Research in "Duty of Filtering" of Chinese E-commerce Platform in the Scope of Copyright Protection -- Refer to Article 17 of the Directive on Copyright in the Digital Singles Market

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Abstract. With the development of Internet technology and the advent of the era of user-generated content, copyright infringement occurs frequently. The e-commerce platform, which is dominant in the operating transaction space, needs to supervise and manage the selling activities of the merchants in the platform. The issue under discussion in this paper is whether the "duty of notice" to be performed by e-commerce platforms in the regulation of infringement occurs after the infringement and does not require the right holder to give effective notice of infringement to the e-commerce platform, and the criteria for determining the platform's high duty of care ("Duty of Filtering") in judicial practice. This paper adopts a literature and doctrine analysis method to summarize and analyze the core claims of scholars. By adopting the empirical analysis method, a sample of 200 judicial decisions related to the "Duty of Filtering" of e-commerce platforms in online copyright infringement was collected from various platforms, and the typical cases retrieved were summarized and integrated to summarize the current situation of judicial application of the Duty of Filtering of e-commerce platforms. Through a combination of empirical and theoretical research, the current status of the determination of the "filtering obligation" of e-commerce platforms in China is explored, as well as the court's thinking on the case that should be adjusted in light of Article 17 of the EU Directive on Copyright in the Digital Singles Market.

Keywords: duty of notice; Duty of Filtering; e-commerce platforms.

1. Introduction

1.1. Background and Significance

With the development of Internet technology and the advent of the era of user-generated content, copyright infringement occurs frequently [1]. The operators of the e-commerce platform are the main body that operates and controls the e-commerce platform. They dominate the virtual trading space, hold more information technology resources and enjoy greater economic dividends, which not only need to provide technical support for online transactions but also need to supervise and manage the sales activities of merchants within the platform. There has also been discussion as to whether it should be subject to a higher duty of notice.

At the legislative level, China has taken as its core articles 1194-1197 of the Civil Code and constructed a system of copyright infringement liability rules under which "the e-commerce platform operator of the right holder issues a notice → the e-commerce platform operator sends a forwarding notice + removal notice to the operator within the platform → the operator within the platform makes a statement of non-infringement in defiance and the e-commerce platform operator forwards proof of non-infringement to the right holder. However, the rapid development of the Internet has given rise to problems such as a lack of coherence and systematization with existing legislation. Notably, in 2019 the Council of the European Union formally approved the latest EU copyright law, the *Digital Single Copyright Directive* (DSCD), which in Article 17 introduces a disruptive change to the

traditional "notice-to-delete rule" by imposing an obligation on online media to actively filter content, or the "Duty of Filtering" [2].

At the judicial level, the current online content-sharing marketplace for e-commerce platforms is rampant with infringement, while the courts have not uniformly ruled on the duty of notice of e-commerce platform operators, there are serious disparate judgments in the same case or similar cases. There are also difficulties for rights holders in defending their rights in actual litigation, and it is difficult to obtain adequate compensation from judgments that have come into effect.

Therefore, from the perspective of Article 17 of the EU Copyright Directive (hereinafter referred to as the Copyright Directive), the study of the "Duty of Filtering" of e-commerce platform operators is of great theoretical reinforcement and practical guidance to clarify the responsibilities of platform operators, shape a benign copyright market order for China's e-commerce platforms, and clear up the cyberspace to ensure a balance of interests of rights holders.

1.2. Purpose of the Study

The issue discussed in this paper is whether the duty of notice to be fulfilled by e-commerce platforms in regulation, which occurs after an infringement and does not require the right holder to give effective notice of the infringement to the e-commerce platform. It needs to be raised in this context: what the standard in judicial practice for determining the platform's “duty of filtering” really is and what the criteria for determining a platform's “duty to filtering” is. This obligation raises the standard of the duty of notice set out in the current PRC E-Commerce Law.

1.3. Research Methodology

1.3.1 Literature analysis techniques

In this paper, the authors have carefully analyzed various literature materials such as monographs, journals, and dissertations related to the subject of the thesis first. Then the authors summarised the core propositions of scholars and reviewed the existing systems and policy documents related to the duty of notice for intellectual property rights of e-commerce platform operators in China.

1.3.2 Theoretical analysis

In this paper, the theoretical basis of the duty of notification system for the intellectual property rights of e-commerce platform operators is studied, and the basic analytical tools of economics, such as rational economic man, cost, and benefit, are used to study the feasibility and necessity of setting the duty of notice for e-commerce platform operators. This study focuses on the theoretical foundations that support the duty of notice of online service providers beyond the "notice-and-delete" rule: hazard control theory. Hazard control theory is that the duty of notification is defined by the degree of control over the hazard. The tortfeasor usually has more control over the danger than the victim, and therefore the ISP has only a reasonable duty of notice, guided by the principle of technological neutrality. Control in the traditional tort field means that the actor should have foreseen and controlled the dangers of his or her actions, and when the consequences of the damage occur, the actor is considered to be at fault for his or her failure to exercise appropriate care. It is worth noting that the doctrine of control in the online environment differs from the control in the sense of the traditional tort field--Risk-Benefit theory. Traditional tort law is based on the "reward theory" of liability. According to this theory, the benefits and risks of a liable entity are consistent, and the greater the benefits obtained, the greater the risks borne. Specifically, in the case of e-commerce platforms, the online transaction services provided by e-commerce platforms are significantly different in terms of transaction objects and transaction volume compared to offline transactions. The risk of copyright infringement is also significantly expanded. At the same time, the jurisprudential logic of the "Duty of Filtering" is combined with contingency and constructive analysis.

1.3.3 Empirical analysis

This paper summarizes the current situation of judicial application of the "Duty of Filtering" of e-commerce platform parties in online copyright infringement. It finds that there is an inconsistent

determination of the "Duty of Filtering" of platform parties in current judicial practice, and puts forward targeted suggestions for improvement.

2. Literature Review

2.1. Duty of Notice

The Oxford Law Dictionary explains a duty of notice as a statutory duty to exercise reasonable care to avoid causing damage. An actor is not liable for negligence in tort law unless the act or omission which caused the damage was in breach of a duty of notice owed to the plaintiff. If a person can reasonably foresee that his conduct may cause personal injury or damage to property to other persons, then in most cases he owes a duty of notice to those who may be affected by it. [3]" That is, the duty of notice can be summarized as deriving from the subjective element of "being able to reasonably foresee" and the objective condition of "causing damage to others by the act". There is no clear-cut definition of the duty of notice, although there is a preference for the compromise view that the actor foresees the outcome of the constituent element and acts accordingly [4]. In China, the duty of notice is mainly set out in the Electronic Commerce Law and the Civil Code - Tort Liability and is divided into a system of regulation of the duty of notice beforehand and the duty of notice afterward. The ex-ante duty of notice mainly refers to the "failure of the e-commerce platform to fulfill its obligation to examine the qualifications of the operators on the platform" as stipulated in Article 38(2) of the E-commerce Law. The ex post facto duty of notice refers to the duty of notice that occurs after the infringement has taken place, which is based on the "notice and removal" rule.

Since the *Digital Millennium Copyright Act* (DMCA) of 1998 in the United States, the "safe harbour rule" has been in place for the first time, specifying that a platform is not liable for infringement if it satisfies the condition that the platform has no knowledge of infringement by third parties. In Professor Cheng Xiao's book, it is also written that "the law should not impose a general obligation on ISPs to actively act to review and prevent and stop infringements committed by thousands of third parties using online services in the sea address. [5]" Otherwise, it will waste a lot of human and material resources and increase operating costs and reduce the speed and efficiency of information dissemination. However, Article 17 of the Copyright Directive makes a radical change to the traditional 'safe harbour rule' by creating an obligation for online media to actively filter content. The idea is worth examining, as large e-commerce platforms are often easily exempted from their tort liability based on traditional terms, but with the development of science and technology, internet platforms face a greater amount of information at the same time, and their technology is constantly being enhanced to enjoy greater economic dividends while also should bear greater responsibility. Similarly, in the reality of the jurisprudence, the courts have more than once imposed a higher duty of notice on platforms.

2.2. Duty of Filtering

"Duty of Filtering", i.e., online e-commerce platforms should have the obligation to take the necessary technical means to actively review the content shared on them for copyright infringement during the operation of their platforms, and no longer have the obligation to simply remove the relevant content after receiving notification that the right holder has discovered copyright infringement to be exempt from liability [6]. In the Copyright Directive, the EU requires e-commerce platforms, on the one hand, to make their best efforts to conclude copyright licensing agreements with copyright holders and, on the other hand, requires online content-sharing platforms to take appropriate measures to actively prevent infringement. The text of Article 17, with its "high industry standard of professional diligence", states that copyright holders are required to provide the necessary data to storage providers for content identification, while storage providers are required to inform copyright holders of the filtering measures they have adopted, their success rate and to allow copyright holders access to the use of their works.

The construction of the "Duty of Filtering" is worth discussing in terms of the purpose of the legislation. Firstly, the legislation should be designed to serve the innovative development of the copyright market and not to interfere too much with the development of cyberspace; Secondly, it is beneficial to protect the legal rights of all citizens to digital copyright, personal privacy, and freedom of expression, and to combat illegal and criminal acts such as online piracy, malicious defamation, and promotion of pornography [7]. And for the specific construction of filtering rules, it is also feasible. For instance, in responding to filtering errors after the infringement, the platform can establish procedures for users to raise objections and appeal defenses, timely acceptance procedures for online platforms, and procedures for restoring online distribution [8].

As an important concept of negligence leading to tort, the tort liability of the e-commerce platform in the context of the indirect tort theory of China's current law requires the boundary of "filtering duty" to classify the degree of fault. The uncertainty of the "Duty of Filtering" will affect the fulfillment of the obligations of the e-commerce platform and the determination of tort liability and the scope of liability in judicial practice.

3. Theoretical Analysis

There is a long-standing view in Chinese civil law academia that the duty of notice is divided into the general and special duty of notice. The distinction is based on the general actor’s level of awareness of the harm-causing act. The general civil subject has a general duty of notice with the general awareness level, social common sense and basic legal requirements; while the special civil subjects should have a higher duty of notice in order to better protect the copyright, as it has the ability to know more than the general subject do or should have a certain level of awareness in advance. Therefore, for online content-sharing service providers, the "Duty of Filtering" should also be specified according to the platform's capabilities, such as the professionalism of the platform, the business model of the operator, the state of industrial development, the level of technology, etc. From this perspective, while they lead the industry in terms of technology, the Internet giants should also be able to undertake a "Duty of Filtering" that matches their capabilities.

Pursuant to Article17 of the Directive on Copyright in the Digital Singles Market, in determining whether a service provider complies with the obligations set out in paragraph 4, account shall be taken of the principle of proportionality, taking into account (a) the type, audience, and size of the service and the type of works and other content uploaded by users; (b) the availability of appropriate and effective means and their cost to the service provider the costs incurred by them. This has some reference value for our legislation.

In addition to the principle of proportionality, the determination of the "duty to filtering" should also be based on the principle of balance of interests and the theory of risk controlling [9]. The balance of interests and the risk-benefit doctrine embodies the legal requirement of "consistency of rights and obligations", i.e., when a party has a greater interest in the outcome of the infringement, it should bear a higher liability. This is in line with the EU Directive on Copyright. Many users have lacked the protection of a large number of users' rights due to the existence of the DMCA. For example, for platforms where the main mode of operation is based on user-originated videos, such as YouTube and Vimeo, it is difficult for rights holders to assert their rights based on inadequate monitoring of the platform. Even though once users discover infringing content, the website will take it down immediately to absolve itself of responsibility for inadequate censorship [10]. There is a margin in the protection of rights in a rights holder's intellectual property network, where his or her work can be used freely by others and even profit from it until he or she discovers that his or her original work has been infringed. And as is often the case, by the time the right holder discovers the fact of infringement, the infringing work often already has a certain level of attention and has caused irreparable damage. The danger control theory suggests that the closer one is to the source of the danger, the greater the likelihood that he or she will prevent it from occurring [11]. In specific cases,

the legislative branch should determine which party is most likely to prevent the outcome of the infringement and thus determine the allocation of the duty of notice.

From a jurisprudential point of view, Article 13 of the EU Copyright Directive (Draft) aims to mitigate the so-called "value gap" between the various actors in the industry chain due to the unequal distribution of benefits from the distribution of copyrighted content [12]. For a long time, rights holders have often given way to technological developments, which have often overridden private rights due to the principle of legal hierarchy. But the connivance of technology has resulted in internet companies being able to easily avoid legal restraint, allowing them to enjoy the privilege that is not equal to their obligations. From another point of view, the redistribution of obligations can also stimulate the efficiency and enthusiasm of innovation of rights holders. Of course, in the process of assigning obligations, the platform's capacity should be fully considered, and appropriate adjustments should be made in line with the safe harbor rule, which is also a consideration for China's national conditions.

The intellectual property system was established late compared with the western world but has grown rapidly. China has a large number of internet platforms and the legal system is rooted in the civil law system. In the future amendment of the e-commerce law, that likely, the relationship between the rights and obligations of users and operators will be readjusted. The development of Internet platforms is still one of the focuses of the development strategy. Since the IT industry started late in China, it is impractical to require all platforms to be equipped with advanced technology in the short term through legislation, so people should also explore the standards of this system of Duty of Filtering based on the current situation and cases.

4. Empirical Analysis

4.1. Sample Sources for Empirical Analysis

This part adopts an empirical research method to analyze the data of cases in which the focus of the documents is on whether the platform has helped to infringe the copyright by random sampling, and to study the court's decision criteria for determining the "Duty of Filtering" of the platform, taking the court's online judgment documents throughout China as the sample source.

Searching for words keywords such as "platform operator", “Copyright Infringement” and duty of notice on platforms such as "Fa Xin", "China Judgment Document Network" and "Wolters Kluwer goes first" to limit final judgments to copyright infringement disputes, a total of 941 judgments were searched out, spanning from 2011 to September 2022. However, the 941 judgments did not fully meet the sample requirements; some of them did not analyze whether the e-commerce platform was responsible for helping infringement in the focus, and some of them did not focus on the distinction between the general duty of notice and the special duty of notice for the platform. Based on this situation, the 941 judgments were randomly sampled in the process of screening out cases that did not meet the purpose of the study, and then 200 judgments that met the sample requirements were sampled. Among them, there were 35 judgments in which the court finally ruled that the platform should raise the duty of notice, and these 35 judgments were mainly based on the platform helping copyright infringement, with the e-commerce platform as the defendant, which to a certain extent can reflect the court's judgment standard for the "filtering duty" of the platform in judicial practice.

4.2. Sample Data Collation and Analysis

Overall, only 35 cases out of 200 samples were found by the courts to be liable for helping the platform to infringe, accounting for 17.5 % of the total sample (see Figure 1) indicating that in judicial practice, courts do not tend to consider the platform to have a higher "duty of notice". After the sample was collated, it can be seen that: the number of decisions in which the court found a high duty of notice due to the special identity or special recognition of the platform was 17, accounting for 8.5% of the total sample; the number of decisions in which the platform was directly profitable was 15, accounting for 7.5% of the total sample; the number of decisions in which the content involved was

significant or had high visibility was 8, accounting for 4% of the total sample; and the number of decisions in which the platform had encouraged user behavior was 5, accounting for only 2.5%. The number of verdicts for encouraging user behavior was 5, accounting for only 2.5% (see Figure 2). It is worth noting that among the 35 cases in which the court ruled that the platform was liable for helping the tort, 25 cases ruled that the platform had a high duty of notice based only on a single criterion from the below four perspectives, accounting for 12.5% of the total sample size; while the remaining 10 cases discussed the platform's higher duty of notice from multiple perspectives to determine the platform's "Duty of Filtering" (see Figure 3). For example, in the case of "Fujian Pipi Jumping Technology Co., Ltd. and Beijing Aqiyi Technology Co., Ltd. infringing on the right of information network dissemination of works", the court determined the platform's higher duty of notice from three perspectives: the special status of the platform, direct profit, and the significant content involved in the case [13].

Specifically, courts have tended to look at four angles to determine the platform's "Duty of Filterings".

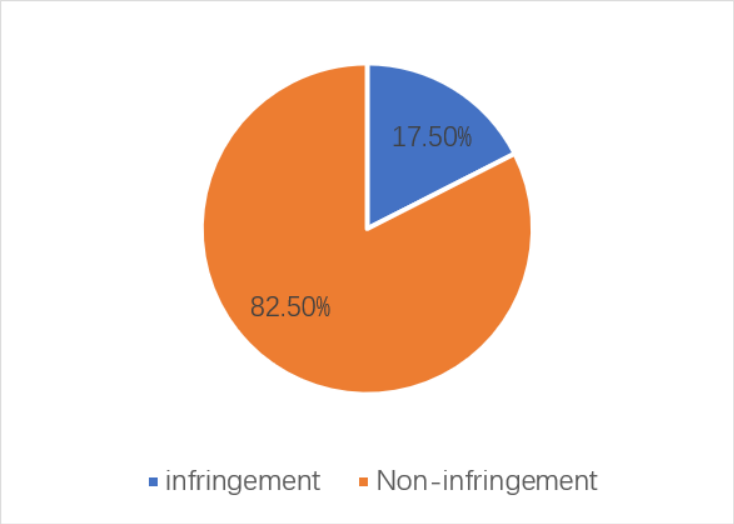


Fig 1. The percentage of the infringement sample

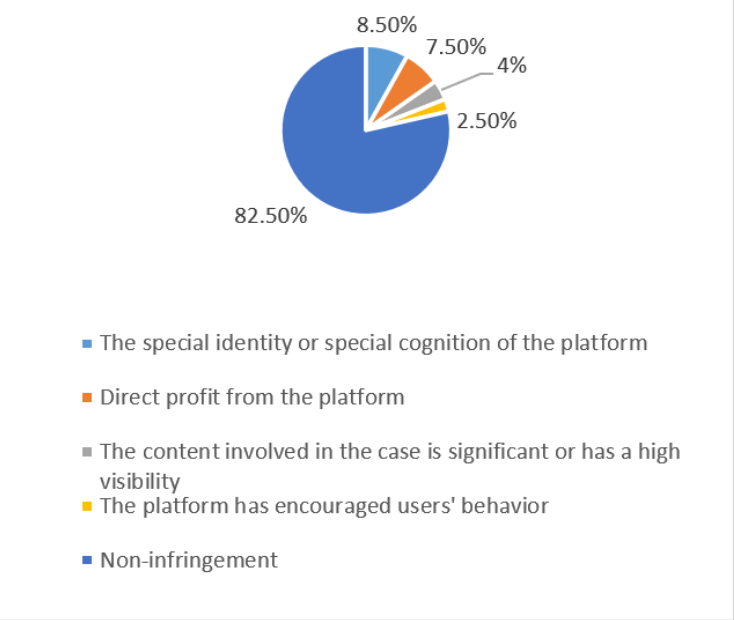


Fig 2. The percentage of the issue of target cases

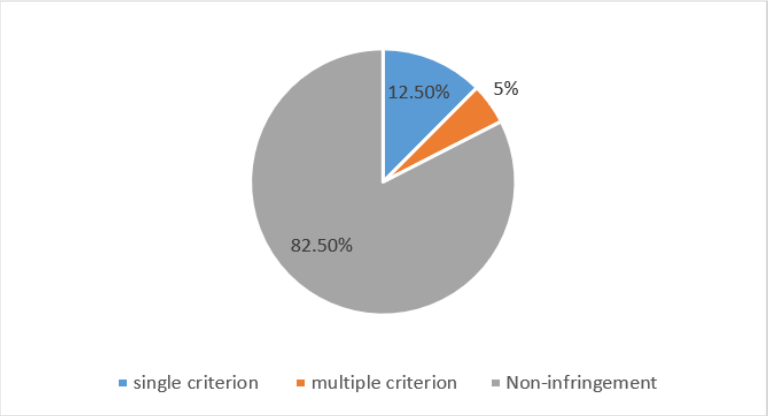


Fig 3. The percentage of the different criteria of target cases

4.2.1 The special identity or special cognition of the platform

For instance, in the case of "Hangzhou Leyuan Technology Co., Ltd. and Henan Wanyu Entertainment Media Co., Ltd. infringing on the right of information network dissemination of works", Leyuan, as the operator of the NetEase cloud music platform in question, is not only the provider of network services, but also the owner and provider of the content of the network platform, with a special status [14]. It should be responsible for the legality of the uploaded works on the platform with a duty of notice. Another example is the case of "Guangzhou Li Zhi Network Technology Co., Ltd. and Guangzhou Qi Drum Culture Communication Co., Ltd. infringing on the right of information network dissemination of works", in which Qi Drum and Li Zhi have communicated several times about the song in question, Li Zhi should pay higher attention to the content of the song title and lyrics uploaded by the platform users [15].

4.2.2 Direct profit from the platform

For example, in the case of "Shenzhen Aiwen Technology Co., Ltd. and China Medical Journal Co., Ltd. infringing on the right of information network dissemination of works", Aiwen set up a welfare rebate for users to purchase a membership for the article in question, and users who purchased a membership can use download coupons instead of cash money to download, which proves that the company set up a paid download for the article in question, and received direct economic benefits from it [16].

4.2.3 The content involved in the case is significant or has a high visibility

For example, in the case of “Nanjing Xici Information Technology Co., Ltd. and China Personnel Publishing House Co., Ltd.”, the book in question was an examination book [17]. As a long-running online community, Xici should have known that such works would not be authorized for personal use and dissemination. Xici should have been found to have failed in its duty of management and care. In another case, “Guangdong Original Power Culture Communication Co., Ltd. and Hangzhou Intu Information Technology Coz”, the pictures uploaded by ordinary netizens containing the above-mentioned animated images are very unlikely to be authorized by the right owner [18]. The above-mentioned animated images are obvious in the pictures, and the titles of some of the pictures are the names of the animated images. The obvious infringement could have been discovered by the platform with a general duty of notice.

4.2.4 The platform has encouraged users' behavior

In the case of “the dispute between Beijing Evaluation Valley Education Technology Co”, the company's business model of encouraging users to share information in the form of "forum coins" rewards was an act of "abetting or aiding network users to infringe the right of information network dissemination". Accordingly, it required its operator to impose a higher “duty of notice” on intellectual property rights [19].

5. Conclusion

According to the court's determination of the "Duty of Filtering", the court's main criteria for differentiation are as follows: (1) The platform itself, whether it has high professionalism and high attention capacity and should be in place for the screening of infringing information, i.e., the platform itself carries the "Duty of Filtering" that it should be equipped with. (2) Whether the infringer's infringing information was handled by prior acts for the infringing information that has been processed by the platform, the court considers that it has some knowledge of the infringing information. Even in some cases, after being processed by the platform, the platform constitutes a helper of the infringing activity and joins in the infringing act, and it should also bear the infringement liability. At the same time, this is also in line with “the requirements of the danger control theory”, and the platform should moreover review the information in the process of processing, which is at the same time the easiest stage to check out the infringement. (3) Whether the infringer's infringing information has reached a point where it is sufficient to attract the attention of a reasonable person in general. When the infringing information has reached the point where it can attract the general attention of reasonable people, then it is more unlikely that the operator can avoid the "Duty of Filtering". (4) Whether the infringing content is of a beneficial nature. it is also the requirement of “the principle of balance of interests” and the value orientation of the law that the platform should bear more duty of notice while gaining more benefits. (5) Other special behaviors of the platform in the infringing activities. Such as the platform has to encourage user behavior, which undoubtedly establishes the platform's "Duty of Filtering".

China's judicial practice does not tend to endow platforms with higher notification obligations, but with the development of science and technology, e-commerce platforms will be confronted with massive information and their technical level is constantly improving. Therefore, e-commerce platforms should shoulder greater responsibilities while enjoying greater economic dividends. The EU copyright Directive's change to the traditional "safe harbor principle" is conducive to the construction and improvement of China's intellectual property protection system and meets the needs of China's development. Lawmakers can learn from and carry out in-depth investigations before revising China's intellectual property legislation.

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