

Analysis of the Rules of “Necessary Measures” in Internet Service Provider’s Tort Liability

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Abstract. Due to the rapid development of the Internet, a large number of infringing acts occur frequently on online platforms. The traditional "necessary measures" in the form of "positioning and removal" can no longer meet the large-scale and repeated infringement of the network world today. And China's law for the "necessary measures" provisions is limited, but its extension in judicial practice and the trend of expansion for the rule has generated more controversy. This paper adopts the literature case analysis method, comparative study method and induction method to study and analyze the rule of "necessary measures" in the tort liability of network service providers. Considering that the rule originally originated from the United States of America's safe harbor principle, it is reasonable to draw on extraterritorial experience in the application. However, the improvement of the rule of necessary measures should still be combined with the characteristics of the local industry. In China, the necessary measures should be divided into types and defined in terms of form and content, which can also be judiciously determined according to the relevant definition criteria of the proportionality principle. At the same time, under general circumstances, the theoretical and judicial circles should adhere to the separation of "forwarding notice" and "necessary measures". According to the characteristics of the platform itself and the specificity of the type of services provided, the forwarding notice should be exceptionally considered as one of the necessary measures.

Keywords: network service provider; infringement liability; necessary measures.

1. Introduction

With the rapid development of the Internet, the dissemination of information on the Internet has brought about large-scale infringement and repeated infringement of copyright, which has led to the problem that the traditional "necessary measures" of "positioning and removal" are unable to cope with the speed of Internet dissemination in this era. This has led to a different understanding of the "necessary measures" rule in the current academic and practical fields. Since Chinese law did not adopt a complete enumeration of "necessary measures" in the legislation, the extension of "necessary measures" is unclear. At the same time, the relationship between "forwarding notice" and "necessary measures" is blurred, and there is a controversy about whether forwarding notice can be regarded as a necessary measure. In this paper, the rules of "necessary measures" are studied and analyzed in the tort liability of network service providers, and the refinement of necessary measures is focused on while referring to the practical experience of foreign countries and the facts of the local network industry. This study discusses and summarizes the relevant theories, and distills valuable ideas and methods for court decisions. It is expected to add to the theory of this research area, provide some practical support for the application of the existing "notice - necessary measures" rule, and some reference value for the future application of the practice.

2. Overview of the "Necessary Measures" Rule

2.1. Definition of the "Necessary Measures" Rule

It is generally believed that necessary measures refer to measures sufficient to prevent the continuation of infringement and the expansion of the consequences of infringement. And these measures will not cause disproportionate damage to network service providers. They specifically include removal, blocking, disconnection of links, termination of services, etc [1].

2.2. Extraterritorial Reference

The effectiveness of any copyright system depends on the shape and characteristics of the local industry to a large extent. The interpretation of China's "notice - necessary measures" obligation also needs to be in line with the reality that the local Internet industry dominates the copyright industry. In view of the current situation of China's Internet industry dominating the copyright industry, the following difficulties exist in learning from the established experience of the United States and the European Union.

The U.S. extends the "notice - necessary measures" mechanism to a filtering measure—the network service provider takes the library of works provided by the original author as a prerequisite for taking necessary measures. In the event of an infringement, the library of works with confirmed copyright ownership will be considered as qualified notice, and the ISP can take the necessary measures directly [2]. However, since the subjects of China's network industry expect to operate the copyright industry on their own, it constitutes a direct competitive relationship between the two types of subjects, so it is difficult for the two parties to reach cooperation. This is something people should pay attention to when following the American model.

In the current online content business model in China, Internet users pay a fixed membership fee to gain access to work for an unlimited number of units of time [3]. This is typical of the Internet industry's licensing model aimed at dissemination efficiency, which aims to ensure that Internet users can use works as freely as possible. Therefore, the design of a system that prioritizes the protection of the copyright industry as in EU countries is likely to create a disconnect between it and the business model in China.

In view of the above-mentioned local industrial characteristics, China should apply the "necessary measures" rule around the advantages of the Internet industry that has been formed [4-6].

3. The Dilemma of Unclear Extension of Necessary Measures and Improvement

In terms of legal provisions, the Electronic Commerce Law and the Civil Code both explicitly provide for four types of necessary measures. However, the law does not provide for the "necessary measures" in a fully enumerated and exemplary manner, which makes it controversial in practice to determine whether they belong to the types of necessary measures [7,8].

3.1. Existing Dilemma

3.1.1 Theoretical controversy

Professor Li Yang pointed out that although the legal provisions have made it clear that "deletion, blocking and disconnection of links" are within the scope of necessary measures, they still have not defined a specific scope for them [9]. Professor Kong Xiangjun believes that the choice of necessary measures by the right holder should be the standard for the network service provider to take necessary measures, but if the right holder does not designate the measures, then the network service provider can make the type and scope of the measures according to its own judgment, and choose reasonable necessary measures under the premise of minimal damage [10]. Feng Shujie believes that the principle of proportionality is the benchmark for taking measures, and the selection of necessary measures should be guided by the principle of proportionality on the premise that it will not bring unavoidable losses to network users. So the necessary measures such as restricting information uploading, lowering credit ratings and issuing warnings can be counted as necessary measures under the circumstances of meeting the premise, and even the most serious account suspension can be applied under certain conditions [11].

3.1.2 Judicial disputes

In "Hu Baosong v. Zhongshan Guli Electronic Technology Co., Ltd. infringement of patent rights dispute", the court held that the act of transferring the notice to the Zhejiang Provincial Intellectual Property Office for the professional judgment was considered a "necessary measure" [12]. In the

"WeChat applet case", the Hangzhou Internet Court held that the requirement for real-name authentication of network users and the notification to sellers on the platform were identified as "necessary measures" [13]. In "Hangzhou Daodou company v. Changsha Baizan, Tencent Case", the court held that the network service platform can take "necessary measures" including but not limited to blocking, deleting, disconnecting links, etc [13]. In "Han Han v. Baidu Case", although Baidu used its anti-piracy system to automatically delete the allegedly infringing documents, the court held that the dispute arose because Baidu failed to ensure the normal operation of its anti-piracy system and did not take other measures to prevent its infringement, but only passively waited for notice of infringement. The court thus found that Baidu had not taken the "necessary measures" to stop the infringement [14].

3.2. Path Choice

3.2.1 Types of necessary measures

From an interpretive point of view, there is a need to classify the types of Internet service providers at this stage, so as to determine the different categories of necessary measures. The necessary measures should be divided into three categories based on the ability of the online platform to manage information, with "deletion" as the benchmark for a more compromised measure of efficiency [3].

The first type of measure is similar to the provision of a financial guarantee, which is weaker than the effect of "disconnection" or "removal". Depending on the nature of the service and the level of information management of the ISP, if the infringement cannot be confirmed eventually, the necessary measures other than forwarding the notice may be taken in order not to affect the business operation of the notified party by submitting a deposit. The existing practice in judicial practice is the deposit proposed by the High People's Court of Zhejiang Province as a necessary measure. After the e-commerce platform operator receives a qualified notice, it can request the platform operator being complained against to provide a security deposit. The security deposit guarantees the loss of the right holder rather than the e-commerce platform operator, if the subsequent can prove that the platform operator does infringe, then this part of the security deposit can be used to reimburse the loss of the right holder [15].

The second type of necessary measures such as deletion, blocking and disconnection of links taken to close the access channel for network users. This type of necessary measure is mainly for two types of ISPs providing stored information and link search. However, in the case of an application, the type of network service providers should be strictly reviewed, and the application should be upgraded for the type of services other than providing information storage space.

The third category is similar to necessary measures such as cancellation of service qualification which are more effective than deletion. The purpose of these necessary measures is mainly to stop the services of online service providers, i.e., to take measures to prohibit the online platform from providing services to online users, such as closing the store, blocking the number, etc.

3.2.2 Definition of necessity

In practice, the judiciary can understand the boundary of "necessity" as a formal necessity and substantive necessity.

Formal necessity is understood as the adoption of measures corresponding to capacity. For example, in the case of Hangzhou Daodou Company v. Changsha Bazan and Tencent, the court said that the necessary measures that an Internet service platform can take include, but are not limited to, blocking, deleting and shielding. Tencent, which provides small program services, immediately deleted all the relevant small program programs after it was notified that some of the content of the small program programs might be suspected of infringement. Accordingly, the court found that it was not at fault subjectively.

Substantial necessity can be understood as the effectiveness of preventing infringement. For example, in "Han Han v. Baidu Case", although Baidu used its anti-piracy system to automatically remove the allegedly infringing files, the court held that the dispute was caused by Baidu's failure to

ensure the normal operation of its anti-piracy system and its failure to take other measures to prevent infringement, and that it only passively waited for notice of infringement. It did not take "necessary measures" to stop the infringement.

3.2.3 Other defining criteria

After summarizing the criteria for defining "necessary measures" in a large number of judicial practices, Table 1 shows some representative cases.

Table 1. Examples of standards for determining court cases [16]

Cases	Define the criteria	Key points of the ruling
Knife and bean case	The determination of the necessary measures should take into account the nature, form and type of the relevant network services, the manifestation, characteristics and severity of the infringement, in order to be technically achievable and reasonable purposes not exceed the necessary limits.	"Forwarding notice" can be a necessary measure.
Hans case	In the case of commissioning a third-party organization to issue an advisory opinion on patent technology comparison, reasonable care has been exercised and necessary measures have been taken.	
Ali cloud case	The choice of necessary measures should be determined in accordance with the principle of prudence and reasonableness.	
Weihai Jia Yi baking case	The "necessary measures" should follow the principle of prudence and reasonableness, according to the nature of the infringement, the specific circumstances of the infringement and technical conditions to determine a comprehensive.	

It is easy to see that, in practice, courts can also generally judge whether reasonable measures are necessary based on the "principle of proportionality", the varying degrees of prima facie evidence of infringement, the severity of the infringement, and the magnitude of the harm [16].

4. The Dilemma and Improvement of the Blurred Relationship Between "Forwarding Notice" and "Necessary Measures"

Some courts have held that the forwarding notice can be considered as a necessary measure. However, in contrast to judicial practice, both the "Regulation on the Right to Information" and the Civil Code, if interpreted literally, indicate that the notification and the necessary measures are independent of each other [3].

4.1. Existing Dilemma

4.1.1 Theoretical controversy

Professor Li Yang believes that if the necessary measures taken by the network service provider will cause unnecessary and unreasonable losses, then the option of forwarding the notice can be adopted [17]. Zhou Xuefeng argues that it is an expansive interpretation to consider "forwarding notice" as one of the necessary measures [18]. Yao Zhen also disagrees with the classification of "forwarding notice" as a necessary measure alongside "deletion, link breaking", etc. He believes that the nature of "forwarding notice" should be a kind of "formalities" subordinate to the main obligation, which itself is not a new obligation set by the legislator separately for whether the network service provider should bear the liability [19].

4.1.2 Judicial disputes

In the case of "Jia Yikao v. Jin Shide and Tmall", the court held that the Tmall platform should take the necessary measures to forward the valid notice materials to the infringing sellers on the platform [20]. In the second trial judgment of the case of "Lodging Excellence v. Aliyun", the court held that forwarding the notice was a necessary measure to be taken by the platform operator when it was not appropriate to take other necessary measures [21]. In the case of "Lanke Technology Co. v. Alibaba Advertising Co., Ltd. " on patent infringement, the Supreme Court held that forwarding notice is the minimum obligation of the e-commerce platform operator, and that the fulfillment of the forwarding notice obligation cannot be rebutted by the completion of the obligation to take necessary measures under the law [22].

4.2. Path Selection

4.2.1 General situation

In view of the provisions of the Civil Code and the Electronic Commerce Law, it is generally not appropriate to consider the forwarding of notices as one of the "necessary measures". The reasons are as follows.

The formulation of legal provisions and their logical relationship reflect the juxtaposition, in terms of the expression and logical relationship of the articles. The Civil Code uses expressions such as "should transfer notice" and "take necessary measures", emphasizing that e-commerce platforms should first have the obligation to transfer notice [23]. This is a basic obligation, and then the necessary measures should be taken. On the other hand, the Electronic Commerce Law uses the words "shall take the necessary measures in a timely manner" and "and notice" and other words [24]. Although the order of the two provisions is opposite, both of them emphasize that "forwarding notice" and "necessary measures" are parallel, rather than an alternative relationship.

The efficacy of the blocking of infringement by the forwarding notice is very limited. Compared with measures such as deletion, blocking and termination of services, the effectiveness and deterrent effect of "forwarding notice" on curbing infringement is weaker. And it is often difficult to achieve the purpose of safeguarding the legitimate rights and interests of right holders by means of forwarding notice. It also significantly lowers the threshold of suspicion and risk exemption of e-commerce platforms, which is not conducive to the initiative of network service providers [25]. Therefore, it is inappropriate to directly include forwarding notice within the scope of general necessary measures.

4.2.2 Exceptions

However, this does not mean denying that a forwarding notice may be considered a necessary measure under certain conditions. On the contrary, based on the characteristics of the network service provider itself and the type of service, if the relevant platform is unable to take measures other than forwarding notice, the forwarding notice can be considered as one of the necessary measures under certain circumstances. This approach was reflected in the Aliyun Case [21]. The court held that, based on the special nature of the cloud computing service platform, if the network service provider is required to delete user data or shut down the server, the use of users and the operation of the platform will be seriously affected, which is not conducive to the overall development of the industry. Therefore, the technical characteristics of the cloud computing industry should be taken into account, and the transfer of notice should be regarded as a necessary measure under specific circumstances.

Therefore, for general network service providers, a mere forwarding notice is not sufficient, but should also take necessary measures to fulfill the corresponding obligations. Only when the platform itself cannot take measures other than the forwarding notice according to the characteristics of the platform itself and the specificity of the type of services provided, the forwarding notice itself can be regarded as one of the necessary measures.

5. Conclusion

In the face of the rapidly developing network technology, the perfect interpretation of "notice - necessary measures" can only focus on the definition of the scope of necessary measures and internal relations. The former can determine the type of necessary measures and limit the necessity in form and substance, and can also be judicially determined according to the principle of proportionality. The latter should insist on separating the "forwarding notice" from the "necessary measures" in the interpretation, requiring the Internet service provider to protect the legitimate interests of the right holder and fulfill its legal obligations. According to the type of service of the network service provider, only when the network service provider cannot take measures other than the notice, the notice can be regarded as one of the necessary measures. Under the condition that the legal obligations of the network service platform are clarified, the governance ability and intellectual property protection level of the network service platform can be improved in order to promote the healthy development of the network service platform and maintain the balance of interests of multiple parties.

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