

Research on the tort liability of network service providers

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Abstract

In the context of the rapid development of the Internet, the incidence of online infringement is also rising. With the diversification of online infringements, the infringing subjects include not only ordinary users, but also network service providers. According to the relevant provisions of the Civil Code, the principle of attribution of liability for network infringement of network service providers is usually general fault liability. However, tort prevention liability that is not for the purpose of compensation for damages is not conditional on fault. In indirect infringement, the liability of the network service provider and the direct infringer is usually in the form of aiding in joint infringement, and the former is guilty of helping the infringer. In the event of a data breach, the network service provider usually bears additional liability for violating the security obligation.

Keywords

Network service providers; Tort; tort liability; Principle of attribution.

1. The basic theory of tort liability of network service providers

1.1. The concept and types of network service providers

(1) The concept of network service provider

In 1998, the United States promulgated the Digital Millennium Copyright Act, which first proposed the concept of network service providers. Article 512 classifies network service providers as: providing transient information dissemination services; provide system caching services; A network service provider that provides information storage and information search services based on user instructions.

There are broad and narrow definitions of network service providers. Network service providers in a broad sense refer to natural and legal persons who provide network communication-related services to serve an unspecified majority of people through the medium of the Internet, including network content providers and network intermediary service providers. Network service providers in the narrow sense only refer to network intermediary service providers, that is, natural persons, legal persons or other organizations that conduct network communication between third parties and provide technical support and services for the purpose of profit [1]. The network service providers mentioned in this article refer to network service providers in the narrow sense, i.e., network intermediary service providers, that is, natural persons, legal persons or unincorporated organizations that only provide intermediary technical services and do not produce substantive content.

(2) The type of network service provider

There is no unified classification standard for the classification of network service providers in Chinese law, and there are different opinions in Chinese academic circles on the types of network service providers. For example, in Professor Zhang Xinbao's view, network service providers include intermediaries that provide transmission hosts, information hosts, exchange services, transaction facilitation services, and other types of services [2]. Professor Yang Lixin believes that network service providers in a broad sense are composed of network connection

information service providers, network access service providers and network platform providers [3]. Therefore, in the context of the Regulations on the Protection of the Right of Information Network Transmission, different network service providers can be divided into several categories in view of the unique characteristics of their service types:

Internet access service providers

"Network access service provider" refers to the network service provider used to provide basic communication services such as basic physical network equipment and network access interfaces for information transmission. The so-called physical network infrastructure is a variety of hardware networking media similar to optical cables, routers and other hardware networking media to meet the needs of users. Users use these media to connect or access the Internet through dial-up and other means. For example, China Mobile, China Unicom, China Telecom, etc. are all network access service providers. In other words, when users browse, upload, and download data on the Internet, they must use the access services provided by the network access service provider.

Online platform service providers

Online platform service providers refer to virtual platform entities that provide Internet users with services such as editing, publishing, and exchanging information in the process of surfing the Internet, such as online platforms such as Douyin, Weibo, WeChat, Twitter, and YouTube. The online platform service provider only provides an online platform for communication between Internet users, and it usually does not participate in the dissemination of information. However, compared with network access service providers, the biggest difference between network platform service providers is that they have a stronger ability to control the information published on the platform, and can control and delete the infringing information in a timely manner. As a result, online platform service providers are often prone to infringement disputes.

Location Service Providers

Information location service providers refer to providers that classify information websites for Internet users and provide links and navigation URL services, such as Baidu, Google, and other platforms. Among them, search and link provision are the most typical, and the search includes the following two types: first, the user searches and queries according to the determined keywords, and the information positioning service provider retrieves the corresponding website content according to the keywords. For example, if you search for the keyword "Jay Chou" on Baidu, the page will soon appear pages related to "Jay Chou", some are text pages about Jay Chou's personal profile, and some are music websites. Second, users can search through the set directory to find the information they need. For example, if we want to travel but don't know exactly where we want to go, we can click on "Tourist Transportation" on the Google Search homepage to search the directory.

1.2. Determination of infringement by network service providers

(1) The meaning of infringement by network service providers

In the theory of online infringement, there is a distinction between direct infringement and indirect infringement. Direct infringement refers to the act of uploading or downloading the work of the right holder on the Internet or otherwise infringing the exclusive rights of the right holder without the permission of the right holder. The so-called indirect infringement refers to the act of the actor not infringing the exclusive rights of online works, that is, the act of deliberately inducing others to commit direct infringement or giving substantial assistance knowing or should know that others are about to carry out or are carrying out direct infringement, as well as the act of preparing for direct infringement and expanding the consequences of infringement in specific cases [4]. From the above concept of indirect infringement, it can be seen that although the infringement is committed by ordinary network

users, it seems that the network service provider is also liable because the network service provider has provided certain technical support for the infringement or because it has failed to fulfill the duty of reasonable care. Therefore, the corresponding legal liability for indirect infringement should be borne.

(2) Elements of infringement by network service providers

The network service provider has committed an infringing act

Infringement requires that the network service provider must have committed the infringement.

The network service provider's conduct is illegal

The illegality of the act is a prerequisite for requesting the infringer to perform the tort liability, and it is obviously unfair to require the actor to bear the tort liability if the act carried out by the actor is not reprehensible at all. Therefore, the tort liability borne by the network service provider must be based on the premise that the act is illegal, and the act carried out by the network service provider can be determined to be illegal under the following two circumstances: first, the act of instigation, aid, or inducement carried out by the network service provider provides substantial assistance to the direct infringer and ultimately leads to the harmful result. For example, in the Napster case, the U.S. court held that Napster's software, server, and search system played an auxiliary role in direct infringement, facilitating communication between people or downloading documents, and that it was aiding infringement. Second, the network service provider has a reasonable duty of care for the information published within the scope of its management and control platform, and it is also illegal for it to allow the infringing information if it is aware of the existence of infringing information.

There is a causal relationship between the infringement committed by the network service provider and the result of the damage

There is a special causal relationship between the infringement committed by the network service provider and the result of its damage. This is because the infringement not carried out by the network service provider directly caused the occurrence of the damage result, but caused the same damage result together with the direct infringement. If the following three situations occur, it can be determined that there is a causal relationship between the network service provider's infringement and the damage result: first, the infringement committed by the network service provider plays a technical support role for the direct infringer and is conducive to the direct infringer's infringement; Second, the infringement by the direct infringer is caused by the behavior of the network service provider; Third, in order to make profits, network service providers ignore the infringements that occur within the scope of their management and control, and allow them to develop.

The network service provider is at fault

Since direct infringement is a prerequisite for the occurrence of indirect infringement, the direct infringer is the first person responsible. Therefore, the fault of the network service provider is a prerequisite for it to bear indirect tort liability. Specifically, if the network service provider knows or should know that there is an infringement, but fails to fulfill its duty of due diligence or allows the infringement to develop, resulting in the infringement of the direct infringer, resulting in the occurrence or expansion of the damage, the network service provider shall be found to be at fault.

2. The principle of attribution of tort liability of network service providers

2.1. Interpretation of Article 1194 of the Civil Code

Article 1194 of the Civil Code (Liability of Network Users and Network Service Providers) stipulates that network users and network service providers who use the network to infringe on the civil rights and interests of others shall bear tort liability. Where the law provides otherwise, follow those provisions. This article is a general provision on online infringement. The first sentence of this article is derived from Article 36, Paragraph 1 of the Tort Liability Law, and there is no change. China's Copyright Law, Trademark Law, E-Commerce Law and other laws all have a number of special provisions on online infringement, so the expression "where the law provides otherwise, follow those provisions" is added to the second sentence of this article.

Purely as a matter of expression, the article appears to provide for a no-fault liability, since there is no reference to fault or breach of care. However, this article is not a complete legal provision, and it does not stipulate the constituent elements, and other legal provisions must be relied upon when determining whether the perpetrator has established online infringement. Therefore, this article is a declaratory legal provision in nature. Any person who infringes upon the civil rights and interests of others in any way shall bear tort liability. Among them, "anyone" of course includes "network users and network service providers", and "by any means" of course includes "use of the network". Therefore, there is no new content in the article. However, in today's information age and the Internet age, such a declaration still has its significance. On the one hand, traditional infringement methods are mainly in physical ways, while online infringement methods are mainly in virtual ways. On the other hand, there is a high incidence of online infringement, emphasizing that online infringement should bear statutory liability, which has the emphasizing significance of education and warning [5]. At the same time, the proviso to this article indicates that the first sentence of the article has the meaning of a general declaratory clause that, where the *lex specialis* otherwise provides, shall prevail.

2.2. The principle of fault liability shall apply to the liability for tort damages

Only those online infringements that are at fault and cause damage to others are liable for tort damages. Here, Article 1194 of the Civil Code cannot be invoked to assert that the network service provider bears the liability for no-fault tort damages to the infringed party. Trial practice has also unanimously held that the establishment of the network service provider's liability for tort damages is premised on the existence of fault. For example, in the case of the horizontal evaluation of the goodwill of an infringing enterprise published by a WeChat public account, although the defendant Xue noted in the article involved in the case that "this article only represents the personal views of the judges", he listed the "Qishan Shenwei" brand mooncakes produced by Qishan Shenwei Company as the penultimate in the black list of Qishan mooncakes, and used words such as "eating additives to grow up", "the taste of medicine", "can be divided into dry garbage", "Paige will not eat" and other words to comment, which obviously went beyond the neutral scope of pure evaluation and turned into a guiding belittlement. Therefore, Xue's act of producing and publishing the evaluation article lacked a legal basis, failed to fulfill his duty of prudent care, and was subjectively at fault. At the same time, Tencent, as a network service provider, did not take active measures after receiving the complaint from Qishan Shenwei Company, so it should be jointly and severally liable for the enlarged part of the loss.

2.3. The principle of no-fault liability applies to preventive tort liability

Although Article 1194 is not a complete legal article and does not explicitly mention the imputable elements of an act, the word "infringement" actually indicates that not all acts of using the Internet or providing network services that cause damage to the civil rights and interests of others constitute acts of online infringement, and only those acts that are determined to be "illegal" through the weighing of interests can be called online infringement. When a network service provider has an illegal act that endangers the personal or property safety of others, the infringed party may, in accordance with Article 1167 of the Civil Code, request the network service provider to bear tort liabilities such as stopping the infringement, removing obstacles, and eliminating dangers. This kind of tort liability is different from the traditional tort liability for damages, and is a new type of tort liability-tort prevention liability or preventive tort liability [6].

3. Different forms of liability for infringement by network service providers

3.1. Joint infringement in the narrow sense or aided joint infringement

In terms of the form of liability, the network service provider and the network user in this paragraph bear joint and several liabilities. However, where joint and several liability is explicitly mentioned in the law, it is truly joint and several liabilities. This paragraph is no exception. There is a view that this kind of joint and several liability of network service providers is indirect tort liability and intermediate liability, and network service providers can recover from network users after assuming responsibility. However, this view is not founded, at least in this article.

There is no doubt about the constitutive elements and legal effect of joint and several liabilities in this article, and it is questionable why network service providers should bear joint and several liability with the infringer. There are at least two explanations for this. First, the network service provider and the infringer bear joint tort liability in the narrow sense of Article 1168 of the Civil Code. Second, the network service provider and the infringer bear the joint tort liability of assistance under Article 1169 of the Civil Code, and the network service provider exists as an aiding infringer.

This article argues that, since only the perpetrator of the online infringement is the direct infringer, and the network service provider is an indirect infringer regardless of whether he knows or should have known about it, this joint and several liabilities between the two should be interpreted as a joint tortfeasor liability of assistance. In particular, it is considered that even if the network service provider is aware of the existence of allegedly infringing content, it is not appropriate to interpret it as intentionally harming the rights and interests of others. In other words, knowing the existence of the allegedly infringing content does not necessarily mean that the infringement is intentional under the Law on Liability for Damages. When the network service provider is negligent in tort, it is unlikely that joint infringement in the narrow sense can be established, regardless of whether the direct actor is intentional or negligent, because there is no concerted act between the two, not only does not have the agreement to cause harm, but also there is no agreement on a specific act. On the contrary, whether intentional or negligent, aiding joint tortfeasors can be established.

In addition, the scope of joint and several liability is the "enlarged part of the damage". This is so because it is only in the "enlarged part of the damage" that the ISP knew or ought to have known.

3.2. Network service providers' security and security obligations and their supplementary responsibilities

In cases where the direct infringement by the actor and the indirect infringement by the network service provider are combined, there are also situations of supplementary liability. The most typical is that the data stored by the network service provider is leaked due to the actions of a third party. In the type of data leakage, the direct infringer is usually a hacker, whose infringement is manifested in deliberately climbing over the firewall to steal the data stored by the network service provider, which may be completely owned by the network customer, such as the personal data and materials uploaded by the right holder after purchasing the right to use Baidu's network disk, etc.; It may also be a database processed by the network service provider, but it contains personal information (including private information) that should be protected by the right holder, such as the occupancy history of residents stored in the system of Huazhu Club or other hotels and the corresponding identity information. For these two types of data, regardless of who belongs to them, the network service provider has a security obligation as the data storer. If the failure to fulfill the necessary security guarantee obligations leads to data leakage and causes damage to the right holder, it shall bear corresponding supplementary liability [7].

Of course, the existence of the security obligation is contextualized, i.e., in the so-called three-person or multi-person situation, and its purpose is to prevent the intentional infringement of the third party. Therefore, if there is no third party who commits the direct infringement, but only two parties, it cannot be called the security guarantee obligation of the network service provider in the virtual space, which is different from the security guarantee obligation in the real world. In the latter, if the manager of a public place or the organizer of a mass event suffers damage to the right holder due to defects or defects in its own software or hardware, there is also direct tort liability for violating the security obligation on the two occasions. However, in the virtual space, it is relatively rare for the network service provider to cause damage to the right holder due to inaction or violation of security obligations.

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