Video Sharing Sites' Fault Identification in Indirect Copyright Infringements

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Abstract: Under the guidance of "technical value theory" taking both the natural and social attributes of technique into consideration, the fault in indirect infringements of copyrights by video sharing websites includes two forms: "intention" and "negligence". As an objective criterion of negligence identification, the duty of care, is the natural extension of the security obligation in cyberspace; for a video sharing website, the foreseeable obligation of infringements is the main content of the duty of care; and it is highlighted that the degree of the duty of care hinges on different factors. For the form of liability, a video sharing website faces the difficulties of excessive costs in debt recovery after assuming the complementary liability, joint and several liability is thus alienated as an aggravating responsibility. However, according to the causative potency between the fault of a video sharing website and the infringement results, the several / shared liability can avoid the overburden to a video sharing website and distribute the risks of inadequate compensation based on the principle of fairness.

Keywords: video sharing website; should know; technical value theory; duty of care; several / shared liability

1. Issue to be resolved

"Video sharing website" refers to a website that provides an information storage and a release platform, and enables users to upload, watch or download and share video content including hit films and television works and sporting events on the Internet. Without the permission of the copyright owner of a video file, however, a network user uploads such video files to a video

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sharing website for the non-specific third person to appreciate or download at the time and place he/she has chosen. In this context, the network user's behavior constitutes a direct infringement on the copyright owner's right of dissemination on information networks. The video sharing website, providing the network user with uploading and sharing services, offers the tools to make the occurrence of a direct copyright infringement possible. In terms of objective elements, the behavior of the video sharing website constitutes an indirect infringement, and the identification of the video sharing website's subjective fault becomes the key to judging whether the video sharing website assumes the liability for indirect copyright infringements. The identification of a video sharing website's subjective fault is crucial to the interests of the network user, the video transmission platform, and the public and to the maintenance of cyberspace order and advancements in network technique.

According to Article 36-3 of the *Tort Law of the People's Republic of China*, "Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user." This shows that the "know" plays a key role in judging whether the network service provider assumes the liability for infringements, yet there is no further stipulation on the specific content of the "know".[①] According to the *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks* (hereinafter referred to as *Interpretation No. 20 [2012] of the Supreme People's Court*), network service providers' faults include whether they "clearly know" or "should know" a network user's infringements on other's right of dissemination on information networks. From the date on which the *Interpretation No. 20 [2012] of the Supreme People's Court* took effect, the provision that "know" is only interpreted as "clearly know" stated in the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Networks* (*Interpretation No. 11 [2006] of the Supreme People's Court*) was abolished. [②] Also, the *Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks* (2013) explicitly stipulates in Article 23 that, "a network service provider that provides searching or linking services to a service object", "if it knew or should have known that the linked work, performance, or audio-visual recording has infringed upon an other's right, it shall bear liability for joint infringement". Based on these, "should know" has been gradually acknowledged as one of the fault forms of the network service provider in the existing legal system of China.

The academic circle is increasingly inclined to endorse the view of "know" including "should know". The opposing view comes down to the fact that if "know" is interpreted to include "should know", a network service provider must undertake the obligation of prior review. This, however, is unfair and unreasonable for the

① From the perspective of legislative documents, "clearly know" used in the first draft and the second draft of the *Tort Law of the People's Republic of China* is modified into "know" in the third draft and "know or should know" in the fourth draft, and "know" in the final draft. A series of changes probably show that "know" should include "clearly know" and exclude "should know," alternatively, legislators use the term "know" to deliberately evade the question of choice between "clearly know" and "should know," thereby leaving space for legal interpretation. (See: Feng Shujie. On Fault Forms of the Indirect Infringement Liability of Network Service Providers [J]. China Legal Science, 2016(4): 186.)

② Article 4 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network*: "The People's Court may investigate the contributory infringement liability of a network service provider that provides substantive services knowing of the Network users' acts of infringement of other people's copyright through the network, or that has been given warnings by the owner of the copyright to take measures to remove the infringing contents, in accordance with the stipulation of Article 130 of the *General Principles of the Civil Law*."

network service provider, [①] and hinders the Internet development and freedom of expression. This viewpoint, therefore, has been widely questioned as it could not be verified by facts. While for people in favor of "know" including "should know", the duty of care for the network service provider cannot be completely exempted, or else fairness could not be guaranteed. Only when the network service provider assumes a certain duty of care, can it fully prevent and restrain the occurrence of infringements on the Internet and then protect civil rights and interests. In addition, although the neutrals deny[②] that "know" includes "should know" in principle in consideration of the application scope of "notification rules", they do acknowledge this view under special circumstances. In the judicial practices, courts at all levels have gradually expanded the scope of a network service provider's fault identification by recognizing that "know" includes "should know", [③] after the *Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks* was promulgated. For instance, Article 29 of *Several Opinions of Zhejiang Provincial Higher People's Court on the Trial of Cases Involving Copyright Disputes over Computer Network*[④] enacted by Zhejiang Provincial Higher People's Court in 2009 clarifies the opinion that the subjective fault of a network service provider may be identified based on the reason that the network service provider "should know".

A consensus on the conclusion that a video sharing website's "know" is identified based on the deduction that the video sharing website "should know" has been reached in the legislation and judicial fields, and will also be possibly reached in the academic circle. However, the substantive issue has not been resolved yet, namely, "should know" as the subjective requirement of a video sharing website conflicts with the consensus that the video sharing website has no obligation to review the video contents uploaded by network users[⑤]. The primary causes of the conflict include: researchers hold different opinions on the specific content of "should know"; and have an unclear understanding on the relationship between the exempt obligation of review and the duty of care to identify the negligence. Thus, this paper attempts, by sorting out the theories concerning the fault forms in the context of "should know", to examine and correct related viewpoints and to demonstrate that whether "should know" includes "negligence". By doing so, this paper aims to improve the fault identification system related to the indirect copyright infringements of video sharing websites, further clarify the system concerning the video

① Professor Yang Lixin holds that, "Edition or review is not involved in the process of work and information publication on the Internet. Any network user can upload articles to the Internet, and network service providers only provide platform support for the network users in this regard. If network service providers are required to bear the same liability as editors and publishers of news media to review the works prior to publication, it is unfair and unreasonable for network service providers." (See: Yang Lixin. the Tort Law [M]. Shanghai: Fudan University Press, 2011: 369.)

② If the information infringing the copyright of the information owner has not been deleted within a certain period, the indirect infringement is constituted for the reason that the network service provider "know" the infringement act. If the assumption is tenable, the existence of "notification rules" makes no sense. (See: Wang Liming, Zhou Youjun, Gao Shengping. Study on Knotty Issues of the Tort Law [M]. Beijing: China Legal Publishing House, 2012: 332–333). Such kind of questions can be solved properly by adjusting the specific applicable conditions of the "notification rules."

③ Take the case of "Ciwen Media suing the CNC (Hainan)." The Supreme People's Court holds that although the fact that the plaintiff has not sent infringement notification to the defendant and the defendant deletes the work infringing the copyright immediately after receiving the copy of pleadings, "the deep link provided by the defendant is different from the common link targeted to a third-party website, thus, the CNC (Hainan) shall be obliged to review the contents uploaded to the channel to a certain extent." (See: (2009) MTZ No. 17)

④ Article 29 of *Several Opinions of Zhejiang Provincial Higher People's Court on the Trial of Cases Involving Copyright Disputes over Computer Network*: "To judge whether a network service provider "should know" shall be based on the fact that whether the network service provider has fulfilled the reasonable duty of care. In general, the network service provider does not have the ability to review whether the information provided by network users is infringing, nor does it have the obligation to actively review and monitor whether all information provided by network users is infringing prior to the publication, yet the network service provider shall assume the certain obligation to examine the legality of all information. In case that the network service provider who shall shoulder the duty of care hasn't discovered the information after filtering and monitoring the information infringing upon the copyright by means of reasonable and effective technical measures, it shall not be deemed that the network service provider has not fulfilled its duty of care."

⑤ Article 8–2 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks*: "Where a network service provider has not been proactive in reviewing a network user's infringements on other's right of dissemination on information networks, the People's Court shall not judge the fault of the network service provider accordingly."

sharing websites' obligation to review video files uploaded by network users, sweep away the logic obstacles for those consensuses which have been reached or are in incubation among legislative, judicial and academic circles and prevent the original meaning of the copyright law from being confused due to the advancement of network techniques, thereby resolving the issues through the lens of the copyright law's basic principle and spirit.

2. Transformation of thought about identification of "should know"

According to Article 6 of the *Tort Law of the People's Republic of China*, "one who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability". Yet the fault in this regard includes two forms: "intention" and "negligence". However, "should know" can be included among the constitutive factors of infringement liability as long as it is deemed as the corresponding subjective fault. To defuse the conflict between a video sharing website's fault and the logic that it has no obligation to review, the priority is to clarify the meaning of "should know" in the aspect of the form of liability, that is to say, to determine "should know" as "intention" or "negligence". The blur issue has given rise to judge's misunderstanding of the tort law, copyright law and other normative systems, thus bringing about the different criterions of judicial judgment.

2.1 Technical neutrality theory: "should know" only interpreted as "intention"

Interpreting "should know" as "intention" shall be based on the premise that a video sharing website objectively does not know that a network user has uploaded video files infringing other's copyright on the website. Under the guidance of the technical neutrality theory, when the video sharing website does not know such infringement fact, it is unacceptable to impose infringement liability upon the video sharing website. If a video sharing website is given the obligation of prior review, the legitimate basis could be provided for the case that the video sharing website should assume the liability for infringements even though it does not know the infringement fact. Under the circumstance that there is a consensus that a video sharing website is not given the duty of review, if it hopes to evade the conflict between "should know" and no obligation of review, there is a view that the necessary basis for requirement that the video sharing website "should know" can be changed, namely, the video sharing website objectively does not know the contents infringing other's copyright . From the point of the argumentation that whether a video sharing website objectively knows the contents infringing other's copyright, however, the view denies that "should know" can be interpreted as "negligence" and equates "should know" with "have reason to know". "Have reason to know" is supported by the cognition and inference achieved on the basis of specific fact or environment, in other words, it is inferred that a video sharing website knows the objective infringement fact in the legal sense, according to the facts relevant to infringement behaviors.

According to Article 9 of *Some Provisions of the Supreme People's Court on Evidence in Civil Procedures*, "the fact that can be induced according to legal provisions or known facts or the rule of experience of daily life", needs "not be proved by the parties concerned by presenting evidences". In line with the evidence theory stated in the procedural law, the presumption rules are established to solve those issues that could not be sorted out based on objective facts in the process of solving case, and presume the fact that is still unknown and difficult to ascertain on the basis of known facts and combined with legal provisions and experience rules. There must be a high degree of probability or consistency between the result derived from the presumption rules and objective

facts. And the authenticity of a fact based upon the provable basic fact embodies the effect of a presumption. In both cases, either a video sharing website "know" the infringement fact through the presumption rules or "clearly know" the fact, the video sharing website's subjective intention is embodied. However, different from the latter case that eliminates any reasonable doubts in proof standard and any fracture in proof logic, the former merely seeks for the high degree of probability in proof standard but does not shut reasonable doubts out, maintaining the presumption result before the emergence of a contrary evidence to overturn the result. If there is no evidence to prove that a video sharing website clearly knows the infringement fact, content, popularity, production cost and other factors of a video file uploaded by a network user and circumstantial evidences such as the list posted on the website can become the factual basis to presume that the video sharing website knows the infringement fact.

"Should know" being interpreted as "presumed to know" and "intention" rather than "negligence" can be found in China's copyright law existing system. Article 9 of *Interpretation No. 20 [2012] of the Supreme People's Court*① lists all factors to presume that a network service provider "should know" the infringement fact. This article is aimed to prove a network service provider "probably know" the infringement fact, and give the conclusion that the network service provider "know" the infringement fact based upon its applicable presumption rules. Therefore, "should know" shall be interpreted as "intention" in the article. According to Article 10 of *Interpretation No. 20 [2012] of the Supreme People's Court*, where a network service provider recommends hit films and television works by setting list, contents, index, descriptive paragraph and brief introduction among others, it can presume that the network service provider should know the infringement fact. And Article 12 of *Interpretation No. 20 [2012] of the Supreme People's Court* stipulates, if a network service provider that offers information storage space places hit films and television works on the home page or other main pages, initiatively chooses, edits, sorts out and recommends the themes and contents of hit films and television works, or sets special list for these works, it can presume that the network service provider should know the infringement fact. Above two articles give the indirect evidences to presume that the network service provider "know" the infringement fact, so as to ensure the high consistency of presumption result and objective fact.

It is thus evident that those who take an affirmative view on "know" including "should know" have not fully understood "should know" as "negligence". In the case that a video sharing website probably knows the infringement fact based upon the presumption rules, the video sharing website constitutes the subjective intention. This can successfully evade the dispute over whether the network service provider assumes the general obligation of review. President Chen Jinchuan holds that, an obvious infringement fact is the prerequisite for "should know" or "have reasonable reason to know", in other words, if the fact or circumstance

① Article 9 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks*: "The people's court shall, based on whether the specific fact that a network user infringes on the right of dissemination on information networks is obvious and by taking consideration into following factors, presume that whether a network service provider should know the infringement fact: (1) the capacity of information management the network service provider shall have, which is determined according to the nature and mode of service and the possibility of infringement therefrom; (2) the type and popularity of work, performance as well as audio and video recordings and the obvious degree of infringement information; (3) whether the network service provider takes the initiative to choose, edit, modify and recommend the work, performance as well as audio and video recordings; (4) whether the network service provider has actively taken the reasonable measures to prevent the infringement; (5) whether the network service provider has established the convenient procedure receiving the infringement notice and reasonably responded to the notice in time; (6) whether the network service provider has taken corresponding reasonable measures against the repeated infringement of the same network user; (7) other related factors."

of the obvious infringement act exists and a network service provider shall be aware of the infringement fact therefrom, it is presumed that the network service provider is at fault. A video sharing website's obligation to review the video files uploaded by a network user will not be an influencing factor to judge that whether the video sharing website assumes the liability for infringements, in the event that "should know" is interpreted as "presumed to know". To interpret "should know" as "intention" is based on the fact that the video sharing website knows the infringement fact of the network user, "know" herein embraces two statuses, i.e., "know" at realistic level and "know" at legal level. To interpret "should know" as "intention" in the tort law echoes the purpose to standardize a network service provider's liability for infringements in the tort law, narrowing the liability scope of the network service provider and thus contributing to the development of network techniques in current China. However, denying the condition that a video sharing website does not know the infringement fact cannot fully resolve the conflict. Generally, "should know" belongs to a kind of "negligence", and the solution that takes "negligence" as the doctrine of liability fixation remains necessary.

2.2 Transformation of thought: technical neutrality theory to technical value theory

"Should know" being interpreted as "intention" rather than "negligence" is based upon the technical neutrality theory. Yet it needs to further demonstrate whether the assumption of the "technical neutrality" proposition consists with the objective fact that the technique is not value-laden in itself. Supporters of the technical neutrality theory believe that the network only serves as a pure tool for information dissemination, and thus there is no value judgment about it. The mandatory requirement for a network service provider to assume the obligation of prior review will go against the objective laws of the Internet and not conform to the objective reality. This can be proved by the fact that countries all over the world generally hold the attitude of technical neutrality to a network service provider. To judge whether the technique carries value is the key to interpreting "should know" as "negligence" or "intention". In this regard, the argument based on other countries' practices does not touch the essence of the issue, largely weakening the argument strength. In fact, to demonstrate the authenticity of the "technical neutrality" proposition shall return to the proposition itself. This is where the weakness of current research lies, however.

Supporters of technical neutrality theory take the "technical-value neutrality theory" as the theoretical support. According to the theory, ethically, there is no right or wrong in terms of science, and science is thus neutral in value. Science has nothing to do with values but facts, which is its natural attribute. As an application form of the science, the technique can be used as a variety of purposes. When the technique is used by a subject, it only serves as a tool to serve the purpose of the subject and has nothing to do with other social factors. Thus, the user of the technique shall directly take the consequences arising therefrom. The subject engaged in the technical research, often adheres to the scientific laws that are true for scientific technique itself. As the research motivation is to address technical problems and on the premise that the research process is free from the interruption of political and ethnical factors, the research result is the solution to technical problems and thus free of any value orientation, which can further reach a conclusion that the technique itself is neutral in value. As the network technique, a typical modern technique, is influenced by the value neutrality of science, the value neutrality of network technique comes naturally. Although the "technical neutrality" is concluded from the natural attribute of the technique, because of the research subject's own factor and the political and cultural environments in which the technique lies, the technique not only embodies its natural attribute but also its social attribute not to be ignored.

The social attribute of the technique appears as the cognitive value it carries. Technical research derives from a certain kind of ought-to-be value that comes from the holistic view of the society in most cases. In the course of technical research and development, a research subject cannot fully suppress interference of other factors as those supporters of technical neutrality theory have conceived. And it is impossible for the research subject to exclude his/her value priorities when choosing research conception and path among others. In contrast, the research subject often integrates his/her mentality and thought into the technical work. The value carried by the technique is interrelated with the cultural environment of the society. As a product of social culture, the technique can dynamically mirror the orientation of social value. The orientation of technical value can contribute to the reconstruction of social value on the whole. Therefore, the technical neutrality theory has its one-sidedness as it neglects the social attribute of the technique. The technical value theory more accords with the reality that the technique is value laden. As an important modern technique, the network technique embraces natural and social attributes. And its natural attribute appears as a way of information exchange in the process of network technique operation, yet the network is created by the person in society and is bound to serve human's demands. Furthermore, the activity that satisfies human's demands is a social process, making the network technique have a certain social attribute. Specifically, a video sharing website, as an information dissemination media, is not valueless in the process that the information is uploaded by a network user to a network platform and then reach another network user, and the internal material and symbolic structures of a video sharing website play the role of interpreter and shaper in determining what kind of and how information will be encoded and transmitted and in the course of how information is encoded. The structure of a video sharing platform determines the nature of information, and material and symbolic structures of the platform bring about the value deviation and orientation. In addition, the value orientation of the network technique is influenced by social environment where the network technique lies. On the one hand, the value orientation of the whole society has an impact on the research and development as well as application of the technique, on the other hand, the network technique, as a part of social culture, constantly influences the development of social culture and the reconstruction of value orientation. Hence, the conclusion that the technique embraces value orientation, which is drawn based on both natural and social attributes of the network technique, demonstrates that the "technical neutrality" proposition is untenable.

2.3 Technical value theory: the necessity to identify "should know" as "negligence"

There is no deny that "should know" is more commonly interpreted as "fail to know due to negligence" in addition to "presumed to know", that is to say, a video sharing website has the obligation to "should know" but violates the obligation, laying it on the doer. As described above, in the eyes of the supporters of the technical neutrality theory, "should know" can only be interpreted as "presumed to know". This is not based on the obligation of "should know", however. After the transformation of technical neutrality theory to technical value theory, the network has been given the consciousness factor of designers or operators, and therefore can be deemed as the natural extension of its personality. This has transcended a website's nature as a pure tool, and makes it possible that the website operator shall assume the obligations under the civil law. In the context, the interpretation of "should know" as "fail to know due to negligence" comes reasonably. However, the qualification for shouldering a certain obligation to "should know" does not mean the certainty of the assumption of the obligation. To impose the obligation on a video sharing website that it "should know" the infringements of the video files uploaded by a network user on other's copyright, the biggest obstacle is that the

network service provider has no obligation to review in advance whether the network user infringes on other's right of dissemination on information networks according to related provisions of existing law. The exemption from the obligation of prior review involves the balance of the interests of multiple parties on the network, as a common practice of countries worldwide, relieving the burdens of a network service provider, and becoming conducive to the development of the network technique. Nevertheless, above argument is not verifiable in objective fact, weakly arguing for the standpoint that a network service provider does not assume the obligation of "should know". In order to argue for the hypothesis that a video sharing website shall assume the obligation of "should know", it is necessary to revalue the interests balance that has been reached, and argue for the obligation of "should know" shouldered by the video sharing website.

After the Article 36 of the *Tort Law of the People's Republic of China* was rolled out, especially after the law took effect, the majority of academics held the counterviews on the opinion that "know" includes "should know", namely, "negligence". They argued, for example, that "imposing the obligation of prior review on network service providers will go against the objective laws of the Internet and not conform to the objective reality" and "the network service providers are different from traditional publishers and thus impossibly assume the general duty of review". These counterviews are reasonable to some extent, as network users were the passives at that time and network service providers had the relatively poor ability in control. On this background, not taking the negligence as the identification criterion can not only balance the interests of both sides but also expedite the healthy development of the network then. The legislator of Article 36 of the *Tort Law of the People's Republic of China* uses "know", a legal terminology leaving room for interpretation, to respond to subsequent specification problems arising from the aggravation of network infringements. As the Internet environment changes, the interpretation of "know" shall keep pace with the changes of social reality. In the Internet environment that has experienced profound changes, network users have gradually upgraded as the information makers from information receivers, with their status being active rather than being passive. Some hold that as the statuses of both network service providers and network users have changed greatly, network service providers find it more difficult to effectively monitor the network users' behaviors like before, and their abilities to control and anticipate the network users' behaviors are declining. They see the control ability of a network service provider from the static perspective, however. In fact, the monitoring ability of a network service platform is increasingly improved as the development of the network technique[①]. The platform has had the ability to judge whether the video file uploaded by a network user infringes on the copyright, or else the powers of a network service provider and a network user will be out of balance, and the cyberspace order will fall into chaos accordingly. The monitoring ability of a video sharing website has been improved while the phenomenon that a network user infringes on others' copyright of video files remains widespread. Under the background, it is necessary to impose the obligation of "should know" on a video sharing website.

Before determining whether to impose the duty of care on a video sharing website about the video files uploaded by a network user, it needs to consider whether the duty of care keeps in line with the general theory of the tort law. As the risk is the source of the duty of care incurred, the maker or controller of the risk

① Thanks to the development of digital watermarking and fingerprint technologies, copyright owners can embed an invisible label in the digitized works, which is used to describe the status, rights ownership and authorization of a work, and track its use and dissemination. While a video sharing website can, by leveraging advanced filtering technology, compare the video files uploaded by a network user with the videos stored in the database, so as to identify those video files uploaded without permission. (See: Wang Qian. Study on Copyright Infringement of Video-Sharing Websites [J]. Studies in Law and Business, 2008(4): 49.)

shall assume the obligation to foresee and prevent the damage therefrom. At the same time, when providing convenient service for a network user, a network service provider offers available tools for the network user to infringe on other's copyright and even induce the occurrence of direct infringements on other's copyright. Meanwhile, a network service platform acquires direct economic interests from the service it provides. Therefore, the network service platform, as a kind of information dissemination tool, shall control the risk within the scope of its services. The source of such kind of risk is the personnel who make such kind of risk on a network service platform. If the duty of care is not imposed on a network service platform, a network user will become the bearer of all risks at last, which will bring about the unfair and unreasonable results. Besides, imposing the duty of care on a video sharing website also conforms to the cost – benefit law in the economics. By measuring the cost and benefit arising from the obligations of a video sharing website, the abovementioned unfair and unreasonable results due to vacuous contents of social policies can be avoided. The direct cost arising from the obligation of "should know" includes the cost of time spent in checking a mass of files uploaded by unspecified network users, and the cost of money spent in establishing the database of video files protected under the copyright law and available for reference. Specifically, the cost of time is the main component of total cost and can be saved by developing the information filtering technology. The benefit arising from the duty of care imposed on a video sharing website refers to the decrease in the video sharing website's fault identification in indirect infringements thanks to the full performance of its duty. The benefit arising from the duty of care imposed on a video sharing website about the video files uploaded by a network user far outweighs the cost spent in fulfilling the duty of care. And in the case that a video sharing website's interest is maximized, the increase of total social welfare is also guaranteed. From the perspective of the economics, it is necessary to impose the duty of care on a video sharing website.

In addition, although the existing copyright law of China relieves a network service provider from the general obligation of prior review, it does not mean that the network service provider will not shoulder any duty of care. According to Article 8-2 of *Interpretation No. 20 [2012] of the Supreme People's Court*, "where a network service provider has not been proactive in reviewing a network user's infringements on other's right of dissemination on information networks, the People's Court shall not judge the fault of the network service provider accordingly". In the clause, the failure to proactively perform the obligation of review is deemed as the only factual factor to judge whether the network service provider is at fault. Yet it does not deny the negligence as the doctrine of liability fixation, namely, the existence of other duties of care of the network service provider is not negated. According to the provisions of Article 16 of the *Administrative Provisions on Internet Audio-Visual Program Service* (2015)[①], the audio-visual programs provided by Internet audio-visual program service entities and received by network operation entities shall keep in line with the provisions of the laws, administrative regulations and department rules. This article also stipulates that, the illegal contents that disturb the social

① Article 16 of the *Administrative Provisions on Internet Audio-Visual Program Service*: "The audio-visual programs provided by Internet audio-visual program service entities and received by network operation entities shall keep in line with the provisions of the laws, administrative regulations and department rules. Those audio-visual programs that have been broadcast shall be kept intactly for at least 60 days. Audio-visual programs shall not involve the following contents: (1) those which go against the basic principles prescribed and set by the Constitution; (2) those which endanger the national unity, sovereignty and territorial integrity; (3) those which divulge state secrets, endanger national security or tarnish national honor and interests; (4) those which incite national hatred or national discrimination, undermine national unity, or infringe upon national customs and habits; (5) those which propagate evil cults or superstition; (6) those which disturb public order or destroy public stability; (7) those which induce minors to commit unlawful acts and propagate violence, obscenity, gambling and terrorist activity; (8) those which insult or slander others, or infringe upon the individual privacy and lawful rights and interests of others; (9) those which endanger public ethnics or the excellent culture tradition; (10) other contents prohibited by the laws, administrative regulations and national legislation."

order, undermine the social stability, insult or slander others and infringe on other's privacy are prohibited to provide. Based upon above content, a video sharing website has the obligation of prior review as the operation entity of audio-visual programs. But a conflict will arise between above two effective articles if the provision of the former one is understood to exempt a network service provider from all duties of care. Moreover, with regard to the identification of the duty of care of a video sharing website, the legal obligation of a network service provider is not merely limited to the stipulations of the copyright law according to which the nature of service, marketing and profit models of the network service provider shall be judged. In addition, the network service provider shall abide by the principle of honesty and credibility stipulated in the civil law, and fulfill the legal obligation under the principle of honesty and credibility. After balancing the interests between a network service provider who gains benefits from network service it offers and has the ability to monitor and prevent the infringement act and the copyright owner, it may give the network service provider a certain obligation to review and monitor the contents disseminated on the network, which is obviously fair for both sides. This shows that the copyright law does not completely exempt a video sharing website from the duty of care. It merely involves the scope and degree of the duty of care.

3. Scope and degree of the duty of care

According to the above mentioned, it is necessary for a video sharing website to assume the liability for negligence in the case of indirect infringements on other's copyright, and the duty of care shall be the objective criterion of negligence identification. The duty of care embraces the establishment and the breach of such duty, with the former as the core content. While establishing the duty of care, it needs to consider the maintaining of the basic order necessary for community life and ensure the reasonable expectations of community members for their attention to others' behaviors. At the same time, it also needs to consider the reasonable limits on the duty of care, so as to avoid that the stricter requirements for the duty of care will influence community members' positivity in this regard. By reviewing the establishment of the duty of care targeted to a network service provider in the existing tort law and copyright law, we can find that the video sharing website will only assume the obligation to curb the infringements after it is informed of such infringement act by the copyright owner. In terms of this establishment, we can see that it is difficult to effectively curb the network infringement act and meet the reasonable expectation of community members for a video sharing website. Hence, it is necessary to take negligence as the doctrine of liability fixation in a video sharing website's indirect infringements, and it is inevitable to reset the scope and degree of the duty of care based upon the negligence theory. However, two factors shall be taken into consideration when resetting in detail the duty of care, namely, a video sharing website's positivity affected by the overloaded duty of care and the influence of judge's discretion on the establishment of the duty of care.

3.1 Nature of the duty of care: the relationship with the security obligation

To discuss the scope and degree of the duty of care, first we need to define the nature of related duty of care of a video sharing website. According to Article 37 of the *Tort Law of the People's Republic of China*, "the manager of a public venue such as hotel, shopping center, bank, station or entertainment place or the organizer of a mass activity shall assume the tort liability for any harm caused to another person as the result of his failure to fulfill the duty of safety protection." The security obligation in public places enjoys its universality

and belongs to a basic task. In the context that the network technique is increasingly influencing the lifestyle of the public today, a video sharing website becomes more open and socialized and demonstrates the same characteristics as a public place in reality. Against the backdrop, the operators of a video sharing website play the same role as the managers of a public place. To this end, it is necessary to make an accurate judgment on the relationship between the duty of care and the security obligation under the tort law when determining the nature of the duty of care assumed by a video sharing website. To be precise, is the duty of care a manifestation of the security obligation in a video sharing website or a kind of obligation that is different from the security obligation? In the latter case, how to distinguish between the two?

As for the relationship between the duty of care shouldered by a video sharing website and the security obligation under the tort law, some believe that there is homogeneity between the two, and the duty of care in cyberspace should be the natural extension of the security obligation in social space. "A person opening or joining the cyberspace has the security obligation to others there and shall take reasonable care of others' rights and interests". Based on the same legal basis, therefore, the duty of care assumed by a network service provider belongs to the security obligation mentioned here. Others, through the lens of the value rationality concerning the duty establishment, hold that a network service provider's security obligation can balance the interests of all parties related and make the social total cost fairly split. While objectors argue that a network platform is different from a social place in reality. The reason is that the network platform is a risk controller rather than a risk maker. Moreover, the network platform has never directly benefited from the act of infringements upon others. The duty of care of the network service provider directs toward the third person other than the network user, yet the third person is not the subject within the control scope. Above views mirror the different cognitions of the public space and the social cyberspace in the academic circle. Those who support the security obligation applicable to the cyberspace claim that there is no substantial difference between the cyberspace and the public place, while objectors retort upon supporters on the ground of the differences between the two spaces.

This paper holds that there is not essential difference between a public place in reality and an open network platform. In particular, the operator of the interactive network platform with the feature of socialization realizes the control of all network users' behaviors on the platform by designing the interaction rules, naturally extending the applicable objects of the security obligation from public spaces in reality to such kind of interactive network platforms. The separate provisions of Article 36 and Article 37 of the *Tort Law of the People's Republic of China* cannot become the reason that the security obligation is not applicable to the cyberspace. As in Article 37, the provision concerning public spaces is inclusive and makes the incorporation of other public spaces possible. In the case that a network user infringes upon the third person's copyright, the view, that there is no homogeneity between the duty of care and the security obligation for a network platform is not a risk maker, is indefensible. However, it's not easy to exempt the network service platform from the liability in the case that the network user infringes on the third person's right of dissemination on information networks, as the operator of the network service platform is the designer and executer of interaction rules on the network service platform. Moreover, a manager of a public place in reality fully fulfills the security obligation, which indicates that the manager can be identified as a risk controller rather than a risk maker. As for the view that the object of protection under the security obligation must be the subject within the controlled scope of a public place, the duty of care of a network service platform shall not be perceived as the security obligation because the network service platform protects the lawful rights and interests of the third person other than a network user in the case

of indirect infringements. Nevertheless, a network user uploads other's works to a network service platform – an open spatial space, which means that the third person's works the network user has infringed on has been placed within the control scope of cyberspace. This demonstrates that we cannot deny that the network service platform shall protect these works just based upon the fact that the owner of the works has not registered on the network service platform.

3.2 Scope of the duty of care: strengthening the obligation to foresee the infringement results

We can draw the conclusion from the above that the nature of the duty of care shouldered by a video sharing website can be identified as the security obligation. But it is difficult to determine the scope of the duty of care, for the tort law has not stipulated in detail the security obligation. According to the general theory related, the duty of care encompasses the obligation to foresee the infringement results and the obligation to avoid the infringement results. The obligation to foresee the infringement results refers to the obligation that the doer shall foresee his/her behavior might incur harmful consequence based upon the specific circumstance when a case happening; while the obligation to avoid the infringement results refers to the obligation for the doer to avoid the harmful consequence incurred by his/her behavior. The obligation of a video sharing website to avoid the infringement results embodies in the provisions of "notification – deletion" under Article 36-3 of the *Tort Law of the People's Republic of China* and Article 8-3 of *Interpretation No. 20 [2012] of the Supreme People's Court*: Where the video files uploaded by a network user infringe on the other's right of dissemination on information networks, means such as deletion, shielding and disconnection are necessary to avoid the occurrence of the infringement results. Hence, the obligation to avoid the infringement results refers to the passive measures taken after the copyright owner notices the video sharing website the fact of infringements upon the video work. If the website operator has clearly known the infringement fact but not has taken measures to avoid the infringement results, however, the fault of the video sharing website can be identified as subjective intention. While in terms of the obligation for the video sharing website to foresee the infringement results, related provision in the *Tort Law of the People's Republic of China* indicates that the prevention of an infringement act appears as a legislative objective that is parallel with the punishment for an infringement act[①], and the establishment of the preventive obligation can give play to the doer's initiative to prevent the occurrence of the infringement act.

The existing tort law and copyright law have not directly made stipulation on the obligation of a video sharing website related to foresee the infringement results. Yet according to Article 8-3 of *Interpretation No. 20 [2012] of the Supreme People's Court*, "Where a network service provider can prove that it has taken reasonable and effective technical measures but still finds it difficult to discover a network user's infringements on other's right of dissemination on information networks, the court shall exempt the network service provider from the fault". We can see from the above article that a video sharing website shall take effective measures to actively foresee and avoid the occurrence of a network user's infringements on other's right of dissemination on information networks, and the foreseeable act hereof is not premised on whether the infringement fact is obvious. It is not a simple matter to judge whether a network user infringes upon other's right of dissemination on information networks, however. Accordingly, it is by no means easy to grasp a video sharing website's fulfillment of the obligation to foresee the infringement results after it takes corresponding technical measures.

① Article 1 of the *Tort Law of the People's Republic of China* states that: "In order to protect the legitimate rights and interests of parties in civil law relationships, clarify the tort liability, prevent and punish tortious conduct, and promote the social harmony and stability, this Law is formulated."

The content of the obligation to foresee the infringement results, namely, whether a video sharing website is required to foresee the specific social harmfulness resulting from a network user's infringements on other's right of dissemination on information networks, is rife with controversies. As for the content of the obligation to foresee the infringement results, academics can be divided into two schools, i.e., supporters of the specific result theory and supporters of the abstract result theory. The former insists that the infringement results can only be limited within the scope prescribed by the laws, while the latter holds that it only needs to foresee the general results of the infringement fact. As for the obligation to foresee the infringement results in the case that a video sharing website indirectly infringes on other's copyright, this paper agrees with the latter school. This view proceeds from the professional and foreseeable abilities of a video sharing website and the complexity of copyright infringements as well as the feature that the infringement results are hard to control.

When performing the obligation to foresee the infringement results, a video sharing website is not required to review all video files uploaded by a network user in advance, which means that the obligation of prior review is not included in the content of the obligation to foresee the infringement results. The "obligation of prior review" requires a network service provider must take active measures to review the video files uploaded by a network user one by one, and check whether the network user holds the legal and complete authorization certificate. However, a large number of predictable costs will be needed if the network service provider reviews these video files uploaded by the network user one by one, and the principle of efficiency in establishing the preventive obligation under the tort law will be disobeyed. In Article 16 of the *Administrative Provisions on Internet Audio–Visual Program Service*, audio-visual programs which involve reaction, violence, obscenity and other misconducts, and which insult or slander others, or infringe upon the individual privacy and lawful rights and interests of others, are prohibited to provide on the Internet. We can find from these prohibited items enumerated in the article that, the obligation of prior review is only aimed at the video files which harm the public interests and citizens' publicity rights, but not designed for those which damage the property rights of the common people. This indicates that the provider of audio-visual program services may not assume the obligation of prior review for the video files uploaded by a network user. The requirement on the obligation to foresee the infringement results shouldered by a video sharing website in indirect copyright infringements is not as high as that on the obligation of prior review. The establishment and fulfillment of the obligation to foresee shall hinge on a series of factors, including service nature, occupational requirement and the degree of care the rational person in the same industry shall reach under the same circumstance. Moreover, the obligation of prior review cannot be deemed as the obligation to foresee the infringement results, but the influence of the obligation of prior review on the duty of care and the like cannot be neglected. The reason is that when making legitimate review on video files, a video sharing website is often able to find out whether a video file uploaded by a network user infringes on other's right of dissemination on information networks①.

3.3 Degree of the duty of care: establishment of different duties

① In the case of "NuCom Online International suing Shanghai Tudou Network Technology for copyright infringement," the court holds that, Shanghai Tudou Network Technology shall conduct prior review on video files according to the procedures published on its website. After staff of "review group" review the legitimacy of the video file uploaded by a user and affirm that the video file is up to related standard, this video can be released to the public 12 hours after the review. Shanghai Tudou Network Technology argues that it has only reviewed whether the video file contains illegal contents which involve obscenity, reaction and others. Nevertheless, as the film involved is extremely popular on the network, the review group shall realize that the film has been posted on the website without the permission of the copyright owner. In fact, the review group adopts the laissez–faire attitude to the uploader, which showcases that Shanghai Tudou Network Technology has the fault to turn a blind eye on the copyright infringement, and even help the uploader infringe on other's right of dissemination on information networks. (See: (2008) HGMS (Z) ZZD No. 62)

The degree of the duty of care is related to the cost of the obligation of a video sharing website, which is an important factor that needs to be considered when establishing the duty of care. As mentioned above, there is no essential difference in nature between the duty of care shouldered by a video sharing website and the security obligation, and the applicable objects of the security obligation can be identified as a manifestation extending from real world to cyberspace. The security obligation belongs to a kind of basic obligation, but this does not mean a video sharing website shall assume unlimited security obligation, in other words, the duty of care needs to be divided into different levels in accordance with the cognitive abilities of the video sharing website, which can embody the fairness and reasonability of the duty establishment. According to the basic theory of the tort law, a video sharing website shall assume the duty of care targeted to the good administrator, namely, the doer of the video sharing website shall shoulder the duty of care which the participants of particular employment or social activities undertake and which is in line with his/her professional thinking and cognitive ability. Strongly linked with the scale, control ability, technical level and other factors of a video sharing website, the standard for good administrators is hard to determine under the circumstance of copyright infringements on the network. Based upon the foreseeable ability and scope of a network service provider, the degree of the duty of care shall depend on the type of rights under protection, the nature of network service, and the risk control ability of the network service provider among other factors. Usually, a video sharing website implements other behaviors in addition to providing simple network service. It is these behaviors that lay the reasonable foundation for the video sharing website to assume the duty of care at different levels.

According to the general theory related, the duty of care encompasses general duty of care and higher duty of care. The higher duty of care is the type of duty that shall be borne by the personnel engaged in the jobs with higher technical content, for they know the technical safety performance and product operation best. The video sharing website serves as an obligor mastering strong network techniques, thus, we have more reason to believe the video sharing website is able to guarantee the legitimate rights and interests of the network user and the third person when offering related services. The network service provider (i.e., the video sharing website), like other network service providers, shall assume the higher duty of care corresponding to his/her ability in specific cyberspaces where the copyright infringements often occur or the circumstance is relatively serious. Furthermore, many video sharing websites set "TV channels" that are parallel with the "original columns" for network users to upload video files, in this regard, these video sharing websites shall undertake the higher duty of care. The establishment of such duty, however, does not mean the video sharing website has known the fact that the video file uploaded by the network user infringes on other's copyright. The reason for the higher duty of care imposed on the video sharing website can be explained by the website's operation model. In detail, the website can directly gain greater economic benefits when network users are downloading hit movies and television plays which are free of charge and thus have strong attraction to the public. Thus when setting the "TV channel," the video sharing website has the obligation to foresee the possibility that the network user may upload unauthorized films and television works. Meanwhile, the video sharing website shall be able to foresee the risk of copyright infringements that may occur in the "TV channel", and also have the obligation to take corresponding preventive measures to avoid the occurrence of the infringement act. If the video sharing website fails to continuously monitor the contents uploaded on the "TV channel", or the staff of the website for films and televisions fails to spot those unauthorized films and television plays uploaded on the website but should have the ability to spot according to his/her professional knowledge, we can conclude that the website has not

fulfilled the higher duty of care.

The general duty of care, however, does not arise from the occupation basis of the obligor, but belongs to the normal behavior like antecedent behavior. The degree of such duty is higher than the bottommost duty of care but lower than the higher duty of care. In the case that a video sharing website indirectly infringes upon other's copyright, such duty does not require the video sharing website to monitor the video files uploaded by a network user. The basic content of such duty is that the video sharing website shall spot the obvious infringement act through the filtering technology, and take measures in time after finding the infringement fact to avoid the occurrence of the infringement results. From the perspective of information filtering technology, as an array of the filtering technologies applied in the proxy and gateway servers, including list-, keyword-, image- and template-based and intelligent filtering technologies, have been relatively mature, which allows the video sharing website to spend less cost in assuming such duty. Objectively, it is not so difficult to judge whether the infringement act under the general duty of care occurs. For obvious infringement act, the video sharing website has the ability and also the obligation to curb the infringements upon other's right of dissemination on information networks through its platform, so as to prevent the occurrence of the infringement results. This implies that there is homogeneity between the general duty of care and the security obligation, and once again proves that such duty shouldered by the video sharing website has nothing to do with its professional characteristic and profitability among other factors. Such duty is only aimed to keep the possibility of risks under a controllable range.

4. Liability form of fault

As mentioned above, as for the video sharing website's indirect infringements on other's copyright, the duty of care assumed by the video sharing website in nature is identical to the security obligation under the tort law. According to Article 37-2 of the *Tort Law of the People's Republic of China*, "if the harm to another person is caused by a third party, the third party shall assume the tort liability; and the manager or organizer, if failing to fulfill the duty of safety protection, shall assume the corresponding complementary liability". In terms of complementary liability, legislators of the *Tort Law of the People's Republic of China* explain, the assumption of the infringement liability of the third party and the complementary liability under the security obligation shall be in a sequential order. Specifically, if the third party cannot be spotted or the third party is unable to bear all liabilities for damage, the security obligor shall share the infringement liability, and how much the obligor shall undertake depends on the scope of the security obligation it has failed to fulfilled; in the case that the third party has undertaken all infringement liability, the obligator will not share such liability. As can be seen from the above, the complementary liability belongs to a special joint and several liability[①]. Some academics and legislators of the *Tort Law of the People's Republic of China* hold that the network service provider and the network user shall assume the joint and several liabilities for the copyright infringements on the network. It is therefore induced that, the form of liability shouldered by the video sharing website shall be the joint and several liabilities in the case of copyright infringements, but it needs to further discuss the issue whether such inference

① See: Sui Pengsheng. The Difference between Complementary Liability and Joint Liability [EB/OL]. (2010–12–15) [2017–10– 05]. http://blog. sina.com.cn/s/blog_6926eb870102e0la.html.

is in line with the juridical practice in copyright infringements on the network.

4.1 Practical dilemma of joint and several liability: excessive recovery costs

The video sharing website and the network user shall assume the joint and several liability for the infringement on other's right of dissemination on information networks, yet it is not applicable in juridical practice due to the feature of network infringements. When registering on a video sharing website, the applicant is not required to provide information on true identity. This often makes the video sharing website, after assuming the compensation liability, find it hard to claim for loss successfully from the network user. Even if the true identity of the network user has been confirmed, the video sharing website may still face the dilemma of claiming for the loss. As revealed by the 40th Statistical Report on Internet Development in China released by the China Internet Network Information Center in July 2017, as of June 2017, an overwhelming majority of Chinese netizens were still aged 10-39, accounting for 72.1% of the total number. Among them, 29.7% were aged 20-29, taking up the largest proportion; 19.4% aged 10-19 and 23.0% aged 30-39. And netizens with a secondary education level constitute the major part. Up to December 2017, junior high school students and senior high school students respectively constituted 37.9% and 25.5% of Chinese netizen population. Middle school students still occupy the largest proportion of total netizens in China to 24.8%, followed by self-employed businessmen / freelancers taking up the proportion of 20.9%. The proportions of netizens with a monthly income of RMB 2,001 - RMB 3,000 and RMB 3,001 - RMB 5,000 are relatively high, i.e., 15.8% and 22.9%[①]. These data showcase that Chinese network users features young in average age, student dominated, secondary education level, relatively low in income and others. Hence, it is difficult for a video sharing website, after fully compensating the copyright owner for the infringements, to claim the loss from the network user involved, for generally, the network user has lower economic compensation ability.

"If a person is expected to take the law as the weapon to protect his/her own rights and fight evil, the law must have the practical charm for the person in terms of availability, effectiveness and economic efficiency". After assuming all liabilities for damage, the video sharing website faces many dilemmas like the difficulty in confirming the true identity of the network user and in claiming loss after confirming, which lead to the excessive recovery costs to be spent and pitiful loss could be recovered. More badly, the network user required to compensate for loss is likely to not accept the service provided by the video sharing website asking him/her to compensate for loss any more, alternatively, he/she may choose other websites to upload video files. This will directly give rise to the decrease and even the loss in information flow and operation revenue of the video sharing website. Given this, the excessive recovery costs and relatively low revenue probably force the video sharing website to give up the recovery. According to its basic theory, the joint and several liability is designed to restore the legitimate rights and interests of copyright owners and punish infringers for their illegal acts. The existence of the recovery system ensures that the joint and several liability for damages will not increase the amount of compensation of any infringers, and will just require distributing the risks of inadequate compensation among responsible persons of the liability for infringements. If the probability of difficult recovery in practices is relatively high and the difficulty can be expected, the inadequate compensation will not

① See: China Internet Network Information Center (CNNIC). The 40th Statistical Report on Internet Development in China [EB/OL]. (2017–07–01) [2017–10–05]. http://cnnic.cn/hlwfzyj/hlwxzbg/hlwtjbg/201708/P0201708073519 23262153. pdf.

represent a risk, but a factor that makes the joint and several liability dissimilate into the heavier liability of the video sharing website. Thus, we can conclude that the joint and several liability is not a fair liability form in the case of the video sharing website's indirect copyright infringements.

4.2 Justification of several / shared liability: causative potency as the element

In the tort law, the liability form of the security obligation is complementary liability, which is also a controversial issue in the academic circle and practice circle. The objectors argue that as the security obligor "fails to fully perform his/her reasonable security obligation, he/she does have the fault which is causally related to the damage upon the victim, therefore, the obligor shall assume a certain compensation liability, and could not shift his/her liability onto a third party". For the infringements based on the security obligation run counter to the principle of individual responsibility, the responsible person has the general liability attribution, and thus shall assume the due liability for his/her own fault rather than shift his/her own liability onto others. According to Article 40 of the *Tort Law of the People's Republic of China*, the school shall assume the corresponding complementary liability if failing to perform its security obligation, yet in the juridical practices in particular of the cases of minors' infringements upon other's rights in school, the school involved may not assume the complementary liability. The reasons for objecting the form of complementary liability are that the responsible person shall assume the compensation liability based on his/her fault and the causative potency as well as the fact that its individual liability goes against the liability form of the security obligation. It can be seen that the complementary liability is not the only liability form in the case that the security obligation has not been fully performed, other liability forms are still applicable herein under specific circumstances.

Where a third party infringes on other's legitimate rights and interests, if the security obligor and the direct infringer stand at the same liability level, in other words, they basically have the same fault, there shall not be a sequential order between the security obligor's liability and the direct infringer's liability. Under this circumstance, the form of complementary liability is not applicable. This paper thinks that the video sharing website has the duty of care which belongs to the security obligation in nature in the case of the video sharing website's indirect infringement upon other's copyright, and the form of infringement liability shouldered by the video sharing website due to its breach of the duty of care shall be established as the several / shared liability rather than the complementary liability with individual liability as the principle. On the one hand, the several / shared liability based on the individual liability is applicable within the scope of the form of liability going against the security obligation, and will not be contradictory to the nature of the duty of care; on the other hand, the several / shared liability exempts the video sharing website from the cost spent in claiming loss from the direct infringer in the form of joint and several liability. According to the several / shared liability, the video sharing website shall bear the damage as a result of its own fault which is judged from the principle, namely, the causative potency between its infringement act and its damage to the copyright owner. This embodies the fairness and avoids that the video sharing website will bear the responsibility of others just to ensure the victim can obtain adequate compensation. In course of claiming loss from the direct infringer, the video sharing website undertakes the same risk as the victim to claim compensation from the direct infringer, thus, to impose the risk of inadequate compensation on the video sharing website, which goes against the principle of fairness. It can thus indicate: theoretically, it is more scientific for the video sharing website to bear the several / shared liability than the complementary liability as there is a weakness in the latter.

5. Conclusion

As for the video sharing website's fault identification in indirect copyright infringements, the issue focuses on the discussion that whether "know" includes "should know" in Article 36-3 of the *Tort Law of the People's Republic of China*. Given that there are different perceptions of this issue among the academic circle and juridical practice, this paper, by blazing a new path, namely, starting from the technical principle behind the video sharing website's fault identification, attempts to draw the following conclusions:

First, the technical neutrality theory merely focuses on technique's natural attribute and overlooks its social attribute. Thus, the technical neutrality theory shall be transformed to the technical value theory if both natural and social attributes need to be considered. The internal material and symbolic structures of a video sharing website play the role of interpreter and shaper in determining what kind of and how information will be encoded and transmitted and in the course of how information is encoded. The video sharing website, therefore, embodies the value priorities of the designer and the operator. On the basis of technical value theory, "should know" shall include "negligence" in the case of the video sharing website's indirect copyright infringements.

Second, it is necessary to take "negligence" as the doctrine of liability fixation in a video sharing website's indirect copyright infringements, and it needs to take the duty of care as the objective criterion of negligence identification. The duty of care shouldered by the video sharing website is the natural extension of the security obligation from a public space in reality to cyberspace. The determination of the scope of the duty of care shouldered by the video sharing website shall be dominated by the foreseeable obligation of the infringement results, and the function of infringement prevention under the tort law be strengthened; in terms of the degree of the duty of care, the duty of care shall encompass the general duty of care and the higher duty of care according to specific circumstances, which will not affect the positivity of the video sharing website due to the overloaded duty of care.

Third, as to the video sharing website, the form of liability for faults shall be determined based upon the nature of the duty of care borne by the video sharing website. According to the provisions of the tort law, the video sharing website shall assume the complementary liability in the case of the breach of security obligation. However, the complementary liability is lack of theoretical support, and makes the video sharing website face the dilemma of excessive recovery costs in practice in the field of network infringements. To establish the several / shared liability based on the individual liability as the liability form in the case that the video sharing website indirectly infringes upon other's copyright can relieve the burden imposed by the risk of inadequate compensation and at the same time meet the requirement of social fairness.

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