

Research on Duty of Care in Trademark Infringement in the Age of Digital Justice

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Abstract: With the rapid development of Internet economy, e-commerce platforms, search engines, live streaming platforms and other digital platforms have entered the field of trademark infringement, which has triggered the discussion on the duty of care of e-commerce platforms in the era of digital justice. In the context of digital economy, network platforms are no longer limited to the role of "gatekeeper", but become network service providers. It makes trademark infringement public through websites, e-commerce and other Internet services, and adopts different duty of care requirements for different subjects. There are also some disputes in the judicial practice in our current laws and regulations concerning the duty of care of e-commerce platforms. By analyzing the specific content of duty of care on e-commerce platforms, this paper aims to provide some reference suggestions for improving the system of duty of care on e-commerce platforms.

Keywords: Digital Justice; Trademark Infringement; Duty of Care

1. What is the duty of care

1.1 The legal concept of duty of care

"Duty of care" is an open and uncertain concept, and the specific matters about duty of care are not specified directly in the provisions of trademark law. Therefore, judicial practice should be combined with theory to give a limit to the duty of care. In the process of providing services, the network service platform itself has to maintain the fairness of the network environment and abide by the common rules of network communication. Under the concept of "duty of care", the duty of care can be divided into "general duty of care" and "special duty of care". To determine whether different subjects have fulfilled the special duty of care, it is necessary to examine whether this possibility exists. That is, whether it is a special case that should be performed according to laws or administrative regulations. Can we understand in this way that Baidu's censorship of keywords can be arbitrarily reviewed according to its own ideas, without specific standards for the level of censorship, without reviewing or acquiescing in the existence of some customers' infringing keywords, it can allow these behaviors to develop on its network platform, and it does not need to bear any responsibility for this. ^[1]

1.2 Duty of care required by industry norms

General duty of care. Generally, online platforms have corresponding censorship obligations for users' keyword searches. The service operator of the platform should realize the service to maximize the value according to the user's request, but this does not mean that the service operator does not have the information collection, responsibility and profit should be synchronized. Reasonable review obligation is responsible for the right holders, and it is also necessary. To some extent, it will reduce the way for the network to handle platform disputes. The closer the actor is to the danger caused by the tort, the more obligation he has to prevent the occurrence of the danger, and the more advantages he has to control the expansion of the danger. After an infringement occurs, the operator of an e-commerce platform shall take effective measures in time to prevent further expansion of the damage caused by the infringement.

Duty of special care. The enactment of laws is lagging, and its meaning will also change with the continuous development of

society, so this duty of care will also change, but this change needs to be decided by judges, and cannot be regulated by laws. Duty of care is a kind of dynamic obligation, which can prove the subjective malignancy of the infringing network service platform from this level in the judgment, so as to increase its responsibility. In this case, the plaintiff in the lawsuit can submit a case with similar circumstances to the court to prove that the network platform has been sued for similar circumstances. At this time, we believe that the degree of attention to the duty of care of the network platform should be increased, rather than waiting for trouble. If it can be proved that the network company has failed to act for a long time, Courts can hold that online platforms have failed in their duty of care under more lenient standards.

2. Identification of liability in the event of infringement

2.1 The way in which responsibilities are borne

As to how a trademark can be infringed, there are only two situations, one direct and the other indirect. The "duty of care" discussed here mainly refers to the damage caused to the trademark owner by the inaction of the online service platform in providing the service, which should be defined as indirect infringement. The indirect nature of trademark infringement is not an excuse to avoid liability. Although the liability is lower than that of direct actors, there is a duty of care granted by law, which requires them to assume responsibility.

2.2 Application of "Safe haven" rules for network service platforms

The online service platform of network infringement (mainly indirect infringement) can actively take necessary measures to reduce the infringer's loss avoidance liability system. Simply put, it is a system in which the infringer can timely delete the infringing information after receiving the notification of the infringed and exempt himself from the liability for negligence. The beginning of this system is the system adopted by copyright network infringement in the United States, and then adopted by our country's Tort Liability Law. There is also an exception to the "safe haven rule", which is the detailed explanation of the requirements of "knowing or should know". When the infringement facts are obvious, the e-commerce platform cannot refuse to take measures to prevent the infringement on the grounds that it has not received the notice from the right holder.

3. Problems in trademark infringement on online platforms

3.1 The distinction between indirect infringement and joint infringement is not obvious

Joint tort is a concept mentioned in tort liability law of civil law, while indirect tort is a concept proposed for trademark infringement by search engine. There are some differences between the two. According to Article 9 of China's Tort Liability Law, "Those who instil or assist others in carrying out tort acts shall be jointly and severally liable with the perpetrators." Then, whether the Internet search engine can establish the joint infringement of trademark exclusive right with the trademark infringer because of its help behavior? ^[2] It is hoped that China can refer to the theory of indirect infringement when dealing with the infringement cases of network service platform, so as to distinguish the joint infringement from the indirect infringement.

3.2 Unclear positioning of network service operators

It is not clear what attitude or role network operators should take in the service. There are several views on this issue: the first view is to strengthen the profit-making of the network service platform, which is directly regarded as the seller or co-operator. The second view is to treat ISPs as lessors, providing push services to other merchants in the form of rental platforms. The third view is to regard the network service platform as an intermediary to provide network services. In this view, one side of the network service should bear the responsibility similar to the intermediary. In general, the network service platform should maintain a neutral role and should not be driven by interests. Although it cannot be denied that search engines have substantial non-infringing uses, of course such judgment needs to have a certain legal basis.

4. Suggestions on improving the duty of care of current e-commerce platforms

4.1 Introduce indirect tort system through legislation

In the digital age, network service operators can no longer act as gatekeepers, but need to undertake corresponding obligations in

the control of service quality and protection of consumer rights and interests. Although the E-commerce Law of the People's Republic of China provides relatively simple provisions on the duty of care of e-commerce platforms, it provides a relatively perfect framework for legal practice and a "ruler" for judicial organs to handle relevant cases. The Civil Code also stipulates the "fault liability principle" of Internet service providers. It can be seen that the E-commerce Law has laid a good foundation for the construction of the duty of care system of e-commerce platforms. However, in judicial practice, due to the unclear definition of the duty of care of e-commerce platforms and the unclear disclaimer of e-commerce platforms, it is necessary to combine the Civil Code and judicial practice to further improve.

4.2 Standardize the mode of network service platform at the present stage

To strengthen the duty of care of Internet service platforms, platforms are required to take their own technical preventive measures. At this stage, it is more reasonable to take the adoption of filtering technology as a consideration factor to identify the subjective faults of platforms in specific cases, rather than stipulating general compulsory filtering obligations in legislation. If Chinese law stipulates that platforms have a universal filtering duty for information content, it means that the existing rules of subjective fault determination will be fundamentally changed, and platforms will have a universal pre-censorship duty for content uploaded by users. This is bound to have a significant impact on the stakeholders and the market. Therefore, how the imposition of filtering obligation will affect the rights and obligations of platforms, copyright owners and the public still needs more and more in-depth research in the future. As the EU has taken the lead in enshrining filtering obligations in its legislation, we may wish to wait and see how the new law is implemented to see if and how this practice is adopted.

4.3 Introducing punitive compensation system in judicial practice

From the perspective of judicial practice in various countries, network platform providers are often required to bear specific responsibilities for platform infringement. In the shadow of the "fog" of the Internet, it is difficult for victims to directly Sue the infringer, while platform providers have clearer objectives and stronger economic strength. If they jointly appoint defendants in the prosecution process, the difficulty of litigation can be reduced and the rights and interests of the right holders can be protected. [3] However, from the perspective of traditional methods, only requiring platforms to bear joint and several liabilities leads to liability imbalance and hinders the full protection of public interests. Therefore, the impact of the punitive damages system should not be underestimated. The network platform should increase the degree of the duty of care in various dispute cases, and safeguard the relevant rights and interests of the right holder, so that the amount of damages greatly exceeds the economic benefits that the infringement may bring. The punitive damages system determines the amount of compensation to be paid according to the fault degree of the network trading platform provider.

References

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