

Redefining Duty of Care: Challenges and Solutions for Network Service Providers

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Abstract: With the rapid development of Internet and algorithm technology, how to judge the "duty of care" of network service providers has become a new problem in the field of network infringement. The main topic of this paper is to focus on what kind of duty of care network service providers should bear, and how to solve the problem of responsibility division and commitment in practice. It begins with a comprehensive analysis of the current legal frameworks in China, comparing them with global standards, particularly focusing on the United States' "Safe Harbor" principle and the European Union's Digital Single Market Copyright Directive. It further discusses the challenges of enforcing the duty of care, emphasizing the variability in judicial interpretations and the difficulties in applying traditional legal principles to modern digital contexts. It highlights the need for clearer definitions and preemptive legal measures to mitigate infringement risks, as demonstrated by proactive copyright declarations like those implemented during the 2022 Beijing Winter Olympic Games. Additionally, it examines the potential misuse of the duty of care in competitive business environments, suggesting judicial and legislative strategies to prevent abuse and ensure a fair application of the law. The conclusion advocates for a collaborative approach to reforming duty of care standards, involving a range of stakeholders from legislators to copyright holders, to ensure they are robust yet flexible enough to accommodate future technological developments.

Keywords: Online infringement, duty of care, censorship, safe harbor principle

1. Introduction

With the rapid development of the Internet, network service providers play an urgent and important role in information dissemination and data processing. However, the question of how to divide responsibilities and obligations has also emerged with urgency. The urgent need to define "duty of care" precisely and appropriately is driven by the increasing complexity of online interactions and the potential for widespread impact on users' rights and data security.

The assumption of equal care duties by service providers raises significant questions: How should these duties align with the providers' capabilities? What legal and ethical standards should be applied to ensure that they do not exceed or fall short of what is technologically and reasonably feasible? These issues are not just technical but are deeply intertwined with legal implications, necessitating a careful balance between innovation, user protection, and regulatory compliance.

Therefore, this paper hopes to better understand and discuss the topic of duty of care through the analysis of cases and related legal concepts. The significance of studying the duty of care of network service providers is that it can adopt certain measurement standards more accurately and accumulate more judgment experience in the face of urgent judicial practice.

This paper is divided into three parts. In the first part, based on the analysis of China's legal system on the duty of care, it also makes a comparison and analysis in the global legal provisions, so as to achieve a comprehensive understanding of the background of the duty of care of network service providers. In addition, the first part will also put forward three specific problems that the duty of care will encounter in the current judicial practice, and make a brief analysis. In the second part, this paper will conduct an in-depth analysis of "duty of care" itself. Through the concrete analysis of the case, the corresponding judgment scale and other views are obtained. The third part of the paper mainly puts forward the solution strategy to the current problem, and draws the conclusion that network service providers should reasonably measure the scale of duty of care.

2. The Relevant Provisions on the "Duty of Care" of Network Service Providers

2.1. The Problems Arising from "Duty of Care" in China's Current Judicial Practice

Among the responsibility requirements of China's network service providers, the "notice-delete" rule, "necessary measures" and "red flag principle" constitute the core content of the duty of care that China's network service providers should perform. Among them, notice-delete rule requires service providers to remove content when they receive a valid legal notice indicating that the content is unlawful. The effectiveness and fairness of this rule are often questioned, particularly in how it balances protecting copyright holders and preserving freedom of expression and innovation. Necessary measures require providers to take all necessary precautions to prevent the violation of rights on their platforms. The ambiguity of what constitutes "necessary" measures can lead to varied implementations and effectiveness, influencing the overall accountability of providers. Red flag principle compels service providers to act when they become aware of illegal activities or information on their platforms. The challenge lies in defining what exactly should trigger this awareness and the extent of due diligence required before a provider is deemed to have knowledge of such activities.

The application of these principles in the context of algorithm-driven technologies further complicates their interpretation and enforcement. Algorithms, by their nature, filter and recommend content based on user behavior and preferences, which raises questions about the extent of a provider's responsibility in monitoring and controlling such automated systems. For example, the debate over whether providers should bear a higher duty of care pivots on the capability of algorithms to influence user interactions significantly without explicit human oversight.

Scholars and jurists diverge in their views on these issues. One side believes that in some algorithm recommendation services, service providers do not purposefully and uniformly recommend content to non-specific users, nor do they constitute intentional infringement that "should know" subjectively [1]. In practice, such conduct does not constitute an assumption of responsibility for the "ought to know" rule. The other side, starting from the current environment of rapid development of network service technology, thinks that network service providers should undertake higher obligations in line with their technical capabilities and economic benefits.

In judicial settings, these disputes manifest in the difficulties of applying traditional legal principles to the modern digital context. Courts are often tasked with interpreting these principles in cases involving sophisticated technologies, leading to inconsistent rulings and a pressing need for clearer guidelines.

2.2. An Analysis of Global Legislation on Duty of Care

Global perspectives on the "duty of care" that network service providers must uphold have been significantly influenced by the legislative frameworks of the United States and the European Union. The setting of the duty of care of China's network service providers was also originally designed based on the "safe harbor" rule of the United States. Therefore, by studying the responsibility division of network service providers in foreign countries under the background of the rapid development of new technologies, we can seek inspiration and experience on how to better solve the problem of duty of care under China's legislation.

The "safe harbor principle" was first proposed by the United States and is the core principle to solve the disputes between the early network service providers and copyright. This principle is enshrined in the Digital Millennium Copyright Act (DMCA) of 1998. The Act provides several exemptions under which network service providers can enter safe havens. The Act will enable network service providers to manage and control online content more effectively without taking on excessive additional censorship responsibilities [2]. However, the continuous evolution in digital communication and content sharing has exposed limitations in this principle, particularly when adapting to the scale and capabilities of modern technologies. For example, if the right holder abuses the right to complain and engages in litigation for the practical purpose of commercial competition, the Safe Harbor Principle may be subject to abuse.

The Digital Single Market Copyright Directive (DSM Directive) adopted by the European Union in 2019 can be seen as an international extension of the Safe Harbor Principle and more explicit provisions [3]. The Act reflects the trend of the obligation of network service providers to assume more "filtering obligations" from only the "notice-delete" principle. The bill characterizes systems in emerging algorithmic technologies as "acts communicated to the public or made available to the public." In other words, in the new Act, the Internet service provider is no longer just a "middleman" role, but has become a real participation in the "dissemination of information to the public" of the responsible subject. Among them, "filtering obligation" has included the censorship obligation to a certain extent, which reflects the legislative trend of higher duty of care shouldering network service providers [4].

Therefore, combining the provisions of the United States and the European Union, when measuring the issue of "duty of care", international legislation also reflects the idea of keeping up with the development wave of technology and the Internet industry and constantly adding more explicit provisions on "duty of care". It is similar to the current problems in the judicial field of China, which can provide a certain reference for China to solve the problem of the division of obligations.

2.3. China's Specific Problems in the Determination of "Duty of Care"

The determination of the appropriate "duty of care" for network service providers is fraught with complexities in China's judicial landscape. In the current judicial practice, the most important problem still lies in how to deal with whether network service providers should bear a higher "duty of care", which is characterized by different judgment rules in courts and endless arguments in academia.

From a legislative perspective, defining the scope and boundaries of the duty of care poses significant challenges. Current laws may not sufficiently delineate the responsibilities of digital platforms, leading to ambiguity and potential misuse. There is a critical need for clearer legal definitions and guidelines that articulate the expectations from service providers, balancing the need for innovation with consumer protection and rights enforcement. Effective legislation would not only clarify the roles and responsibilities of digital platforms but also enhance the overall structure of the digital market, promoting a healthier business environment.

Besides, in the face of network service providers and right holders who are also merchants, how to avoid the use of the "duty of care" principle for commercial competition is also a challenge that needs to be faced. In the context of fierce competition between long video and short video platforms, it is not uncommon for parties to use legal provisions to carry out "infringement and rights protection" lawsuits, but actually engage in public opinion wars and commercial competition. Therefore, how to avoid the abuse of the relevant provisions of such network service providers is also the focus of controversy in judicial practice.

3. An In-Depth Analysis of "Duty of Care"

In the era of big data push, network service providers are faced with more complex responsibility boundaries. With the development of information flow and big data technology, network service providers can make personalized push based on users' historical data and behavior patterns, thus improving user experience and service accuracy. However, in this process, network service providers also need to face the challenge of how to divide the boundaries of infringement liability.

3.1. The Judgment Standard of Duty of Care from iQiyi Limited v. ByteDance

In determining the liability of network service providers, courts often take into account their ability to bear. Specifically, the duty of care of network service providers should be consistent with their technical strength, resource investment, business scale and other factors. If an Internet service provider has strong technical strength and resource support, it should bear a relatively higher duty of care.

An illustrative case is iQiyi Limited v. ByteDance, where iQiyi, which holds distribution rights for a film across global networks, faced unauthorized distribution of short videos from the drama on ByteDance's Toutiao app. Iqiyi believes that the use of information stream recommendation technology to recommend and disseminate the video to the public infringes iqiyi's right to disseminate information on the network of the drama, which is an act of aiding infringement [5]. As a large Internet video platform, Byte company has sufficient resource investment in big data flow, including capital, manpower and technical support, and should bear a higher duty of care than the general subject. In addition, ByteDance itself has a corresponding management system for information security management, but in actual operation, it fails to strictly implement necessary measures such as prevention, timely discovery and deletion of infringing videos. Therefore, it can be found that the tort did not bear a reasonable duty of care.

The court held that ByteDance's failure to assume a duty of care consistent with its own strength amounted to assigning to the copyright owner the adverse consequences clearly caused by the infringement. Infringing users enjoy network services and network service providers gain commercial benefits, which is fundamentally inconsistent with the basic principles and legislative intent of copyright law. Therefore, the case was finally heard by the Beijing Haidian District People's Court, and the judgment was: the defendant Byte Company compensated the plaintiff iQiyi Company 1.5 million yuan and reasonable litigation costs 500,000 yuan. The case underscores the principle that network service providers must align their duty of care with their operational and technical capacities to prevent legal infringements and protect intellectual property rights.

3.2. The Distinction and Connection between the Duty of Care and the Duty of Review

The duty of care refers to a series of norms and requirements that network service providers should pay attention to and abide by in the process of providing network services, aiming to ensure the legitimate rights and interests of users and network security. Compared with other obligations, it is necessary to pay more attention to the matters and norms that network service providers should pay

attention to in the process of service provision, the main purpose of which is to regulate the behavior of network service providers and protect the rights and interests of users and social public interests. This proactive duty mandates that providers consciously implement and uphold their obligations throughout the service delivery process. For example, network service providers should strengthen the protection of user information and take necessary technical and management measures [6].

In contrast, the duty of review involves scrutinizing content uploaded by users to prevent the dissemination of illegal information and protect the rights of others. Adhering to the duty of review is essential for maintaining content legality and ensuring compliance with platform regulations.

While Chinese legislation has clearly defined duty of care and duty of review as distinct responsibilities, recent judicial practices indicate a shift towards integrating these duties, particularly as large internet companies become predominant in the digital landscape. Judicial decisions show a trend of higher requirements for "duty of care corresponding to the information management ability of the infringing subject". Words such as "higher duty of care" frequently appear in judicial decisions and academic citations. This is also the inevitable result of large Internet companies gradually becoming the main body of network service providers in the era of big data. The duty of care undertaken by these network service providers, who are judged to be in need of better duty of care in practice, is gradually including the content that originally belongs to the duty of censorship.

Therefore, in the face of the current judicial trend towards network service providers, the duty of review should not exist apart from the duty of care. Encouraging network service providers to fulfill the responsibility of pre-examination and prevention more comprehensively is conducive to the responsibility of the main body to better undertake "higher duty of care". However, in the current legal practice, most of the review is limited to the post-review, and the lack of pre-review also leads to the difficulty of performing the duty of care [7].

4. The Solution Strategy of "Duty of Care" Problem

4.1. Adapting Duty of Care to Technological Advancements

From the above case and theoretical analysis, it can be seen that whether to undertake a "higher duty of care" should not be generalized. This trend is essentially a response to the changing role of network service providers after the popularization of algorithm technology. If the infringing subject itself is a network platform with strong technical level, accurate algorithmic ability and huge economic benefits, then its duty of care should be higher than that of ordinary network service providers. Therefore, the scale of "duty of care" that the responsibility subject should undertake should match its own background and strength.

As for the algorithm platform itself, a more clear and strict review mechanism should be established within the algorithm platform. In the face of the "notice-delete" process, the mechanism and principle of timely response should also be implemented more strictly. On the basis of not disclosing commercial and technical secrets, the network platform in the new era should also make its algorithm recommendation mechanism more open and transparent [8]. These solutions are conducive to reducing the pressure on algorithmic network service providers to assume the duty of care in the current environment. For the whole network service provider, "concrete analysis of specific problems" is an important principle to measure the duty of care.

According to the different capacity of the responsible subject and the infringement circumstances of the case, the judicial department should start from the case itself to judge whether the Internet service provider meets the exemption of "fulfilling reasonable duty of care". In judicial practice, avoiding the same tendency to analyze different issues is conducive to more just and scientific implementation of legal provisions.

4.2. Enhancing Preemptive Measures to Mitigate Infringement Risks

The scale of duty of care is the key to determine whether an Internet service provider constitutes an infringement. Therefore, encouraging the subject of the right to agree on the standard of the duty of care in advance is also an important way to clarify the scope of the obligation and reduce the risk of infringement. For example, in the relevant statement on the broadcast rights of the 2022 Beijing Winter Olympic Games, the National Copyright Administration has clarified in advance that the copyright of the 2022 Beijing Winter Olympic Games is the International Olympic Committee and the China Media Group. The Radio and Television Group also clearly announced the subject of its authorized event broadcasting rights through the release of a statement on the official website and the signing of the event program [9]. Through timely disclosure of information and authorization list to the public, it is not only conducive to the major network service providers to clarify their own responsibilities and obligations, and reduce their own infringement risks; it also helps the judicial department to more accurately judge whether the behavior of Internet users uploading programs constitutes infringement.

The problem of reducing the infringement risk of network service providers should not be solved by the responsible subject alone. Right holders should also have the consciousness of actively safeguarding their own copyright interests before the infringement occurs. Copyright holders should consider implementing measures such as issuing clear guidelines on the extent of permissible use of their copyrighted materials. This could involve detailed pre-declarations that specify what constitutes fair use of the content and under what circumstances their materials can be shared or utilized. Moreover, entering into preemptive agreements with service providers can lay down clear terms and conditions that define the scope of use and the responsibilities that each party holds. These agreements should ideally include details such as the nature of the rights being granted, any limitations on these rights, and explicit mention of the consequences of breaching these terms. For instance, a music publishing company could enter into a preemptive agreement with streaming platforms, outlining the specific usage rights for playlists, radio features, and direct downloads, thereby ensuring all parties understand their limits and obligations.

4.3. Preventing Misuse of Duty of Care in Competitive Environments

How to minimize the abuse and unfair competition of the "higher reasonable duty" standard while implementing the principle of duty of care? In the face of such cases, especially in the case of direct competition between the Internet service provider and the copyright owner, the judicial department can adopt a discretionary compromise approach. For example, in the case of the dispute over the copyright of "Anti-Black Storm", the Beijing Intellectual Property Court required the respondent (that is, Tiktok) to provide a letter of commitment, and the court ruled that the applicant's request for an injunction was rejected [10]. Since the rise of short video, short video and traditional long video platform have produced fierce commercial competition. At the same time, the use of information network communication right to Sue or apply for injunction behavior is constantly. Therefore, the court can encourage the mediation of both parties, prudently evaluate the interests of both parties, strengthen the necessity review of the exercise of the "litigation preservation system" and other methods, so as to avoid the "duty of care" relevant provisions and litigation preservation system becoming tools for the litigant parties to fight against business opponents. In the case of "Anti-Black Storm", the court held that the obligation promised by the respondent was actually higher than its own legal obligation, and there was no need to judge or punish the claims made by the right holder. Therefore, in the face of such problems, the judicial department can comprehensively adopt a variety of legal means to solve the problem as the basic principle, and prudently deal with the infringement between enterprises.

In addition, enterprises should also actively fulfill their legal obligations, rather than only passively consider the "bottom line responsibility" stipulated by the law. In this case, Tiktok Platform also made a commitment to the infringement related to the TV series in the Letter of Commitment. Tiktok offered to use keywords and other technologies to proactively conduct pre-review and post-review for a certain period of time. As a network information dissemination platform, take the initiative to undertake more censorship obligations, which is conducive to reducing the risk of infringement to a large extent. Therefore, encouraging network entities to voluntarily assume a higher level of responsibility is very beneficial for better duty of care. This strategy is also a positive response to the trend of gradually integrating censorship and filtering obligations into duty of care in the new era.

5. Conclusion

The rapid advancement of the internet has profoundly impacted the roles and responsibilities of network service providers, bringing to the forefront the complex issue of duty of care. This paper has explored the multifaceted nature of this duty within the context of evolving technological capabilities and legal expectations, emphasizing the necessity for adaptive legal frameworks that reflect these changes.

This paper has underscored that the duty of care cannot be uniformly applied but must be tailored to the specific capabilities and operational contexts of the service providers. In environments dominated by advanced algorithms and significant data processing, the expectations for service providers to manage and protect user data and content appropriately are heightened. Furthermore, this paper has highlighted the importance of preemptive legal measures and proactive engagement by copyright holders to delineate clear boundaries and expectations for the use of their intellectual property. The paper has also addressed the challenges of applying traditional legal principles to contemporary digital scenarios, where the capabilities of technology often outpace the development of corresponding legal standards. Moreover, the potential for the misuse of duty of care in competitive business environments calls for a balanced and equitable approach to legal disputes.

In conclusion, as network service providers continue to evolve, so too must the frameworks governing their duties. This requires a collaborative approach involving lawmakers, the judiciary, service providers, and copyright holders. Together, they must work towards developing dynamic legal standards that are capable of accommodating future technological advancements while ensuring fair and responsible use of digital platforms.

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