

Research on Indirect Infringement Identification of Short Video Platforms

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Abstract: *With the emergence of short video platforms such as TikTok and Douyin and their increasing integration into people's lives, short videos have increasingly become the first choice for more and more netizens to obtain information. In recent years, infringement disputes related to short video platforms have continued to emerge. According to various judicial cases in recent years, some short video platforms are often slack in undertaking their obligations, resulting in damage to the interests of rights holders. Under this circumstance, it is imperative to standardize the standard for determining the liability for indirect infringement of short videos. For the determination of indirect infringement of short video platforms, the latter insurance must grasp the three principles of technology neutrality, predictability, and equivalence of rights and obligations. In the current legal practice of the Division, the difficulty in judging whether a short video platform constitutes an indirect infringement lies in how to determine whether the short video platform "knows" or "should know" in the subjective aspect. Due to the unreasonable distribution of the burden of proof, the concealment of platform infringement, and the imperfection of the "notice-deletion" rule, rights holders have difficulty in safeguarding their rights. In this regard, in order to better safeguard the legitimate rights and interests of creators, encourage short video creators to innovate continuously, and promote the healthy development of the short video industry, when determining that a short video platform sees indirect infringement, the short video platform should appropriately aggravate the responsibility for the infringing video. The duty of care to further promote the reasonable application of the safe harbor rule.*

Keywords: *Duty of Care, Short Video Platforms*

1. Introduction

While the short-video industry is booming, it has also brought about a host of accompanying issues. Due to the fast spread speed and short cycle of hot traffic-generating videos, short-video platforms have gradually become a hotbed for short-video infringement. Meanwhile, to compete for traffic, the rivalry between short-video platforms has intensified. Unlike traditional long-video streaming platforms such as Tencent Video, Mango TV, and Youku, short-video platforms feature "concealed" infringement characteristics and diverse infringing acts, which make it difficult for right holders to effectively protect their rights such as copyright. This has a significant negative impact on the overall creativity and innovative development of the short-video industry, hindering its healthy growth.

2. Determination of Indirect Infringement Liability of Short Video Platforms

2.1 The Existence of Direct Infringement by Short Video Platforms

In general copyright disputes of short videos, short video platforms often act as network service providers. Among these roles, short video platforms provide services such as collecting content uploaded by users, helping users connect to the network platform, and assisting users in storing information. With the development of 5G technology and the popularization of mobile communication devices, short videos on short video platforms have the characteristic of fast dissemination. After an infringement occurs, if the infringing video is not handled in a timely manner, it is likely to spread on a large scale, causing greater harm to the rights holders. From the judicial practice cases in recent years, in cases of short video infringement, short video platforms often appear as defendants. Therefore, determining whether a short video platform has infringed has become an important part of judicial trials.

According to the classification of works in the Copyright Law, short videos generally fall into the

categories of musical and dramatic works as well as audio - visual works. However, looking at the types of various short video platforms, there are many short videos that do not belong to these two categories. On one hand, the content of a short video work needs to demonstrate a certain degree of creativity and reflect the author's personal characteristics in its expression. If the author of a short video merely makes mechanical reproductions of natural phenomena such as bird songs and insect chirps, simple conversations between two people, or lectures, and the video producer only conducts simple reproduction and recording without incorporating their own expression, lacking the author's own ideas in the expression and failing to reflect new creativity in the content, then from the perspective of the Copyright Law, such a video cannot be directly regarded as a "work". Instead, it should or can only be identified as a video product protected by neighboring rights[1]. On the other hand, China's Copyright Law does not protect "pure ideas" but rather the "expression" of ideas. This is based on the theory of the dichotomy of ideas and expressions. After all, it is a consensus that the same idea can be expressed in many different ways. Similarly, the same idea can be expressed through different short videos. Based on the dichotomy of ideas and expressions, the author of a short video cannot claim that others have infringed their copyright on the grounds that other videos share the same idea. Based on the above two aspects, we can briefly classify the numerous short videos currently available and analyze their copyrightability respectively.

In accordance with the provisions of China's Copyright Law, for a short video to be protected by the Copyright Law, first, it must be an independently and originally created work by the creator, rather than being copied from others through means such as copy - pasting. Second, the short video should embody the creator's unique ideas and emotional expressions, that is, the work should reflect the creator's personal intellectual labor. Third, on the premise of meeting the above - mentioned requirements, the short video should possess a certain degree of "creativity". This can be in the form of original creation or a work with creativity derived from the creator's unique ideological expression based on existing materials. Although China has not clearly stipulated the degree of "creativity" that a work should embody at the legal level, due to the characteristics of short videos themselves, such as being short in length and low in creation cost, in judicial practice, judges have relatively low requirements for the creativity of short videos. It only requires that the short video can demonstrate the minimum degree of creativity that an ordinary person can perceive[2]. Given the rich variety of short videos nowadays, this article holds that in judicial practice, when analyzing whether a short video has infringed copyright, based on the above - mentioned theoretical basis, specific analysis should be conducted on a case - by - case basis. For different short videos, the analysis should be carried out according to their specific types.

2.2 Elements of Indirect Infringement Acts by Short Video Platforms

Indirect intellectual property infringement refers to acts where the actor does not commit a direct infringement, but abets or assists others in committing intellectual property infringement, or fails to prevent others from committing intellectual property infringement despite having an obligation to do so due to a certain interest relationship [3]. Professor Wang Qian pointed out that indirect infringement refers to acts that induce, abet, or substantially assist direct infringement [4]. In cases of copyright infringement of Internet short videos, the act of assistance generally means that the platform, as a network service provider, not only fails to stop or remove the infringing video when a user uploads it but also provides assistance for the dissemination of the video. Another type is inducement liability, also known as inducement infringement. This usually occurs when a short video platform, as a network service provider, stimulates users through methods such as setting up rankings and providing points for completing tasks, thereby inducing and instigating users to commit acts of infringing the copyright of others' short videos.

Article 1168 of the Tort Liability Section of the Civil Code stipulates abetting infringement and assisting infringement. Article 7 of the Judicial Interpretation on the Right to Network Dissemination of Information issued by the Supreme People's Court stipulates: "If a network service provider abets or assists a network user in committing an act of infringing the right to network dissemination of information when providing network services, the people's court shall order it to bear tort liability." Moreover, Paragraphs 2 and 3 of Article 7 respectively stipulate the specific manifestations of abetting infringement and assisting infringement by network service providers.

China's laws have relevant provisions on how to define the "control power" of the defendant over the infringing act of the infringer in disputes over network copyright infringement. According to the relevant provisions of China's Civil Code, to require a short video platform to bear indirect infringement liability, two conditions must first be met. One is that the short video platform "knows" or

"should know" about the infringing act. The other is that after "knowing" or "should know", it still fails to take necessary actions to stop or restrict the dissemination of the infringing short video[5]. In other words, for a network service provider to bear liability for an infringement, it must first have the ability to take necessary measures to control the act of the infringer and its consequences. At the same time, the relevant provisions of the Judicial Interpretation on the Right to Network Dissemination of Information also show attention to this element. For example, Paragraph 3 of Article 8 stipulates that network service providers that "have adopted reasonable and effective technical measures but still find it difficult to detect acts of network users infringing the right to network dissemination of information" shall be excluded from bearing indirect infringement liability. Paragraph 1 of Article 9 proposes that "the ability of a network service provider to manage information" can also be one of the conditions for determining the fault in indirect infringement liability.

Regarding the element of "direct benefit" from the infringing act, Paragraph 4 of Article 22 of the Regulations on the Protection of the Right to Network Dissemination of Information also reflects this. It takes the situation where "no direct economic benefit is obtained from the works, performances, or audio - visual recordings provided by the service objects" as one of the conditions for network service providers to be exempted from compensation liability. According to Article 11 of the Judicial Interpretation on the Right to Network Dissemination of Information, the economic benefits obtained by adding shopping links to short videos or engaging in "advertising placement" in the form of advertising agency do not belong to the direct economic benefits obtained by the platform from the infringing act[6].

2.3 Subjective Determination of Indirect Infringement by Short Video Platforms

In the theory of technological neutrality, short video platforms only assume the role of network service providers. The imputation principle for indirect infringement adopts the "fault" theory. In the context of the theory of technological neutrality, if fault includes "should know", then in the face of a large variety and quantity of short videos, the requirement of "should know" to a certain extent increases the duty of care of the platform, which is inconsistent with the characteristics of technological neutrality that platforms need to share and be decentralized.

In judicial practice, the presumption of "should know" has been generally adopted in determining the fault of short video platforms. According to the provisions in the Judicial Interpretation on the Right to Network Dissemination of Information, in the presumption of fault for indirect infringement of short video platforms, fault includes "knowing" and "should know". The former refers to the situation where the platform clearly knows that the relevant video is being disseminated on the platform but still allows the dissemination of the infringing video, resulting in the expansion of harm to the rights holder. The latter refers to whether, based on the understanding of the platform's own capabilities and management level, it can generally detect the occurrence of the infringing act and has the ability to stop the occurrence and expansion of the infringing act.

2.3.1 Inconsistent Judicial Standards for "Knowing" or "Should Know"

In the current judicial practice, courts generally determine whether a short video platform is aware of the infringing act by comprehensively considering factors such as the popularity of the infringing video, the reputation of the original short video, and the influence of the short video. Among these factors, whether the infringing short video has significant influence is taken as the main judgment factor by the courts. However, in the absence of comprehensive legal provisions, courts have a relatively large discretionary power. There are different views among courts on the standards for determining whether a short video platform is subjectively "knowing" or "should know" about the infringing video.

In the case involving Hunan Broadcasting System, the court held that the evening party broadcast on Hunan Satellite TV (organized by Hunan Broadcasting System) had a high audience rating, which indicated that the evening party had a certain degree of influence. The production of this evening party also involved long - term planning and design by Hunan Broadcasting System, which embodied the efforts of the creators and demonstrated strong creativity. Therefore, the court held that the defendant platform failed to conduct timely review when the infringing video was uploaded and did not fulfill its due obligation regarding the video with certain social influence. In this case, the court held that the defendant "should have known" about the existence of the infringing video, and the short video platform (Qianjun Network Technology) constituted indirect infringement. In a judgment issued by the Shanghai Intellectual Property Court in 2018, the court stated that the defendant should not bear

indirect infringement liability. The reason was that the infringing short video was not produced by professionals, and its production was simple with low cost, so it did not have significant social influence, and the defendant did not have the fault element of "knowing" or "should know"[7].

In China's laws, the relevant factors for determining whether a platform "knows" or "should know" are stipulated in the Judicial Interpretation on the Right to Network Dissemination of Information. Although the law states that the judgment should be based on whether the relevant facts of the case are sufficiently obvious, in judicial practice, courts mainly focus on the influence and dissemination scope of the infringing short video when determining whether the platform "knows" or "should know". However, there are no specific algorithms or identification standards for judging whether the infringing short video has significant influence and reputation. Therefore, in individual cases, the determination of the reputation and influence of the infringing video is made by the court and the judge based on their own cognition. This gives the court a large discretionary power, which brings uncertainty to the nationwide cases of indirect infringement by short video platforms. Nowadays, the production of short videos has become increasingly simple, and ordinary users can also skillfully produce videos after receiving guidance. A large number of videos on short video platforms are created by ordinary users. Under this premise, it is unreasonable to take only the influence and reputation of short videos as the basis for judgment. Because many works created by ordinary users are difficult to achieve a high level of influence, such a judgment will undoubtedly be a blow to ordinary creative users and is not conducive to the innovation of the short video industry.

At the same time, the existence of difficulties in determining "knowing" and "should know" has led to some problems. On the one hand, short video platforms may be reluctant to assume their responsibilities due to the exemption under the "notice - and - take - down" rule, resulting in the failure of this rule. On the other hand, due to the lack of sound rules for defining "knowing" and "should know", the parties have to spend a lot of energy collecting more evidence that can prove the obvious infringement to demonstrate that the platform should bear indirect infringement liability, which increases the burden on the rights holders.

2.3.2 Unclear Norms on the Obligations and Liabilities of Short Video Platforms

The key to determining whether a platform needs to bear the responsibility of active review lies in how we understand its "neutrality". If a short-video platform is defined as a mere "technical provider" of internet services, it only needs to bear indirect infringement liability (under certain conditions) and should not be further required to assume the responsibility of actively reviewing the videos uploaded by users. After all, from a practical perspective, short-videos are concise, widely and rapidly disseminated[8]. It is impractical to require internet platforms to review each piece of content one by one. For example, in the case of Beijing Zhongshu Technology Co., Ltd. v. Kulou.com, the court held that it was difficult for the defendant to detect the case-related short-video among the large number of short-videos on its platform, and this was listed as one of the defendant's exemptions from liability.

The Safe Harbor Principle originated from Section 512 of the Digital Millennium Copyright Act (DMCA) enacted by the United States at the end of the 20th century. This law lists exemption clauses for various platforms in different judicial practice cases, classifies internet service providers, and sets different provisions for different types of internet service provision platforms. In China, the Safe Harbor Rule is mainly reflected in Article 22 of the Regulations on the Protection of the Right to Network Dissemination of Information. According to the general principle of the Civil Procedure Law—"A party shall provide corresponding evidence for its claims"—the original intention of the Safe Harbor Rule is to provide internet service providers with a basis for exemption from certain obligations. However, based on this rule, short-video platforms often neglect their obligations, believing that they only need to fulfill the requirement of the "Notice-and-Takedown" process to be exempted from their legal liabilities.

From the perspective of copyright owners, in the face of a large number of infringing videos on the internet, they need to spend a lot of energy and manpower to check and report each platform, which incurs significant costs and efforts. For short-video platforms, after receiving a notice, they need to review the content and then notify the user who uploaded the infringing video[9]. This process is not only time-consuming but also inefficient. From the perspective of the commercial benefits of short-videos, it is more beneficial for short-video platforms to wait for copyright owners to issue notifications than to spend their own energy reviewing short-videos that may or have already constituted infringement[9]. In this case, the Notice-and-Takedown Rule has, to a certain extent, greatly reduced the platforms' motivation to regulate their content independently. Of course, under the restriction of the Red Flag Rule, short-video platforms still need to fulfill certain obligations. However,

when the conditions for the Red Flag Rule are met, short-video platforms still do not actively review the videos on their platforms based on commercial benefits and only remove the infringing videos after receiving notifications from short-video copyright owners. If a short-video platform only delays taking necessary actions on the infringing video after receiving the notification, resulting in the large-scale dissemination of the short-video on the platform, the losses will continue to increase. Finally, even after the short-video platform deletes the original infringing video, it cannot prevent the video from being repeatedly uploaded to the platform afterward.

This paper holds that with the development of internet technology, internet short-video platforms are the biggest beneficiaries of this industry. As the technology of short-video platforms continues to advance, internet short-video platforms should assume more responsibilities and obligations in the copyright governance of short-videos[10]. Copyright owners already face great difficulties in collecting evidence, and short-video platforms can still defend themselves by applying the Safe Harbor Rule. When it comes to collecting a large amount of information on the internet, short-video platforms are obviously in a more advantageous position. However, copyright owners—who are in a disadvantaged position—are required to bear the burden of proof and also face the risk of losing the lawsuit due to the platform's application of the Safe Harbor Principle. This is unfair to copyright owners

For "providers" of internet service technologies, the application of the Safe Harbor Rule enables them to obtain a certain degree of "exemption from obligations". However, the existence of this principle also easily leads to misunderstandings among the operators of short-video platforms. For example, they may believe that as "internet service providers", they only need to fulfill the simple obligation of "Notice-and-Takedown" to be exempted from legal liabilities arising from copyright infringement of content through the Safe Harbor Rule. The court judgment in the case of Beijing Weishi Vision v. Baidu Online further helps us understand the "higher duty of care" that platforms should bear as stipulated in the Judicial Interpretation on the Right to Network Dissemination of Information when internet service providers are required to assume such a duty. It can be seen that the protection of copyright is not limited to specific paths; the platform's active fulfillment of its duty of care within the scope of its responsibilities and assumption of corresponding management responsibilities are also important ways to safeguard the above-mentioned rights.

3. Suggestions for Improvement

3.1 Reasonable Application of the Safe Harbor Rule

The manifestation of the Safe Harbor Principle in China is mainly the "Notice-Forward Notice + Takedown" Rule in the Civil Code. Even with such restrictions, this does not mean that short-video platforms can be exempted from all liabilities. Short-videos are characterized by fast dissemination and a wide spread range. If the infringing video is not deleted in a timely manner, it will cause greater harm to the copyright owner. If the Safe Harbor Principle is applied simply, it will allow short-video platforms to commit infringing acts, implicitly condoning such acts and reducing their corresponding obligations, thereby damaging the rights and interests of copyright owners. Therefore, when applying the Safe Harbor Principle, attention should be paid not only to whether the short-video platform has deleted the relevant case-related infringing video after being notified by the copyright owner but also to meeting other conditions.

To apply the Notice-and-Takedown Rule more reasonably, this paper holds that the following steps should be taken: First, the purpose and significance of the Notice-and-Takedown Rule should be clearly defined, i.e., it is a means to provide remedies for copyright owners and also a way for copyright owners to protect their own interests. In the Notice-and-Takedown Rule, based on the common sense understanding of ordinary people, if it can be proven that the internet service provider (short-video platform) has certain technical and management capabilities and that the platform clearly knew or should have known about the infringing act but ignored it, leading to the expansion of harm caused by the infringing act, the platform cannot be exempted from liability for the harm caused by the infringing act. Second, "takedown" is an obligation of short-video platforms as stipulated in the Civil Code. In practice, this is often the standard used by judges to determine whether the short-video platform has taken the necessary measures required by law against the user's infringing act to prevent the further expansion of infringement damage. When making a ruling, the judge's criterion for measuring whether the short-video platform has taken timely, effective, and necessary measures is based on the extent to which the measures reduce the infringement damage. In the Hangzhou Daodou Network case, the defendant was required to completely delete the infringing mini-program. This requirement obviously

exceeded the necessary limit for reducing damage, resulting in the failure to present key evidence in the case during the court hearing. Paragraph 1 of Article 1195 of the Civil Code stipulates that after the copyright owner provides preliminary evidence proving the infringement of the platform's user and the type of service, the short-video platform shall take corresponding measures to prevent the further expansion of the infringement damage based on this evidence. Compared with the Tort Liability Law (before the implementation of the Civil Code), the Civil Code still specifies measures that can stop the infringing act and prevent the further expansion of infringement damage to a certain extent, such as deleting the infringing work, disabling the link of the uploader of the infringing work, and blocking the user through certain technical means. This requires that in judicial practice, judges should conduct a comprehensive analysis based on the specific circumstances of each case to determine whether the measures taken by the case-related short-video platform are necessary. Third, the reasonable application of the Safe Harbor Rule requires both short-video platforms and judges to clearly understand that the Safe Harbor Rule is not a procedural requirement for its application, nor is it a prerequisite for exempting short-video platforms from indirect infringement liability. More importantly, a comprehensive analysis should be conducted on whether the short-video platform has a reasonable "constructive knowledge"—a substantive condition.

3.1.1 Appropriately Increasing the Duty of Care of Short-Video Platforms

First, there should be a legally valid non-competition agreement. The non-competition agreement is a double contract between the worker and the employer on the obligation of non-competition, whereby the latter pays economic compensation, and the former fulfills the obligation of restriction. The agreement constitutes the basis of the rights and obligations of both parties. Its signing and content, especially the liquidated damages clause, must align with the relevant provisions of the Civil Code and the Labor Contract Law. Secondly, there shall be a breach of the separation non-competition agreement. Breach of contract refers to the process of contract performance; one party does not fulfill its obligations or the performance of obligations does not meet the agreed requirements, mainly manifested in the refusal to perform, incomplete performance, and delayed performance of the three forms of restriction on the main body, behavior, area and time and other aspects of the specific provisions of the Tongxin.

3.1.2 The Amount of Liquidated Damages for Non-compete Agreements is Agreed to be Too High

The assessment of liquidated damages for non-competition should be based on a comprehensive standard of equity. Given that such liquidated damages are similar to those in civil law, it is difficult to set a uniform "excessive" standard. According to Article 29 of the former Interpretation II of the Contract Law, the quantitative standard of "significantly exceeding the actual loss" is more than 30%. However, applying this standard is limited because it is not easy to quantify the loss. During the legislative period of the Labor Contract Law, the draft proposed that the maximum amount of liquidated damages for workers be capped at three times the amount of compensation for non-competition, and this principle has been generally followed in practice.

3.1.3 Application of Parties to a Separation from Service Non-competition Agreement

From the perspective of legal provisions, as internet service providers, short-video platforms should assume a higher duty of care in reviewing infringing short-videos. In the case of iQiyi v. ByteDance, the case-related video on the defendant's platform directly included the title of the drama and was marked with words such as "free" and "welfare" to attract viewers—these were obvious signs of infringement. It can be seen that the defendant platform still failed to delete the case-related infringing video in a timely manner despite these obvious infringement signs, which indicates that the defendant did not fulfill its reasonable duty of care. [11] Before this case, the National Intellectual Property Administration had also issued a warning to the platform regarding the infringing drama *The Mystic Nine*, requiring the defendant short-video platform to assume a higher duty of care for the videos on its platform.

3.2 Status of the Court's Liquidated Damages Discretion

The "judicial adjustment" of liquidated damages for non-competition should semantically cover both upward and discretionary reductions of liquidated damages. However, due to the practice of both parties to the contract generally tend to agree on a high amount of liquidated damages, so in the judicial practice of the vast majority of cases involved in the Court at the request of the parties to the amount of liquidated damages for discretionary reductions, and request for upward circumstances are extremely rare. China's civil legislation has only made principle and directional provisions, and the labor

legislation also refers to civil law practice. When workers' non-performance of non-competition obligations causes losses to the employer, if the parties claim that the agreed liquidated damages are too high than the actual losses, the Court shall decide based on the actual losses, taking into account other relevant factors[12]. An analysis of the results of judicial adjustment of non-compete liquidated damages cases shows that most cases are based on discretionary reductions to safeguard workers' rights and interests. However, the lack of systematic and scientific consideration of factors and the significant regional variations indicate the challenges in judicial adjustment.

For short-video platforms, they are not only internet service providers but also operators. With regard to the platform communication space constructed by short-video platforms, the platform has two identities: 1) It can act as an operator in the social network it has built; 2) It serves as the administrator of a specific network space. According to the relevant provisions of the E-Commerce Law of the People's Republic of China, as a platform administrator, the platform provides users with special benefits such as user authentication, platform privacy protection, and illegal data monitoring. At the same time, the platform needs to provide security support for platform users and has various rights such as file closure, security protection, personal data protection, malicious data erasure, and credit protection.

In summary, as a new type of business entity bearing market functions, short-video platforms are no longer mere internet service providers in terms of their functional operations[13]. When resolving short-video-related disputes, the important role of short-video platforms should be recognized. In infringement cases, short-video platforms should assume a heavier duty of care, and greater protection should be given to the interests of copyright owners.

4. Conclusion

With the rapid industrialization of the short-video industry, the determination of indirect infringement liability of short-video platforms is of great significance. At this stage, to address short-video infringement issues, we can start from the perspective of indirect infringement by short-video platforms, appropriately increase the duty of care of short-video platforms, reasonably apply the Safe Harbor Rule, protect the interests of copyright owners, and promote the healthy development of the short-video industry.

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