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Study on the Definition of the Duty of Care in the Tort Liability of Platform Operators

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Abstract: With the continuous development of China's online economy, online platforms have emerged and continued to grow. In order to protect the new industry, reduce certain legal risks, and protect the interests of consumers, Chinese Civil Code and E-Commerce Law have introduced Safe Harbor and the Red Flags Rule for the platform operator's tort liability. This paper analyzes the comparative jurisprudence of cases from China and the United States, synthesizes many cases, and proposes more specific standards for the determination of "knew or should have known". The existing system in China has been interpreted and modified in terms of jurisprudence, so as to make the introduction of its rules more concrete and operable. The paper also draws experience from the foreign system and solves problems based on the Chinese national conditions. From the perspective of the social law school, it studies the "living method" of western theories in China. Starting from China's actual situation, it puts forward new suggestions for China's legal research and legal practice, and provides a more perfect legal supporting system for the development of the platform economy, a new industry.

Keywords: safe harbor, red flags rule, platform economy

1. Introduction

In recent years, China's network economy has formed a business environment that continues to develop around network platforms. Although network platforms do not directly provide services or commodities for network users or consumers, they create a platform for platform merchants to enter into transactions with consumers or network users and provide a series of derivative services around this. With the continuous development of the platform economy, the related tort liability cases have shown a rising trend year by year, and the data shows that the number of related cases involving online platforms in 2019 has been elevated by 59.7% relative to 2018. To a certain extent, this brings huge legal risks for the e-commerce platform, for this reason, China's newly promulgated Civil Code, Article 1,192, the E-commerce Law, Article 42, stipulates that after being notified by the claimant, the platform operator who has not taken the necessary measures shall bear the responsibility, which in essence provides the platform operator who has taken the necessary measures with a certain amount of space for exemption from the liability defense, reflecting the protection of the platform economy as a newborn industry, which is generally regarded by scholars as the embodiment of Safe Harbor.

However, in reality, the phenomenon of online platforms abusing the "safe harbor" rule to engage in unfair competition and control consumption channels has occurred time and again. And in the field

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of judicial practice, platform operators invoke the safe haven principle as a basis for defense, which frequently fails. From the legislative point of view, this is because China's civil code and e-commerce law are too vague on the most important standard for the application of the safe haven rule, the standard for judging "knew or should have known", and although the Supreme Court made a judicial interpretation in 2020 to supplement this, it has not fundamentally solved the problem. Although the Supreme Court made a judicial interpretation in 2020 to supplement this, it did not fundamentally solve the problem. This not only brings uncertain risks for platform operators, but also becomes an obstacle for consumers or network users to safeguard their legitimate rights. Therefore, the relevant provisions need to be made more explicit, precise and objective in order to promote the green and healthy development of the newborn industry.

2. Theoretical Controversy over the Limits of "Safe Harbor"

In the common-law context, the safe-harbor rule first appeared in the "notice-and-strike rule". A network service provider, including a platform operator, that receives notification from other network users that the content of the services it provides may involve infringement. As long as the internet platform takes the necessary measures, mainly blocking and deleting, it is equivalent to hide in a safe harbor and is no longer liable. However, if its infringement is so obvious that it is impossible to ignore it like a red flag flying, the haven does not exist and it should be held liable for the damage previously caused, even if it has taken the necessary measures. In the United States, where the safe haven principle originated, it is widely recognized that the safe haven principle manifests itself in the form of knowledge before responsibility. Obvious knowledge under the red flag rule, on the other hand, requires that the fact of infringement is apparent. The standard to be applied can be compared to Corbis versus Amazon. In that case, the court noted that the obvious standard was that the station's merchants used explicitly infringing language, such as pirated cracked versions, on the site's pages [1]. In fact, courts are quite strict in determining obvious knowledge. Some scholars have done statistical searches, and as of 2015, there has been no jurisprudence holding that the platform meets apparent knowledge [2].

In China, it is generally recognized that articles 1195 and 1197 of the Chinese Civil Code correspond to the safe haven rule and the red flag rule, respectively. Article 1195 constructs a behavioral model in which the suspected infringement exists - the right holder makes a notification to the internet service provider - the internet service provider takes the necessary measures to eliminate the expected result of the damage and is therefore not liable. If the network service provider fails to take the necessary measures, the result of the damage is to extend the damage, which constitutes indirect infringement and joint and several liability. It follows that the objective element of liability for extended damages is whether the necessary measures are taken in a timely manner. The point at which the scope of liability is determined is from the appropriate time after the effective notification by the right holder.

But according to article 1197 of the Civil Code, the criterion for the liability of the internet service providers is the subjective element, knowing or should have known. Whereas there is a dispute as to the extent of its liability and its timing. It has been argued that the point in time should be the same as the point in time at which liability is assumed under Article 1195, the notice of the right holder. Liability extends to extended losses resulting from the failure to take the necessary measures after notification. However, the mainstream view of the academic community, the node of time to assume responsibility, should be for network service providers know or should know network users infringement, the scope of responsibility should be the infringement caused by all the damage. In the author's view, from the perspective of comparative jurisprudence, these two provisions of China's Civil Code are motivated by the purpose of introducing the foreign safe harbor rule and the red flag rule. If the former view is taken, it will not be consistent with its purposive interpretation, and will

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also result in a redundant and repetitive structure of the law, which is not in line with the rules of systematic interpretation.

Visible, the above two articles put forward the responsibility of the important cognitive standards, "know or should know", but what should know, should be further clarified, some scholars believe that should know refers to sufficient evidence [3], according to the principle of high degree of causality attribution, presumed to know, but there also scholars believe that should know out of negligence leads to the infringement of the fact should know but not known.

3. Judicial Overview of the Dispute and Problems

Until the relevant judicial interpretations were issued in 2020, the ambiguity of the legislation led to a situation of divergent understandings among judges in judicial practice. In Yi Nian versus Taobao, the court presumed, based on Taobao's dominant market position and the company's technological level, that Taobao knew or should have known that Yi Nian had been infringed upon and failed to take the necessary measures [4].

In the case of Ciwen versus Guizhou Telephone company, the infringed movie Seven Swords had a large influence and popularity, and Guizhou Telephone company should have known that its copyright was protected and that network dissemination of its works required the permission of the copyright owner. This uses the popularity and reach of the infringed work as a criterion for considering liability [5].

And in 11 Record Labels versus Yahoo, the court of first instance, although it found that the recording had a certain degree of popularity, it was a third-party website that made the song available to Internet users. The search engine and download link services provided by Yahoo do not have a high degree of control over the content of the video, and the technical means adopted by Yahoo is limited to information retrieval, with little possibility of its knowledge, thus arguing that Yahoo does not need to bear the responsibility for the infringement [6].

In the case of Bu Sheng versus Baidu [7], the court held that although Baidu merely provided search engine service [8], the service was not limited to introducing the artistic value of the infringed song, but Baidu also profited by charging a fee for downloading videos containing the song, so Baidu should be held liable for infringement. It can be seen that the nature of the services provided by the online platform [9], its profitability and non-profitability, has become an important factor in shaping the judge's decision.

These standards of judgment developed in judicial practice have been almost entirely absorbed into the judicial interpretation of the Supreme People's Court on the provisions of the law applicable to the trial of civil disputes over the use of the information network to infringe upon personal rights and interests.

Article 6 of the Judicial Interpretation intends to embody the subjective standard by including the network service provider's handling of content, its information management capability, its social impact, and its level of security technology in the scope of the obligation to know.

However, the results have been less than satisfactory. In the 16 cases retrieved from the China Judgment Website, the courts essentially avoided applying or misapplied article 6 of the judicial interpretation. Take Peng Qiuyan, Guangzhou Yuejin Trading Company and other Internet Tort Liability Dispute Civil First Instance Civil Judgment as an Example [10], the court directly relied on the fact that the online platform had taken the necessary measures after being notified by the right holder, and therefore should not be held jointly and severally liable. Decisions such as these confuse the two completely different spheres of liability for damages caused by an infringement prior to notification by the right holder and damages caused by the platform's failure to take the necessary measures after notification. In this case, the platform operator took the necessary measures in a timely manner to fulfill its non-genuine obligations, resulting in the loss that was expected to occur not

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occurring, and it would not have been liable for the expanded loss that did not occur. However, the court did not argue whether the online platform was obliged or had the possibility to "know or should have known" of the infringement and to take the necessary measures before the notification by the right holder. The judgment did not comply with the principle of fill-in-the-blank and did not compensate the right holder for the damage caused by the infringement prior to the right holder's notice.

4. Measures to Address the Problem: Building a Safe Haven with Clear Boundaries

The application of the law is the life of the law. And legislation is the root cause of justice. The solution to the many problems in the administration of justice lies in correcting the shortcomings of legislation. In the author's opinion, the necessary changes must be made to the judicial interpretation.

4.1. To Clarify the Elements of the Determination

Elements differ from elements in that the former refer to generalized conditions that should be met for the law to apply [11], such as "whether the platform has taken appropriate and reasonable measures". The latter refers to the specific judgmental factors that can be taken into account when determining the elements, such as the company's management level, technical capabilities. In order to determine whether it has taken the necessary measures within its capacity. In Chinese legislation and practice, elements are often "mistaken for elements", thus causing confusion. The author believes that the provisions of the Supreme People's Court on the application of the law on the trial of civil disputes over the use of information networks to infringe on personal rights and interests lack the necessary elements of the enumeration, lack the necessary elements of the enumeration, should also be further refined. For example, paragraph 2, "The network service provider shall have the ability to manage the information, as well as the nature and manner of the service provided, and the extent of the possibility of infringement arising therefrom" is too macroscopic and lacks the necessary details from the technical point of view of the legislation. In the author's view, the nature of the services provided by the network service provider can be enumerated, as well as the type of personal rights can be made.

4.2. Protection Should Not Be Limited to Personal Rights

As the judicial interpretation has already limited the applicable scenario to online disputes only, there should be no restriction on the type of rights it protects, limiting it to personal rights.

4.3. "Reasonable Measures" Should Be More Specific and Effective

Paragraphs 5 and 6 are silent on the use of reasonable measures in the case of reasonable measures. This leads to a possible duplication of the law by this judicial interpretation. Article 42 of the e-commerce law also states that the platform operator shall take the necessary measures. This is that the judicial interpretation loses the significance of enabling the law to be correctly applied to adjudicate specific cases. Therefore, the author believes that the so-called specific measures should be further detailed provisions, such as deletion, blocking and so on. The repeated infringement referred to in paragraph 6 is precisely the weakness and pain point in China's efforts to address the violation of the rights of others through the use of online platforms. Conventional actions such as deletion cannot address the violator's high density, repetitive, and high frequency of posting infringing information in violation of the law. Therefore, the author believes that the European legislative experience should be introduced to incorporate AI keyword screening and blocking into

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the necessary measures, so that the measures taken by the platform operator can truly protect the interests of the violator.

4.4. The Responsibility of the Platform for Taking Measures in Error Should Be Consolidated

In addition, the principle of a safe haven should not be turned into a safe haven for platforms to negatively evade their responsibilities. Some online platforms are overly sensitive to reports and notifications and immediately take down the reported content upon notification without the most preliminary verification, leading to the prevalence of malicious notifications. This is a clear violation of the right to freedom of expression and normal business operations. Therefore, the author believes that the malicious report as well as the platform operator's irresponsible deletion and shielding behavior should be part of the joint and several liability connection and placement, in accordance with the proportion of the cause of the fault force, so that the irresponsible platform operator to bear part of the joint and several liability.

5. Conclusion

With the introduction to a series of laws, China has basically built a preliminary framework for a safe haven system. Although, there are still a series of lack of legislative technology, such as insufficient specificity and practicality. However, there is no doubt that China's steps on regulating the behavior of platform operators and protecting the development of this newborn industry will not stop, and the legal system will be continuously improved. This paper links the judicial cases in different periods, combines foreign laws for comparative analysis, and analyzes the lack and insufficiency of China's legislation on the field of legislation concerning network platform operators. This paper summarizes the methods and measures to improve China's safe haven system. Although the method proposed in this paper lacks practical foundation from the perspective of social law school, it also provides some new ideas for China's legislation in the field of Internet.

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