

网络平台在新领域新业态背景下的责任与义务

Responsibilities and Obligations of Online Platforms with New Business in New Areas and Forms

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2023.12.13



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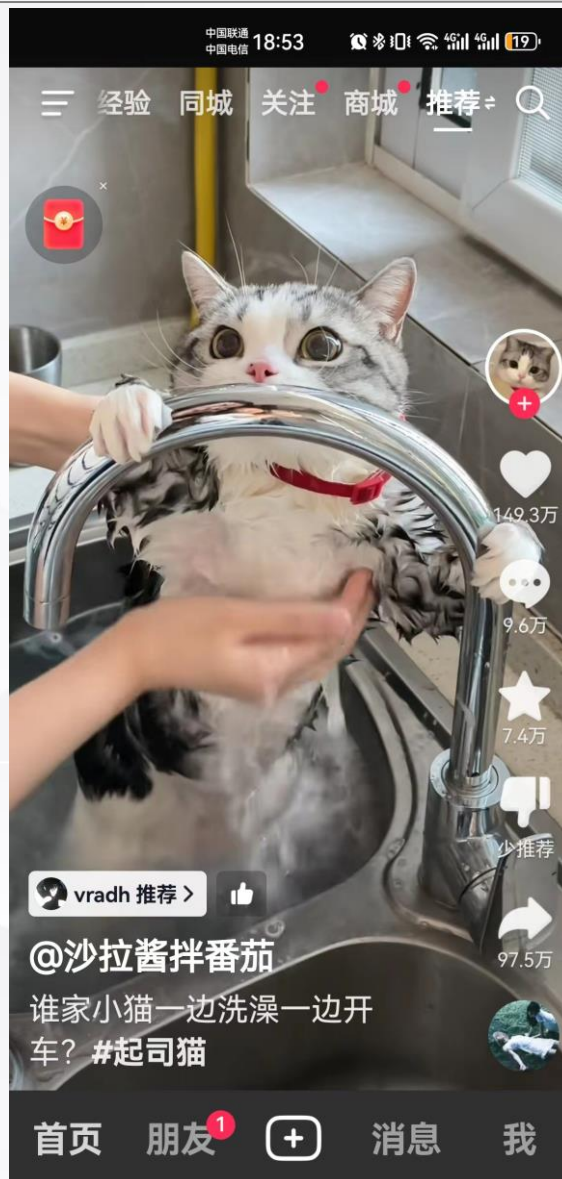
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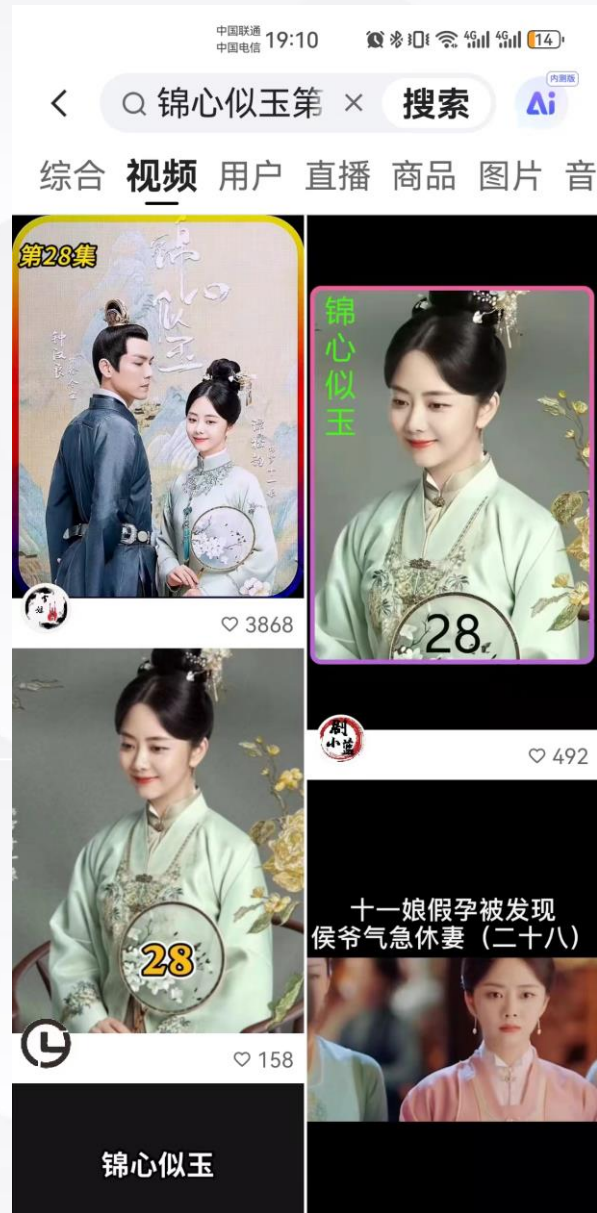
短视频平台
Short video platform


以**短视频平台**的相关版权问题为介绍对象：

- 1.涉及的版权问题较为集中
- 2.很多问题争议较大
- 3.司法实践较为活跃

The copyright issues related to **short video platforms** are as follows:

1. Copyright issues involved are concentrated
2. Many issues are controversial
3. Judicial practice is active





为什么争议较大？与长视频平台（视频分享网站）有何区别？

Why is it more controversial? What is the difference with long video platforms (video sharing sites)?

相同 Similarities:

1. 用户产生内容 (UGC) User-generated content (UGC)
2. 网络平台均是网络服务提供者 All online platforms are network service providers

不同 Differences:

1. 视频碎片化 Video fragmentation
2. 侵权视频量级非常大 Infringing videos are very large in volume
3. 侵权视频持续、动态上传 Infringing videos are continuously and dynamically uploaded
4. 算法推荐使得侵权视频更为快速地大范围传播 Algorithmic recommendation makes infringing videos spread more quickly and widely
5. 侵权视频可能存在二次创作的情况，侵权判断难度更为复杂 Infringing videos may have secondary creation, which makes it more difficult to identify.



这些新情况提出的问题 Questions raised by these new developments:

1. 现有的法律规则是否过时了 Are existing legal rules obsolete?

《民法典》第1195条：“通知——必要措施”（避风港规则） Article 1195 of the Civil Code: "Notification - Necessary Measures" (safe haven rule)

网络用户利用网络服务实施侵权行为的，权利人有权通知网络服务提供者采取删除、屏蔽、断开链接等必要措施。通知应当包括构成侵权的初步证据及权利人的真实身份信息。

If a network user uses network services to commit an infringement, the right holder has the right to notify the network service provider to take necessary measures such as deletion, blocking and delinking. The notification shall include prima facie evidence of what constitutes infringement and the actual identity information of the right holder.

网络服务提供者接到通知后，应当及时将该通知转送相关网络用户，并根据构成侵权的初步证据和服务类型采取必要措施；未及时采取必要措施的，对损害的扩大部分与该网络用户承担连带责任。

After receiving the notice, the network service provider shall promptly forward the notice to the relevant network users, and take the necessary measures according to the preliminary evidence of infringement and the type of service; if it fails to take the necessary measures in a timely manner, it shall bear joint and several liabilities with the network users for the expansion of the damage.

权利人因错误通知造成网络用户或者网络服务提供者损害的，应当承担侵权责任。法律另有规定的，依照其规定。

Where the right holder causes damage to the network user or network service provider due to the wrong notification, the right holder shall bear the tort liability. If the law provides otherwise, such provisions shall prevail.

《民法典》1197条：“明知、应知——必要措施”规则（红旗规则）

Article 1197 of the Civil Code: "Knowing, Should Know - Necessary Measures" Rule (Red Flag Rule)

网络服务提供者知道或者应当知道网络用户利用其网络服务侵害他人民事权益，未采取必要措施的，与该网络用户承担连带责任。

Where a network service provider knows or should know that a network user infringes on the civil rights and interests of others by using its network service, and fails to take necessary measures, it shall be jointly and severally liable with the network user.



最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定》

Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law to the Trial of Civil Disputes on Infringement of the Right to Information Network Dissemination

第七条：帮助侵权、教唆侵权

Article 7: Aiding and Abetting Infringement

第八条：过错包括明知应知；**不负有主动审查义务**；已采取合理、有效措施仍然难以发现侵权，不具有过错

Article 8: Fault includes knowing and should know; **not having the obligation to take the initiative to examine**; having taken reasonable and effective measures but still having difficulty in discovering the infringement, and not being at fault.

第九条：应知的判断因素

Article 9: factors defining 'should know'

第十条：对热播影视作品等以设置榜单等方式进行推荐，且可直接获得，属于应知

Article 10: Popular movie and TV works recommendation lists, etc., and such lists can be obtained directly, falls into the range of 'should know' .

第十一条：直接获得经济利益的，负有较高注意义务

Article 11: A higher duty of care is owed if one directly obtains economic benefits

第十二条：信息存储空间服务提供者应知的判断

Article 12: Judgment and knowledge that should be known by Information Storage Space Service Providers

第十三条：收到通知后未采取措施，构成明知

Article 13: Failure to take measures after receiving notification constitutes having the knowledge

2.在新的情况下，如何认定短视频平台的法律责任？

2. How to determine the legal responsibility of short video platforms under new circumstances?

短视频平台版权责任的司法实践及学术讨论

Judicial Practice and Academic Discussion on Copyright Liability of Short Video Platforms

众多争议问题 Controversial issues:

1. 算法推荐是否改变了网络服务商的行为性质?

1. Does algorithmic recommendation change the nature of the behavior of the network service provider?

2. 算法推荐是否等同于司法解释中的“推荐”，是否应该据此提高短视频平台的注意义务?

2. Whether algorithmic recommendation is equivalent to "recommendation" in the judicial interpretation, and whether the duty of care of short video platforms should be increased accordingly?

3. 在个案中如何认定短视频平台应当知道存在侵权视频?

3. How to determine in the case that the short video platform should know the existence of infringing videos?

4. 是否支持拦截、过滤措施?

4. Whether interception and filtering measures are supported?

5. 如何认定二次创作及二次创作的存在对于判定短视频平台责任有什么影响?

5. How to recognize the existence of secondary creations and what is the impact of the existence of secondary creations on determining the liability of the short video platform?

6. 行为禁令问题。

6. Behavioral injunctions.

7. 损害赔偿问题。

7. The issue of damages.

1. 算法推荐是否改变了网络服务商的行为性质?

1. Does algorithmic recommendation change the nature of the behavior of ISPs?

算法推荐下，网络服务商的行为 The behavior of ISPs under algorithmic recommendation:

(1) 信息存储空间服务

Information storage space services

(2) 算法推荐

Algorithmic recommendation

将不同作品精准呈现在不同网络用户首页
Precise presentation of different works on
the homepage of different web users

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学术讨论 Academic discussion:

(1) 作品提供行为 Behaviors of making works available

(2) 网络服务行为 Behaviors of network service

短视频平台版权责任的司法实践及学术讨论

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认为属于作品提供行为的观点：The view that it belongs to the behavior of making works available:

有学者认为：“由此引申到算法推荐平台的服务定位，从某种程度上讲，平台的服务定位从传统的‘网络服务提供者’发展成为‘信息内容发布者’”“从用户感知角度，算法推荐平台已脱离于传统的信息网络服务提供商的角色，转变为根据其个人喜好、标签设置、话题热度等指标‘主动’推送的网络内容提供者”。

Some scholars believe that "this leads to the service positioning of the algorithmic recommendation platform, which, **to some extent, has developed from the traditional 'network service provider' to 'information content publisher.** From the perspective of user perception, **the algorithmic recommendation platform has been detached from the traditional role of information network service provider, and transformed into a network content provider that 'actively' pushes according to its personal preferences, label settings, topic popularity and other indicators**".

有学者认为：利用算法推荐技术向用户提供作品的行为，**属于ICP（互联网内容服务商），如果未经权利人许可就是直接侵权行为，不能适用“避风港原则”，应当适用《民法典》第一千一百九十四条而非一千一百九十五条至一千一百九十七条。**

While other scholars believe that: the use of algorithmic recommendation technology to provide users with works, **belongs to the ICP (Internet Content Service Provider), therefore without the permission of the right holder constitutes direct infringement of rights, and "safe haven principle" can not be applied. The applicable articles from the Civil Code is Article 1194 rather than Articles 1195 to 1197.**

有学者认为：算法推荐**导致平台角色发生变化，由单纯技术服务变为集技术和内容分发服务于一身。**

Still some scholars believe that algorithmic recommendation **has led to a change in the role of the platform, from a purely technical service to a combination of technical and content distribution services.**

认为属于网络服务行为的观点： The view that it belongs to network service behavior:

有学者论述：“平台通过算法向特定用户推送的，只是某内容材料的链接，而非内容材料本身。所有内容材料（包括涉嫌侵权的内容材料）仍然是由某个用户自主上传到平台上的（简称“用户生成内容”，英文缩写UGC），**算法推荐并没有把平台的角色从间接提供链接服务换成直接提供作品内容**，它改变的只是将原来由单个用户在平台上自行搜索其想要的商品链接，转化为平台根据“算法画像”主动向特定用户推送相关商品链接。”

Some scholars argue: "What the platform pushes to a particular user through the algorithm is only a link to a certain content material, but not the content material itself. All content materials (including content materials suspected of infringement) are still uploaded to the platform by a user on his/her own (referred to as "user-generated content", abbreviated as UGC), and **the algorithmic recommendation does not change the role of the platform from an indirect linking services provider to direct content provider**, and the only change is that a search link of a product on the platform is previously done by an individual user, and now it's pushed to specific users according to the "algorithm portrait".

短视频平台版权责任的司法实践及学术讨论

Judicial Practice and Academic Discussion on Copyright Liability of Short Video Platforms

司法实践：没有将算法推荐认定为作品提供行为的判例

Judicial practice: no cases identifying algorithmic recommendations as acts of making works available

杭州市中级人民法院 (2022) 浙01民终10023号民事判决书：

Hangzhou Intermediate People's Court (2022) Zhejiang 01 Civil Final No. 10023 Civil Judgment:

“算法推荐服务提供者不同于一般的网络服务提供者，系伴随着互联网技术发展而形成的新型网络服务提供者，随着技术从技术角度，算法推荐服务提供者基于算法对信息索引、排序、生成、推荐，再呈现给用户；从信息论的角度来讲，推荐算法显著降低了海量网络信息的混乱程度，将用户需要的信息以一定顺序的形式提供给用户，**算法推荐服务提供者作为传播者并不提供内容，但其使用的算法使得网络信息有了更明确的结构，故算法推荐服务提供者系新型的网络服务提供者。**”

"Algorithmic recommendation service providers are different from general network service providers, is accompanied by the development of Internet technology and the formation of a new type of network service providers, with the technology from the technical point of view, algorithmic recommendation service providers based on algorithms for information indexing, sorting, generating, recommending, and then presenting to the user; from the point of view of the theory of information, the recommendation algorithms significantly reduce the huge amount of network information confusion, the user needs information in a certain order of the form provided to the user, **algorithmic recommendation service provider as a disseminator does not provide content, but its use of algorithms to make the network information has a clearer structure, so the algorithmic recommendation service provider is a new type of network service provider.**"

短视频平台版权责任的司法实践及学术讨论

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司法实践的做法更符合法律及法理 The judicial practice is more in line with the law and jurisprudence:

1. 作品提供行为的认定标准——初始传播 Criteria for recognizing the act of making works available - Initial dissemination

最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定》

Rules on Several Issues Concerning the Application of Law to the Trial of Civil Disputes on Infringement of the Right of Online Dissemination by the Supreme People's Court

第三条 网络用户、网络服务提供者未经许可，通过信息网络提供权利人享有信息网络传播权的作品、表演、录音录像制品，除法律、行政法规另有规定外，人民法院应当认定其构成侵害信息网络传播权行为。

Article 3 Network users and network service providers shall, without authorization, make available works, performances and audio-visual recordings of which the right holder enjoys the right of online dissemination, and the people's court shall determine that such act constitutes infringement of the right of online dissemination, unless otherwise provided by laws or administrative regulations.

通过上传到网络服务器、设置共享文件或者利用文件分享软件等方式，将作品、表演、录音录像制品置于信息网络中，使公众能够在个人选定的时间和地点以下载、浏览或者其他方式获得的，人民法院应当认定其实施了前款规定的提供行为。

Where a work, performance, sound and video recording is placed in online by uploading it to a network server, setting up a shared file or utilizing file-sharing software to enable the public to obtain it by downloading, browsing or otherwise at a time and place of one's choice, the people's court shall regard it as the act of making it available as stipulated in the preceding paragraph.

2. 算法推荐行为的作用——信息投送方式的改变

2. The role of algorithmic recommendation behavior - the change of information delivery method

3. 算法推荐行为的积极意义——减少信息搜索成本、提高互联网使用效率

3. The positive significance of algorithmic recommendation - reducing the cost of information search and improving the efficiency of Internet use.

短视频平台版权责任的司法实践及学术讨论

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2. 算法推荐是否等同于司法解释中的“推荐”，是否应该据此提高短视频平台的注意义务？ Is algorithmic recommendation equivalent to "recommendation" in the judicial interpretation, and should the duty of care of short video platforms be increased accordingly?

最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定》 Provisions on Several Issues Concerning the Application of Law to the Trial of Civil Disputes Involving Infringement of the Right of Online Dissemination by the Supreme People's Court

第九条 人民法院应当根据网络用户侵害信息网络传播权的具体事实是否明显，综合考虑以下因素，认定网络服务提供者**是否构成应知**：

Article 9 The people's court shall, based on whether the specific facts of the network user's infringement of the right to online dissemination are obvious or not, and taking into account the following factors, determine **whether the network service provider constitutes should know**:

- (一) 基于网络服务提供者提供服务的性质、方式及其引发侵权的可能性大小，应当具备的管理信息的能力；
- (二) 传播的作品、表演、录音录像制品的类型、知名度及侵权信息的明显程度；
- (三) 网络服务提供者是否主动对作品、表演、录音录像制品进行了选择、编辑、修改、推荐等；**
- (四) 网络服务提供者是否积极采取了预防侵权的合理措施；
- (五) 网络服务提供者是否设置便捷程序接收侵权通知并及时对侵权通知作出合理的反应；
- (六) 网络服务提供者是否针对同一网络用户的重复侵权行为采取了相应的合理措施；
- (七) 其他相关因素。

(i) The ability that the network service provider should have manage the information based on the nature and manner of the services provided by the network service provider and the extent of its likelihood of triggering infringement;

(ii) The type and popularity of the disseminated works, performances, sound and video recordings and the obviousness of the infringing information;

(iii) Whether the network service provider has taken the initiative in selecting, editing, modifying and recommending the works, performances and sound and video recordings;

(d) Whether the network service provider has actively taken reasonable measures to prevent infringement;

(v) Whether the network service provider has set up a convenient program to receive infringement notices and respond to the infringement notices in a timely and reasonable manner;

(vi) Whether the network service provider has taken appropriate and reasonable measures against repeated infringement by the same network user;

(vii) Other relevant factors.

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最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定》

第十条 网络服务提供者在提供网络服务时，**对热播影视作品等以设置榜单、目录、索引、描述性段落、内容简介等方式进行推荐**，且公众可以在其网页上直接以下载、浏览或者其他方式获得的，人民法院可以认定其应知网络用户侵害信息网络传播权。

Provisions on Several Issues Concerning the Application of Law to the Trial of Civil Disputes Involving Infringement of the Right of Online Dissemination by the Supreme People's Court

Article 10 Where a network service provider, **in providing network services, recommends popular movie and television works by setting up popular lists, catalogs, indexes, descriptive paragraphs, content profiles, etc.**, and where the public can directly obtain from its webpage by downloading, browsing or otherwise, the people's court may regard as should have known that the network user infringes on the right of information transmission through the network.

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学术讨论 Academic discussion :

肯定观点：算法推荐属于司法解释中的“推荐”，短视频平台应当提高注意义务。

Affirmative point of view: algorithmic recommendation belongs to the "recommendation" in the judicial interpretation, short video platform should improve the duty of care.

有论者认为：“算法推荐本质就是网络服务提供者利用算法进行推荐，算法无非就是一种工具，利用算法进行推荐才是算法推荐的实质，所以**算法推荐与人工推荐在性质上是相同的，不同的仅是推荐手段而已**。所以，网络服务提供者主动利用算法扩大作品的传播，使得侵权作品更容易被网络用户获得。**这一行为已经改变了传统网络服务提供者中立、被动的角色，故对其注意义务的设定应当有所变化而不能固守一般理性人标准**。另外，算法推荐侵权作品，使得权利人的作品处于更容易被侵权传播的风险之中，**根据风险控制理论**，网络服务提供者制造了这一风险，其也就应该采取更加积极的行为消除这种风险，且算法模型是其设定的，其也应该有能力消除这种风险。此外，网络服务提供者采取算法推荐增加了用户粘性，带来了巨大的流量，取得了商业上的成功，赚取了巨大商业利益，**根据权利义务相一致的基本法理**，让其在经营中负担比一般人更高的注意义务是符合法理和常理的。综上，本文认为，**采取算法推荐的网络服务提供者的知识和能力足以使其成为“专业人员”，其对于算法推荐行为引起的侵权风险的认知应当采取比一般理性人注意义务标准更高的专业人员行为标准。**”

Some commentators believe that: "the essence of algorithmic recommendation is that network service providers use algorithms to recommend, while algorithms are just a tool. Using algorithm to recommend is the essence of algorithm recommendation, so **algorithmic recommendation is the same as human recommendation in nature, and the difference is only about the means of recommendation**. Therefore, network service providers actively use algorithms to expand the dissemination of works, making infringing works more easily accessible to network users. **This behavior has changed the neutral and passive role of traditional network service providers, so their duty of care should be different instead of sticking to the standard of general rational person**. In addition, the algorithm recommendation infringes works, which makes the right holder's works disseminated with the risk of more easily infringed. And **according to the theory of risk control**, the network service provider creates this risk, it should also take more active actions to eliminate this risk, and as the algorithm model is set up by the service provider, it should also have the ability to eliminate this risk. Further, the network service provider adopts algorithmic recommendation to increase user loyalty, bringing huge internet traffic, achieving commercial success, and earning huge commercial interests. Therefore, **according to the basic jurisprudence of the matching rights and obligations**, it is in line with the jurisprudence and common sense to have the network service provider exercise a higher duty of care in the operation than the general public. To sum up, this paper holds **that the knowledge and ability of the network service provider adopting algorithmic recommendation is sufficient to be regarded as a "professional", and their knowledge of the infringement risk caused by the algorithm recommendation should be measured with a higher standard of professionals than that of the normal rational person's duty of care standard.**

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否定观点：算法推荐不属于司法解释中的“推荐”，不能据此提高注意义务。

Negative view: Algorithmic recommendation does not belong to "recommendation" in the judicial interpretation, and the duty of care cannot be increased accordingly.

有论者认为：“算法推送”不能等同于“信网权解释2012”中的“主动编辑”或“设置榜单”等针对所有平台用户的行为。因为“信网权解释2012”中被视为应知的积极行为，属于**网络服务提供者有目的地帮助涉嫌上传侵权内容的网络用户向平台其他不特定用户推送的行为，具有公开性和统一性**。正是这种公开性和统一性，才彰显了**网络服务提供者存在帮助侵权的主观意图**。而“算法推送”在运行中则具有**个性化和私密性**，每个平台用户收获的推送内容不同，且不向他人主动公开，这除了说明**内容由机器根据客观标准筛选外**，还意味着**网络服务提供者并未将机器筛选的内容提供给任何第三人，第三人只可能获得基于自己偏好而推送的差异化内容**。

Some commentators believe that "algorithmic pushing" cannot be equated with "active editing" or "setting up popular lists" in the "Interpretation of the Right to Online Network 2012". This is because the positive behavior in the "Interpretation of the Right to Online Network 2012" is regarded as the active behavior that should be known, which belongs to **the behavior of network service providers purposefully helping its users suspected upload infringing content to push to other unspecified users of the platform, and it has the openness and uniformity**. It is this openness and uniformity that **highlights the subjective intention of the network service providers to help infringement**. The "algorithmic push" in operation is personalized and private, each platform user harvested different push content, and do not actively disclose to others, which in addition to indicating **that the content is screened by the machine according to the objective criteria**, but also means **that the network service provider did not provide the machine screened content to any third party, the third party may only obtain differentiated content pushed based on their own preferences**.

如果网络服务提供者**有能力实时调整推送的内容，即说明其具备相应的信息管理能力，再结合作品类型、知名度及侵权信息的明显程度等考量要素，方可认定网络服务提供者的主观过错**。然而如前所述，“算法推送”乃是建立在**机器自动筛选的基础上**，在该项技术实施时，同时并无人工的参与。这一方面是由于**海量网络用户的偏好处于随时变化中**，另一方面**特定内容的来源也在不断变化**，这种偏好和内容的双重不确定，乃是造成人工推荐无法有效实现的原因，只有通过**算法程序才能有效率地同时应对用户端和内容端的不断改变**。既然算法实施的同时无具体行为的存在，也就意味着**不可简单以算法的结果视为网络服务提供者的主观过错**。

If the network service provider **has the ability to adjust the pushed content in real time, it means that it has the corresponding information management ability, and then combined with the type of work, popularity and the obviousness of the infringing information and other considerations, it can be recognized that the network service provider's subjective fault**. However, as mentioned above, **the "algorithmic push" is based on automatic machine screening**, and there is no human involvement in the implementation of this technology. This is on the one hand, due to **the vast number of network users' preferences are changing at any time**, on the other hand, the source of specific content is also changing. This preference and the double uncertainty of the content is the reason why human recommendation can not be effectively realized, only algorithmic programs can effectively cope with the constant changes on both the user and the content side. Since the algorithm is implemented without the existence of specific behaviors, **it also means that the results of the algorithm cannot simply be regarded as the subjective fault of the network service provider**.

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司法实践:

北京市海淀区人民法院 (2018) 京0108民初49421号《延禧攻略》侵权案民事判决书:

“字节公司向用户提供的**不仅仅是信息存储空间服务，而是同时提供了信息流推荐服务**。涉案侵权短视频的下大范围传播，是用户的侵权行为与上述两种服务相结合的结果。字节公司以其服务特点和技术优势帮助用户在移动互联网上高效率地获得更多的曝光和关注的同时，**也为自身获取了更多的流量和市场竞争优势等利益**。但不容忽视的是，字节公司更加先进和高效的服务**也存在着提高侵权传播效率、扩大侵权传播范围、加重侵权传播后果的风险**。正因为存在获取更多优势、利益与带来更大侵权风险并存的上述情况，**字节公司与不采用算法推荐、仅提供信息存储空间服务的其他经营者相比，理应对用户的侵权行为负有更高的注意义务。**”

Judicial Practice:

Beijing Haidian District People's Court (2018) Beijing 0108 Civil First Instance 49421 Civil Judgment in the Infringement Case of "Story of Yanxi Palace":

"ByteDance provides users with **not just information storage space services, but also provides information flow recommendation services at the same time**. The wide spread of the short video involved in the infringement is the result of the combination of the user's infringement and the above two services. With its service characteristics and technical advantages, ByteDance helps users get more exposure and attention efficiently on the mobile Internet, **but also obtains more traffic and market competitive advantages for itself**. However, it should not be ignored that ByteDance's more advanced and efficient services also have **the risk of improving the efficiency of infringement communication, expanding the scope of infringement communication, and aggravating the consequences of infringement communication**. Because of the above situation of obtaining more advantages, benefits and bringing greater infringement risks, ByteDance **should have a higher duty of care for users' infringement behavior compared with other operators who do not use algorithm recommendation and only provide information storage space services.**"

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杭州市中级人民法院（2022）浙01民终10023号民事判决书：

Hangzhou Intermediate People's Court (2022) Zhejiang 01 Civil Final 10023 Civil Judgment:

“算法技术本身虽然是中立的，但平台对算法推荐技术的设计、部署是包含价值观和主观意图的，基本可以预见推荐算法运行的结果，故平台不仅通过算法推荐技术介入了用户行为，通过可以通过算法推荐技术获得收益。

"Although the algorithm technology itself is neutral, the design and deployment of the algorithm recommendation technology of the platform contains values and subjective intentions, and the results of the operation of the recommendation algorithm can be basically predicted, so the platform not only intervenes in user behavior through the algorithm recommendation technology, but also gains benefits through the algorithm recommendation technology. "

相较于一般的网络服务提供者，类似抖音平台通过算法进行内容分享的视频平台，**一方面算法推荐体现了算法设计者的意志**，系平台实现个性化内容和定制服务的表现形式，且**当前平台亦具有一定的信息管理能力和**，另一方面，**算法推荐会一定程度上扩大侵权视频的传播范围，增加了侵权风险，且平台据此可以获取流量并获得一定的经济利益**；平台理应在享受技术红利的同时承担一定的注意义务，以实现平台与权利人的利益平衡，**因此，应承担更高的注意义务**。需要指出的是，平台需要为算法运行承担更高的注意义务，并不意味着平台必然提升注意义务，**平台对不同算法系统的控制力等方面影响其责任承担方式，平台责任需要根据算法技术的具体功能在个案中具体分析。**”

Compared with the general network service providers, similar to the Tik Tok platform through the algorithm of content sharing video platform, **on the one hand, the algorithm recommendation embodies the will of the algorithm designer**, and it is the way of platform to have personalized content and customized services, and **the current platform also has a certain degree of information management capabilities**. On the other hand, **the algorithm recommendation expands the scope of dissemination of the infringed video, increasing the risk of infringement, and the platform can obtain traffic and gain certain economic benefits**. Therefore, the platform should assume certain obligations of care while enjoy the technical dividends to balance the interests between the platform and the right holders. **And the platform should assume a higher obligation of care**. It should be noted that the platform needs to assume a higher duty of care for the operation of the algorithm does not mean that the platform is bound to elevate the duty of care, as **the platform's control over different algorithmic systems and other aspects affect the way it assumes responsibility, and the platform's responsibility needs to be specifically analyzed in individual cases according to the specific functions of the algorithmic technology.**"

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重庆市第一中级人民法院 (2023) 渝01民初72号民事判决书:

Chongqing first intermediate people's court (2023) YU01 Civil First Instance 72 Civil Judgment:

“现有证据显示，被告快手科技公司使用的传播技术从技术效果来说，相关视频分类、关键词联想、热搜标热等功能，**客观实现了全平台内视频分类精准定向推荐的效果**，此技术效果**促进了平台内海量侵权视频加速精准传播**，亦使其**应负担相对应范围的注意义务**，这更符合公平、诚信的商业道德；被告快手科技公司传播技术功能具有视频聚集性、分类性等特征，使被告快手科技公司更易通过技术认知并治理平台内海量侵权视频，即无论从主观上亦或客观能力上均具有匹配全平台内海量侵权视频注意义务的技术保障可能；被告快手科技公司平台对此类传播技术的整体运用，**从效果上符合信网权规定关于将平台以各形式推荐视频内容的行为纳入认定应知注意义务的事由**，即使存在一定区别，亦对平台主观认知存在影响。”

"The existing evidence shows that the dissemination technology used by Kuaishou Technology. And from the technical perspective the relevant video classification, keyword association, hot search, hot mark and other functions, **objectively realizing the targeted recommendation of different types of videos across the whole platform.** This technical method, on one hand, **enables the platform to precisely disseminate massively about the infringing video; on the other, makes the platform to carry appropriate duty of care**, which is more in line with the business ethics of fairness and honesty. Kuaishou Technology 's dissemination technology features video aggregation and classification, which makes it easier for Kuaishou Technology to recognize and manage the massive infringing videos on the platform through technology, i.e., no matter subjectively or objectively, it' s possible to provide technical guarantee to carry out the duty of care for the massive infringing videos on the entire platform. The overall use of such dissemination technology on the platform of the Defendant Kuaishou Technology **falls in the scope of the provisions of should have known and duty of care for the platform's behavior of recommending video content in various forms, even there is a certain difference, it also has an impact on the subjective knowledge of the platform.**"

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北京知识产权法院(2021)京73民终4295号民事判决书:

Beijing Intellectual Property Court (2021) Beijing 73 civil final 4295 civil judgment:

“荔支公司上诉称其推荐行为系平台自带的算法推荐所致，属技术中立。但本院认为，荔支公司的上述**算法推荐行为，实际上是向用户提供了信息流推荐服务，一定程度上存在提高侵权传播效率、扩大侵权传播范围的风险，同时也为其自身获得了更多的流量和市场竞争优势等利益，其理应对用户的侵权行为负有更高的注意义务。**但荔支公司并未对此尽到合理的注意和管理义务，故一审法院认为荔支公司在应知网络用户利用网络服务侵害信息网络传播权情况下，未采取删除、屏蔽、断开链接等必要措施，或提供技术支持，构成帮助侵权，并无不当，本院予以确认。”

"Lizhi Inc appealed that its recommendation behavior was due to the algorithmic recommendation that came with the platform, which was technologically neutral. However, this court believes that the above **algorithmic recommendation behavior of Lizhi Branch Company, in fact, is to provide users with information stream recommendation services, and to a certain extent, there is a risk of improving the efficiency of infringement dissemination, expanding the scope of infringement. And it obtains more traffic and market competition advantage and other benefits, therefore it should have a higher duty of care for users' infringements.** However, Lizhi Inc failed to exercise reasonable care and management obligations in this regard. Therefore, the Court of first instance held that Lizhi Inc did not take necessary measures such as deleting, blocking, disconnecting links, or providing technical support when it should have known that network users infringed on the right of online transmission by using network services, which constituted aiding infringement, and was affirmed by this Court."

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上海知识产权法院(2023)沪73民终287号民事判决书 Shanghai Intellectual Property Court (2023) Shanghai 73 Civil Final 287 Civil Judgment:

算法推荐区别于人工推荐，不能因算法推荐技术的使用而当然推定网络服务提供者信息管理能力的提高，进而要求对所有推荐内容主动采取防范侵权的措施，亦不能因算法推荐内容涉及侵权，而当然推定网络服务提供者知悉该内容的存在，进而对该内容是否可能侵权作出判断。

Algorithm recommendation is different from manual recommendation. The improvement of information management ability of network service providers cannot be presumed due to the use of algorithm recommendation technology, thus requiring proactive measures to prevent infringement of all recommended content. Nor can it be presumed that network service providers are aware of the existence of such content due to the infringement of algorithm recommended content. And then make a judgment on whether the content is likely to infringe.

当然，算法推荐技术本身并非一成不变，可以也应当被不断改进和完善。虽然并不要求采用算法推荐技术的网络服务提供者在技术采用之初同步采取相应的侵权预防措施，以避免对新技术发展苛以过高法律义务导致对于技术本身的实质否定评价，但采用算法推荐技术的网络服务提供者仍应当定期审核、评估算法模型，在特定算法推荐系统已经引发著作权侵权事实的基础上，尤其当算法推荐技术被用于存在较高著作权侵权风险内容的推送时，网络服务提供者应提高相应的注意义务，采取技术上可行的模型修正方式，或者采取其他预防侵权的合理措施。

Of course, the algorithmic recommendation technology itself is not static. It can and should be constantly improved. Although network service providers using algorithm recommendation technology are not required to take corresponding infringement prevention measures at the beginning of the adoption of technology, in order to avoid imposing too high legal obligations on the development of new technology resulting in substantial negative evaluation of the technology itself, network service providers using algorithm recommendation technology should still regularly review and evaluate the algorithm model. On the basis of the fact that a particular algorithmic recommendation system has already triggered copyright infringement, especially when the algorithmic recommendation technology is used to push the content with high risk of copyright infringement, the network service provider should increase the corresponding duty of care, adopt technically feasible model correction methods, or take other reasonable measures to prevent infringement.

上诉人主张本案系其平台因大数据算法推荐内容涉嫌侵权被诉至法院的第一起案件，在案证据显示上诉人采用算法推荐技术进行个性化推送和通用榜单排序，并无证据显示上诉人将该技术使用于存在较高著作权侵权风险内容的推送，基于以上考量，本案尚不能认定上诉人未尽到与其信息管理能力相应的注意义务。

The appellant claimed that this is the first case in which its platform was sued to the court for alleged copyright infringement due to big data algorithmic recommendation, and the evidence in the case showed that the appellant used the algorithmic recommendation technology to carry out personalized push and generic list sorting, and there was no evidence showing that the appellant used the technology to push the content with higher risk of copyright infringement, and based on the above considerations, this case could not find that the appellant had not fulfilled the duty of care corresponding to its information management ability. Based on the above considerations, it cannot be concluded that the appellant failed to fulfill its duty of care corresponding to its information management ability.

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4.是否支持拦截、过滤措施? Are interception and filtering measures supported?

学术讨论 Academic Discussion:

支持观点 Supporting viewpoints:

有学者论述：“网络版权内容过滤技术的进步，将使得版权侵权的预防方式发生革命性变化。网络安全港规则已经成为充分利用这一技术的法律障碍。著作权法应适当修正这一规则，引导网络服务商与著作权人合作建立合理的版权内容过滤机制，自动识别和阻止用户的版权侵权行为。这将节省著作权人监督网络和发送侵权通知的成本，也降低网络服务商处理侵权通知的成本。”

Based on some scholars, "Advances in online copyright content filtering technology will revolutionize the way copyright infringement is prevented. The network safe harbor rule has become a legal obstacle to fully utilizing this technology. The copyright law should appropriately amend this rule to guide ISPs to cooperate with copyright owners to establish a reasonable copyright content filtering mechanism to automatically identify and block users' copyright infringement. This will save the cost for copyright owners to monitor the network and send infringement notices, and also reduce the cost for ISPs to deal with infringement notices."

有学者论述：我国侵权现象还比较严重；网络服务提供者的身份发生了巨大变化；网络服务提供和的技术能力发生了巨大变化，尤其利用了算法推荐技术；短视频利用方式已经对长视频构成了替代。这是采取拦截、过滤措施的社会基础。另外，《民法典》第1195条、1197条规定的是“必要措施”，未限定所采取的具体方式，除删除、屏蔽、断开连接外，并未排除拦截、过滤的方式。

Some scholars have discussed that: the phenomenon of infringement is still relatively serious in China; the identity of network service providers has changed dramatically; the technological capability of network service provision has changed dramatically, especially utilizing algorithmic recommendation technology; and the way short videos are utilized has constituted a substitute for long videos. This is the social basis for interception and filtering measures. In addition, Articles 1195 and 1197 of the Civil Code provide for "necessary measures" without limiting the specific means to be taken, and do not exclude interception and filtering, except for deletion, blocking and disconnection.

反对观点 Opposing viewpoints:

没有法律依据；过滤机制是网络服务商自发采取的措施，是私立规则，而且还需要与权利人的合作；强制拦截、过滤会妨碍不侵权内容传播及言论自由；成本过高；技术上不可行。There is no legal basis; the filtering mechanism is a spontaneous measure taken by ISPs, which is a private rule and requires cooperation with right holders; mandatory interception and filtering will hinder the dissemination of non-infringing content and freedom of expression; the cost is too high; and it is not technically feasible.

短视频平台版权责任的司法实践及学术讨论

Judicial Practice and Academic Discussion on Copyright Liability of Short Video Platforms

司法实践：

重庆市第一中级人民法院（2021）渝01民初401号民事判决书：

“治理技术能力基于技术发展而相应发展，应与平台传播技术能力匹配。**传统删除、屏蔽、断开链接以外的过滤拦截等措施既非必然也非禁忌。平台应根据侵权行为特征采取相适宜的措施手段尽力快速进行侵权治理**，避免权利人利益严重受损，以符合及时必要性标准。**对于海量侵权情形，如平台采取传统删除、屏蔽、断开链接无法及时有效治理，则需根据侵权特征，采取包括但不限于过滤拦截等适宜措施尽力及时进行侵权治理。**”

Judicial Practice:

Chongqing First Intermediate People's Court (2021) Yu 01 Civil First Instance 401 Civil Judgment:

"The technical capacity of governance develops accordingly based on technological development, and should match the technical capacity of platform communication. **Measures such as filtering and interception beyond traditional deletion, blocking, and broken links are neither inevitable nor taboo. The platform should adopt appropriate measures according to the characteristics of the infringement behavior to try its best to quickly carry out the infringement governance** to avoid serious damage to the interests of the right holder, in order to meet the standard of timely necessity. **For massive infringement, if the platform cannot effectively manage the infringement in a timely manner by adopting traditional deletion, blocking and disconnecting links, the platform shall adopt appropriate measures, including but not limited to filtering and blocking, according to the characteristics of the infringement to try its best to manage the infringement in a timely manner.**"

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长沙市中级人民法院 (2021) 湘01民初1037号民事裁定书:

Changsha Intermediate People's Court (2021) Xiang 01 Civil First Instance 1037 Civil Ruling:

考虑到被申请人收到告知函后理应知道《千古玦尘》正在热播、被申请人针对被控侵权视频投放广告获取了收益、被申请人已经收到申请人高频次的侵权“通知”等事实，结合《民法典》第一千一百九十五条、第一千一百九十七条的规定，本院认为，被申请人作为网络服务提供者，除应当对侵权视频采取删除、屏蔽、断开链接等措施外，**为了防止侵权行为的继续以及侵害后果的扩大**，被申请人采取的“必要措施”还应当包含对侵权视频实施有效的过滤和拦截。

Considering the fact that the Respondent should have known that "Eternal Jue Dust" was being aired after receiving the notification letter, that the Respondent had gained revenue from the advertisements placed by the Respondent for the allegedly infringing video, that the Respondent had already received high-frequency infringing "notifications" from the Claimant, and taking into account the provisions of Articles 1195 and 1197 of the Civil Code, the Court held that the Respondent, as a network service provider, in addition to taking measures such as deleting, blocking and disconnecting the infringing videos, **in order to prevent the continuation of the infringing behavior and the expansion of the consequences of the infringement**, the "necessary measures" taken by the Respondent should also include the implementation of effective filtering and interception of the infringing videos.

根据被申请人发布的《2020年抖音安全年度报告》内容，被申请人有能力事先拦截违规视频内容，能够对被控侵权视频实施有效的过滤和拦截。被申请人在其他案件中承诺采取“删除侵权视频、主动审查过滤、阻拦侵权视频”措施，且取得了“侵权视频明显减少，即便存在少量位置不明显的、未能及时处理的侵权视频，浏览量也不大”的效果，因此，**过滤、拦截措施具有可实施性**。

According to the Respondent's 2020 Tik Tok Safety Annual Report, the Respondent has the ability to intercept the offending video content in advance, and is able to implement effective filtering and interception of the allegedly infringing videos. In other cases, the Respondent undertook to take measures to "delete infringing videos, proactively review and filter, and block infringing videos", and achieved the effect that "infringing videos have been significantly reduced, and even if there are a small number of infringing videos with inconspicuous locations that are not dealt with in a timely manner, the viewership is not large". **Therefore, the filtering and blocking measures are enforceable.**

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Judicial Practice and Academic Discussion on Copyright Liability of Short Video Platforms

成都市中级人民法院 (2021) 川01民初6139号民事判决书:

Chengdu Intermediate People's Court (2021) Sichuan 01 Civil First Instance 6139 Civil Judgment:

腾讯(北京)公司、腾讯(成都)公司主张要求微播视界公司采取有效措施清除抖音APP和抖音网站(douyin.com)中所有未经允许侵害《传闻中的陈芊芊》视听作品信息网络传播权的视频, 并采取有效措施过滤、拦截用户上传和传播侵害《传闻中的陈芊芊》视听作品信息网络传播权的视频, 对此本院认为, 因**目前被诉侵权视频微播视界公司已做下线处理, 客观上要求微播视界公司采取有效措施清除抖音APP和抖音网站(douyin.com)中所有未经允许侵害《传闻中的陈芊芊》视听作品信息网络传播权的视频已无事实基础, 没有判令的必要**, 另外, 微播视界公司的被诉侵权行为实质为用户直接侵权为前提的帮助侵权, **平台不具有承担主动的事前审查义务, 在微播视界公司已经对被诉侵权视频做下线处理的情况下, 不宜要求微播视界公司采取有效措施过滤、拦截用户上传和传播侵害《传闻中的陈芊芊》视听作品信息网络传播权的视频。**

Tencent (Beijing) Company and Tencent (Chengdu) Company claimed that Weibo Shijie Technology should take effective measures to remove all unauthorized videos infringing on the right of information network transmission of the audiovisual works of "The Romance of Tiger and Rose" from the Tik Tok app and the website (douyin.com), and should take effective measures to filter and intercept the uploading and dissemination of videos infringing on the right of information network transmission of the audiovisual works of "The Romance of Tiger and Rose" by the users. In this regard, the Court held that, **as the infringing videos have been taken offline by Weibo Shijie, objectively speaking, there is no factual basis for requesting Weibo Shijie to take effective measures to remove all videos infringing on the right of information network dissemination of the audiovisual works of " The Romance of Tiger and Rose " from the Tik Tok app and the website (douyin.com) without prior permission, and that there is no necessity to make a ruling on this matter.** In addition, the alleged infringing behavior of Weibo Shijie is essentially aiding infringement on the premise of direct infringement by users, **and the platform does not have the obligation to take the initiative to review beforehand. In the case that Weicast Vision has already taken down the infringing videos, it is not appropriate to require Weibo Shijie to take effective measures to filter and block users from uploading and disseminating** videos infringing on the information network right of dissemination of the audiovisual work "Chen Pingping in Rumors".

短视频平台版权责任的司法实践及学术讨论

Judicial Practice and Academic Discussion on Copyright Liability of Short Video Platforms

青岛市中级人民法院 (2021) 鲁02民初2258号民事判决书:

Qingdao Intermediate People's Court (2021) Lu 02 Civil First Instance 2258 Civil Judgment:

关于被告是否应当采取过滤、拦截等有效措施制止用户在涉案平台上传和传播侵权视频, 本院认为, **原告的该项诉讼请求实质是要求被告对抖音平台上的信息承担事先审查义务。**通常情况下, 网络服务提供者对于网络用户上传到网站中的作品没有主动审查的义务, 网络服务提供者只有在明知或应知网络用户上传的作品构成侵权时才应承担采取必要措施的责任。**确定网络服务提供者是否应当承担事先审查的义务应结合案件具体情况, 综合考虑网络服务提供者提供的服务内容和管理信息的能力、传播作品的类型和知名度、现有的技术水平、行业特点以及权利人、网络用户和网络服务提供者的利益平衡等因素。**

Regarding whether the Defendant should take effective measures such as filtering and blocking to stop users from uploading and disseminating infringing videos on the platform in question, the Court held that **the Plaintiff's claim was essentially a request for the Defendant to undertake a prior censorship obligation for the information on the Tik Tok platform.** Normally, network service providers do not have the obligation to take the initiative to examine the works uploaded to the website by network users, and they should only take the responsibility to take necessary measures when they know or should know that the works uploaded by network users constitute infringement. **Determining whether the network service provider should assume the obligation of prior censorship should be based on the specific circumstances of the case, taking into account factors such as the content of the services provided by the network service provider and its ability to manage the information, the type and popularity of the disseminated works, the level of existing technology, the characteristics of the industry, and the balance of interests among the right holders, the network users and the network service provider.**

短视频平台版权责任的司法实践及学术讨论

Judicial Practice and Academic Discussion on Copyright Liability of Short Video Platforms

被告为网络服务提供者，涉案平台**视频数量极大**且主要为**短视频**。判断短视频是否构成侵权首先需要通过相应的技术手段将存在侵权可能性的**视频筛选出来，然后再进行人工审核**。短视频相对于长视频来说，**构成合理使用的情形更为复杂**，被告作为平台经营者对于筛选出来的视频**是否构成侵权难以作出准确判断**。构建良性的网络视频版权生态，**需要权利人、平台经营者、网络用户的共同努力**，如果对平台经营者**设定过高的审查义务，不利于鼓励创作者的积极性、作品的传播和互联网及文化产业的发展**。本院认为，在被告已经将涉案侵权视频予以删除、原告未有证据证明涉案平台仍有大量侵权视频、涉案视听作品已过热播期的情况下，**本院对原告要求被告采取过滤、拦截等有效措施制止用户在涉案平台上传和传播侵权视频诉讼请求不予支持**。

The defendant is a network service provider, and **the number of videos** on the platform in question is very large quantity and mainly **short videos**. To determine whether the short video constitutes infringement, the first step is to **screen out the possibility of video infringement through the corresponding technical means, and then manually review**. **Short videos are more complicated than long videos in terms of reasonable use**, and it is difficult for the defendant, as a platform operator, **to make an accurate judgment on whether the screened videos constitute infringement**. The construction of a benign online video copyright ecology **requires the joint efforts of right holders, platform operators and network users**, and if **excessive censorship obligations are imposed on platform operators, it will not be conducive to encouraging the enthusiasm of creators, the dissemination of works, and the development of the Internet and the cultural industry**. The court held that, considering defendant has removed the infringing video, the plaintiff has no evidence to prove that the platform still has a large number of infringing video, and the audio-visual works have passed the period of popularity, **the Court does not support the plaintiff's request for the defendant to take effective measures such as filtering and blocking to stop users from uploading and disseminating infringing videos on the platform involved**.



思考的问题 Reflections:

过滤、拦截措施的理论基础是注意义务，还是审查义务？

Is the theoretical basis for filtering and interception measures a duty of care, or a duty of review?

支持过滤、拦截是否超出了注意义务的范围？

Whether supporting filtering and interception is beyond the scope of the duty of care?

最高人民法院《关于审理侵害信息网络传播权民事纠纷案件适用法律若干问题的规定》

Provisions on Several Issues Concerning the Application of Law to the Trial of Civil Disputes on Infringement of the Right of Online Dissemination by the Supreme People's Court

第九条 人民法院应当根据网络用户侵害信息网络传播权的具体事实是否明显，综合考虑以下因素，认定网络服务提供者是否构成应知：

(一) 基于网络服务提供者提供服务的性质、方式及其引发侵权的可能性大小，**应当具备的管理信息的能力**；

(四) 网络服务提供者**是否积极采取了预防侵权的合理措施**；

Article 9 The people's court shall, based on whether the specific facts of the network user's infringement of the right to disseminate information network are obvious or not, and taking into account the following factors, determine whether the network service provider constitutes should know:

(i) **The ability to manage information** that the network service provider should have based on the nature and way of providing the service and the possibility of causing infringement;

(iv) Whether the network service provider **has actively taken reasonable measures to prevent infringement**;

最高法院的上述规定能否作为支持采取过滤、拦截措施的依据？如果是，是否意味着其理论基础仍然是注意义务，并未赋予其一般性的审查义务？

Can the above provision of the Supreme Court be used as a basis to support the adoption of filtering and blocking measures? If so, does it mean that its theoretical basis is still the duty of care and does not impose a general duty of review?

未来的展望—平台责任的法理基础是否会有变化?

Future Outlook - Will the Jurisprudential Basis for Platform Liability Change?

考虑到网络侵权现状、短视频平台特点、技术发展状况等，平台责任的法理基础会不会从注意义务发展到审查义务?

Taking into account the current situation of online infringement, the characteristics of short video platforms, and the development of technology, will the legal basis of the platform's responsibility evolve from a duty of care to a duty of review?

1.对侵权行为尚未实际发生但著作权人侵权预警函中提及的作品清单是否负担事先审查义务?

Is there a duty of prior review of the list of works mentioned in the copyright owner's infringement early warning letter even though the infringement has not actually occurred?

2.网络平台是否应当和可能承担一般性的事先审查义务?

Should and may online platforms assume a general duty of prior review?



感谢! Thank you!