

Cracking The Dilemma of Network Service Providers' Duty of Care: Based on The Perspective of Direct Benefit Acquisition

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Abstract. With the increasing scale of the domestic network economy, legal issues in this field continue to appear in our field of vision, such as the endless infringement of network users, which has become an important issue in the governance of the current network economy. Although China has introduced the "notice-delete" rule in the legislative field for the indirect infringement of network service providers, with the passage of time, the "notice-delete" rule has shown many shortcomings in terms of response speed and efficiency in protecting the rights and interests of right holders. Although some scholars have proposed the duty of care for network service providers in response to this phenomenon, there are many controversies in the field of domestic and foreign legal science and judicial circles on the duty of care. From the perspective of direct benefit acquisition, this paper takes how network service provider shall bear the responsibility the duty of care as the research object, analyzes the problem by case analysis and comparative research methods, and draws the conclusion that the conditions for obtaining direct benefits should be reasonably and appropriately used, so that network service providers can bear the corresponding duty of care for the direct benefits they have obtained, in order to promote the continuous improvement of the network service provider responsibility system, and make corresponding contributions to completely clearing up the chaos of network infringement and purifying the network environment.

Keywords: Network service provider; duty of care; "notice - delete" rule; direct benefit obtained.

1. Introduction

Today, when information dissemination is highly developed, infringement by network users has long been common. In the course of hearing such infringement cases, in addition to pursuing the infringer's direct infringement liability, It is also critical to ascertain the network service provider's indirect tort culpability. The application of the notice-take-take rule protects network service providers from excessive indirect tort liability. Since the introduction of the duty of care originating in the field of common law tort, it has become the key to measuring the indirect tort liability of China's network service providers. In terms of legislation, although China has introduced the duty of care, it has not made a clear definition of its connotation and applicable standards, which has led to the relevant provisions being vague in specific judicial practice, and courts in various places giving full play to their discretion when interpreting the duty of care. In the case of Beijing CCTV Public Consulting Company v. Dopod Communications Company in the mobile phone tv infringement dispute case, and Shanghai Busheng Company v. Baidu Company's music works deep link infringement case, due to differences in understanding of the nature of the infringement, there were also different judgments in the same case in many cases. At the same time, the academic circles with different views on the duty of care, and the dispute over the duty of care between scholars of civil law and intellectual property law has never stopped, and there have been corresponding provisions in the field of extraterritorial jurisprudence on the assumption of the duty of care of network service providers. For example, Germany's Multimedia Act stipulates that network service providers need to bear specific duty of care, and the "safe haven rule" originated in the United States, the court has also raised the conditions for the application of the "safe haven" rule. How network service providers fulfill their duty of care is a difficult problem that needs to be solved urgently in China's legislation

and judicial process. Looking at many definition criteria, the consideration of the factor of direct profit and direct profit has begun to be repeatedly mentioned in the judgment documents of national courts. There is no doubt that direct profitability has quietly become an important window into the grand proposition of the duty of care of network service providers.

2. Organization of the Text

2.1 Problems found: existing problems in China

In recent years, China's Internet economy has developed rapidly, and various indicators are at the leading level in the world. According to the data, in the first half of 2022 alone, The revenue of China's Internet and related enterprises in Internet business reached 717 billion [1]. In an Internet economy of this scale, how network service providers undertake the duty of care is one of the focus of controversy over the attribution of responsibility of network service providers. In response to the determination of the tort liability of Internet service providers, China has introduced a safe harbor rule in the current law. On the one hand, domestic legislation has transplanted safe harbor rules into private law norms such as article 36 of the Tort Liability Law, establishing the rule that Internet service providers do not bear the obligation of review, but on the other hand, article 1197 of the Civil Code has broken through the "safe harbor rule" to a certain extent, providing possible interpretation space for network service providers to undertake the duty of care at the stage of non-notification, which shows that there is considerable controversy in both academic circles and legislative fields as to whether the duty of care should be undertaken by network service providers [2]. In this dispute, the author believes that network service providers should bear certain duty of care.

First of all, if the network service provider only passively waits for the notice of the right holder, it is difficult to protect the legitimate rights of the right holder in a timely and effective manner in many cases. If only the "notice-delete" rule is applied to determine that until the infringement has occurred and the right holder knows and provides the network service provider with obvious evidence that its rights have been infringed, the losses caused by the infringement will continue, thereby aggravating the losses suffered by the owner of the right. In another way, the simple application of the "notice-delete" rule is also easy to make the network service provider's act of protecting rights in a formality and reduce the efficiency of protecting rights [3]. For example, in the case of Yinian (Shanghai) Fashion Trading Co., Ltd. against Zhejiang Taobao Network Co., Ltd. and Du Guofa for infringement of its trademark rights, the court of second instance in the case found that Yinian Company had sent tens of thousands of complaints to Taobao Company about Du Guofa's trademark infringement, and Taobao Company almost always took measures to delete links after receiving complaints. This situation repeatedly occupies a lot of time, energy and resources of the right holder and the network service provider, but still fails to prevent the infringement from continuing. In addition, the trend towards the establishment of a duty of care can also be confirmed in the field of foreign judicial affairs. German courts have established "nuisance liability" for network service providers by expanding the application of § 1004 of the German Civil Code [4]. Network service providers have a reasonable duty of care to prevent direct infringement, and if they fail to fulfill their reasonable duty of care, they will bear the infringement liability. Network service providers have a reasonable duty of care to prevent direct infringement, and if they fail to fulfill their reasonable duty of care, they will bear tort liability [5]. Even in the United States, the birthplace of the Safe Haven Rule, courts have raised the conditions for the application of the Safe Haven Rule. In *BMG Rights Management v. Cox Communications*, the court denied that COX had closed the account of the infringing user and activated it, finding that it had not implemented the "duplicate infringement policy" and could not apply the safe harbor rule, which showed that the US courts had a tendency to believe that it was necessary for network service providers to take more effective measures to prevent duplicate infringement, and those who were only formal would not be able to be sheltered. For example, although the network service provider under articles 8 to 10 of articles 7 (2) of the German Multimedia Law is exempted from the general obligation to monitor whether the files uploaded by

the user are legal, that is, the network service provider does not need to take care of the information transmitted or stored by the user, this article only exempts the network service provider from the monitoring obligation in the general sense, and does not exclude the network service provider's monitoring obligation in special circumstances. Network service providers are still required to have the duty of care anticipated on the basis of their reasonable judgment and the duty of care established by national legal provisions [6].

In summary, it is precisely because of the weakening effectiveness of the traditional "notice-erasure rule" and the tendency of academic circles and relevant judicial fields to recognize the establishment of the duty of care that it is necessary to reconsider the setting of the duty of care in order to make this vague area of dispute relatively clear.

2.2 Extraterritorial experience

2.2.1 French experience: three-strike out system

In the setting of the duty of care, all countries in the world have gradually realized the many inconveniences of online rights protection under the previous safe harbor model, so they have invariably expanded the duty of care of network service providers to a certain extent. France's Law on the Promotion of the Protection and Dissemination of Internet Creations has created a "three-strike out" system, whereby when the right holder discovers that other network users have infringed on it, it can provide the relevant administrative agency with the facts of infringement, which orders the network service provider to issue an infringement warning letter by mail; If the infringement persists within 6 months thereafter, the agency will issue a second warning, and if the infringement persists after the second warning, the relevant materials in the case will be forwarded to the court, and if the court finds that the network user constitutes infringement, it will make a decision such as disconnection, fine or imprisonment of the user. In South Korea, New Zealand, the United Kingdom, Japan and Taiwan, there are similar systems of "three-strike out" [7].

2.2.2 EU Experience: Disconnection Ban

Under the consensus of appropriately enhancing the duty of care of network service providers, countries have also made their own judicial attempts in light of specific national conditions. For example, many EU countries have tried to improve the "notice removal" procedure created by the DMCA, proposing a blocking injunction measure, that is, if the network service provider is heavily used by its users to engage in copyright infringement activities, the copyright owner can sue the court, and if the infringement is established, the network access service provider will enforce the legal responsibility for the network service provider to take the network service provider's network service provider, which was first created by the British court [8]634-636. It was considered to be in compliance with the prohibitions in Article 8(3) of the Information Society Copyright Directive and Article 11 of the Intellectual Property Enforcement Directive of the European Union and was recognized by the Decision of the Court of Justice of the European Union in march 2014 in the CASE OF THE UPC Telekabel Wien v Constantin Film before the Supreme Court of Austria [9].

2.2.3 U.S. Experience Reference: Direct Benefit Gain

Among the many attempts, combined with specific online infringement cases and corresponding judgments, the author finds that the direct profit factor plays a key role in determining the infringement liability of network service providers and basing them on the duty of care. Direct profit was first defined by Section 512(c) of Chapter II of the Digital Millennium Copyright Act of the United States, which states that if a network service provider has the right and ability to control the infringement, it must not directly derive financial benefits from the infringement in order to be exempt from liability. Inspired by this, China's laws have also made similar provisions: "Where network service providers directly obtain economic benefits from works, performances, audio or video recordings provided by network users, they shall be found to have a higher duty of care for the network users' infringement of the right of dissemination on the information network." In the

following, the author will also synthesize relevant cases and judicial precedents to examine the duty of care of network service providers in the new era from the perspective of "direct profit".

2.3 Recommendations for domestic

In example national law, one of the most important criteria for determining the duty of care of a network service provider is the direct economic benefit derived from the network service provider. For example, Article 11 of the Provisions of the Supreme People's Court on Several Law Enforcement Issues Concerning the Trial of Civil Disputes Concerning infringement of the right of dissemination of information networks stipulates that network service providers have intensified due diligence on online users' infringement of the right to information dissemination from works, performances, and audio and video recordings provided by network users. When a dispute arises between cultural communication companies and other court judgments. Times and a certain network technology company Shanghai rights case and Apple and others v. YU Zhuo for infringement of the right to disseminate information networks as the reason, the court ruling opinion also made it clear that if a network service provider obtains direct economic benefits from works, performances, audio and video recordings provided by network users, the court must find that it is responsible for the infringement of the right to network information dissemination, which means that network users have a higher duty of care. It can be seen from this that directly obtaining economic benefits is an important criterion for determining the duty of care of network service providers in the current judicial field. At the same time, the introduction of the direct profit clause has its legitimacy, and when the network service provider directly obtains revenue from the user content, it should also bear a higher duty of care. This is both economically justified and in line with the requirements of distributive justice [10]. At the same time, this is also in line with the principle of consistency of rights and obligations emphasized in Article 131 of the Civil Code. Nevertheless, the implementation of this provision has caused a series of controversies, and this article will start from the two major elements of the direct profit clause and explore the establishment of the corresponding duty of care of network service providers.

2.3.1 Definition of direct profit

In the Shanghai Intellectual Property Court's *pintu v. Qiantu.com*, the court of first instance held that the four general original pictures involved in the case needed to be downloaded by members who paid for it, so Qiantu.com directly obtained economic benefits from them, while the court of second instance held that the unified membership fee collected by Qiantu.com belonged to the general service fee and management fee charged to maintain Qiantu.com's business model, and was not a direct economic interest. It can be seen from this that in the determination of direct profits, China's legal circles have not reached an agreement. In fact, in network operation, network service providers provide network users with various services such as information transmission, storage and release, and accordingly will obtain economic benefits by charging service fees, membership fees, commercial advertising implants, and sharing revenue with users. Among them, the most controversial is whether advertising revenue is direct profit. From the perspective of civil law, the behavior of network service providers to provide services for free and use the traffic attracted by the platform to advertise to earn fees is completely legitimate and legal, and should not be subject to a higher duty of care. However, some courts, such as the Chongqing Liangjiang New Area People's Court, the Guangzhou Intellectual Property Court, and the Shanghai Pudong New Area People's Court, have held that investing in advertisements before the video of a paid website is played, setting up advertising spaces below the video and above the comment area, and inserting advertisements on the video search page are all "direct profits". There are also a small number of courts, such as the relevant judgment of the Chaoyang District People's Court in Beijing, that the advertisement is automatically loaded by the video player and is not a "direct profit". In the case of *Beijing Youpen Pule Technology Co., Ltd. v. Global Times Online (Beijing) Culture Communication Co., Ltd.* for infringement of copyright property rights, although Global Times Company did not directly participate in the dissemination of the film involved in the case, it was also ruled by the court to bear infringement

liability because of the cooperation agreement signed between it and Juli Media Company, and the two parties shared the advertising proceeds. In fact, whether advertising revenue is direct profit cannot be generalized. From the perspective of the source of income of network service providers, the user pays for the use and operation of user service charges is the most typical direct way to benefit, the former is that network users download and pay fees to network service providers when watching specific content, and the latter is the operating user as a content provider to pay fees or share revenue to network service providers when they deliver relevant content on the network platform [2]. Therefore, the provision of services for free cannot be an excuse that the advertising revenue of the web service provider is not directly profitable. But at the same time, to borrow the words of the Shanghai No. 1 Intermediate People's Court: not all advertising is a direct profit, and only when there is a specific connection between the advertisement and the user content, such as the advertisement is directed to specific content instead of random delivery, and the advertising revenue is positively correlated with the number of clicks on the content, etc., it can be identified as a direct benefit.

2.3.2 Performance of the higher duty of care

The realization and application of article 11 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Disputes Involving Infringement of the Right to Information network communication is undoubtedly an important reference factor for setting the duty of care for network service providers.

In the direct profit clause, the "higher duty of care" should be based on the network service provider's ability and right to control the infringement. The ability to control and direct profit are the two major constituent elements of "substitution liability" in the US Digital Millennium Copyright Act, so the "higher duty of care" caused by "direct profit" also needs to fully consider the control ability of network service providers. The ability to control is divided into discovering infringement and controlling infringement, the latter can be achieved through technical measures such as blocking, deleting and disconnecting links, and the key lies in the former. Some scholars believe that whether network service providers can and should discover the facts of infringement depends on a series of factors such as the nature of the service, the professional requirements, and the degree of attention that rational people in the same industry should achieve under the same circumstances. Because there are differences in the business model, profitability factors, technical capabilities and types of rights objects of different network service providers, in judicial practice, it should be clear that there is a difference between the "higher duty of care" in judicial practice.

To be clear, a higher duty of care cannot be equated with an obligation to review. For all kinds of content such as short videos, text works and picture files, network service providers actually have practical difficulties in not being able to perform their obligations: first, from the technical level, it is difficult for network service providers to distinguish the facts of infringement from various types of works that are mixed with fish and dragons, and second, due to the lack of professional knowledge, it is difficult for network service providers to determine whether the act is legal. Therefore, the "higher duty of care" of network service providers should be coordinated with their ability to manage content under real-world conditions. A more reasonable measure would be to define it as an ex post facto duty of care with a strict and specific scope of the review obligation. In the case of "direct profit", if the network service provider actually has "control ability", even if it has not received effective notice from the right holder, it should perform the corresponding duty of care for the infringing content from which it "directly profits" [11].

3. Summary

Behind the increasing prevalence of online infringement, in addition to the direct infringement of network users, network service providers as third-party entities also play an important role in curbing online infringement. It must be recognized that network service providers are no longer simply providing information storage and transportation services, but are participating in the operation of various network affairs with unprecedented activity. On the one hand, network service providers must

undertake the corresponding duty of care for the direct benefits they have obtained, but at the same time, legitimate demands cannot degenerate into endless excessive demands. How to accurately grasp the balance of power between network service providers and network users is undoubtedly the greatest practical significance of the study of the duty of care of network service providers. The introduction of direct profit clauses has advantages and disadvantages, and only when properly used can we promote the continuous improvement of the network service provider responsibility system, and take a solid step to completely eliminate the chaos of online infringement and purify the network environment.

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