

Discussion on the Liability of Patent Indirect Infringement on the Network Trading Platform

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Abstract—In the face of judicial practice, many criminals use online trading platforms to infringe patent rights, and there are differences in applying common infringement or indirect infringement. The author believes that such cases do not meet the applicable conditions of joint infringement and should apply indirect infringement. The key to the identification of patent indirect infringement liability of online trading platform lies in its subjective aspect. The connotation of its fault is not only fault, but also includes negligence. For the online trading platform, therefore, the notice and removal rules cannot be directly transplanted into the field of patent law, and should be applied to it.

Keywords—*patent indirect infringement; subjective aspects; duty of care; notification and removal rules*

I. INTRODUCTION

With the development of Internet technology, people's living standards have gradually improved, and online shopping has become an extremely important way of shopping. While the online trading platform provides convenience for the public, it also provides opportunities for lawless elements. The use of online trading platforms to sell infringing patents of others has occurred frequently. In judicial practice, rights holders often think of that the platform should bear the tort liability in online transactions. However, it is controversial of the questions of why the online trading platform assumes responsibility, how to assume responsibility and determining the responsibility.

II. THE NATURE OF THE RESPONSIBILITY OF THE ONLINE TRADING PLATFORM

A. The Legitimacy of the Responsibility of the Online Trading Platform

The online trading platform provides virtual trading venues and tools for both parties to the transaction and charges a fee. Based on the principle of income and risk balance, since it is profitable from it, it can no longer rely on technology neutrality, and does not assume any responsibility for patent infringement that occurs on this platform. In addition, for patent infringements that occur on online trading platforms, the platform often has the most convenient and effective means of control, and the separation of this powerful "controller" from patent infringement will weaken the network environment. The control of patent

infringements increases the difficulty of law enforcement and condones the network patent infringement behavior, making the network a breeding ground for patent infringement. Therefore, as a kind of income platform, the online trading platform should bear the risks while taking profits, and may bear certain tort liability. [1]

B. Nature of Responsibility

The online trading platform provides venues and tools for both parties to the transaction. The criminals use the indiscriminate network services provided by them to implement patent infringement, and the online trading platform should bear corresponding responsibilities. However, for the nature of the infringement liability of the online trading platform, the academic community has differences between joint infringement and indirect infringement. Joint infringement refers to the infringement committed by the injurer for two or more persons. Indirect infringement means that the act committed by the perpetrator does not constitute a direct infringement of the patent right of others, but helps others to commit the infringement patent right. Indirect infringement is not included in China's tort theory. However, many cases in practice cannot meet the applicable conditions of joint infringement and have been dealt with indirect infringement to compensate for the existing loopholes in the "Tort Liability Law".

1) Differences from joint infringement: Joint infringement includes general joint infringement and quasi-joint infringement (joint dangerous behavior), requiring the implementation of the same infringement, common fault, same goal or result and causal relationship. However, the status and relationship of the online trading platform and the infringer do not conform to the constituent elements of the joint infringement.

First of all, the online trading platform and the infringer subjectively do not have joint faults. In the case of joint infringement, the subjective fault of each actor is the basis for joint liability. [2] In the case that the tort-feasor uses the network service provided by the online trading platform to implement the patent infringement, the online trading platform obviously does not have the intention of infringement, let alone the intent to communicate with the tort-feasor. As for the duty of care of the online trading platform, it is difficult to determine that it bears the joint duty of care with the tort-feasor.

Secondly, joint infringement does not meet the principle of "being responsible for their actions." The general principle in tort liability law is that the perpetrator is responsible for his or her actions, not for the actions of others. However, in the case of indirect infringement of patents, indirect tort-feasor only help or induce others to commit direct infringement of patents, and therefore only bear responsibility for their own actions and apply their own responsibility principles. [3] In the case of joint infringement, if the subjective fault is not considered, the factual damage consequences may be indivisible. However, it is entirely possible to determine the specific responsibilities of each actor according to the cause of the joint damages caused by the infringement of different actors, rather than requiring them to bear joint responsibility. However, the Internet has a strong anonymity feature, and the acquisition of user information is very difficult, which leads to the difficulty of locking tort-feasor of patent infringement in the network environment. [4] Therefore, the patentee often directly requests compensation from the online trading platform.

2) *Indirect infringement theory*: In view of the fact that the theory of joint infringement cannot solve the corresponding problems, China draws on the practices of the United States, the European Union and Japan and introduces the concept of indirect infringement in practice. China's current Patent Law does not stipulate the issue of patent indirect infringement, but judicial practice has tried several patent indirect infringement disputes since 1993. For the first time, the indirect infringement of patents was clearly defined in the "Opinions on Several Issues Concerning the Determination of Patent Infringement (Trial)" passed by the Higher People's Court of Beijing in 2001. On the basis of summarizing the practical experience of patent judicial trials for more than ten years, this opinion specifically stipulates the issue of patent indirect infringement. The Supreme People's Court is preparing the "Regulations on Several Issues Concerning the Trial of Patent Infringement Disputes" and has also noted this issue.

The indirect infringement of the online trading platform is subordinate to the direct infringement, that is, its establishment is based on the premise of the establishment of direct infringement. When determining the indirect infringement, the United States requires the fact that direct infringement occurs, but does not require the judicial conclusion that the direct infringement is established, and this practice has high requirements on the theoretical level and practical experience of the litigant. [5]

III. THE IDENTIFICATION OF INDIRECT TORT LIABILITY OF NETWORK TRADING PLATFORM

It is necessary to determine the indirect tort liability of the online trading platform. First, there is direct infringement, and the behavior of the online trading platform is related to the direct infringement; second, the online trading platform has imputable reasons. The former is generally difficult to judge based on facts, so the difficulty lies in determining whether the online trading platform has any cause of

attribution. The key is the subjective aspect of the online trading platform.

Article 36, paragraph 3 of the Tort Liability Law stipulates that: Network service providers who know that network users use their network services to infringe upon the civil rights and interests of others, and fail to take necessary measures, need to bear the joint responsibility with the network users. In this provision, "knowing" is the key to judging the subjective aspects of network service providers. Whether "knowing" includes "ought to know", the academic view is becoming more and more positive. If the subjective aspect of the online trading platform can be judged to be fully aware or ought to know, its liability for indirect infringement is undoubted. However, the concept of "ought to know" conflicts with the consensus of network service providers not to review the user's uploaded content. Therefore, it is necessary to define the meaning of "ought to know", that is, whether its connotation includes negligence to facilitate the identification of indirect tort liability of the online trading platform.

A. "Ought to Know" Is Limited to Intentional Behavior

Some scholars believe that the content of "ought to know" should be limited to intentionality. If it contains negligence, it is contrary to technical neutrality. The so-called technology neutrality means that technology is neutral in nature. Technology creates new possibilities for human choice and action, but it also makes the disposal of these possibilities in an uncertain state. What impact does technology have on service? For what purpose, these are not inherent in the technology itself, but depend on what people do with technology. [6]

They believe that the inclusion of negligence in the scope of "ought to know" will lead to the network trading platform being responsible for the fact that it does not know the fact of infringement objectively. If the network's trading platform is generally subject to pre-examination obligations, it is not conducive to the progress of network technology.

After analyzing the development process of the subjective requirements of US patent indirect infringement, it is not difficult to find that its development trend is to limit the subjective aspect of network service providers to intentional. Article 21 of China's "Patent Judicial Interpretation (II)" and Article 62 of the "Patent Law Review Draft" adopt the "be fully aware" element and limit the subjective fault of the indirect agent to the subjective intention. In addition, from the perspective of patent law legal interest, as a balance mechanism between monopoly interests and social interests, the patent law limits the subjective fault of indirect infringement to intentionality, only investigates malicious indirect actors, and can play the role of indirect infringement rules as much as possible while avoiding the excessive balance of patent protection and hurting the balance of interests. [7]

B. "Ought to Know" Contains Negligence

The author believes that technology neutrality is not enough to become an "ought to know" content that is limited

to deliberate strong support. Technology neutral does not mean that the technology used by people for a certain purpose is neutral. Value theorists who oppose technology neutrality believe that technology is a means or tool to achieve a certain purpose, and that technology neutralism, which is technical and ethical, and politically unrelated, is intuitive and reflects certain facts, but it is not comprehensive. [8] Technology neutrality is based on the natural attributes of technology, but it ignores the social attributes of technology. The research and development of technology and the choice of research path cannot exclude the value orientation of developers. On this basis, the network is endowed with a human consciousness factor that can be seen as a natural extension of its personality, which breaks through the purely instrumental nature of the website. In the case that the monitoring capability of the online trading platform is greatly improved, and the phenomenon that the network users use the online trading platform to infringe on the patent rights of others becomes more and more common, it is necessary to give the network service provider an obligation to be aware of, and to understand the meaning as a result of negligence, which is the meaning of the title.

The duty of care here is similar to the security obligation. Today's social network services become more open and socialized, which reflects the characteristics of the public places without any differences. Online trading platforms often play the same role as social venue managers. [9]

The duty of care is divided into the foresight obligation of infringement results and the avoidance obligation of infringement results. The latter generally refers to the notice deletion rule stipulated in Article 36 of the Tort Liability Law. That is, if the network service provider knows that the infringement fact exists and does not take measures to avoid the occurrence of the infringement result, it can be considered that the subjective existence is intentional. As for the former, the existing law does not make clear provisions, considering that the network service provider's general review obligation will increase its burden, which will undermine technological progress and social welfare. Therefore, the online trading platform can prove that after taking effective measures. It is still difficult to find that the user infringes on the patent rights of others, and there is no subjective fault. Such foresight obligations are not based on the premise that the infringement facts are obvious, and do not require a one-on-one review of the user's uploaded documents. Regarding the foresight obligations of infringement results, they should be classified into different degrees for different situations. It is normal for goods to be promoted on the online trading platform. Which products can be promoted in a prominent position on the online trading platform will undoubtedly need to be selected by the platform. For such goods, the online trading platform should have a higher duty of care, and other situations can be subject to general duty of care.

IV. NOTIFICATION AND REMOVAL RULES APPLY

Article 36, paragraph 2 of the Tort Liability Law stipulates: "When a network user uses a network service to

commit an infringing act, the infringed has the right to notify the network service provider to take necessary measures such as deleting, blocking, and disconnecting the link. If the network service provider fails to take necessary measures in time after receiving the notice, the expanded part of the damage shall be jointly and severally liable to the network user." This provision on notification and removal rules and the scope of application of itself can be applied to all infringements committed through the network, and patent infringement is also included. In addition, the second paragraph of Article 63 of the "Revised Draft Patent Law (Draft for Review)" in 2015 stipulates that: the patentee or the interested person post office proves that the network user infringes his patent right or fakes the patent by using the network service, and can stop it by the network service provider taking necessary measures such as deleting, blocking, and disconnecting the infringing product. If the network service provider fails to take necessary measures in time after receiving the qualified and effective notice, the expanded part of the damage shall be jointly and severally liable to the network user. This notification and removal rule is first prescribed in China's "Copyright Law". Is it appropriate to transplant this rule into the field of patent law?

A. Application Range of Notification and Removal Rules

Notification and removal rules, also known as "safe haven" rules, were first proposed by the US Digital Millennium Copyright Act. It emphasizes that the premise of the "safe haven" rule applies to works provided in the form of information on the Internet, such as uploading its role without the permission of the copyright owner for browsing or downloading by an unspecified third party. But for trading pirated books on the Internet, this rule does not apply. The difference between the two behaviors is that the former directly infringes the copyright owner's copyright, and the latter does not infringe the copyright after the transaction is concluded. Only when the "original or copy of the work" is delivered online, it constitutes an infringement of the copyright. Therefore, being possible to spread through the Internet, that is, what borrows the network service as a means of infringement can only be the work itself composed of information. However, the direct infringement of patents in the network environment has nothing to do with the dissemination of information. Among the exclusive rights contained in the patent right, there is no communication right similar to the "right to disseminate information on network", that is, providing inventions and creations protected by patent law in the form of information is not subject to the control of the patentee, and it is impossible to constitute direct infringement of the patent right. Naturally, there is no room for application of this rule.

The author believes that the removal and notification rules stipulated in the "Revised Draft Patent Law (Draft for Review)" cannot be directly applied to the field of patent law.

First of all, whether the user's behavior infringes on the copyright of others, the network service provider can initially judge whether it constitutes infringement through simple comparison, and the identification of patent infringement

cannot verify whether it constitutes patent infringement through simple comparison.

Secondly, according to the rule, it is obviously too arbitrary to judge whether the network user constitutes infringement by relying on the notice of the right holder, or to delete, block or disconnect the infringing product of the product claimed by the right holder. In a certain sense, this gives the role of the "inquisitor" and "enforcer" of the online trading platform.

Thirdly, unlike copyright, the content of copyright infringement is generally uploaded by an individual. After receiving the notice from the right holder, the network service provider removes the work and does not cause great losses to the network user. However, patented products are often sold online by companies in large quantities. Once they are removed, the economic losses suffered by sellers due to their inability to sell may be enormous, and the removal of goods may also damage the seller's business image.

B. Transformative Application to the Notification and Removal Rules

As it mentioned above, the notification and removal rules in the "Copyright Law" cannot be directly transplanted into the field of patent law, but this rule is of great significance for promoting the online trading platform to play a regulatory role and timely stop loss, so it can be modified and applied. There are mainly two ways so far:

1) *Adding notification — anti-notification rule and prompt guarantee rule*: The notification — anti-notification rule means that after receiving the appropriate notice from the right holder, the online trading platform takes the necessary measures according to its notice. The alleged infringer believes that the act does not constitute a patent infringement, and instead sends a notice to the online trading platform to cancel the necessary measures. Although this rule can avoid the large economic loss of the alleged tort-feasor to a certain extent, the problem is that just as the online trading platform cannot determine whether the notice of the "obligee" is correct. The online trading platform is also unable to determine the correctness of the alleged tort-feasor's notice. As for the "obligee", some scholars believe that the relevant content of the opposition registration system in the Property Law can be used. That is, the "tort-feasor" will invalidate the notice if the "obligee" does not sue the court within 15 days after the counter-notification. 10 The notice of the alleged tort-feasor may be given a certain guarantee that the online trading platform may require the "tort-feasor" to guarantee that its conduct does not infringe on the patent rights of others.

2) *Changing to notification, transfer notification, and removal rules*: Unlike the above, which still requires the network trading platform to take certain measures, the other is to change the notification and removal rules to notification, transfer notification and removal rules. This is based on the notice and notification rules stipulated in the

Canadian "Copyright Law", that is, after receiving the notice from the copyright owner, the network service provider does not need to remove the alleged infringing work, but collects the necessary fee from the notifier. The notice is immediately forwarded electronically to the alleged tort-feasor. The online trading platform forwards the notice to the alleged tort-feasor and asks for a statement, and informs that if the corresponding explanation is not made within the time limit and the necessary measures will be taken according to the requirements of the patentee. If the alleged tort-feasor replies within the limited time limit and claims that his or her conduct does not constitute a patent infringement, the online trading platform will forward the reply to the patentee without taking necessary measures and the relevant patent dispute will be resolved through litigation. If the alleged tort-feasor has not responded within a limited time limit, the online trading platform shall take the necessary measures in accordance with the notice of the patentee. If not taken, it is considered subjectively faulty, and the enlarged part of the damage bears joint and several liabilities with the seller. [11]

V. CONCLUSION

Based on the analysis of the difference between joint infringement and indirect infringement, this paper argues that the online trading platform should indirectly infringe the patentee if the subjective aspect is intentional or negligent for the platform user to use the platform to implement patent infringement. At the same time, it analyzes the application of the notice and removal rules in the field of copyright law in the field of patent law, and believes that the rule cannot be directly transplanted into the field of patent law, which should be modified and applied. This contributes to the identification and resolution of the indirect tort liability of related patents in judicial practice.

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