

Legal Analysis of Issues Related to User-Generated Content in Derivative Works

Junyi Li*

Southwest Minzu University, Chengdu, 610041, China

*Corresponding Author's Email: puresilver@163.com

ABSTRACT

In the information age, the barriers to individual creative production have significantly lowered, leading to new developments in the arts, while also giving rise to various legal issues. One such challenge lies in defining originality and the boundaries of infringement in derivative works. This is especially problematic on user-generated content (UGC) platforms, where new forms of creative expression, such as video mashups, lack clear standards for determining infringement. By comparing international practices and considering the specific context of China, this paper seeks to balance the interests of creators, platforms, and original authors. The goal is to encourage creativity while respecting the copyright of original authors, ultimately achieving a win-win situation in the creative market and fostering cultural innovation and freedom of expression.

KEYWORDS

User-Generated Content; Copyright; Derivative Works; Intellectual Property.

1. INTRODUCTION

1.1. Overview of User-Generated Content

User-Generated Content (UGC) refers to content created by individuals using their own devices, particularly within the Web 2.0 environment, as opposed to the traditional Web 1.0 era dominated by editorial content created by website administrators. UGC encompasses various forms of content published online by users, including images, text comments, audio, and video[1]. The majority of UGC creators are non-professionals who engage in content creation out of personal interest or other reasons, and typically do not seek profit. However, with the evolution of the internet, the financial benefits of becoming an "internet celebrity"-a term referring to individuals who gain widespread popularity and followers online-have become widely recognized. Consequently, many individuals, after gaining significant attention from a particular creation, choose to pursue derivative creation as a profession with the hope of earning a profit. For the purposes of this paper, "User-Generated Content" also includes content produced by professional derivative creators.

1.2. Conceptual Clarification of "Derivative Works"

The concept of "Derivative Works" (Re-creation) contrasts with "Original Works" and is also referred to as "Re-creation." It generally refers to the act of creating new works based on pre-existing texts, images, music, or other forms of artistic expression [2]. Some scholars argue that the essential difference between "Original Works" and "Derivative Works" lies in whether the work uses pre-existing characters, settings, or other elements. The resulting works are typically categorized as

"Derivative Works," and can take various forms such as tributes, parodies, imitations, pastiches, collages, mashups, adaptations, and citations. Other scholars note that "Derivative Works" is not a specialized sociological term but rather a new term that has been accepted by the public as this form of creation has gradually entered the mainstream. However, the practice of creating derivative works based on existing artistic creations is not new[3]. For example, ancient practices included annotating, continuing, or adapting classical literary works. This study focuses on content uploaded to Chinese platforms such as Douyin, Bilibili, and Weibo, which are primarily user-generated content platforms characterized by a large volume of content with varying quality and impact.

1.3. Significance of the Study

The current approach in China's copyright law primarily aims to incentivize creative work by granting copyright holders exclusive control and profit rights over their works, thereby promoting the development of literature and the arts[4]. Scholars have noted that copyright law addresses two economic phenomena: on the one hand, protecting the original creator's work and investment, as unrestricted imitation could undermine the creator's interests and economic incentives; on the other hand, copyright can suppress the use of works by derivative creators, as their works often involve modification, enhancement, or re-creation of the original works[5].

However, as the field of artistic creation becomes increasingly complex, simply granting exclusive control and profit rights to original copyright holders may not effectively fulfill the legislative goal of incentivizing creative work. The law, inherently lagging behind technological and societal developments, may not fully anticipate or address new circumstances. According to current regulations, derivative works should obtain authorization from the original copyright holder before making reasonable use of the original work. However, given the large volume of derivative works, varying degrees of innovation in the creative process, and the difficulty for original copyright holders to evaluate and authorize every derivative creator, it is rare for derivative creators to obtain such authorization under China's current circumstances. From the perspective of China's Copyright Law, its legislative intent aims to protect creativity and establish a balance of interests, which includes encouraging the lawful dissemination of works. There is no doubt that the widespread dissemination of derivative works has objectively promoted the distribution of original works. Real-life examples exist where derivative works have propelled original works to fame, thereby generating more revenue for the original copyright holders. For instance, movie reviews that offer unique insights often lead large numbers of internet users to watch the original films. However, this should not lead to a complete disregard for the protection of original copyright holders. Many unauthorized derivative works infringe upon the legal rights of original copyright holders, and reward mechanisms on major new media platforms, such as tipping, further blur the boundaries of "fair use." In the context of user-generated content, the distinction between creators and users becomes unclear. Content generated by one user's derivative work might be subject to further derivative creation by others, leading to increasingly ambiguous ownership rights and making it difficult for traditional copyright law to effectively regulate derivative works in user-generated content. As derivative works come to occupy a significant portion of artistic production, finding a balance that protects the interests of original creators while also considering the rights of derivative creators has become an urgent issue.

2. JUDICIAL STATUS OF DERIVATIVE WORKS IN USER-GENERATED CONTENT IN CHINA

2.1. Cases Involving Derivative Works

On August 6, 2019, the Beijing Internet Court delivered a verdict in the case where Youku Network Company sued Shushu Technology Company for infringing the right of information network dissemination of its works. The court held that the defendant's provision of a series of images was not

for the purpose of introducing or commenting on the work but rather to cater to the demand for quickly understanding the plot and main visual content within the context of today's "fast food culture." The court noted that this use did not constitute a legitimate commentary-based citation. Furthermore, the court emphasized that the application of appropriate citation should not solely depend on the proportion of content used but should be assessed in the context of the purpose of fair use. The act of providing a series of images constituted a substantial substitution of the original work, leading the court to conclude that the visual interpretation of the movie did not fall under fair use.

In the case hailed as China's "first fan-fiction case," where Jin Yong sued Jiang Nan, the Guangzhou Intellectual Property Court upheld the first-instance decision, finding Jiang Nan guilty of copyright infringement and unfair competition. The appellate court determined that the majority of character names in *The Youth of This Era* were derived from the four novels involved in the case written by the plaintiff, Jin Yong. Moreover, the personalities, relationships, and backgrounds of these characters bore substantial similarities to those in Jin Yong's works. Overall, the court found that the collective portrayal of these characters, including their names, personality traits, relationships, and backgrounds, reflected the plaintiff's creative choices and arrangements, which were sufficiently detailed and specific to form a structure with strong logical connections among its elements. This structure qualified as an "expression" protected under copyright law. Therefore, the court ruled that the appropriation of character names, personality traits, and relationships from Jin Yong's four works in *The Youth of This Era* constituted plagiarism, which is prohibited by copyright law. Additionally, the court noted that the plaintiff's works embodied significant intellectual effort and enjoyed substantial fame and influence. Although *The Youth of This Era* was initially published online for free, it later gained considerable attention and was published to earn royalties, demonstrating a clear commercial intent. Consequently, the court ruled that the plaintiff and the defendant were competitors, and their actions were subject to regulation under the Anti-Unfair Competition Law.

It is important to note that the Guangzhou Intellectual Property Court introduced the "non-cessation of infringement" rule in the second-instance judgment of *The Youth of This Era* case. The court stated that "when the elements of character names, personalities, and relationships are similar but the plots are different and belong to different literary genres with distinct readerships, and when the diversity of reader preferences is considered to contribute to the development and prosperity of cultural industries, the court may not order the cessation of infringement, provided that adequate and effective compensation or economic remedies are applied." The court ordered that 30% of the royalties from the reprinted edition be paid to the rights holder as economic compensation. This rule has sparked controversy among experts and scholars both within and outside the industry, with concerns raised about its potential negative impact on the field of literary and artistic creation.

2.2. Ambiguities in Determining Legal Standards

2.2.1. Unclear Boundaries of Fair Use

The boundaries of fair use have long been a contentious issue in copyright law research and legislation [6]. China's copyright law adopts a closed legislative model for fair use rules, but with the continuous development of *The Times*, this kind of closed legislative model shows lag to a certain extent, which is not conducive to economic development, which also leads to the blurred boundary between fair use and tort. [7]. Generally, it is believed that secondary creators should obtain authorization from the original authors before using their works; otherwise, the secondary creation would constitute infringement. However, there are exceptions under the doctrine of "fair use." Article 22 of China's Copyright Law lists twelve situations where a work may be used without the permission of the copyright holder and without payment. In judicial practice, judges often assess whether the derivative work has added new content, perspectives, ideas, or other elements that imbue the original work with new value to determine whether it falls under fair use. The extent to which a transformative use enhances social knowledge and wealth should outweigh the harm done to the original rights holder.

With a clear understanding of "fair use", copyright owners can judge whether the video they own can be used normally and whether it violates their legitimate interests, so as to protect their rights and interests from the perspective of law. On the other hand, when making videos, secondary creators can refer to the four-factor standard to judge whether the legitimate rights and interests of the copyright owner are infringed, cultivate legal awareness, standardize the creation behavior, and reduce the occurrence of infringement[8].

2.2.2. Lack of Standards for Assessing "Originality"

Unlike traditional derivative works, derivative works created through user-generated content platforms often take more flexible forms, rather than traditional written content. Determining whether such UGC constitutes infringement is often more challenging compared to traditional written derivative works. Some scholars have suggested that the standard for determining substantial similarity often relies on the traditional dichotomy between idea and expression, where copyright law protects expression but not ideas. However, this method has proven inadequate for judging increasingly complex forms of infringement [9]. When these works are created, the secondary creators often add their own original elements based on their understanding of the original work. However, the extent to which these original elements have been added, and how much of it constitutes infringement, remains an unresolved issue. For example, in the case of "mixed-cut videos" on UGC platforms, where the original video material might include multiple works, while the secondary creators do not present the original plot, they still utilize the labor results of the original production team. However, the ideas expressed might differ significantly from the original work. Whether such works can be recognized as having added sufficient originality or being substantially similar to the original works remains a topic of debate.

3. INTERNATIONAL EXPERIENCES IN REGULATING DERIVATIVE WORKS FROM USER-GENERATED CONTENT

Compared to China, where user-generated content (UGC) platforms have developed relatively late, some countries that started earlier have accumulated experience in regulating derivative works. For instance, the United States primarily regulates derivative works by including them within the scope of fair use, while Canada has established a separate copyright exception for derivative works, placing them alongside traditional exceptions like fair use. This section summarizes the regulatory approaches of some representative foreign countries, aiming to provide insights that could help regulate and foster the market for derivative works in China.

3.1. Practices in the United States

In the United States, the determination of whether a derivative work constitutes copyright infringement is primarily made within the framework of fair use. U.S. judges often assess whether the derivative work meets the standard of "transformative use" to determine if it qualifies as fair use. The concept of transformative use is deeply rooted in U.S. court cases. Under this concept, judges primarily consider whether the derivative work has added new expression, meaning, or function to the original work. If it has, it may be deemed to have transformed the purpose or method of using the original work, thus meeting the standard for fair use. Moreover, the U.S. Supreme Court in the 1994 *Campbell v. Acuff-Rose Music, Inc.* case pointed out that the more transformative a work is, the less weight other factors of fair use will carry [10].

Since 1976, the four elements of fair use have entered into the United States copyright law in the form of legislation, after half a century of baptism, its theoretical basis. And the practical experience has been further developed, from the focus on market elements to the proposal of transformational use, which reflects the development of copyright law in the United States. From the focus of copyright protection to the trend of copyright openness to users, this is also the trend of the world copyright

pattern favoring public interests under the development of the Internet and artificial intelligence, and it is also the new balance point between the copyright law involving multiple stakeholders under the new technological environment.[11].

In these assessments, judges primarily consider two key elements of transformative use. The first is the transformation of the original content, and the second is the transformation of the purpose for using the original content. This means that if the original content is used for a purpose different from that of the original work, it may also constitute fair use. It is evident that the U.S. concept of transformative use leans towards protecting the interests of secondary creators, aiming to encourage innovation and stimulate market growth by loosening restrictions on derivative works. However, it is important to note that the U.S. approach to transformative use is still evolving. Given China's current situation, it may be premature to adopt this approach to assess transformative use.

3.2. Practices in Canada

Unlike the United States, Canada has adopted a regulatory model that treats non-commercial user-generated content derivative works as an exception to copyright infringement, placing it alongside other copyright infringement exceptions. According to Article 29 of the Canadian Copyright Directive, known as the UGC exception, creators of user-generated content are allowed to use copyrighted works without the prior permission of the original rights holder, and they are also entitled to disseminate these derivative works [12]. Under this model, individual users are allowed to create fan works (like *The Youth of This Era* mentioned earlier) and upload them to UGC platforms. Personal users can also use background music they like to create new videos. A critical precondition for this UGC exception in Canada is that the user's behavior must be non-commercial, which is the foundational requirement for constituting the UGC exception. When considering the actual situation of UGC platforms in China, most platforms have established their own incentive mechanisms for creators. These mechanisms were initially designed to encourage more content creation within the community platform. However, in today's context, the ability to monetize traffic has become a contentious issue. In practice, many derivative creators do not initially intend to monetize their creations; they simply express their love for the original work or share it with like-minded individuals. However, due to the high quality of their work, it may resonate with other users, leading to significant attention. After gaining considerable attention, the platform may reward the creator based on its incentive mechanism, and businesses might approach the creator due to the large traffic they attract. The creator can then "monetize" the attention and traffic through advertising and other means. In such cases, determining whether the creator has infringed based on their initial non-commercial intent or the tangible benefits they eventually receive is a matter worth exploring.

In conclusion, although Canada has adopted a unique approach by treating UGC derivative works as an exception alongside other copyright infringement behaviors, there remains considerable room for discussion in legal practice. Moreover, as a common law country, Canada has numerous case precedents for judges to reference in their rulings. However, China is not a common law country, so when learning from the experiences of foreign countries, it is essential to consider China's actual situation and make comprehensive judgments and considerations.

4. EXPLORING REGULATORY APPROACHES FOR DERIVATIVE WORKS IN USER-GENERATED CONTENT IN CHINA

4.1. Establishing a Revenue-Sharing Mechanism for Authors

The legislative intent of copyright law is to encourage literary and artistic creation and to promote the flourishing of the creative market. If the balance of interests between original authors and secondary creators is disrupted, the enthusiasm for creation among authors could be suppressed. For example,

in the case of short videos, if short video creation were only allowed with the authorization or consent of long video copyright holders, it would undoubtedly restrict creative freedom and stifle innovation. Currently, the legal consequence of fair use is that users neither need to obtain authorization from the copyright holder nor pay any fees, making it a dual exception in terms of both authorization and payment. While this rule design is appropriate for public welfare areas like education and research, its legitimacy in a commercial environment is questionable [13]. Derivative works are created based on original works, which serve as the foundation for their creation. On the other hand, derivative works can also serve to promote the original works to some extent. If a revenue-sharing mechanism could be established, linking licensing with profit-sharing, and setting a revenue threshold for derivative creators, whereby they are required to pay reasonable fees to the original copyright holder once this threshold is reached, a balance of interests could be achieved between the two parties.

4.2. Optimizing the Licensing Model

Currently, UGC is primarily published on online community platforms focused on user-generated content. At present, these platforms play a relatively weak role in copyright review, limited to removing infringing works after being notified of the infringement. In reality, if a derivative work gains significant traffic, the platform can also profit from it. As a platform with resources far beyond those of ordinary users, it should utilize these resources to warn users of potential risks, strengthen cooperation with other copyright holders, collective management organizations, and other platforms, and promote resource sharing within the region to facilitate creators.

5. CONCLUSION

In summary, although derivative creation is widely recognized globally, there are significant differences in legal regulation across countries and regions. These differences manifest in the understanding of derivative creation, the scope of protection, the standards for fair use, and the strategies for addressing infringement. This is not merely a problem that can be solved through law alone; it requires a concerted effort from legal, technical, and social aspects. During this process, it is crucial to skillfully balance the interests of all parties to ultimately foster the development of cultural innovation and freedom of expression.

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