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Application Dilemma and Resolution Path of Safe Harbor Rules in the Field of Network Infringement

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Abstract: This paper mainly discusses the origin and content of the "safe harbor" rules of online trading platform providers in online infringement rules, and compares and analyzes the legislative consideration and development of the safe harbor principle in China with the provisions of the safe harbor principle in the United States. Through the legislative sorting of online infringement safe harbor rules, the paper explores the existing problems and legislative considerations of the specific application of the transplanted and introduced "safe harbor" rules in China's e-commerce trading platform. By comparing and learning from foreign regulatory legislation, this paper combs out the applicability and path choice of "safe harbor" rule in China.

Keywords: Safe harbor rules; Network infringement; Internet service provider

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1. The origin of safe harbor rule and its transplantation in China

The safe harbor rule means that when network infringement occurs, internet service providers perform appropriate obligations. If they delete the infringing content in time after receiving the notice, they will not be jointly and severally liable for the damage consequences caused by it. That is to limit the copyright liability of internet service providers in the internet environment [1]. In the law, it is mainly manifested as the provision that the Internet service provider does not assume responsibility when meeting specific conditions. In the Internet era, infringers can copy and spread works protected by copyright law in a large scale in a short time with the help of Internet service providers, causing great damage to the copyright of the right holders. Due to the infringer is usually anonymous, and the compensation ability is very limited, sometimes the right holders will not directly prosecute these users, but to pursue the responsibility of the Internet service provider. When identifying the tort liability of network service providers, there is a problem of inconsistent standards. In the tort liability of the United States, there are the distinction principles of direct infringement and indirect infringement. In order to uphold the freedom of speech principle of the First Amendment of the Constitution, the United States Courts have taken a restrictive attitude to the responsibility of the intermediate links that insulting statements publish through, requiring the intermediary as the disseminator to be aware of the infringement of others to a certain extent. However, in the early litigation of network infringement, the intermediary of copyright infringement was imposed strict liability by the court. Some courts confuse direct infringement with indirect infringement, neither defining who uploaded the specific infringing content, nor considering whether the subjective fault of the platform service provider is taken into account. Instead, they identify all these situations as direct infringement.

In this regard, the "Safe Harbor Rule" established in the Digital Millennium Copyright Act (DMCA)

[2] of the United States in 1998 plays an exemplary role. It stipulates in the legislation that "the liability for Copyright infringement of Internet service providers engaged in special activities is limited [3]." The academic circle regards the system of Internet service providers being exempt from liability for indirect copyright infringement under certain conditions as "safe harbor rule." Network service providers are not liable if they meet the conditions set by the DMCA. The safe harbor rule originated from the *Digital Millennium Copyright Act* of the United States in 1998. After that, it has been transplanted in Europe, America, Japan and other countries. In 2006, China introduced the rule in the *Dissemination of Information on the Network Ordinance*, and this rule is also stipulated in Article 36 of the Law on the Liability of Infringement promulgated in 2010. However, this rule is very different from the legislative tradition of our country, and the transplantation is not complete, causing many disputes in theory and practice. In the newly promulgated Civil Code of the People's Republic of China (hereinafter referred to as the Civil Code) in 2021, articles 1195 and 1196 of the Civil Code stipulate safe harbor rules for online tort liability [4], relevant notification rules and anti-notification rules.

2. Legislative disputes and legislative considerations of the "safe harbor" rule

The clauses in the form of exemption set by the *Regulations on The Protection of The Right of Information Network Transmission* did not really solve the problem, but caused more disputes. Although the provisions of the regulation have been more detailed, the provisions in the form of exemption only list several typical behaviors that can be exempted from liability. If the behavior of internet service providers does not fully comply with such provisions, what should be done? Some scholars believe that only those who meet the listing requirements can be exempted from liability. It is worth questioning whether intermediaries who do not fully comply with these provisions should be held liable for tort. In this regard, some scholars believe that the safe harbor rule plays a role in protecting internet service providers and provides certain additional protection to the parties who may constitute infringement. That means, with such additional protection provided by "the safe harbor rule," the internet service providers can be exempt from punishment when they constitute certain infringements. According to this view, if the safe harbor rule is not set artificially, the network service provider may be liable for infringement if their corresponding behaviors touch on the situations involved in this rule. Does this mean that a new defense has been created in addition to "fair use" and "statutory license"? The difference is that some scholars believe that the safe harbor rule should be attribution clause. By running the established "notice-remove" procedure, it can be used to determine whether service providers know the existence of infringement content in the website. And this seems to be inconsistent with the name "safe harbor." Professor Qian Wang believes that due to the legal and cultural differences between China and the United States, the "liability exemption" mentioned in the "safe harbor" rule in *China's Regulations on The Protection of The Right of Information Network Transmission* cannot be understood literally as "exemption from tort liability constituted according to the provisions of the tort liability law", but the "liability exemption condition" should be included in the logical framework of the identification of tort liability in China [5].

At the same time, the safe harbor rules involved in the relevant provisions of the original *Tort Liability Law* have also caused differences in understanding. The word "know" in Article 36 of *Tort Liability Law* is controversial, whether it only means "known" or includes both "known" and "should know." Moreover, the provisions of *Tort Liability Law* are not consistent with those of the *Regulations on The Protection of The Right of Information Network Transmission*, and there is no unified opinion on which provision should be applied first. Some scholars believe that the *Regulations on The Protection of The Right of Information Network Transmission* is a special law that should be applied preferently, while the opponents think that the *Tort Liability Law* with a higher level should be applied preferently. However, this will make Article 20 and Article 21 of the *Regulations i*neffective and lead to the imbalance of interests.

Article 1197 of the newly issued *Civil Code* adds the provision that Internet service providers "shall know" that network users infringe upon the civil rights and interests of others by using their network services [6].

3. The legal application dilemma of the "safe harbor" rule

During the application of the specific "safe harbor" principle, the specific provisions made by the platform party, such as "notice-deletion," tend to help the platform exempt from liability. This is mainly a kind of legal expression presented by comparing with "notice-deletion" in copyright. If the "notice-deletion" rule is put into the trademark field, obviously there will be a lot of problems. For example, the attack on the infringement party is not enough, but the protection of the authority is weak, which will bring great economic losses to the authority. It is the existence of such a situation that the "notice-deletion" rule does not apply to trademark infringement.

The form of tort liability refers to the form in which the parties in the legal relationship of tort bear tort liability [7]. The liability of Internet service providers can be divided into two categories: single liability and joint liability. In the original *Tort Liability Law*, there are also prominent provisions on the "safe harbor" rule, which mainly involves the network platform of joint and several liability, and means that if you already know that the user has done the infringing act, but for some factors, such behavior has not been timely prohibited, thus bringing certain economic losses. In this case, the platform party shall bear joint and several liabilities with the infringing party and jointly compensate for the loss of the authority. The Electronic Commerce Law has made adaptive changes to the changes of tort. For example, the principle of subjective fault determination is based on the principle of "knowing" in the original legal provisions, but there is obviously a great controversy. There are various interpretations of the meaning of this word, which brings confusion to the judgment in the following judicial practice. As a result, different judges will have different interpretations for the judgment of the same case.

In practice and theory related to the understanding of "should know" there are big differences, for some scholars, they tend to "red flag standard". That is, for network service providers, the infringement is very obvious, and the network platform should take the initiative to rectify the infringement facts. This behavior does not necessarily have to be informed by the authority. If the Internet service provider fails to rectify it, it means that it should share relevant liability with the infringing party [8]. In view of this provision, we can find that the notice sent by the authority to the platform is only an external form of identifying the relevant infringement, but there is more than one method to define the infringement.

4. The perfection path of the "safe harbor" rule, establishing the exemption system in the "safe harbor" rule

In the United States, the *Digital Millennium Copyright Act*, an earlier law concerning copyright infringement, explicitly states the exemption of trading platforms. In this law, its exemption system focuses on providing "safe harbor" rules for platform service providers, which is intended to avoid potential risks that bring unnecessary losses to the service platform. Among them, the conditions for using "the safe harbor rule" are as follows: The first condition is that the network trading platform is technical and automatic, and the storage and transmission of information content cannot be controlled to a great extent; The second condition is that when the authority notifies or knows that the network operator has infringed, it should immediately take measures to protect the rights and interests of the authority and make rectification. The third condition is that where the online trading platform has the ability to limit the occurrence of infringement, it must stop the infringement and limit its occurrence [9]. The European Union has also formulated relevant laws for such situations, such as Article 15 of the *Electronic Commerce Directive*, which also stipulates the exemption conditions for the network service providers of electronic commerce

platforms. Article 15 of the regulation: "When the service providers are providing the instruction services stipulated in article 12, article 13 and article 14, member states should not require service providers to undertake the general obligation of information supervision, transportation and storage, and should not require service providers to undertake general obligations to proactively collect facts or circumstances indicating illegal activities [10]." Although the exemption system has been introduced in China, in view of the current development status of electronic commerce in China, it is bound to be subject to many restrictions in the application process. According to relevant conditions, China can appropriately learn from the experience of the EU in terms of exemption and develop a system of exemption in line with China's actual situation as soon as possible:

(1) The conditions for the use of safe harbors should be further clarified. For example, a reasonable duty of care should be performed to avoid losses to the authority.
(2) Set an appropriate red flag standard, which is applicable to those obviously infringing transactions, and the service provider should deal with the infringing facts quickly to protect the interests of the authority.
(3) To make use of the notification deletion system, the trading platform should notify the network operator to delete the relevant information in a timely manner when it receives the relevant notice or is aware of the infringement. All the above conditions will exempt the trading platform from its own liability [11].

For e-commerce operators, it is very beneficial to further determine the "safe harbor" rule. In this way, because of the increase of infringement events, a lot of trouble will be brought to the transaction. The application of this "safe harbor" rule can protect the normal operation of the trading platform to the greatest extent, increase the stability of trading, and promote the benign development of the market economy.

5. Conclusion

The "safe harbor principle" still plays an important role in determining the responsibility of e-commerce platforms, which requires e-commerce platforms to assume the obligation of careful prudence. E-commerce platforms should actively carry out compliance work in terms of online shop registration, qualification verification, information disclosure, transaction security, data submission to competent authorities, fair competition and cracking down on intellectual property infringement.

With the rapid development of Internet technology, a large number of infringement behaviors emerge, which also brings great challenges to the protection of intellectual property rights. From the safe harbor rules established in the *Digital Millennium Copyright Act* of the United States to the transplantation and reference of the safe harbor rules in the *Regulations on The Protection of The Right of Information Network Transmission through Information Network* in China, we have been seeking a balance between the protection of rights and the promotion of the development of the Internet industry. However, the new legislation also brings new problems of understanding and application. In order to better understand the original intention of legislation, we still need to know more about and analyze the source of relevant legislation transplantation, so as to better help us understand the legislative ideas of our country and maintain the healthy and orderly competition order of e-commerce trading market.

Disclosure statement

The author declares no conflict of interest.

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[6] Article 1197 of the Civil Code stipulates: “If an Internet Service Provider Knows or Should Know That a Network User Infringes Upon Another Person’s Civil Rights and Interests by Using its Network Service, and Fails to Take Necessary Measures, it Shall be Jointly and Severally Liable with the Network User.”

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