

Discussion on the Tortious Liability of Network Service Providers

—Discussion on the Article 36 Improvement of Torts

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Keywords: Internet service provider, notice, counter notice, the rule of knowing

Abstract: Internet development increases the phenomenon of network tort. However, only Article 36 of Torts in China have carried out the principle specification. The responsibility of Internet service providers have many problems. There are no conditions for notice, no counter notice rules and no clear degree of security attention obligation. These conditions are far from adequate for implementation. China's future Tort Liability Volume of the Civil Code should elaborate the tort liability of internet service providers. It is important to enhance practicability and predictability of the law, improve the specification of the important document, clarify the criteria for review and attention, and refine the notice and counter notice procedures.

1. Introduction

In 2017, the General Provisions of the Civil Law of People's Republic of China was successfully implemented. The whole civil law field is working on the revision of civil law rules. Article 36 of Tort Liability Law --- network tort liability has been the hot issue. The second and third paragraphs specify the responsibility of network service provider, and establish the rules of 'notice' and 'knowledge'. This rule sets up corresponding legal obligations for network service providers, so as to determine whether they constitute network infringement and assume the principle of liability for network infringement. In other words, Internet service providers will possibly face the network infringement and the legal liability is "notice - review - remove" or "knowledge - remove". Which means, the network service provider knows or receives the notice from the right holder that network user has infringed upon the legitimate rights and interests of others through their own service system. Delete suspected information after examination, which is the legal obligation of the network service provider. Both theoretical and practical circles give high evaluation on the status of notice and know rules in the governance of network infringement. However, the phenomenon of network infringement in China has not been effectively curbed. On the contrary, the number of network infringement has increased and its influence has been growing. The cause point to the difficult principals and standers of 'notice' rules in article 36. Scholars all believe that Torts needs to further refine the provision and increase the practicability.

2. The Tort Liability Limitation of Network Service Providers in the Torts

The deficiency of the "notice" rule in article 36, paragraph 2 of Torts is mainly reflected in the following aspects.

2.1 The important documents of notice need specification.

Torts fails to provide conditions for the notice. However, the suitable condition is the first phase to purify the network environment. Qualified notice subjects, appropriate notice forms and correct notice contents are prerequisites for network service providers to correctly decide whether to remove them. The terms of these notices should be clarified. The notice subject shall be the oblige himself and his lawful agent, such as the intellectual property owner and the victim are right of reputation has been damaged. The present law does not specify the notice form is limited to written form or additional forms are permitted. The notice content is not the same as other relevant laws and regulations of the Internet that has been implemented in China. For example, Regulation on the

Protection of the Right to Network Dissemination of Information stipulates that the notice should include "require to delete or disconnect the links with the name and Internet address of infringing works, performances that require the deletion or disconnection of links" and "preliminary evidence of infringement". In the provisions of the supreme people's court on certain issues concerning the application of law to trial civil cases of infringement of personal rights and interests by using information network, the rules are "require the necessary measures or the relevant formation sufficient to accurately locate the infringing content" and "the reason for the notifier to request deleting the relevant information". The further Civil Law-Code of Tort Liability shall unify the notice standards.

2.2 It is necessary to introduce the counter notice rules.

When the network user receiving the infringement notification from the network service provider, if he thinks that his information does not constitute infringement, he can send the counter notice. This is the logic contained in the notice rule and a remedy measure to protect the rights of Internet users. Therefore, counter notice is an essential link to balance the interests among network service providers, users of infringing networks and right holders. However, this system is not recognized in the current Tort Liability Law. The counter notice right holder, the condition and limitation of the counter notice system design is even more impossible.

2.3 Lack of the standard for the duty of network service provider.

The network service provider has the review obligation after receiving the users' notice. He should confirm the authenticity and delete it in time. In accordance with article 36, paragraph 2, of Torts, network service providers should take necessary steps in time. So what is the necessary review obligation? What is the distinction between "timely" and "slack"? Network service providers have an obligation to review information published through their systems. Does the scope of "knowledge" under article 36, Paragraph 3 of Torts includes "should know" or is it limited to "know perfectly well"? These problems are closely related to whether Internet service providers are liable for tort. The network service provider's examination of the notice shall be timely and effective without fault. How to identify the fault? Does the "knowledge" of a network service provider include "should know"? Take Han Han's case against Baidu for example: the court held that Baidu should know that its library of documents involved in the infringement, the fault formed. In the absence of legislation, China's courts dare to explore in practice. This provides useful experience for the legislation, and also puts forward the requirement for the unification of the legal system as soon as possible.

2.4 Responsibility for error notice and error deletion.

Proper notice can be effectively protected by law. When legitimate rights and interests are infringed by network infringement, the notice rules can provide legal protection to the right holder. At the same time, false or even malicious notices are very common. Error notice will cause error deletion, which will cause network users to suffer losses. This should be compensated. Therefore, notice and know rules should not only protect the interests of the legitimate right holder, but also effectively prevent the loss caused by wrong notice. In recent years, in the fields of intellectual property, such as copyright, trademark right and patent right, there have been many cases of infringement of the rights and interests of others by notice rule. The wrongful notice may be resolved in accordance with the general infringement under article 6 of Torts. However, it is more intuitive and effective to directly list the responsibility of error notice in the notice rules. Moreover, the legal system of Internet infringement will also be more complete. In the provisions of the supreme people's court on certain issues concerning the application of law to trial civil cases of infringement of personal rights and interests by using information network, it has already been reflected that the future Tort Liability Law can be referred to and absorbed for reference.

3. Tort Liability Path of Network Service Providers

Civil code of the People's Republic of China is the fundamental law of China. It plays the role of cornerstone pillar and spiritual guidance in the civil field. Although our country already has a certain administrative regulations and judicial interpretations of tort liability regulation of network server, but the Civil law, Tort Liability Law compiled as the basic law, and should provide general rules. The author thinks that the network service providers should not be too strict to ignore the development of the network, nor be limited to the form of review. The notice and know rules stipulated in article 36 of the current Tort Liability Law shall be inherited, but specific rules shall be further elaborated. The legislator should improve article 36 on the basis of drawing lessons from relevant judicial interpretations and case studies. In addition, they should pay attention to the coordination with the previous judicial interpretation, and reasonably foresee the progress and future of the network, so as to ensure the long-term applicability and practical operation of the legal norms.

4. Amendment of tort liability rules for network service providers

4.1 Identify important document for notice.

Because there are so many users on the network, if we don't restrict it, there are so many deletion notices. It is necessary to restrict the notice of network users. Firstly, the scope of the notifier is limited to the victim himself and his agent. If it infringes upon the rights of the deceased (such as the copyright holder who has not passed the protection period), the close relatives shall have the right of notice. If the name, portrait, reputation and honor of heroes and martyrs are infringed upon through the Internet and the public interest is harmed, the civil affairs department shall issue a notice to those who have no close relatives. Secondly, can the notice be in any form other than written? According to the general rules of civil law, notices and other forms of meaning are spoken, written and others. Oral form is not applicable here because it is difficult to retain evidence. Other forms should allow network service providers to set up other more convenient means of right notice according to their own characteristics. For example, Youtube has set up a rights notice delivery channel on its website. The right holder may, in accordance with the guidelines on the website, gradually fill in the specific content of the notification of rights and submit it to a special agency for processing. [1]Thirdly, the content of the notice should be sufficient and supported by evidence. The notice content shall include not only the information concerning the exclusive rights of the right holder, copyright and other rights, but also the infringing websites. The difficulty is what extent is the evidence presented sufficient? The author thinks that network users can provide regular evidence according to the general infringement. We can require all network users to provide real information of the infringer too high requirements, unable to provide can be exempt from providing.

4.2 "Transfer notice" and "counter notice".

After receiving the notice from the right holder, the network service provider shall take corresponding measures in time. If a determination can be made after its examination, the deletion measures shall be taken immediately. Some network service providers have difficulty making correct judgments based on notice information. Then the "transfer notice" shall be sent to the network users suspected of infringement within a reasonable period. That is to inform the suspected users of infringement of the notice. Users suspected of infringement shall, after receiving the "transfer notice", if they have any objection, send the "counter notice" to the network service provider for defense within a reasonable period of time. For network service providers, it is their obligation to "transfer notice" and conduct timely and effective review of "counter notice", as well as their exemption from liability. The author considers that Torts should not be too detailed. The "reasonable time limit" is 10 to 15 days. According to the specific circumstances of network infringement, network service providers can take the following measures: 1. Submit the dispute to an independent third party organization; 2. Inform both parties to bring a lawsuit to the court; 3. If

the network service provider deems it necessary, the network service provider shall take appropriate measures at its own discretion.

4.3 The fault of the network service provider.

Network service providers shall have the necessary obligation to review information published using their platforms. If the infringement of Internet users is discovered through examination, necessary measures should be taken to stop the infringement. This is "knowledge". This "knowledge" includes both the findings of its own review and those obtained after verification upon receipt of notice. Failure of network service providers to carry out an effective review and "not knowing" are all fault, intentional or negligent. How to judge whether it has a fault requires careful consideration. This is because it requires universal censorship obligations on the part of network service providers, which are not only costly but also difficult to operate. [2] Moreover, network service providers are serious about complying with the notice deletion rules, which will not improve their reputation and take a significant risk of user loss. [3] In Han Han's case against Baidu, the judge decided to judge whether Baidu knew of the infringement based on the objective status of Baidu Wenku, the popularity of Han Han and his works, the disputes between Han Han and Baidu over Baidu Wenku, and the predictive level and actual control ability of Baidu for infringement. According to the analysis of relevant evidence, the court held that Baidu should have reasonable reasons to know the infringement of the documents involved and determine its fault. In this case, the judge ruled that Internet service providers "knowledge" includes both "know" and "should know". The "should know" is not "know" is faulty. The author agrees with this view, which is in line with the basic principles of civil law and the duty of care of network service providers. It is too difficult to require the infringer to prove that the network service provider has a "know perfectly well" subjective state [4]. Torts shall provide for this. Moreover, we need to take into account the provisions of the supreme people's court on certain issues concerning the application of law to trial civil cases of infringement of personal rights and interests by using information network and the Regulation on the Protection of the Right to Information Network Dissemination.

Acknowledgement

This paper is the phased objectives of internet infringement liability research as the key project of Jinan Philosophy and Social Science Planning Office in 2018.

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