LEGISLATIVE TREND OF THE TORT LIABILITY OF ONLINE CONTENT SHARING SERVICE PROVIDERS IN EU AND US

Written by ***Zhaoxia Deng***

4th Year PhD Candidate, The University of Hong Kong

INTRODUCTION

The mid-1990s saw the rise of the network services, and how to define the tort liability of Internet service providers (ISPs) due to the infringement of its users has become one of the most heated topics in the copyright field at that time. At last, all countries made a consensus on the Article 8 of the Copyright Treaty of the World Intellectual Property Organization (WCT), and believed that if the ISP does not know or has no control on the infringement of its users, it belongs to "providing physical facilities only for promoting or carrying out communication, which does not constitute communication within the meaning of this article or Berne Convention". Subsequently, the United States (US) enacted the "Millennium Digital Rights Act" (DMCA) in 1998. Section 512 of the DMCA specifies in detail that ISPs can be exempted from tort liability under certain conditions, so this section is also known as the "safe harbor" rule. Section 512 (c) stipulates that ISPs providing storage services for user uploaded content (UGC) are exempted from liability for infringement if they perform the "notice-takedown" rule without knowing or controlling the user's infringement. In June 2001, the European Union (EU) successively issued the Directive on E-Commerce, in which Articles 12 to 14 correspond to Article 512 of the "safe harbor" rule of the United States. The Regulations on the Protection of the Right of Communication through Information Network formulated and promulgated by China in 2006 also stipulates a similar "safe harbor" principle.

Twenty years later, whether the digital copyright law enacted at the end of last century is still applicable to today's digital technology and business model has once again aroused the concern

of all countries. In this legislative reform, the EU has come to the forefront. In April 2019, Article 17 of the Digital Single Market Copyright Directive (hereinafter referred to as "Copyright Directive") passed by the EU basically overturns the safe harbor clause of Article 14 of the previous E-Commerce Directive for online content sharing service providers (OCSSPs), and puts forward higher obligations and responsibilities for them. At the same time, after five years of investigation and research, the U.S. Copyright Office published a research report concerning Article 512 of "safe harbor" rule in May 2020, which questioned whether the OCSSPs should still enjoy the exemption according to the original "safe harbor" clause and put forward corresponding legislative suggestions. This paper introduces the legislative reform of the "safe harbor" provisions of OCSSPs in the EU and the US, and attempts to provide some reference for the industry to consider how to balance the rights and obligations of ISPs and copyright owners in the new digital technology environment.

ARTICLE 17 OF THE EU COPYRIGHT DIRECTIVE

Article 17 of the Copyright Directive passed by the EU in 2019 overturns the principle of "safe harbor" in Article 14 (1) of the previous E-Commerce Directive, and put forwards much stricter exemption requirements for those "profit making" OCSSPs who provide "storage, organization and promotion" services for a large number of users to upload content.[i] At the same time, under the strong demand of Internet platform and European scholars[ii], the EU has also added several exceptions to Article 17, that is, OCSSPs not limited by this provision, including: non-profit Encyclopaedia (such as Wikipedia) for spreading social civilization to the public; online education or scientific knowledge base; open source software development platform; electronic communication service; e-commerce platform providing online retail services; cloud service platform for personal use only; and start-up online content sharing platform with "less than three years of entrepreneurship and less than 10 million euros of annual operating revenue".[iii]

According to Article 17, an OCSSP can apply the exemption clause only if he meets the following conditions, otherwise he will bear the direct tort liability: (1) he has been authorized by the right holder or makes his best efforts to obtain the authorization; (2) he makes his best efforts to protect the necessary and relevant specific copyright information provided by the

right holder after receiving it; (3) he deletes or disconnects the infringing link quickly after receiving the notice of deletion from the right holder, and try his best to ensure that the infringing content is no longer uploaded by users. The main meanings of the above exemption clause are as follows: Firstly, the first exemption situation stipulated in Article 17 aims to encourage OCSSPs to reach content license agreements with copyright owners, so that copyright owners can share the economic benefits brought by user traffic. At present, the most important OCSSPs in the world are technology companies based in the US, such as YouTube, Facebook, Twitter, Instagram, etc. European copyright owners generally believe that when these American technology giants enjoy the huge benefits brought by the traffic of users uploading copyright content (including unauthorized copyright content), the copyright owners do not benefit from it, so this gap is called "value gap". Therefore, the first kind of exemption actually encourages the online content sharing platforms in the US to share the economic benefits of their user traffic by paying license fees to European copyright owners (such as musicians, composers and writers). The second kind of exemption is to require OCSSPs to fulfil the obligation of "copyright filtering", whether through manual filtering or installation of filtering technology. The third kind of exemption is to require OCSSPs to use "notice-stay down" measures to prevent users from uploading infringing content again after receiving the "takedown notice" from the right holder, so as to replace the previous "notice-takedown" measures.

Article 17 of the Copyright Directive was controversial when it was passed, and one of the main critical views is that the "automatic copyright filtering" technology adopted by online content sharing websites will affect the normal and reasonable use of copyright works by Internet users, such as criticism, comments, excerpts, and as such this article only considers the interests of copyright owners while ignores the public interests of Internet users. Another dissenting opinion focuses on the "competition threshold", arguing that the high cost of implementing "copyright filtering" technology indirectly increases the market access threshold of small and medium-sized online content sharing websites, which is not conducive to the fair competition of online content sharing platforms. The third point of view is that the "automatic copyright filtering" and "notification blocking" technologies will lead to online sharing sites "supervising" users' information, so it is suspected of infringing users' privacy data.

U.S. RESEARCH REPORT ON ARTICLE 512 "SAFE HARBOR" RULE

In 2015, at the request of the Judiciary Committee of the House of Representatives, the US Copyright Office started a multi-year investigation to assess whether the "safe harbor" provisions formulated in 1998 are still applicable to the needs of copyright protection in the new digital era. After soliciting nearly 100000 opinions, organizing nine empirical research reports, and holding several hearings, the US Copyright Office published a research report named Section 512 of Title 17 concerning Article 512 of the "safe harbor" rule in May 2020.[iv] The report shows that the development of the "safe harbor" clause has not been able to fully protect the interests of copyright owners, so it finally put forward 12 legislative amendments to the Congress. Some of the suggestions are similar to Article 17 of the EU Copyright Directive.

First of all, the report believes that the most contradictory and urgent reform in the "safe harbor" clause is the ISP defined in article 512 (c) to provide storage services for users' uploaded content. When the U.S. Congress formulated the "safe harbor" clause in 1998, it did not expect that "providing storage services for users' uploaded content" has become an essential function of today's Internet platform. Whether it's YouTube, Tik Tok video sharing platform, or Facebook, Twitter, Instagram, WeChat and other social platforms, or Amazon, Taobao, E-Bay and other e-commerce platforms, to some extents, it all provides "storage space" for users to upload content (including copyright infringement content). The profit models of many online content sharing platforms are also based on the traffic attracted by users' uploaded content (including unauthorized copyright content). With the popularity of Internet and the improvement of network speed in the past two decades, the infringement content on the Internet is more common. Take Google as an example. It received less than 3 million "takedown notices" from right holders between 1998 and 2010, and it received more than 3 million "takedown notices" in 2013. In the year of 2017, Google received more than 880 million "takedown notices". According to statistics, Google has handled more than 4.6 billion takedown notices so far, which shows the rampancy of online piracy. Therefore, it is worth further exploring the boundary of "providing storage services for users' uploaded content" defined in Article 512 (c), and whether it should still enjoy the protection of safe harbor rule.

The second suggestion put forward by the US Copyright Office is how to prevent "repeated infringers" from uploading infringing content again. The report points out that the current "notice-takedown" measure is ineffective, describing infringers as "moles". When an infringing link was just discovered and deleted, another new infringing content is uploaded again by the same infringer, thus entering into an endless fight for rights.[v] In this regard, although the report of the Copyright Office does not directly suggest that Congress takes measures similar to Article 17 of the EU, that is, to replace the current "notice takedown" with "notice block", it does urge Congress to seek more effective measures against repeated infringers. For example, ISPs are required to "announce in writing, publicly and clearly their measures against repeated infringers, such as disconnection, and implement such measures truly and effectively.

As for copyright filtering obligation and content filtering technology, although the US Copyright Office does not require OCSSPs to fulfil the obligation of "copyright filtering" in order to enjoy the "safe harbor" rule, it is a legislative trend that "along with the development and improvement of data and filtering technology, fingerprint filtering technology will become a feasible solution for network service providers, regardless of its scale". [vi] To some extent, it also shows that when the time is ripe, the US may adopt a similar regulation to Article 17 of the EU, which requires OCSSPs to fulfil the obligation of "copyright filtering" in order to enjoy the protection of safe harbor.

CONCLUSION

The principle of "safe harbor" stipulated in the Regulations on the Protection of the Right of Communication through Information Network promulgated by China in 2006 is very similar to the DMCA of the US. Over the past decade, the development of China's Internet has changed with each passing day. According to the latest Statistical Report on Internet Development in China, "the number of Internet users in China has reached 940 million, and the Internet penetration rate has reached 67% by June 2020". [vii] However, there are different levels of copyright infringement hidden in the video sharing websites such as YouTube and Tencent, or social live platforms such as TikTok, Fighting Fish, and even news aggregation platforms.

Therefore, whether the "safe harbor" rule formulated more than ten years ago is still applicable to the needs of today's Internet technology development, business model and even copyright development is worth discussing again. At the same time, it is also vital to consider how to balance the interests between promoting the development of the copyright industry and protecting the public's freedom of speech and information or protecting the public's private data so as to maintain the vitality of the Internet ecology.

ENDNOTES

[i] See Article 17 (1) & (4) of the EU Digital Single Market Copyright Directive.
[ii] When Article 13 (the revised Article 17) of the first draft of the EU Copyright Directive was announced, it was strongly opposed by all parties, including objections from 145 non-governmental organizations, protests signed by more than 5 million individuals and joint petitions on behalf of more than 240 EU small and medium-sized Internet companies. The revised Article 17 basically takes into account the above objections, but it is still full of controversy.
[iii] See Article 2 (6) & Article 17 (6) of the EU Digital Single Market Copyright Directive.
[iv] See United States Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights,* May 2020. < https://www.copyright.gov/policy/section512/section-512-full-report.pdf >last visited January 20, 2021.
[v] Ibid, p 81.
[vi] Ibid, p 178.
[vii] See 'Statistical Report on Internet Development in China' < http://www.gov.cn/xinwen/2020-09/29/content_5548175.htm> last visited January, 20 ,2021.