

# Research on the Fair Use of Re-created Short Videos

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## ABSTRACT

With the advent of the vigorous development of science and technology, the national short video creation boom has swept in. While the secondary creation of short videos has become a new trend in video creation, it is also facing the risk of copyright infringement. How to establish a balance of interests mechanism between copyright owners and the public, especially secondary short video creators, is the research direction of the fair use system. The fair use system can ensure that copyright is not infringed within a reasonable range, and promote the reasonable use, innovation, dissemination and promotion of the original work by the secondary creation of short videos. The creation of secondary short video creators within the scope of the fair use system can not only expand the influence of the original work, but also enrich the atmosphere of video creation and improve the vitality of video creation.

## KEYWORDS

Secondary Creation; Short Videos; Fair Use.

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## 1. INTRODUCTION

The secondary creation of short videos is at its peak, and behind its prosperity and development, copyright infringement incidents are not uncommon, the infringement methods are complex, and the parties are more controversial. In many cases of infringement of secondary creation of short videos, many defendants will defend themselves on the grounds of "fair use", but in the Copyright Law, there are still many differences on issues such as whether a new work can be produced through the secondary creation of the original work, and how to specifically determine whether the use of the original work is fair use, resulting in confusion in judicial decisions and different bases for determination. The purpose of this article is to discuss the issues related to the fair use of secondary created short videos, clarify the criteria and boundaries of fair use, analyze the existing problems, and put forward suggestions for improving the regulation, so as to promote the healthy development of the short video creation industry while protecting the legitimate rights and interests of copyright owners. In practice, there is not much controversy in most opinions about the field to which the secondary creation of short videos belongs, whether they can be reproduced in a certain tangible form, and whether they are intellectual achievements, and the key to determining the attributes of secondary creation short videos lies in the determination of "originality" [1].

## 2. DEFINITION OF THE ATTRIBUTES OF SECONDARY CREATION OF SHORT VIDEO WORKS

Secondary short video creation usually refers to the creation of new short video content by users based on existing film and television works, music, pictures and other materials through editing, dubbing, splicing, etc. The understanding of its definition mainly lies in the two aspects of secondary

and short video, the second represents the processing and recreation of the original work, and the short video represents a short time, which is convenient to meet the needs of the public for the online communication mode of fragmented time entertainment. The secondary creation of short videos is all the rage because of the short video time, low creation threshold, and more in line with the needs of the public. The author believes that since the secondary creation of short videos has the characteristics of "short, flat, and fast", the secondary creation of short videos has a high degree of dependence on the original work, and the author of the short video should not be required to have full innovation ability, as long as the video content or video editing technology can reflect the creator's personal characteristics and original expression ideas, the work can be considered to have "originality". Therefore, appropriately relaxing the criteria for determining the "originality" of secondary short videos will help stimulate the creative enthusiasm of short video authors and promote the development and dissemination of the short video industry[2]

#### (1) The purpose and nature of use

1) Commercial and non-commercial: If the secondary creation of a short video is used for commercial purposes, such as advertising and profit-making promotion, it is usually more difficult to be recognized as fair use. This is because commercial use may have a direct impact on the market value of the original work and harm the economic interests of the copyright owner. Non-commercial use, such as personal study, research, commentary, sharing, etc., is more likely to be considered fair use if other conditions are met.

2) Transformative use: Transformative use is a key factor in judging the fair use of recreated short videos. Transformative use refers to the creation of a secondary work to give the original work a new meaning and value through new expression, purpose or function on the basis of the original work. For example, the purpose of editing a movie into a short film review video is no longer to simply disseminate the original movie content, but to express new opinions and opinions through comments.

#### (2) The nature of the original work

Different types of original works have different levels of copyright protection and fair use criteria. Generally speaking, copyright protection for fictional works (e.g., novels, films, etc.) is relatively strong because it embodies more of the creative labor of the creator. On the other hand, factual works (such as news reports, historical materials, etc.) may be relatively lenient in the judgment of fair use because their content is more based on objective facts. However, no matter what type of work, secondary creation must not unduly damage the core expression and value of the original work.

#### (3) The quantity and substance of use

1) The number of uses: When judging whether the secondary creation of a short video is fair use, you need to consider the number of original works used. If the amount of content used in the original work is small and does not form a core part of the original work, it is more likely to be considered fair use. However, the number of uses is not the only criterion, and even if the number of uses is small, if the use is a key and core part of the original work, it may not constitute fair use.

2) Substantiality: In addition to the number of uses, it is also necessary to consider the material impact of the use on the original work. Materiality refers to whether the use part involves the original expression and core value of the original work. If the secondary creation of a short video uses the unique plot of the original work, iconic images, and other substantive content, and has a greater impact on the market value or potential market of the original work, it will be difficult to be found to be fair use.

#### (4) The impact on the market for the original work

One of the purposes of the fair use system is to avoid unreasonable harm to the market for the original work. Therefore, when judging whether a second-created short video is fair use, it is necessary to analyze its impact on the market of the original work. If the dissemination and use of the secondary

creation of a short video replaces the normal use of the original work in the market, or reduces the potential market share of the original work, harming the economic interests of the copyright owner, then such use may not constitute fair use. Conversely, if the re-creation of a short video can bring new market opportunities to the original work, such as increasing the popularity and audience of the original work through publicity and promotion, then it is more likely to be found to be fair use if other conditions are met.

### **3. OVERVIEW OF THE FAIR USE OF SECONDARY CREATION SHORT VIDEOS**

The fair use of copyright refers to the use of a work under specific circumstances, without the permission of the copyright owner and without payment of remuneration to him, but the name or title of the author and the title of the work shall be indicated, and shall not affect the normal use of the work, and shall not reasonably harm the legitimate interests of the copyright owner.

Article 24 of the Copyright Law of the People's Republic of China stipulates 12 statutory applicable circumstances. As a "catch-all clause" generally recognized by the academic community, how to recreate short videos within its limits is a problem that creators need to think about.

The purpose of copyright law is to protect the creative achievements of copyright owners and encourage creativity, and at the same time, to ensure the reasonable use of works by the public, and to promote the dissemination of knowledge and cultural development. The rational use of re-created short videos is an important manifestation of this balance. The fair use system allows the use of works without the permission of the copyright owner under certain conditions, so that the public can innovate based on existing works and promote the inheritance and development of culture.

Secondary creation short videos provide a platform for creators to express themselves and show their creativity. The creator achieves new expressions and innovations through the reinterpretation and processing of the original work. This kind of creation based on existing works is in line with the law of innovation, which can stimulate more creative inspiration and promote the prosperity of cultural innovation. The fair use regime provides the legal space for such incentives for freedom of expression and innovation.

### **4. THE NECESSITY AND SIGNIFICANCE OF THE FAIR USE OF SECONDARY CREATION SHORT VIDEOS**

#### **(1) Stimulate creative vitality**

Fair use allows creators to be creative based on existing works and lowers the threshold for creation. Creators can use the materials and influence of the original work to quickly enter the creative process, inspire more inspiration, allow people from different backgrounds to participate in creation, enrich the creative ecology, and give birth to more excellent works.

#### **(2) Promote cultural dissemination and exchanges**

Re-creation of short videos disseminates cultural content in a more relaxed and diverse way. Through the reinterpretation of classic works, it can attract more people's attention, especially young people, so that culture can be inherited and spread in a new way. The secondary creation of different regions and styles can also promote cultural exchange and integration.

#### **(3) Meet the diverse needs of the public**

The public's demand for culture and entertainment is becoming more and more diverse, and the secondary creation of short videos can meet the needs of audiences with different interests and hobbies. Some people like to watch funny dubbing, some people are keen on in-depth commentary,

and a variety of secondary creation short videos provide the public with rich choices and improve the user experience.

#### (4) Balancing copyright protection and the public interest

Copyright protection is intended to incentivize creativity, but overprotection may limit the distribution and exploitation of works. Fair use leaves room for the secondary creation of short videos, and on the basis of protecting the legitimate rights and interests of copyright owners, promotes the circulation and value-added of works in the public domain, and achieves a balance between copyright protection and public interests.

## **5. METHODS FOR DETERMINING THE FAIR USE OF SECONDARY CREATION OF SHORT VIDEOS**

China's fair use system adopts an enumerated legislative model. Article 24 of the Copyright Law clearly enumerates the circumstances that constitute fair use. Although there is a catch-all clause of "other circumstances stipulated by laws and administrative regulations", it only extends the scope of statutory circumstances from the specific circumstances stipulated in the Copyright Law to the specific circumstances stipulated in other laws and administrative regulations, which is still a closed enumeration mode in nature. At the same time, the Copyright Law also incorporates Article 21 of the Regulations for the Implementation of the Copyright Law, which "shall not affect the normal use of the work and shall not reasonably damage the legitimate rights and interests of the copyright owner", indicating that China has accepted the "three-step test" judgment standard from the legal level. In other words, according to China's legislation, to constitute fair use, it must not only meet one of the 13 specific circumstances prescribed by law, but also meet the standard of "it must not affect the normal use of the work, and must not reasonably damage the legitimate rights and interests of the copyright owner". However, if it plays a substantial role in substitution, affects the normal dissemination and use of the original work, and constitutes substantial damage to the interests of the copyright owner, it will generally be found to be infringement[4].

#### (1) The risk of infringement in the secondary creation of short videos

The Copyright Law of the People's Republic of China stipulates that copyright owners enjoy moral rights and property rights. This article illustrates the possible infringement of the secondary creation of short videos from the four moral rights and the thirteen property rights.

##### 1) Infringing on the moral rights of others

One of the moral rights of authors is the right of publication, that is, the right to decide whether the work is made public, which is a one-time right that will become invalid and exhausted after one use. The secondary creation of short videos is the secondary creation, adaptation, and re-creation of the content of the original work, and there is generally no infringement of the right of publication. The second is the right of authorship, which indicates the identity of the author and the right to sign the work, so the secondary creation of short videos may be infringed without the name of the original author, infringing on the author's right of authorship. Third, the right to modify, that is, the right to modify or authorize others to modify, the secondary creation of short videos visible on the Internet are recreated without the author's consent to varying degrees, so it is easy to infringe the modification right. Fourth, the right to protect the integrity of the work, that is, the right to protect the work from distortion and tampering, and the secondary creation of short videos that quote music, text and other elements created by others for editing and deletion is very likely to infringe on the original author's right to protect the integrity of the work.

##### 2) Infringing on the property rights of others

The Copyright Law of the People's Republic of China stipulates that there are 13 types of copyright property rights, including the right of distribution, the right of reproduction, the right of rental, and the right of information network dissemination. Among them, there are four rights that secondary creators are most likely to infringe in the creative process: the right of reproduction, the right of adaptation, the right of compilation, and the right of information network dissemination.

First, the right of reproduction, that is, the right to make one or more copies of a work by means of printing, copying, rubbing, audio recording, video recording, ripping, remaking, digitization, etc., and the secondary creator needs to download or remake the original work first in the process of creation, which infringes on the original author's right of reproduction; Second, the right of adaptation, that is, the right to change the work and create a new work with originality, the creation of the second short video is actually an adaptation of the original work, that is, the exercise of the original author's adaptation right without the permission of the original author; Third, the right of compilation, that is, the right to assemble a work or a fragment of a work into a new work through selection or arrangement, for example, a simple editing video is to edit multiple videos and make a collection of short videos, which undoubtedly constitutes an infringement of the copyright owner's compilation right; The State Council's "Regulations on the Protection of the Right of Information Network Communication" stipulates that any organization or individual who provides other people's works, performances, audio and video recordings to the public through information networks shall obtain the permission of the right holder and pay remuneration, and secondary creators often publish the original works on the network communication platform without the consent of the original author. There is a conflict with the original author's exercise of the right to disseminate information on the Internet.

(2) The responsibility of platform management is not clear

Short video platforms play an important role in the dissemination of secondary short videos. However, there is currently no legal clarity regarding the management responsibilities of the platform. Although the platform has certain technical means and management power, it is difficult to review the copyright of a large number of second-created short videos uploaded by users one by one. There is a lack of unified standards and norms for what measures and responsibilities platforms should take after discovering infringements. In order to pursue traffic and user activity, some platforms have failed to supervise infringing acts, resulting in a large number of infringing short videos being disseminated on the platform, which damages the legitimate rights and interests of copyright holders.

(3) Creators' awareness of copyright is weak

Many creators of re-created short videos have weak awareness of copyright and lack understanding of the legal provisions of fair use. In the process of creation, they often use other people's works without the permission of the copyright owner, and even regard infringement as a common way of creation. This lack of copyright awareness is not only easy to lead to copyright disputes, but also not conducive to the healthy development of the short video creation industry.

## **6. ISSUES OF FAIR USE OF SECONDARY CREATION OF SHORT VIDEOS**

With regard to the determination of fair use, there are mainly the "three-step test" of the Berne Convention and the "four-factor test" of the judicial opinion of the Supreme People's Court. Combined with the existing research on judgment methods, this paper will discuss the determination of fair use of secondary created short videos from the following three aspects.

(1) Appropriateness of means

The appropriateness of the means is to determine whether the secondary creation of a short video constitutes a transformative use, and simply put, the secondary creator needs to add original ideological achievements on the basis of the original work.

For the judgment of originality, some scholars have refined the criteria for judging the originality of short videos, and believe that the originality of short video works is reflected in the following three aspects: first, the originality of material selection; the second is the originality of the way and method of shooting materials; The third is the originality of picture editing and arrangement.

In reality, you can find a lot of short videos of "X minutes to watch X movies". This kind of short video uses dubbing to tell the main content of the film and television work, and uses some important pictures in the original work as the video content, which does not reflect its own innovation, nor does it reflect the originality of the two creators in material selection and editing and arrangement, so it should not be found to be transformative use.

## (2) Justification of purpose

Some scholars believe that the legitimacy of the purpose means that the secondary creation of the short video is not used to achieve a commercial purpose, but the author agrees with the view that the commercial purpose in the creation of short video does not absolutely exclude the application of the fair use rule, and believes that it is more appropriate and feasible to balance the interests of the copyright owner and the user of the work for private purposes.

## (3) It does not affect the normal use of the original work

Normal use cannot be simply understood as the playback, rental, or exhibition of the work, but to determine whether the secondary creation of a short video has affected the potential market of the original work. Whether the potential market for a work will be substantially replaced is the key to determining whether the fair use system applies. The lack of originality in simply copying and reorganizing the materials in film and television dramas constitutes a substitute for the original work market.

When judging this factor, it is necessary to distinguish between the impact on the reputation of the market and the substitution effect on the potential market. If there is a negative impact on the evaluation of film and television works, causing the film and television works to lose part of their market reputation, it cannot be determined to affect the normal use of the works. The substitution effect is that the short video of the second creation may affect the release of the original work, because the audience is likely to give up the consumption of the original work by watching the short video of the second creation.

Some scholars believe that if the second creation of a film or television work that has already been marketed is found to be infringing, it should be regarded as a cultural monopoly and will hinder the development of cultural diversity. Some scholars also hold the opposite view, arguing that short video content may reduce consumption in the physical market and harm the interests of the original authors of film and television works. In addition to the crackdown on the physical market, China's review of film and television works is also very strict, and the source of the original works of the second creation is also a major problem. When the creator uses an unlisted film or television work, it can be directly judged that his act is an infringement, and the reason is also directly related to the potential market of the original work

## **7. THE PRACTICAL DILEMMA OF DETERMINING THE FAIR USE OF SECONDARY CREATED SHORT VIDEOS**

### (1) The designation standards lack predictability

Scholars believe that there are unforeseen shortcomings in the criteria for determining the fair use of recreated short videos. The law cannot clearly define every situation and set clear standards. However, if the law does not have detailed provisions, first, it will increase the cost of legislation and is not conducive to saving judicial resources, and second, it is easy to cause the lag of the law, and it is

difficult for the law to judge new things in the absence of a catch-all clause, which is not conducive to the development of cultural undertakings. There is a view that it is necessary to judge the infringement and fair use of short videos through typology[3]

#### (2) Judgment on the commercial purpose of short videos

Some scholars believe that the secondary creation of short videos cannot have a commercial purpose. Short video creators on each platform can earn money through the click-through rate of the platform, so it should be determined that they have a commercial purpose. In practice, it can also be found that the court also takes the audience's click income as the basis for adjudication in the judgment of infringement of secondary creation of short videos, and determines that the second creation of videos is not fair use. However, the author believes that the commercial purpose of short videos cannot be determined so simply, and should be combined with the balance of interests of both parties, and that under the promotion of some second-creation short videos, original short videos may "become popular" and gain more audiences.

#### (3) The legal provisions are vague

The provisions on fair use in China's current copyright law adopt a legislative model that combines enumeration and generalization. Although the Copyright Law provides for a variety of fair use situations, the law does not provide for the secondary creation of short videos, which is an emerging form of creation. This ambiguity leads to the lack of a clear legal basis for judging whether the secondary creation of short videos is fair use in judicial practice, and the judge's discretion is large, and the judgment results of different cases may be different.

#### (4) Difficulty in determining infringement

There are many difficulties in determining the infringement of secondary creation of short videos. On the one hand, due to the fast and wide range of short videos, it is difficult to detect and stop infringements in time. On the other hand, the secondary creation of short videos often has various forms of processing and adaptation of the original work, and how to accurately determine whether it exceeds the scope of fair use and whether it constitutes infringement is difficult at the technical and legal levels. In addition, some infringers may evade legal liability by obscuring the source of the work, fragmenting the original work, etc., which increases the complexity of infringement determination.

## 8. IMPROVE THE PATH

This article will elaborate on the improvement path of the protection mechanism for secondary creation of short video works from three aspects. They are to use the principle of balance of interests to coordinate the interests of both parties in adjudication, give play to the internal regulatory role of short video platforms, and strengthen the supervision of short video platforms by individuals, industries, and the state.

#### (1) Use the principle of balance to coordinate the interests of both parties in adjudication

The basic connotation of the theory of balance of interests in the Copyright Law is to use the theory of balance of interests to protect the rights of individual copyright as the core, and reasonably allocate the rights and obligations of individual copyright individuals in terms of legislation, so as to achieve an appropriate balance between the platform, the original creator and the secondary creator, and at the same time achieve a balance between the protection of copyright and the development of the cultural industry.

First of all, the licensing model should be optimized to provide convenient and smooth channels for users to obtain authorization and maintain their rights and interests. Second, the "principle of proportionality" should be reasonably defined, and the protection of public freedom of expression should be paid attention to while maintaining copyright. Finally, digital technology should be used to

improve the way of profit sharing and achieve a balance between the interests of all parties. A number of strategies have been implemented to promote the development of the short video cultural industry.

## (2) Give play to the role of short video platforms in internal regulation

The short video platform is the communication medium for the secondary creation of short video works. Due to the existence of secondary short video works based on virtual data on the Internet, the high cost of copyright protection and the low amount of compensation for the original author, coupled with the platform's negligence in reviewing in order to attract traffic, there are loopholes in the supervision of short video platforms.

First of all, the platform needs to educate authors about copyright awareness, strengthen authors' awareness of copyright protection, and remind creators to pay attention to copyright infringement in the process of publishing short videos. Second, short video platforms can introduce more effective technical screening measures to promptly delete some of the infringing content, and at the same time promptly take effective measures such as removing the infringing acts, prohibiting playback and dissemination. Finally, platforms should take stricter measures against publishers of infringing videos to set an example.

## (3) Increase the extent of external supervision of the platform

The external supervision of the platform is mainly divided into three aspects: individuals, industries and countries. Individual regulation of platforms is the broadest and most pervasive, but at the same time the most important. Users of short video platforms are more likely to find infringements in their use. The platform gives users a reporting channel is a direct way for users to report infringements. The platform can take timely measures against copyright infringement based on user feedback, which can minimize the damage caused by the infringement to the infringed party. The industry regulation of short video platforms requires the industry to establish unified standards for discrimination, uniformly regulate the measures taken by each platform to deal with infringements, regularly inspect each short video platform, and take punitive measures against the platform if it is found that the platform has inadequate supervision. State supervision requires joint implementation from the aspects of legislation, justice, law enforcement, law-abiding, and supervision, balancing the rights and interests of authors of secondary short videos and the original authors. The scope of application of fair use is as clear as possible in the legislation. In the process of justice, the interpretation of the law is used to balance the interests of both parties and determine whether it falls within the scope of fair use. Strict enforcement of the law and strict measures against infringement of others' copyrights can play a good educational role. In addition, the promotion of copyright and related intellectual property knowledge should be strengthened, so that the public can have a basic awareness of intellectual property rights. In this way, the external supervision of the platform can be better played.

## (4) Raise creators' awareness of copyright

1) Strengthen copyright education and publicity: Through online and offline copyright knowledge training, lectures, publicity activities, etc., popularize copyright laws and regulations and fair use related knowledge to creators of secondary short videos, and improve their copyright awareness and legal literacy.

2) Guide industry self-discipline: Encourage the short video industry to establish industry associations and formulate industry self-discipline norms. Through the guidance and supervision of industry associations, creators are urged to consciously abide by copyright laws and regulations, standardize creative behavior, and jointly maintain a good creative environment and market order.

## 9. CONCLUSION

As an emerging form of cultural creation, secondary short video plays an important role in enriching online cultural life and promoting cultural innovation. However, in order to ensure its healthy and

orderly development, it is necessary to clarify the boundaries and regulations of its fair use. By improving laws and regulations, strengthening the identification and supervision of infringement, clarifying the management responsibilities of platforms, and raising creators' awareness of copyright, on the basis of protecting the legitimate rights and interests of copyright holders, we can fully stimulate the creative vitality of secondary short videos, realize the positive interaction between copyright protection and cultural innovation, and promote the prosperity and development of the short video industry and the online cultural industry. In the future, with the continuous progress of technology and the change of social needs, it is necessary to continue to pay attention to the issues related to the reasonable use of secondary creation short videos, and constantly improve the relevant systems and norms.

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