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A Critical Examination of the Applicability of Standards for Determining Infringement of Information Network Transmission Rights

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Abstract: Currently, there is controversy surrounding the standards for determining infringement of information network transmission rights. However, the application of these standards is of great significance for the regulation of information network transmission rights and holds important implications for the internet industry. Therefore, it should not be overlooked. Regarding the existing standards for determining infringement of information network transmission rights, a wholesale rejection of server standard is irrational, and the hasty application of new standards is also challenging to justify. An objective examination of various existing standards is essential, recognizing both their problem-solving capabilities and their inherent limitations. The adoption of multiple standards may be a feasible approach to address these issues.

Keywords: information network transmission rights, infringement determination, multiple standard application, server standard, substantive alternative standard

1. Introduction

In today's rapidly evolving internet industry, numerous new forms of industries have emerged, making the regulation of information network dissemination rights an unavoidable topic. The significance of protecting information network dissemination rights is self-evident. China's Copyright Law essentially inherits the provisions of the World Intellectual Property Organization (WIPO) and the World Copyright Treaty (WCT) concerning information network dissemination rights. Clarifying the standards for determining infringement of information network dissemination rights plays an extremely important role in reducing judicial chaos. Firstly, a clear infringement determination standard can provide a reference and a degree of certainty for the application of the law in judicial practice, making judicial decisions more convincing. Secondly, defining an infringement determination standard can establish a more authoritative perspective within the academic community. Therefore, improving the standards for determining infringement of information network dissemination rights has an undeniable impact on both the legal field and the development of the internet industry. This article argues that applying multiple standards in the current environment is a more reliable approach to addressing the current issues. The application of multiple standards should be based on a comprehensive understanding of information network dissemination rights, an appreciation of the legislator's intent and original purpose, and should be

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determined based on specific circumstances, rather than using a single standard to measure all situations. Only by doing so can we effectively overcome the limitations of a single standard, avoid errors in judicial practice, and achieve effective regulation of information network dissemination rights.

2. Presentation of the Issue

Since the inception of information technology, its development has progressed at a breathtaking pace. To a considerable extent, this has given rise to a diverse online world that enriches and facilitates people's lives. On a broader scale, it has driven a transformation in society, creating an era beyond the imagination of previous generations. However, it has simultaneously revealed numerous challenges in practice. These challenges encompass improper online discourse infringing upon individuals' personal rights, prevention of minors' excessive internet usage, protection of personal information in the online sphere, and inappropriate dissemination of online information, among others. Among these issues, the infringement of information network transmission rights has become a recurrent concern. The emergence of deep linking technology, in particular, has made it increasingly difficult to discern acts of infringement. For instance, in the Tencent v. E-Link Way case, E-Link Way used deep linking to provide the public with access to the exclusive online transmission rights held by Tencent for the drama Palace3: The Lost Daughter. This resource lacked any source attribution, and it directly led users to the playback page. There are no pre-roll or mid-roll advertisements, and no LeTV watermark is shown. Furthermore, the version and layout differ from the LeTV application. These technological methods make it challenging to establish infringement using server-based standard. On one hand, the protection of information network transmission rights safeguards the innovation incentive for content creators and promotes the vitality of social innovation. It reflects the state's emphasis on internet innovation and its high expectations for internet development. On the other hand, facilitating the broad dissemination of creative works to the greatest extent possible is also advantageous for sharing information and maximizing its utility. Therefore, the ongoing debate over which standard to apply, one that safeguards the legitimate rights of content creators while promoting the widespread dissemination of creative works, is intense. In judicial practice and theoretical research, various standards have been proposed, including server standard, user perception standard, substantive alternative standard, new public standard, and substantive presentation standard.

These standards each have their own focus and merits. Server standard primarily determine infringement based on whether content has been uploaded to a server, while user perception standard mainly rely on users' subjective experiences to determine infringement. Substantive alternative standard, on the other hand, focus on whether a work has been substantially presented. Scholars have taken different positions on this matter. Some scholars argue that the concept of "adopting the 'server standard' to determine information network transmission behavior" [1] suggests that setting deep links does not place the work in a state of being "accessible to the public". To achieve such accessibility, it is necessary to upload the work to a server. Hence, the determination of information network transmission rights infringement should adopt server standard. Others argue that server standard are outdated and cannot cover all technological possibilities in the current information technology landscape. They advocate for an improved "new user perception standard" [2], which relies on users' perception of a work's accessibility to the public. It is evident that the use of a single standard alone is insufficient to meet the requirements of reality. Moreover, in today's rapidly evolving technological landscape, becoming too entangled in technical specifics can hinder the development of reliable judgment criteria and decisions that earn public trust. Therefore, I propose the strategy of employing multiple standards to address the complex and multifaceted realities of the

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present situation. This approach aims to explore the applicable scenarios for each standard from diverse perspectives.

Given the current chaotic state of affairs surrounding information network transmission rights, various standards have been proposed in both academia and judicial practice. Among them, the server standard was one of the earliest standards to be introduced and has seen widespread application in China. Although the server standard received broad recognition, it has also revealed several deficiencies when tested by the progress of time.

3. Determination Standards for Infringement of Information Network Transmission Rights: Limitations of the Server Standard

3.1. Emergence of the Server Standard

The concept of the server standard first originated in the 2006 case of "Perfect 10 v. Google". In this case, Perfect 10 was an adult entertainment company engaged in publishing adult magazines, operating adult websites with online subscription services, and providing mobile background image downloads. Google, on the other hand, was a well-known internet portal offering thumbnail search functionality. Some independent third-party websites published images from Perfect 10, which were originally accessible only to subscribers, in violation of the terms agreed upon during the subscription process. Google's web crawlers detected the content on these infringing websites, indexed it, and stored the infringing content in the form of thumbnails on its servers. When users clicked on these thumbnails, they were not directly redirected to the third-party websites. Instead, Google's website displayed the infringing content within a new page frame. Perfect 10 alleged that Google's storage of thumbnails and provision of internal links infringed upon its copyrights. Subsequently, Perfect 10 filed a lawsuit in the United States Central District Court of California, where the court issued partial injunctions in favor of the plaintiff. The court notably pointed out that Google's thumbnails were highly likely to constitute copyright infringement.

In the case of Google's thumbnails potentially causing copyright infringement, District Court have regarded the act of storing the work on servers and making it available to users as the most direct and appropriate criterion for determining infringement. This has led to the emergence of the "server standard".

In China, the server standard finds its direct legal basis in Article 8 of the WCT. It defines the act of exercising information network transmission rights as constituting the "initial act of making the work available". Influenced by both international precedents and treaties, China naturally adopted the server standard as the primary criterion for determining infringement of information network transmission rights.

3.2. Reasons for Applying the Server Standard

Returning to Article 8 of the WCT and China's Copyright Law's definition of "information network transmission rights", the act of "making the work available" should lead to the work being accessible to the public at their personally chosen time and place. Scholars who support the application of the server standard argue that uploading a work to a server clearly aligns with this definition. However, opposing viewpoints argue that contemporary advancements in internet technology, including deep linking and other techniques, also contribute to the exercise of information network transmission rights. In fact, these technologies indeed play a role in exercising these rights. In response, advocates of the server standard counter by stating that other technological means can only link to the original server to provide the work. If the server hosting the original work deletes it, the link would no longer function as a means of providing the work. Therefore, in essence, other technological means cannot replace the server as the fundamental source of work dissemination. Moreover, in the practical context

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of the internet, a work can have multiple independent pathways of transmission, and each instance of reproduction constitutes a new dissemination. Throughout the transmission process, various specific actions occur, such as providing transmission channels, storing and uploading content, caching, linking, and more. The question then arises: which of these actions ultimately enables the user to access the work? From the perspective of information dissemination, uploading the work to a server marks the beginning of the transmission process and serves as a necessary condition for users to access the work. All other actions during the transmission process merely play supportive roles. Particularly in the case of deep linking, which has sparked significant controversy, it can only be considered a supportive action in facilitating information dissemination.

This line of thinking was reflected in the second-instance judgment of Tencent v. E-Link Way case [3]. The second-instance judgment concluded that E-Link Way's hotlinking activities did not, in essence, infringe Tencent's information network transmission rights. As mentioned earlier, uploading a work to a server is a necessary condition for its dissemination. What E-Link Way did was to undermine the technical measures of others and engage in hotlinking for illegal profit. These actions are distinct from the act of uploading to a server, which is typically recognized as infringing information network transmission rights. Therefore, E-Link Way's actions should be judged under the scope of unfair competition laws.

Regarding the future protection of intellectual property on the internet, the server standard is unlikely to become outdated. Presently, internet platform development is trending toward content aggregation platforms. These platforms feature not only professional works but also content from internet celebrities and individual creators. Faced with such a vast volume of online works, ensuring that every instance of dissemination is properly licensed is a challenging and almost impossible task. If every unlicensed dissemination were deemed an infringement, it would not only hinder the normal operation of the internet but also impede the dissemination of excellent works, thus limiting their impact. Over time, this approach could potentially stifle the vitality of the internet and hinder the continued development of the internet industry.

3.3. Limitations of the Server Standard

Currently, the widely acknowledged limitations of the server standard primarily revolve around two points: first, it is seen as being too focused on technical aspects and unable to keep up with the rapid developments in internet technology; second, it is believed that the server standard cannot cover all instances of providing access to works. As previously mentioned, the server standard emerged in the 2006 "Perfect 10 v. Google" case. Since then, over a decade has passed, and internet technology has evolved significantly. In the past, internet services were characterized by features such as P2P networking, and the server standard was well-suited to the actual circumstances of internet transmission at that time. It particularly emphasized the need to balance interests in favor of internet service providers. For instance, during that era, search engines and link-sharing services were dominant industries, while the content industry was not as developed. Judicial interpretations took more into account the interests and development need at that time. Operating a legitimate content industry was not the primary business model back then, and some growing internet companies objectively earned traffic through internet piracy while profiting from search and link-sharing services, thus accumulating initial capital. The server standard became the mainstream criterion for judgments because it aligned well with the technology and business models of the time and maximally accommodated the development needs of the industry during that era. However, it overlooked the protection of copyright in works, which largely harms the rights of creators by directly affecting their income, as well as the traffic and recognition of their works, thereby dampening creators' innovation enthusiasm.

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In light of the current diversity and complexity of technology and business models, researchers (or judges) have attempted to resort to relatively simple standards as criteria for determining infringement. This simplification process can be understood as an attempt to reduce complexity. However, in the pursuit of simplicity, people may overlook the principle of technological neutrality that both WCT and China's Copyright Law adhere to during the legislative process. Regardless of whether the legislators of China's Copyright Law fully researched or clearly understood this point, it unequivocally embodies the technological neutrality principle upheld by Article 8 of the WCT, which directly stipulates acts of providing works or conducting information network transmission. This is evidently a rational legislative model that adapts to the internet environment. Nonetheless, in academic research and judicial practice, due to the limited understanding of researchers, there may be a tendency to forsake the core principles and transform technological neutrality into a "technology-dependent principle." Under this technology-dependent approach, the advantages of technological neutrality cease to exist, and researchers and judicial decision-makers may become entangled in technical details.

In response to the server standard's obsolescence in the face of technological advancements, its focus on technical intricacies, and its limited coverage, researchers have proposed new criteria for determining infringement with the hope of enhancing the legal regulation of acts infringing on information network transmission rights.

4. Determination Standards for Infringement of Information Network Transmission Rights: Application of New Standard

4.1. User Perception Standard

In the "Perfect 10 v. Google" case, the California court used an embedded test as a reference for the user perception standard. The court believed that behavior involving the embedding of content on webpages and making it accessible to the public through push mechanisms could be considered the display of works from a purely visual perspective. This standard gradually evolved into a clear definition, stating that information network transmission rights should be determined based on the subjective user experience. Specifically, as long as the platform's service leads internet users to believe that the content they are viewing originates from the platform itself rather than the linked platform, it is considered that the platform complies with "the act of providing the work", regardless of whether the content is sourced from a third-party rights holder's web server [4].

In the "Happy Sunshine v. Tongfang" case [5], the applicability of the user perception standard was one of the main points of contention. "Tsinghua Tongfang Lingyue 3 Smart TV Box" produced by Tongfang Corporation, featured video-on-demand functionality, allowing users to request specific programs through the smart TV box. "Happy Sunshine" had notarized and preserved evidence of the relevant situation. Tongfang Corporation's actions were carried out without authorization from "Happy Sunshine", leading "Happy Sunshine" to believe that Tongfang Corporation had infringed on its legal rights. Tongfang Corporation argued that the relevant programs were provided by "Tuzi Video", and they only provided hardware technology, so "Tuzi Video" should be joined as a third party in the lawsuit. Furthermore, Tongfang Corporation claimed that the actions of "Tuzi Video" were linking activities and that they did not upload the works to a server, therefore should not bear any infringement liability. "Happy Sunshine" contended that the case should apply the user perception standard, as "Tuzi Video" did not redirect users to the linked website when providing the relevant videos, leading viewers to mistakenly believe that the works were provided by "Tuzi Video". Ultimately, based on an understanding of the legislative origins of Article 10(12) of the Copyright Law and judicial practice, the second-instance court believed that the server standard should be applied to understand information network transmission behavior rather than the user perception

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standard. However, it recognized the importance of considering user perceptions as a reference. Nevertheless, infringement actions are objective, while user perceptions are subjective, and evaluating objective facts based on subjectivity may not be entirely appropriate.

4.2. Substantive Alternative Standard

In judicial practice, the "Substantive Alternative Standard" has been proposed, stemming from the early notion of the "non-substitution principle" introduced by Judge Bisheng Shi. This principle asserts that the judgment should be based on the objective effects generated by the behavior [6]. According to this standard, if a platform presents works from a linked platform to the audience using techniques like deep linking, effectively replacing the linked platform's role, such behavior is considered "providing works" and constitutes a direct infringement of information network transmission rights. This standard, in theory, posits that the act of deep linking to disseminate information expands the channels of information dissemination and captures the traffic that the linked platform should originally have. As a result, it infringes upon the economic interests generated by the original traffic of the linked platform and also deprives the linked platform of control over the dissemination of works for which it holds legal authorization.

This standard has gained support from many scholars and has been adopted by some courts in recent years. Through this standard, they classify such behavior as an act of information dissemination, specifically, an act of providing works. In the Tencent v. E-Link Way case mentioned earlier, the second-instance court believed that the first-instance judgment applied the substantive alternative standard. This standard's specific meaning can be summarized as follows: "Actions such as selection, editing, organization, disruption of technical measures, and deep linking that result in harm to the rights holder and benefit to the actor are not essentially different from providing works directly to users. Therefore, these actions constitute information network transmission behavior". [7] The second-instance court did not concur with this standard, asserting that the determination of information network transmission behavior relies on confirming objective facts rather than assessing the legality of actions. The introduction of legality assessment into the substantive alternative standard deviates from objective facts. Some researchers counter this viewpoint, arguing that the logic of the above judgment "separates fact from law", and such an approach may not lead to rational conclusions. They suggest that judgments regarding information network transmission behavior should ultimately rely on standards that combine facts and legal provisions [8].

4.3. New Public Standard

The "new public standard" represents a new approach to addressing this issue. In essence, it considers acts as constituting the dissemination of works when they generate new audiences beyond what the copyright holder could foresee when authorizing the works. The prototype of this standard can be traced back to the 2006 "SGAE v. Rafael Hoteles SL" case [9]. In this case, hotels receiving signals transmitted television content to every room using cable transmission technology, thereby allowing guests to watch TV. The court deemed this behavior as creating a "new audience" that the rights holder had not originally considered when authorizing the works, making it a typical case of a "new audience". Consequently, in this context of information network transmission, such behavior constituted copyright infringement.

Despite the emergence of new standards, the issue of regulating actions that infringe on information network transmission rights has not been completely resolved. Debates over determination standards have intensified within the academic community, and disputes persist in judicial practice. Additionally, the continuous development of the internet industry further

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complicates the application of standards for determining infringement of information network transmission rights.

5. Dilemma in the Applicability of Determination Standards for Infringements on Information Network Transmission Rights

5.1. The Heightened Demands Imposed by the Rapid Development of the Internet on Determination

The concept of deep linking has been around for a long time, but its specific scope is not very clear. With recent technological advancements and innovations in network service models, new types of network infringement cases have emerged, sparking a fresh debate within the academic community about the understanding of deep linking. Understanding deep linking should not only be based on technical facts but also consider legal facts. A one-sided perspective can lead to skewed interpretations. While technical facts form the foundation of legal facts, legal facts involve value judgments and choices that transcend technical matters. From a technical standpoint, deep linking, as referred to today, mainly includes jump links, framed links, and hotlinks.

However, on the legal front, due to the complexity and ambiguity of deep linking technology, different scholars hold diverse viewpoints. Some scholars argue that when determining copyright infringement in information network transmission, we should adhere to the principle of technological neutrality, setting aside technical nuances and focusing on the core issues. Otherwise, we may unintentionally deviate from technological neutrality [10]. Others believe that the determination of infringement should be based on technical principles to ensure the protection of the development of the internet industry [11]. As seen in the case of “Happy Sunshine v. Tongfang”, one of the central disputes revolved around whether to apply server standard or user perception standard as the infringement criteria. The crux of this dispute actually lies in whether to prioritize technical facts or legal facts. In reality, when faced with such disputes, courts struggle and vacillate, ultimately resulting in unsatisfactory judgments.

As mentioned earlier, server standard originated from the 2006 “Perfect 10 v. Google” case. At that time, internet technology was still in its early stages of development, and uploading to servers was a necessary prerequisite for public dissemination on the internet. Specifically, the technology at the time could only make works accessible to the public through the uploading server method. However, the internet industry, as one of today’s leading sectors, experiences rapid technological advancements. Deep linking subsequently emerged. This means that if another website uses deep linking technology, it can provide works to the public without the need to upload them to a server. In other words, technological innovation has decoupled the act of uploading works to a server from their accessibility to the public, making them no longer synonymous or strictly corresponding. Furthermore, there is still significant room for internet technology to develop, and questions arise regarding how future technologies may exacerbate issues and how the law will regulate them, making the matter even more complex.

5.2. Mechanical Application of Server Standard

Server standard, being the earliest to be proposed, have more applicable experience compared to other standards. In judicial practice, server standard has deep-rooted influence on judges’ decisions. However, in this process, judgments may gradually deviate from the principle of technological neutrality and become entangled in technical details. As mentioned earlier, the rapid technological development in the internet industry could lead to uncertainty in existing categories of rights. If the law introduces new rights as a result, it may eventually fragmentize rights, hindering the cohesiveness of the legal system. Overlapping rights can obscure legal transparency, thereby undermining the

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intended protection of the law. Based on these considerations, the WCT and WPPT adhere to the principle of technological neutrality. China's Copyright Law has largely inherited the provisions of the WCT and WPPT. In other words, whether internationally or domestically, the legislative provisions for information network transmission rights embody the legislators' commitment to technological neutrality. However, the "blind faith" in server standard in practice deviates from this principle. This kind of practice indicates a lack of deep understanding of the legislative intent and results in outcomes contrary to that intent.

It should be recognized that legislators establish a certain degree of flexibility in laws to maintain their stability over a considerable period, avoiding constant changes. The purpose of doing so is to allow judges to adopt more open and inclusive interpretations in practice, rather than adhering rigidly to established norms. In the midst of the chaos surrounding information network transmission rights, some scholars argue that researchers or judges should utilize existing legal provisions, including civil law and procedural law governing general legal affairs, when handling disputes related to information network transmission rights. It is not advisable to limit one's perspective to narrow legal provisions, as this may lead to a restrictive legal interpretation and an increasingly narrow path of legal application [12].

Regarding the current challenges in determining infringement in information network transmission, the author believes that a single standard is inadequate. The application of multiple standards is necessary to help us navigate the current difficulties. Next, we will discuss specific solutions for the application of multiple standards.

6. Suggestions for the Improvement of the Applicability of Determination Standards for Information Network Transmission Right Infringement

6.1. The Necessity of Applying Multiple Standards

Currently, scholars continue to hold different views on the standards for determining infringement in information network transmission, and in practice, judges apply standards based on their own understanding. However, individual cognitive abilities and judgments inevitably carry personal subjective biases, leading to situations where inappropriate interpretations may arise. However, in today's society, the heightened importance of copyright and the highly developed nature of online platforms urgently require a fair and reliable approach to regulate various infringement issues. The reality, however, is that both the well-established server standard and the user perception standard proposed to address current infringement issues, as well as the innovative new public standard introduced by the European Court of Justice, all have their respective shortcomings. This does not mean that these standards should be entirely discarded. Creating entirely new standards to address the flaws of existing standards would be impractical and lack realism. The author believes that the application of multiple standards is the viable solution. A single standard cannot appropriately apply to all situations in the complex reality. On one hand, information network technology has evolved from the early 1.0 era to the 3.0 era, with P2P models being replaced and various technical means like deep linking emerging. On the other hand, content aggregation platforms have emerged, giving rise to professions such as internet bloggers who rely on new internet models to survive. This inevitably leads to more creators defending their rights over their works. It is clear that the development of the internet industry will not stop here. Undoubtedly, protecting the information network transmission rights of internet creators is an urgent issue. Therefore, the application of multiple standards will allow for a case-specific analysis, better adapting to the current development of the internet and supporting its healthy growth.

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6.2. Overall Approach to Applying Multiple Standards

The concept of applying multiple standards entails selecting the appropriate standard based on the specifics of each case to address contemporary issues of copyright infringement in information network transmission. Specifically, in cases where infringement involves only the unauthorized uploading of works to servers, the server standard is undoubtedly a convincing criterion. However, for cases involving techniques like framed linking that make users completely unaware that the content they are receiving originates from a server of another website rather than the one they believe they are visiting, as this kind of operation severely impacts the judgment of the website's customers and affects their exclusive rights and corresponding business interests, the author suggests the application of the substantive alternative standard. Of course, other situations can also consider the use of new public standard or other standards based on their specific issues.

On one hand, this approach adheres to the provisions of China's Copyright Law regarding the protection of information network transmission rights, reflecting the technological neutrality principle upheld by the WCT and the Copyright Law. On the other hand, it also safeguards the innovative spirit of creators. However, there are still some special situations in reality where one can choose the most suitable standard among multiple standards based on specific issues. No single standard can guarantee absolute correctness in all situations. The purpose of applying multiple standards is to break free from the constraints of a single standard and find standards suitable for individual circumstances.

7. Conclusion

Currently, the regulation of information network transmission rights remains a subject of discussion, especially against the backdrop of the rapid development of the internet. Traditional server standard still holds value but should not be the sole focus. It is important to recognize that scholars have put forward their own reflections and even new standards to address the regulation of information network transmission rights in current practice. In discussions within the academic community, it is evident that each standard has its shortcomings. Finding ways to address these shortcomings, perhaps through the application of multiple standards, could be a feasible path. This approach opens up new avenues of thinking, attempting to solve the current issues of regulating information network transmission rights through a more diverse and specific approach. Such an approach may be better suited to adapt to the various changes in society today and allow for greater flexibility and adaptability.

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