the way TPB used it that is seen as the means of infringing.¹¹³ This is how Saudi courts should implement this factor and understand that liability cannot be incurred by simply providing the means of infringement alone.¹¹⁴ Mere facilitation of a tort is not itself tortious unless combined with intention,¹¹⁵ which is a new understanding or direction towards online service providers in Saudi Arabia.

Third, *the inevitability of infringement* is considered to be a mental element. The word "authorise" connotes a mental element,¹¹⁶ where the state of mind – knowledge or intention – of the alleged authoriser must, at the very least, be a relevant consideration in the overall analysis of authorisation liability.¹¹⁷ Hence, the intention or the degree of knowledge on the defendant's part is indeed relevant to establish whether the service provider's conduct justifies an inference of authorisation liability.

Practically, in *Newzbin 1*, when the court assessed the inevitability of the infringement, it was found that when their platform was used as intended, the *Newzbin* facility "inevitably" infringed copyright.¹¹⁸ For Saudi Copyright Law, it is unclear how the judicial authority will interpret their intention and on which legal framework this would be based. It is important to answer this question to ensure that courts do not link intention to the conduct element. Therefore, intention can be proved either by the authoriser admitting the intention to infringe or by courts inferring it from the circumstances. Such circumstances can be based on oral or behavioural evidence of encouragement of the activity. The notion of intention will be

¹¹¹ Patrick Van Eecke, 'Online Service Providers and Liability: A Plea for a Balanced Approach' (2011) 48 *Common Market Law Review* 1455. P. 1483.

¹¹² *Dramatico*, [75]-[77].

¹¹³ *Roadshow* [16].

¹¹⁴ Arnold and Davies, *supra* note 72 at 459.

¹¹⁵ Bagshaw 2003. p. 59.

¹¹⁶ *University of New South Wales v Moorhouse* (1975)133 CLR 1(HCA) ('*Moorhouse*').

¹¹⁷ Saw and Chik, *supra* note 62 at 719.

¹¹⁸ *Newzbin*, 540 (Kitchin J).

provided next when explaining how it can be developed and proved under the *Sharia* law of torts.

Fourth, the degree of control or the steps taken to prevent infringements of this factor cannot be adopted without defining its scope within the law. It was seen when secondary liability in the Saudi Copyright law was analysed that liability for permit was interpreted as having technical abilities to prevent infringements and, in turn, these abilities allow them to control their platforms or networks. Linking technical abilities to control reflects a misunderstanding of how online service providers function, so adopting this factor should be associated with clear limitations to avoid the old interpretation of control continuing.

The question raised now is, how should the control element be understood and adopted in Saudi copyright law? This element should be determined by assessing whether the defendant – under actual knowledge – could have taken steps to prevent or avoid the infringement. In other words, the assessor should look at the control element based on the existence of actual knowledge and then link the assessment to the steps that the online service provider took to prevent the infringement,¹¹⁹ which is the fifth factor that UK courts assess when determining authorisation liability.¹²⁰ In practice, the control element in some UK cases was assessed according to whether the operator adopts measures to prevent infringements. In *Dramatico*, for example, the court found that removing infringing torrents from the TPB website would have been possible because such removals were affected in other situations. However, when it came to copyright files, the operators did not take any steps even though they knew about it. Instead, they excluded this type of infringement from the taking down policy, although it was already their policy to take down child pornography content.¹²¹

It is suggested that these two factors should be combined in Saudi law as one element where the existence of actual knowledge connects them both. The factor should, accordingly, be read in the law as the *degree of control on information provided by a recipient of the service based on the steps taken to prevent the infringement after obtaining actual knowledge of the illegal activity/information or being aware of the facts and circumstances from which the illegal activity is apparent*.

The benefit of combining these two factors and assessing them based on the existence of knowledge would help the Saudi court to differentiate between, on the one hand, online service providers who genuinely have the control to end a specific infringement when they obtain knowledge or are aware of this activity, and on the other hand, those whose control is part of the way they work and function. Choosing to examine 'knowledge' as a condition to support the assessment of this factor, instead of leaving the factor to the courts'

¹¹⁹ The assessment of intentional tort liability extends further in certain analyses, where liability is imposed only when it is demonstrated that infringers actively sought to divert the copyright holder's sales or reasonable license fees. See: Goold, Patrick Russell, Is Copyright Infringement a Strict Liability Tort? (8 December 2014), 30 Berkeley Technology Law Journal 305 (2015), p. 372. Available at SSRN: <https://ssrn.com/abstract=2535557>. Applying this framework to intermediaries, however, presents significant challenges. Establishing a direct causal link between an intermediary's actions and the copyright holder's losses is inherently complex, making it difficult to attribute liability with certainty.

¹²⁰ Linking the two factors is justified as the word "authorise" connotes a mental element. In contrast, it cannot be inferred that an online service provider authorised something to be done if he neither knew nor had reason to suspect that the act might be done. See, *Moorhouse*, at 12-13.

¹²¹ *Dramatico*, [75]-[77].

interpretation, is to guarantee that any further interpretations by the Saudi court will not exceed the primary purpose of adopting this element. Difficult

5.2 How to Develop Torts in Sharia Law to Cover Intermediaries

As discussed earlier in this paper, the treatment of torts in Sharia law is rooted in jurists' writings from the ninth century CE, which Saudi judges frequently rely on to interpret cases.¹²² However, with the recent assignment of copyright cases to the Commercial Court, it remains uncertain how the elements of torts in Sharia will be interpreted concerning the secondary liability of intermediaries when applied alongside the Copyright Law. As noted, Saudi courts rarely rely exclusively on statutory law; instead, they often present extensive Sharia-based arguments to justify their rulings, with statutory law playing a secondary role. This practice underscores the need to refine and clarify the scope of tort elements, particularly concerning the liability of online service providers.

The pressing question then becomes: How can the elements of tort in Sharia law be developed to adequately address the secondary liability of online service providers? The first step involves building on the existing foundation in Sharia law, where liability is established based on fault, causation, and harm. The proposed solutions aim to address these elements individually, clearly defining their scope and limitations. By doing so, these refinements can offer a more precise legal framework that aligns with the complexities of the digital age.

Furthermore, this reconsideration can benefit from integrating specific aspects of English tort law, which provides valuable insights into handling similar issues. Drawing on these principles can help create a more robust and coherent legal framework in Saudi Arabia, ensuring that the courts are well-equipped to handle cases involving the secondary liability of online service providers while remaining consistent with Sharia principles. This approach is critical for balancing intellectual property protection with technological innovation demands, ultimately fostering a more secure and predictable legal environment for all parties involved.

5.2.1 Fault

In Sharia law, liability is established based on the principle of fault or wrong, arising when the defendant acts either intentionally or negligently. Regarding online service providers, it is suggested that the scope of fault capable of holding them secondarily liable should be based solely on intention, excluding negligence. This paper does not advocate for online service providers to adopt a duty of care; the negligence-based approach is excluded for two primary reasons: firstly, in the UK, the application of negligence as an alternative to joint tortfeasance for intermediaries was criticised by Lord Templeman in *Amstrad*. Additionally, this idea was rejected by Davies for the following reason:

Imposing duties of care more readily may place an 'impossible burden' upon defendants. Accessory liability and negligence are conceptually distinct, and the elements of one must not twist the requirements of the other. Although negligence has

¹²² Sharia law is not presented as logical structures of generally stated principles and rules but rather casuistically, by listing multiple hypothetical examples with their outcomes. So, judges would review these examples to decide which is the closest to the case before them. Accordingly, it can be said that analogy is the ruling spirit of *Sharia* law, which is used in exemplary cases to generate rulings on questions within and even beyond the chapter or section in which the original cases appear. Vogel, *supra* note 22 at 75, 87.

*already expanded such that it encompasses a huge area of tort law, it should not cover accessory liability.*¹²³

The Saudi regulator must adopt this viewpoint as it balances intermediaries' rights and does not impose an undue burden on them, which can foster economic sustainability and encourage business investment in the country. Otherwise, there is a concern that intermediaries might bear expanding, uncontrolled responsibilities.

Secondly, in Saudi courts, the existence of a duty sometimes depends on the judge's discretion. A judge presiding over a tort case may, at his discretion, establish a legal duty.¹²⁴ With regard to cases involving intermediaries, this judicial power could lead to a fragmentation of duties, varying from one judge to another in each case. This paper suggests that the Copyright Law should include an article explicitly prohibiting the imposition of any obligations or duty of care on online service providers to ensure legal consistency in judgments and economic sustainability in the online business sector. It might be argued that such uncertainty can be resolved by clearly defining the scope of a duty of care within the Copyright Law, which could ensure consistency in the legal duties imposed. However, this could still place a burden on online service providers, even if it is specified in the law. Therefore, selecting intention only as the main basis for fault provides a more reliable and sustainable legal foundation.

The required level of intention for online service providers should be based on a specific intent for a specific infringement. However, understanding how intent can be established and proven is crucial. In theory, the concept of intent is straightforward, but proving it is challenging as it reflects another person's state of mind. Howarth notes: 'negligence may sometimes speak for itself. Intentional harm does not.'¹²⁵ In this regard, the Saudi court might employ two methods to prove intent: first, the service provider may admit to intending the infringement; second, intent may nonetheless be convincingly inferred from the circumstances.¹²⁶

The first method is far less likely than the second, but it is not impossible.¹²⁷ The first method is far less likely than the second, but it is not impossible. However, how should intent be proven by the second method, that is, by extrapolation from the surrounding circumstances? Specifically, what aspects should the Saudi Commercial Court focus on when determining intent? Dixon's view offers the most suitable path to follow, suggesting that intention can be determined based on oral and behavioural evidence that encourages the infringing activity, including inactivity or indifference of such a nature that a certain desired result may be inferred.¹²⁸ This approach is mirrored in the UK direction where, for example, in *Newzbin 1*, the intention was scrutinised through damning evidence collected at cross-examination, which showed that the site actively encouraged its editors to make reports on films, in

¹²³ Paul S Davies, *Accessory Liability* (Hart Publishing Ltd 2017). P. 182.

¹²⁴ See: 3.1 The Concept of Tort Liability in Sharia Law.

¹²⁵ David Howarth, 'My Brother's Keeper? Liability for Acts of Third Parties' (1994) 14 *Legal Studies* 88. P. 93.

¹²⁶ See: Peter Cane, 'Mens Rea in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533. p. 542, 543; Allen N Dixon, 'Liability of Users and Third Parties for Copyright Infringements on the Internet: Overview of International Developments' in Alain Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar Publishing 2009). p. 31.

¹²⁷ Angelopoulos, *supra* note 87 at 267.

¹²⁸ Dixon, *supra* note 122 at 38. Inactivity or indifference can refer to those online service providers who have actual knowledge about the infringing content or activity and do not do anything about it.

addition to instructing and guiding them to include URLs in their reports. Consequently, from these circumstances, the court found that they intended to make all films posted on Usenet available through Newzbin.

Extracting the intent of online service providers from their attitudes and circumstances can also be learned from *Dramatico*. When the court examined the inevitability of infringement, they deduced from a collection of circumstances that it was indeed the operator's intention. Some of these circumstances included the website's name alongside a pirate ship logo, which alludes to the terminology applied to online copyright infringement; the statement that it was founded by a 'Swedish anti-copyright organisation'; more importantly, reflecting a significant admission of infringement, the site's 'about page' intransigently declared that 'any complaints from the copyright and/or lobby organisations will be ridiculed and published at the site' and that '0 torrents have been removed and 0 torrents will ever be removed'. Additionally, a quote from one of the investors in the site, recorded as stating that 'the purpose of the site was pirate copying'; this made it clear that the operators of TPB were well aware that they were engaged in copyright infringement.

5.3 Causation

The causation element is the participation link that connects the intended act to the harm. Regarding online service providers, it was suggested that it is important to clarify the scope of the behaviour that constitutes causation. It might be argued that it is better to let courts understand causation without providing legal limitations, whereby they can assess any involvement in the creation risk of copyright infringement. In this situation, all possible modes of participation which have a causal impact can be considered causation.¹²⁹ However, this understanding cannot work adequately because leaving causation without drawing its limitations opens the possibility of considering any involvement in the creation risk as a causation element.

Causation interpretations should be limited only to substantial and fundamental causes of harm. One of the most important benefits of adopting such limits is that it will draw a clear line between online service providers who merely facilitate the infringement and those who perform acts or behaviours associated with a clear intention to infringe. Saudi judges have to understand that mere facilitation of a tort is not itself tortious unless it is accompanied with intention.¹³⁰

The paper suggests adopting a clear legal foundation linked to causation, like considering if any procurement or inducement caused such harm and making the service provider benefit from it.¹³¹ Here, judges should examine two conditions: First, the inducer can only be held

¹²⁹ Davies, *supra* note 119 at 182.

¹³⁰ Roderick Bagshaw, 'Downloading Torts: And English Introduction to On-Line Torts' in Stephen Weatherill, Henricus Joseph Snijders and Henk Snijders (eds), *E-Commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International 2003). P. 59.

¹³¹ Besides authorisation liability, common law principles of joint tortfeasorship can be applied to find liability for a copyright infringement. Joint tortfeasorship refers to the mechanism that holds multiple persons liable for a single tort that results in a single damage occasioned by all of them.

Secondary liability for procuring stands when A – the online service provider – intentionally causes B "by inducement, incitement or persuasion" to engage in particular acts infringing C's copyrights. Liability for procuring copyright infringement is both causative and intentional, but it is not a separate tort; it simply makes the secondary wrongdoer liable as a joint tortfeasor. The act of procurement occurs based on two conditions. First, it must be linked to a specific infringement rather than being 'at large', which means that the secondary

liable for another's tortious actions if his or her inducement, incitement, or persuasion played some part in the end user's decision to infringe; second, the person is liable if he or she intended to encourage the other to infringe and that the inducement act was aimed at an individual infringer procuring a particular infringement.¹³²

5.4 Harm

Harm is the final element that must be examined to establish secondary liability. It is recommended that the scope of harm be confined to actual, quantifiable harm that can be directly linked to a specific wrongful act. In cases of third-party liability, Saudi courts should adhere strictly to the provisions outlined in Sharia law when assessing harm rather than seeking to develop or modify the established principles of Sharia tort law. In practical terms, any conduct by an intermediary must be connected to a specific injurious outcome to warrant liability.¹³³

This approach is particularly advantageous for online service providers, as it restricts liability to tangible, well-defined injuries. Expanding the scope of harm to include alleged or speculative damages would introduce significant challenges in terms of proof and measurement in court. Moreover, it would be difficult to directly link such broad claims to the actions of a specific service provider. Allowing right holders to base liability claims on unspecified harm risks holding online service providers accountable without clear legal boundaries, even when such claims are nearly impossible to substantiate. Therefore, the current scope of harm under Sharia law, which focuses on actual and demonstrable harm, should remain unchanged as it effectively balances the interests of all parties involved. By maintaining this clear and limited scope, the legal framework ensures that online service providers are protected from unsubstantiated claims while still holding them accountable for genuine, demonstrable harm. This balance is essential for fostering a fair and predictable legal environment that supports both the protection of rights and the continued growth of the digital economy.

6 Conclusion

The modifications proposed in this paper extend beyond the mere enhancement of copyright protection in Saudi Arabia; they seek to establish a balanced and transparent legal framework capable of addressing the complexities of modern digital interactions. If the current legal structure remains unmodified, it risks imposing undue burdens on online service providers and exacerbating legal uncertainty in cases involving online infringements. Such challenges are particularly pressing given the government's ambitious objectives under Vision 2030, which aim to position Saudi Arabia as a global leader in the digital economy.

An effective legal framework must evolve on multiple fronts to address these challenges comprehensively. In particular, two key areas require reform: the refinement of secondary liability rules within Sharia tort law and the clarification of authorisation liability within Saudi

party must procure a specific infringement. Second, the act of procurement requires incitement, which means that the secondary wrongdoer has 'made himself a party to the infringement'.

Hazel Catty, 'Joint Tortfeasance and Assistance Liability' (1999) 19 (4) *Legal Studies* 489. P. 490; Dietrich, *supra* note 55 at 232; LEE Pey Woan, 'Accessory Liability in Tort and Equity' (2015) 27 *Singapore Academy of Law Journal* 853. P. 858.; CBS, [1057-8] (Lord Templeman), and Amstrad, 66 (Glidewell LJ).

¹³² Nicholas J McBride and Roderick Bagshaw, *Tort Law* (Pearson Education Limited 2018). P. 825; *Amstrad* at 1058.

¹³³ Angelopoulos, *supra* note 87 at 258.

copyright law. Addressing only one of these aspects in isolation would be insufficient to resolve existing legal ambiguities or to implement the necessary reforms to meet the demands of the digital age.

The development of secondary liability rules within Sharia tort law is crucial for several reasons. First, it extends the applicability of Sharia law to emerging legal issues, ensuring that judges have a consistent and reliable doctrinal foundation for their decisions. This is particularly significant in a legal system where Sharia principles underpin judicial reasoning. However, the evolution of Sharia tort law must be accompanied by corresponding refinements in copyright law, particularly concerning the establishment of a clear and precise framework for authorisation liability. This is essential for defining the legal position of online service providers, such as digital platforms, and for ensuring that they are not erroneously equated with traditional publishers.

The interplay between these two legal dimensions—Sharia tort law and copyright law—is critical. Their development must be undertaken in a complementary manner to ensure mutual reinforcement. Refining authorisation liability will delineate the responsibilities and obligations of online intermediaries, while the evolution of Sharia tort principles will provide a culturally and legally coherent foundation for interpreting these responsibilities within the Saudi legal system.

A comprehensive and integrative approach is necessary to establish a robust and adaptable legal framework that accommodates the complexities of digital interactions while striking a balance between safeguarding intellectual property rights and fostering innovation. By simultaneously addressing both legal aspects, Saudi Arabia can cultivate a legal environment that is equitable, pragmatic, and aligned with the overarching objectives of Vision 2030. This, in turn, will reinforce the country's ambitions to emerge as a global leader in the digital economy, laying a solid legal foundation for sustained technological and economic growth.

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