

The Restriction of the Basic Rights of Netizens——Basic on the Expansion of the Safe Harbor Principle

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Abstract. The provisions of the safe harbor principle in the Civil Code greatly expand its scope of application, which makes the ISPs more room to reduce the liability for compensation. On the contrary, the concept of indirect infringement has a different liability which causes the probability of nuisance obligation of the ISP greatly increase. In addition, because the provisions of other department laws tend to remedy the rights of right holders, the risk of relief liability of the ISP is increased in practical practice. ISPs by the light of nature reduce legal costs, and necessary measures in advance become the most economical and effective means. Moreover, the combination of the natural power of the ISP and the hierarchy of public power makes the behavior of the ISP eventually become a means to protect rights by restricting other obliges' rights and naturally fall into the stage of constitutionality review. This paper intends to refute the traditional ideal of the safe harbor principle to introduce the movement of the contrary of such a principle. Based on the theory, this paper will provide a way to improve the system of ISPs' liability for online Infringement.

Keywords: safe harbor principle; imputation; constitutionality; gatekeeper system.

1. Introduction

Since the beginning of the 21st century, Internet technology has developed rapidly. The emergence of various Internet service providers has led to great changes in the judgment of infringement, and the ISP is no longer neutral. In order to protect the rights of the rights holders after the infringement of the relief and end the continuation of the illegal state, the safe harbor principle appears as a boundary that essentially determines the responsibility of Internet service providers. The safe harbor principle comes from the Digital Millennium Copyright Act of 1998, which was enacted in 1998. The earliest receivers of this act in China are Articles 14, 15 and 20-23 of the Regulations on the Protection of the Right of Communication through Information Networks (hereinafter referred to as the Regulations) [1, 2]. With the development of practice, after the absorption and induction of Article 36 of Tort Liability Law, it is finally displayed in Article 1195 of the Civil Code of China, and the intensively related anti-notification provisions and the red flag principle are stipulated in Article 1196 and 1197 respectively [3]. Everything develops in an interaction, and the safe harbor principle in the rapid development of technology over the past 20 years obeys this rule too. The provision of the safe harbor principle in the Chinese Civil Code, compared with the provisions in "Regulations", and its scope of application is widely expanded, which expands from intellectual property rights to civil rights. On the one hand, such adjustment increases the scope of disclaimer of the network ISP, but on the other hand, it also implies that the duty of care or protection of the ISP to the network users' rights is greatly expanded. This paper will analyze the safe harbor principle, discuss its essential meaning, and put forward a different point of view from the mainstream opinion. The essence of the safe harbor principle is to regulate ISP liability through subjective fault rather than a simple disclaimer. Based on this point of view, it is pointed out that due to the changes in the objective facts, the expansion of the application scope of the safe harbor principle does not adapt to the current environment, but becomes a shackle restricting the freedom of speech of Internet users.

2. Reexploration of the Safe Harbor Principle

2.1. This Principle: Imputation Measure

Responsibility is the secondary obligation arising from the violation of the primary obligation. In the general case of using network infringement, it is possible to find the source of the secondary obligation only when the ISP is identified as an indirect infringement. However, according to Article 1169 of the Civil Code, the majority of online infringement cases do not meet the constitutive requirements of "help" [3]. Whether the ISP and the infringer constitute joint infringement is still worth discussing. In comparative law, the ISP's liability in the case of user infringement is often called "intermediary liability", "secondary liability", "injunction" or "nuisance liability" [4]. These liabilities become a tool for benefit relief because they turn a liability into a no-fault liability. It should be noted that the safe harbor rule in the scope of civil law is usually the determination of the liability for compensation of losses. If the principle of the safe harbor is taken as a measure of exemption, it can be easy to find out that the compensation doesn't match such a responsibility. It is therefore logical to regard the safe harbor principle as an imputation measure. ISPs do not participate in the substantive infringement, but violate the obligation of knowing or knowing stipulated in Articles 1195 and 1197 of the Civil Code [3]. And then the ISPs are responsible to the right holder. Only when the duty of care is violated, the secondary duty will be used for imputation.

2.2. The Movement Relationship Between the Safe Harbor Principle and Department Law

Based on the above discussion, a preliminary conclusion can be drawn: the expansion of the scope of application of the safe harbor principle leads to a contradictory result within the scope of civil law. That is, the ISP's liability to eliminate nuisance is on the rise, while the secondary obligation to compensate for the loss caused by the material damage of the right is limited. The expansion of the former's responsibility essentially enhances the audit obligation of the ISP. Although the audit obligation is out of the inherent form of the safe harbor principle, it can be believed that, based on the system and purpose interpretation of Article 1195 and 1197 of the Civil Code, the duty of care brought by should be known or known is the main part of liability [3]. The ISP itself is profit-oriented, so it is natural to avoid these legal responsibilities. Audit duty itself does not belong to the safe harbor principle, but its change is caused by the safe harbor principle. The source of audit obligation and the harbor principle is not straightly related to each other. Other department legal responsibilities are also the enablers that force the ISP to conduct the audit in advance. Therefore, only considering the influence within the scope of civil law will lead to the lack of logic in this paper. The following will consider the impact of the safe harbor principle on the relevant regulations from the perspective of legal value. Taking Criminal Law as an example, the two laws are developing in different directions in the identification of responsibility. The main point of legislation in civil law is to limit the ISP's civil liability arising from the damage of rights. However, in the Criminal Law in Article 286 and Article 287, as well as the Supreme People's Court and the Supreme People's Procuratorate in 2004 and 2010 issued "on the Handling of the use of the Internet, mobile communication terminals, radio station to produce, copy, publish, sell, the spread of obscene electronic information in the criminal cases of the interpretation of several issues of the specific application of the law", and issued in 2010, the criminal legal norms represented by Article 5-6 of the Interpretation of the Law increasingly expand the scope of responsibility of Internet service providers [5, 6]. Article 286 of the Criminal Law belongs to the newly added pure omission obligation crime, while Articles 5-6 of the Interpretation of Dissemination of Obscene Electronic Information (II) and Article 287 of the Criminal Law are regarded as the typical "accomplice criminalization" by scholars [5,7]. In other words, the civil liability of Internet service providers is increasingly limited, while their criminal liability is increasingly expanded. This deep legislative contradiction should attract the attention of the top designers of the law [8]. Through logical analysis, it can be found that such a result is closely related to the conceptual value of protecting the legal interests of the right holders. The limitation of ISP compensation liability naturally leads to the limitation of the right remedy of the right holder. In

order to restore the right of the right holder to perfection, the expansion of the relief in the sense of public law is inevitable. However, the interaction between the department laws leads the ISP into a dilemma. The first is the expansion of the audit in advance responsibility, and the second is the increase of the cross-department law right relief and compensation pressure. The combination of the two makes the ISP's duty of care forced to an unprecedented height.

2.3. Transformation of the Form of Safe Harbor Rules

The establishment of the safe harbor principle is closely related to the interesting game between some subjects. Since the establishment of the Digital Millennium Copyright Act of 1998 in the United States, the United States has long been in a relative balance between the strength of the traditional copyright industry and the emerging Internet industry. The rules formulated by the game between the two types of subjects can meet the interests of both sides and coordinate their contradictions to the greatest extent [9]. Such a premise can be seen as the historical reason for the structure of the harbor principle of "notice-deletion". That is, the relationship between rights and obligations only exists between two specific subjects. But when the scope of application of the safe harbor principle expands, the two sides of rights and obligations no longer maintain such a balance. On the one hand, the scope of rights holders increases and the types of rights increase. It is difficult for Internet service providers to give notice of universal rules in the face of reputation rights infringement, such as defamation and insulting words. It is difficult to judge and easy to lead to wrong behaviors. On the other hand, if the presumed infringer is wrongly judged, the ISP can directly delete, block or selectively deal with the user's speech information. Although there is a regulation of counter-notification, the user cannot know the neutrality behind the processing behavior. For example, the practice of "paid deletion of posts", in which internal technicians make private deals with public relations companies to delete or block some negative comments or accounts, makes it difficult for netizens to defend their rights [10].

The change of the subject makes the audit system before the occurrence of infringement facts become the most economical and necessary measure. The system of audit system is often made up of algorithms that are designated to remove statements that contain keywords. The necessary measures before the occurrence of infringement facts are more feasible and more likely to avoid legal liability than the post-action measures through "notice-deletion". As mentioned above, the expansion of the scope of application of the harbor principle leads to the aggravation of the ISP's duty of care, while the prior behavior is the optimal choice without considering the infringer's behavior. As for whether the necessary measures in advance still belong to the safe harbor principle, the author believes that based on the system interpretation and purpose interpretation, the audit system is based on the self-will of the ISP, and its screened remarks are in line with the constitutive requirements of knowing. That is to say, the necessary measures in advance can at least be considered to conform to the red flag principle.

3. ISP

3.1. Considering ISP's Decisions from the Perspective of Economic Benefits

The obligations of the ISP include the obligation of eliminating the nuisance and the relief obligation of compensating for the damage. Various reasons have greatly increased the legal costs of the ISP. Investing a lot of resources in detailed audits is ultimately a passive and uneconomical approach. But on another side, only when the ISPs develop an audit of the line in the sand in accordance with the legal provisions, and take the initiative to prevent the occurrence of infringement events, can ISPs save costs, and complies with the law of the two sides of the policy. In fact, the so-called "algorithmic audit" is just a speculative term, which should be interpreted as inelastic pre-review measures, including algorithmic processing of "notifications", independent interception of certain speech, and the voluntary deletion of a certain controversial speech by the ISP.

3.2. Combination of the Natural Power of the ISP and Public Power

According to the traditional theoretical consensus, the legal relationship between the subjects of private rights should be abstract and equal [11]. However, through empirical investigation, it is found that the ISP is often the party of coercion and rule-making, and the speech of network users can be easily controlled, so their basic rights are often not guaranteed. This kind of attachment cannot be solved by traditional theory. First of all, the ISP has natural power over the network users, which is reflected in the no-cost restriction of the basic rights of the network users. Secondly, because of this power, the ISP has the obligation and ability to help the country and society fulfill their legal obligations, and also directly fulfill the statutory responsibility of managing the decentralization of public power. The natural power of the ISP and public power are combined in a hierarchical way. The form is that the ISP manifests the will of public power through natural power, and protects the interests of others or the public by restricting the basic rights of some people (mainly the right to freedom of speech). However, ISP is not a legal power recognized by legislation and judicature, which makes the traditional binary opposition between public and private evolve into a triadic opposition between public, ISP and private. The author believes that ISPs are difficult to regulate for two reasons. On the one hand, for the fairness of market competition. On the other hand, it is the rapid development of science and technology that makes legislative action temporarily not follow up.

4. The Restriction of the Basic Rights of Netizens

4.1. The Form of Freedom of Speech on the Internet

There are many views on cyberspace in the academic circle, and with their different theories, different conclusions can be reached. The author has no intention of participating in such discussions. So in this paper, a compromise theory is adopted, which regards cyberspace as an extension of real life, but treats its characteristics rationally. On this basis, the legal basis for discussing Internet rights, such as the right to freedom of speech online, as human rights are mainly Article 19 of the Universal Declaration of Human Rights and Article 19 (2) of the International Covenant on Civil and Political Rights, as well as other international treaties and customary international laws [12, 13]. Internet rights should also be regarded as the extension of human rights in the Internet world, so the right to freedom of speech online naturally belongs to basic human rights. According to the reality of the network society, netizens certainly have the right. However, it should be noted that due to the particularity of the Internet, the actual freedom of speech such as parade and assembly cannot be realized on the Internet. Secondly, due to the anonymity of the Internet, the original identity and social status between people have been destroyed to a certain extent, leaving only the abstract "netizen" on this subject. Due to the particularity of network media, the responsibility attribute of speech is weakened, and the transmission speed is greatly increased, which is very different from the traditional expression form of freedom of speech.

4.2. Freedom of Speech Is Impaired by the Autonomous Pre-audits of the ISP

Fortunately, the connotation of freedom of speech is unchanged, and its value will not change naturally. Through the method of value judgment, the scope of protected freedom of speech can be easily obtained. Freedom of speech itself is a negative right. That is, it requires others to do nothing. Different opinions divide the connotation of freedom of speech into a state of autonomy in which thoughts, opinions, claims, emotions, information, knowledge and other contents are expressed, displayed or publicly transmitted without interference, restraint or punishment from others, and freedom of speech is only the freedom to express one's own will. Combined with the above two views, freedom of speech is the right to advocate and express one's opinions through legal means. The rights limited by the prior review of the ISP mentioned above are such rights. From national events to celebrity gossip, the pre-audit behavior of the ISP fills the entire Internet space. The manipulation of

public opinion and the guarantee of political direction run counter to the essence of freedom of speech, and the right of Internet users to freedom of speech can not be guaranteed.

5. Review the Constitutionality of Prior Audit Caused by the Expansion of the Scope of Application of the Safe Harbor Principle

5.1. Doctrinal Tools for Constitutional Review

After the above analysis, the connotation of the safe harbor principle has changed, and the basic rights of network users have been damaged accordingly. The act of the ISP is also naturally subject to constitutionality review. The method used in this paper is the three-stage theory proposed by Professor Zhang Xiang, including (1) the scope of protection of basic rights; (2) the limit with basic rights; (3) the justification of basic rights intervention [14]. This three-level review framework presents a progressive relationship. When passing the examination of the previous level, it is necessary to enter the examination of the next level. The internal logic can be summarized as follows: when the act of public power interferes with the protection scope of a certain basic right, and this intervention cannot be justified, it constitutes a violation of basic rights. This review framework presupposes the position of protecting basic rights in principle, the restriction of basic rights is an exception, and the state public power bears the burden of argumentation for the constitutionality of the restriction.

5.2. Network User Behaviors Are Protected by Fundamental Rights

According to Article 35 of the Constitution, citizens have freedom of speech [15]. There are two theories on how to judge whether the rights of network users fall into the basic rights. One is the theory of inherent limitation, which divides the scope of basic rights logically and directly and determines that it has boundaries. That is, basic rights in the case that public rights are not harmed. The other is the theory of external restriction, which divides basic rights and public interests into two classes. It believes that basic rights are originally unlimited, and the boundary of basic rights only appears in the case of protecting public interests [16]. This article adopts the theory of external restriction because it does not involve a discussion on the boundary of fundamental rights. In reality, it is often difficult to directly determine the boundary of fundamental rights. For example, the difference in the subject of rights such as politicians and celebrities will lead to the difference in the basic rights of another subject, which is very common in the crime of defamation, but all kind of these rights is covered by the constitution.

5.3. Pre-audit Is a Restriction of Fundamental Rights of Network User

The online ISP's prior audits are seen as a measure to protect other rights holders. The purpose of this measure is clear, consistent with the purpose of the safe harbor principle, and is a means to protect the right holder or public rights. It should be made clear that, based on the theory of external restriction, any speech is protected by fundamental rights, and this level of judgment is reasonable to satisfy the logic of the three-stage theoretical framework.

5.4. The Restriction Is Unconstitutional to Some Extent

The first is whether the audit satisfies the principle of legal reservation. It is difficult to judge whether the audit in advance satisfies this principle, and the legal basis of the ISP behavior generally comes from the safe harbor principle and the red flag principle. There are also relevant indirect provisions in other department laws, but the law has not ensured or has blurred the ISP's obligation to review, resulting in the ISP's behavior can not be called the legal reservation principle. But based on a purposive interpretation, ISPs can be viewed as having a legal basis. Then there is the analysis of the necessary measures for these ISPs, which often make people inexplicit because of their inflexible censorship lines. For example, medical students' online classes were identified as

pornographic live streaming, and they ended up being unavailable on multiple live-streaming ISPs. CCTV.com Youth and Xinhua News Agency jointly published an article to prohibit the stigmatization of paratroopers. Given the variety of examples, it is hard to argue that these restrictions are compatible with the principle of necessity.

6. Relevant Suggestions

6.1. Reducing the Scope of the Safe Harbor Principle

The consequences of expanding the scope of application of the safe harbor principle have been fully discussed above, so it will not be repeated here. However, even if the scope of application of the safe harbor principle is returned to the scope of 1998, it is only a way to avoid the main contradiction, and some rights holders rights are still difficult to get relief. Therefore, the safe harbor principle should make active changes to adapt to the modern environment.

6.2. Establishing a Gatekeeper System

As the name suggests, a gatekeeper is a gatekeeper who holds the power of review. In 1943, American social psychologist Kurt Lewin was the first to refine the concept of "gatekeeper" in his fieldwork on how to effectively change family food consumption decisions [17]. In the above behavior, the network ISP has essentially become the "gatekeeper". However, due to the general legal provisions, each ISP has not developed a more distinctive audit system based on its own ISP characteristics. This is because the specific rights and obligations should be determined in accordance with different laws, and third-party obligations (audit obligations) cannot be imposed on market players in general. With the fierce competition in the market for more than 20 years, super ISPs dominated by a few winners have emerged, whose basic characteristics are the accumulation of large amounts of capital, great power, and often owning their own corresponding industries. Represented by the European Union's Digital Market Act, the digital gatekeeper system is ready to emerge and become at the forefront of the institutional competition among some countries [18]. Its basic logic is to treat the super ISP that meets the conditions stipulated by law as the digital gatekeeper, whose obligations are not third-party obligations but their own direct obligations [19]. This measure successfully cut off the public power in theory. The benefit of this setup is that each of the different ISPs has a flexible review approach through structured obligation Settings. In the past legislative experience, Article 57 of the Personal Information Protection Act is a model, and the European Union Digital Market Act is also a reference object [20].

7. Conclusion

The scope of application of the safe harbor principle is explicitly expanded in the civil code. In a positive way, by expanding the scope of rights protection, the rights of victims are more fully protected in the complex and disorderly Internet environment. However, Internet service providers possess a nature of profit-driven (economic and legal interests). When it is combined with the complex diversity of modern Internet environmental infringement, the notice of the harbor principle—the structure of necessary measures and counter-notice is weakened. The audits in advance become the most economical and efficient means of protection, which is not only the protection of the right of the beneficiaries, but also the protection of the ISP itself. In such an environment, the expansion of the harbor principle makes the pre-audit measures become department laws' competition and cooperation, and preventive, inflexible measures. The immunity of the safe harbor principle is eliminated in favor of a complex review obligation that combines multiple legal responsibilities (e.g., the cybersecurity law). Internet service providers and Internet users are inherently unequal. By means of banning and deleting, Internet service providers naturally have the right to regulate speech. When formulating relevant review measures in accordance with legal provisions and values, a hierarchical combination of the natural power of ISP and public power can

be regarded as the public protecting others or public rights by limiting private rights. Based on this combination, ISP audit should be considered as a public will, an administration-like means to limit private rights and protect others. Therefore, the restriction of private rights caused by the expansion of the safe harbor principle must be examined by constitutionality.

Through the three-stage examination method, the proportionality principle is violated in the mechanical examination method of the ISP. Such examples can be found everywhere in daily life. These examples are not the direct logical extension of the expansion of the safe harbor principle, but the extension of the compound duty of care.

In order to solve this problem, it is a good choice to reduce the scope of the safe harbor principle and make structural adjustments to the duty of care of different ISPs.

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