



The Query on the Pre-Monitoring Obligation of Short Video Platforms

--Taking China's First Copyright Infringement Case in the Context of Algorithm Recommendation as an Example

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Abstract. Algorithm recommendation brings new dilemmas for the determination of infringement of the right of communication through information network and the issue of whether the pre-monitoring obligation of short video platforms should be regulated has attracted much attention. In *iQiyi v. Zijietiaodong Inc.*, the Chinese court for the first time stated its position on the duty of care of algorithm recommendation operators - a "higher duty of care" should be assumed. A higher duty of care is not the same as an obligation of pre-monitoring. Starting from this case, the article compares horizontally and vertically the attitudes of major Internet countries and regions in the world on the issue of the pre-monitoring obligation, such as the United States, the European Union, and China, and then analyzes the reasons why it is inappropriate to set the pre-monitoring obligation of platforms. Finally, on the premise of not introducing the obligation of pre-monitoring, the article explores the path to increase copyright protection under the existing framework.

Keywords: Algorithm Recommendation, the pre-monitoring obligation, higher duty of care, short video platforms, the right of communication through information network

1 Introduction

Nowadays, short videos are widely favored by the public as a new kind of media, and algorithm recommendation technology further makes short videos spread rapidly and widely. By the end of 2022, the number of short video users in China reached 1.040 billion, accounting for 94.8% of the overall internet users, and the average single-day usage time per user exceeded 2.5 hours. [1] However, this has been accompanied by a high incidence of copyright infringement and a widening of the scope of influence. In China's first copyright infringement case in the context of algorithm recommendation (*iQiyi v. Zijietiaodong Inc.*), the plaintiff, *iQiyi*, alleged that the short videos in question had been played nearly 100 million times in total, and claimed damages of nearly 30 million yuan. Following the *iQiyi* case, there has been a rash of similar cases. Infringement of the right of communication through information network in the context of algorithmic recommendation has become a new and important issue in the field of intellectual property. There is a controversy over whether the compulsory filtering obligation of algorithmic recommendation operators should be introduced by breaking through the framework of determining infringement of the right of communication through information network. And the court's attitude was first reflected in the judgment of *iQiyi v. Zijietiaodong Inc.*. Based on this, this article will focus on the question of whether short video platforms (i.e. algorithmic recommendation operators) should assume the pre-monitoring obligation in the context of algorithms.

2 The Latest Position of Chinese Courts on the Duty of Care of Algorithmic Recommendation Operators

The case of *iQiyi v. Zijietiaodong Inc.* points the way to the duty of care of platforms in the context of algorithmic recommendation and has been described as the first case of algorithmic recommendation copyright infringement in China.

In 2018, the film and television work *Story Of Yanxi Palace* was exclusively broadcast on *iQiyi* platform. At the same time, users of *Zijietiaodong's Today's Headlines* platform upload a large number of short videos intercepted or edited by episodes without copyright, and a considerable part of the videos are promoted to the public through the platform's algorithm recommendation technology. *iQiyi* Company has repeatedly sent letters to order the removal of infringing video unsuccessfully and

filed a lawsuit. Finally, the court found that the Zijietiaodong Inc. constituted contributory infringement.

The court held that Zijietiaodong Inc. deserved a higher duty of care for users' copyright infringement compared to operators who do not use algorithmic recommendations. [2] Because while helping users to increase their exposure, the algorithmic recommendation service also brought higher risks of copyright infringement, such as increasing the efficiency, expanding the scope and aggravating the consequences of infringing dissemination. Shortly after, *Zijietiaodong Inc. v. Tencent* continued the direction of *iQiyi v. Zijietiaodong Inc.* and held that algorithmic recommendation operators should be subjected to a "stricter duty of care". [3]

For this tendency in the judicial trial, the academic circles are having a heated discussion. Xiong Qi (2020) questions the reasonableness of the "higher duty of care" triggered by algorithmic recommendations. [4] Most scholars (e.g., Zhang Jiyu, Wang Saifei, Peng Guibing) agree that a "higher duty of care" is reasonable and necessary. [5] However, some scholars (Chu Meng and Ren Anqi) go further, arguing that personalized recommendation service providers with copyright infringement risks should have the obligation to filter infringing content beforehand. [6]

Comparing these two obligations, the higher duty of care is a broader concept, which is reflected in the fact that the algorithm recommends that the operator should pay more attention to whether the work infringes on copyright and deal with the infringement before, during and after the event. The pre-monitoring obligation is mainly reflected in the introduction of the filtering mechanism, which is more mandatory, and the requirements for algorithm recommendation operators are also higher.

The author believes that the algorithm-recommended short video platform should bear a higher duty of care, but the obligation of pre-monitoring should be prudent.

3 Major countries: the Pre-Monitoring Obligation is Not Enshrined in Law

From the perspective of comparative law, the European Union, China and other countries have borrowed from the *Digital Millennium Copyright Act* of 1998 (DMCA) of the United States, forming a more unified notice-and-takedown procedures as the core of the copyright infringement determination rules. In recent

years, the new background of algorithm recommendation has brought new thinking and discussion to many countries, but the pre-monitoring obligation has not been clearly stipulated.

3.1 US: Prudent Fine-Tuning - Further Clarify and Refine the Existing Norms

According to the safe harbor principle in DMCA, ISPs are not obligated to actively censor content uploaded by users. And after subjectively knowing or receiving a notice of infringement from the right holder, they are not liable for copyright infringement if they take the necessary measures, such as deletion. This principle alleviated the worries of ISPs at that time about whether they would be responsible for content dissemination on the platform [7], which was conducive to the development of the emerging Internet industry.

Nowadays, there are two main doubts about the safe harbor principle. First, the expansionary application in judicial practice is suspected of helping infringers evade their responsibilities. Second, in the face of the growing strength of the Internet industry and the emergence of new business models such as algorithm recommendation, is there still a practical need for the principle's original purpose of protecting the interests of network service providers.

Even if there is a great call for reforming the existing system, the response of the United States is still very cautious. Instead of imposing the platform the pre-monitoring obligation, it has chosen to stay within the framework of the safe harbor principle, with the refinement of "actual knowledge" and "red flag knowledge" and other provisions, as well as requiring the platform to conduct more effective aftercare measures to protect copyright interests.

3.2 EU: Rectifying and Weakening of the "Best Efforts" Clause

EU legislation reflects the balance of interests between the local copyright industry and the extraterritorial (US) Internet industry. It has undergone a change of attitude, but it has never clearly stipulated the pre-monitoring obligation.

The EU's 2000 E-Commerce Directive draws on the US principle of safe harbor. With the expansion of the interests of the extraterritorial (US) Internet industry, the European Union issued the Directive on Copyright in the Digital Single Market in

2019, which requires platforms to eliminate as many threats to copyright protection as possible through the "best efforts" clause, to protect the local copyright industry, but this regulation has been questioned. [8] And then, in Article 7 of the Digital Services Act enacted in 2020, the EU explicitly excludes the platform's obligation of pre-monitoring, reflecting a legislative attitude that corrects and regulates the expansion of the duty of care.

3.3 China: Exploring Under the Existing Legal Framework

China's network information service governance is mainly based on the Regulation on the Protection of the Right to Information Network Dissemination and Tort Liability Law. The regulation of platform liability is also based on the principle of safe harbor. The Civil Code of 2021 clarifies that the network platform can adopt different treatment measures for online copyright infringement according to different service types, and further revises and improves the infringement treatment process of the network platform, adds the legal consequences of incorrect infringement notice, and gives the respondent the right to counter-notice. [9] All of the above belong to the improvement of the specific rules under notice-and- takedown, without making a substantive break with the safe harbor principle.

4 Why is it not Appropriate to Set the Pre-Monitoring Obligation of Short Video Platforms

Combined with China's first algorithmic recommendation copyright infringement case, we can try to analyze the reasons for the non-regulation by the major countries:

4.1 The Obligation of Pre-Monitoring Violates the Principle of Technological Neutrality of Algorithms

The principle of technological neutrality, i.e., substantial non-infringing uses, the act of using technology does not affect its neutrality. If a technology can be used for both legitimate and infringing purposes, then it cannot be presumed that the provider of the technology satisfies the requirements of joint tort liability just because the technology may be used for infringing purposes by others. The purpose of this rule is to avoid

hindering the use and progress of technology by not imposing too many obligations on technology itself.

Algorithm recommendation should be technology-neutral. In the judgment of *iQiyi v. Zijietiaodong Inc.*, it is considered that the algorithm recommendation technology is an auxiliary tool for the platform to provide network services to users, and it is not the object of judging whether the platform constitutes joint infringement. It can be seen that this case affirms the neutrality of the algorithm recommendation. In terms of how it operates, its core is to recommend content based on user's feedback to help users filter in massive information. This shows that the choice of content is in the hands of the user, the result of the algorithm recommendation is the mapping of the user's individual value orientation, and the algorithm recommendation technology only assumes a passive and negative role.

The pre-monitoring obligation does not meet the requirements of technical neutrality. Its essence is to improve the short video platform "know or should know infringement" standard, that is, at the beginning of the user's use of technology, the short video platform must be required to ensure that the user does not infringe to reduce the possibility of joint infringement. This is beyond the principle of technology neutrality. By default, once the user has infringed on the short video platform that provides algorithm recommendations, the technology provider "knows or should know" the user's infringement, which requires the technology provider to exclude the copyright infringement liability by pre-monitoring.

In summary, the technical neutrality of the algorithm recommendation should not be overturned to require the short video platforms providing the service to undertake the obligation of pre-monitoring.

4.2 Existing Norms are Still in Force, and the Creation of New Obligation is Fraught with Problems

There are two aspects that we need to consider before adding a new obligation of pre-monitoring:

First, necessity. Whether the old norms are still working, is the evaluation of the safe harbor principle. The U.S. Copyright Office's attitude towards the safe harbor principle is positive. Its research report argues that specific rules in the safe harbor principle need to be fine-tuned, but large-scale structural changes should not be made.[10] They respond to the problems encountered in practice by clarifying and

refining the rules and maximizing the role of existing norms, such as clarifying the legislative connotation of "list of infringing works" and "positioning information," clarifying the punishment rules for repeated infringement and improving the processing mechanism of infringement notice, rather than introducing the obligation of pre-monitoring to give the platform unnecessary burden. The relevant provisions in China's Civil Code embody a similar attitude to that of the US, that is, they recognize the role of the principle of safe harbor, but only improve it at the level of detail.

Second, operability. Adding a new obligation of pre-monitoring will bring a series of technical problems. According to China's current copyright infringement identification rules, the participation of short video platforms in the context of algorithm recommendation and whether they play an active joint infringement need to be identified in combination with individual cases. Therefore, if the platform is added with the obligation of pre-monitoring, it will inevitably lead to the confusion of obligations and responsibilities. For example, how to deal with a request that does not fulfill the pre-monitoring obligation but does not constitute infringement, and should the platform be liable for compliance in violation of that obligation alone? Perform the pre-monitoring obligation, but there are still infringement consequences, can be exempted? To what extent should the obligation of pre-monitoring be fulfilled? Is there a unified standard? Should large platforms and small platforms, different types of platforms be classified to assume the obligation of pre-monitoring?... All the above issues need to be discussed in depth.

To sum up, at this stage, setting the pre-monitoring obligation of short video platforms lacks sufficient necessity and operability.

4.3 The Introduction of a Filtering Mechanism has Practical Challenges.

One of the reasons why some scholars advocate the establishment of pre-monitoring obligation is the improvement of information management capabilities of short video platforms, and there are conditions to introduce filtering mechanisms. However, the filtering mechanism is expensive to build, the market threshold is high, and it is still immature, which may have a negative impact on the platform, users and market in practical applications. There are technical reasons behind this, and it is also because the review and filtering of copyright is inseparable from the cooperation of copyright owners.

The filtering mechanism will increase the compliance cost of the short video platform. In *iQiyi v. Zijietiaodong Inc.*, the court paid great attention to the operating cost of the platform. The judgment shows that if the platform can effectively prove that the cost of avoiding the consequences of infringement is too high, the court will be cautious about the higher duty of care. The author believes that this prudence is reasonable and necessary, because the introduction of the filtering mechanism does not necessarily have a significant effect on the prevention of infringement, but it will inevitably increase the burden on the short video platform and is not conducive to its development.

The filtering mechanism is likely to infringe on the user's freedom of expression. Since the database required for filtering is not yet complete, and it is difficult to identify whether the video constitutes infringement, the efficiency and accuracy of the existing filtering mechanism are not ideal. In this way, the immature filtering mechanism will threaten the freedom of expression of users, which can be corroborated by the frequent mistakes of Content ID put into practice by the EU.

The filtering mechanism would be a threat to a fair, just and fully competitive market order. Under the requirement of pre-monitoring obligation, the head short video platform has sufficient financial and technical capabilities and is more likely to operate in compliance, while small and medium-sized platforms with limited technology and funds will be squeezed out due to the inability to comply. This may create a monopoly position for filter technology developers and owners, which is not conducive to market competition and industry innovation.

The monitoring of copyright infringement is inseparable from the participation of copyright owners. Even if the filtering technology is mature, it is difficult to achieve full filtering with only the power of the short video platform. The cooperation with copyright owners on copyright protection issues must be considered.

5 Path to Improving Copyright Protection

As mentioned above, even in the context of the algorithm, the platform should not be given the pre-monitoring obligation, but this does not mean ignoring copyright protection. We should try our best to pursue better protection under the existing system of rules and balance the interests of the platform and copyright parties.

5.1 There Should Indeed be a Higher Duty of Care, But it is not Appropriate to set the Pre-Monitoring Obligation.

Objectively, the platform improves user stickiness based on algorithm recommendation technology, achieves greater benefits, and indeed brings greater copyright infringement threats to copyright owners. The higher duty of care of algorithm service providers should be affirmed.

However, the higher duty of care does not mean that the application space of the "safe harbor principle" under the neutrality of technology is excluded. According to the legal provisions and judicial practice of major countries, the pre-monitoring obligation is not the best option to deal with the governance of copyright issues in the new context of algorithm recommendation.

For the management of video content, in addition to algorithm recommendation, the platform also includes machine detection, user feedback, manual review and other aspects. So without setting the obligation of pre-monitoring, there is still room for other links to reduce the possibility of infringement and damage results.

Therefore, we should focus on the during and after parts, so that the short video platform with algorithm recommendation function can fulfill the "higher duty of care". To achieve this goal, legislators can improve the rules from many aspects, and market players, such as platforms, copyright parties, and industries, are also promising.

5.2 Normative Level: Optimizing the Principle of Safe Harbor, Linking Laws and Regulations with Professional Autonomy.

From a legal point of view, we should focus on the regulation of the during and after parts. On the one hand, encourages the copyright owner to notify and stop infringement in time; on the other hand, improves the requirements for the platform to deal with copyright infringement videos, including timely processing and effective processing.

First of all, to maximize the role of notice. From the perspective of copyright owners, they should actively exercise their rights. When the right of communication through information network is infringed, they should send notice in time to inform the relevant parties, stop the infringement in time, and try to make the notice standard and valid. From the perspective of the judiciary, when determining the effectiveness of the notice, attention should be paid to the content rather than the formal

requirements. In *iQiyi v. Zijietiaodong Inc.*, the court held that although the infringement notice issued by iQiyi did not conform to the form of statutory notice, it still achieved the purpose of notification, so the defective notice did not affect the determination of the infringer's "should know".

Secondly, regulating the identification of "necessary measures" in terms of both effectiveness and efficiency. In China's first algorithmic recommendation copyright infringement case, the court held that "necessary measures" should meet the substantive requirements of effectively stopping and preventing apparent copyright infringement. The author believes that in addition, measures should be taken to deal with repeated infringement users and avoid uploading the same infringement content again. In addition, the timeliness of processing also needs to be taken into consideration, as whether the platform takes timely measures reflects its subjective attitude and the degree of fault, and often has a significant impact on the outcome of the copyright infringement.

In addition, formulate industry rules that are linked to legal norms. In the case of *iQiyi v. Zijietiaodong Inc.*, the court put forward expectations for industry autonomy, pointing out: "What measures should be taken The court should not and cannot directly make requirements. It should be left to the Zijietiaodong Inc. to formulate corresponding strategies according to the actual situation of its services and users, make decisions independently, and verify its actual results in individual cases, that is, whether it can achieve timely and effective prevention and prevention of obvious violations and consequences". The principled provisions of the law cannot be exhaustive, so industry norms can be supplemented to form norms on the optimization and correction of algorithm services and enhance the ability of the platform to protect copyright.

5.3 Practical Level: Explore the Construction of Long and Short Video Copyright Cooperation Mechanism

Although the interests of the Internet industry and copyright owners seem to be opposite, the way to maximize benefits is still contained in cooperation. Based on optimizing the existing rules, we should be looking for a way out through copyright cooperation between long and short video platforms. [12]

The owner of the right of communication through information network of film and television works is usually a long video platform. On the one hand, the copyright

cooperation mechanism between long and short video platforms can help solve the copyright problem of short video platforms and introduce more high-quality content for short video platforms. On the other hand, it can bring exposure to works on long video platforms and introduce more users.

This cooperation mechanism has been tried. In 2022, iQiyi and Tik Tok, the respective head platforms of long and short videos, have also reached a copyright cooperation agreement on the re-creation of short videos, reflecting the development trend from opposition to cooperation.[13] Both sides have also benefited initially from cooperation. The regular and orderly network environment will stimulate more excellent content creators and produce more high-quality second-creation content, thus effectively releasing the strong ability of short videos to attract viewers, forming a virtuous circle and inputting power for copyright owners.

6 Conclusion

When dealing with the issue of the right of communication through information network in the context of algorithmic recommendation, it is a trade-off between the interests of the Internet industry and copyright owners. The author recognizes that algorithmic recommendation technology objectively triggers higher risks of copyright infringement, and believes that a higher duty of care is indeed necessary, but the introduction of the pre-monitoring obligation still lacks the theoretical necessity and practical applicability. The article proposes to strengthen the platform's fulfillment of the higher duty of care, and to form a diversified protection system for the right of communication through information network through cooperation among industries and enterprises.

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