

Copyright Law Regime for the Legalization of Secondary Creative Acts

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Abstract: With the diversified development of work creation and dissemination, copyright ownership and infringement disputes are becoming increasingly fierce. Private entities as creators and disseminators have overflowed the existing copyright legal system, and the fair use system is difficult to provide legal space for secondary creation. The effectiveness of legal and centralized licenses in secondary creation is also limited. In order to promote the development of secondary creation industry effectively, this paper tries to explore the path of legalization of secondary creation through literature research method and case study method. One is to establish a copyright trading platform to ensure comprehensive protection of copyright management electronic information during the process of work registration, pricing mechanism, and transaction negotiation. The second is to build a copyright sharing mechanism centered on network service providers, so that every work published on online platforms is accompanied by an exclusive "ID card", and rights holders can freely choose to enter or exit the platform. The user can pay the right holder through the network service platform. This path not only protects the property rights of right holders, but also helps private users to use the original work legally for re-creation under the premise of obtaining efficient authorization, and promotes the public's access to information and the prosperity of cultural development.

Keywords: Secondary Creation; Fair Use; Traditional Licensing Model; Rights-sharing Mechanism

1. Introduction

Changes in new technologies have brought new challenges to the protection of copyright law, breaking through the framework of

existing copyright legal relations. The existing copyright law interest allocation is divided into two links: creation by right holders and dissemination by commercial organizations; incentives for professional authors to create works and regulation of commercial organizations to disseminate works constitute two sides of the copyright law; at this time, the divergence of copyright interests is mostly due to the unequal distribution of interests between creators and disseminators. However, changes in digital technology have led to a gap between the design of the legal system and the social reality, and Web 2.0 has completely mixed the identities of creators and distributors[1]. Unlike the previous "creator-distributor-user" approach, the Internet platform has fully realized the user as the core, forming a "user-network service provider-user" circular chain. The Internet platform has fully realized the user-centered approach, forming a circular chain of "user - network service provider", where the user is the creator and the disseminator. Existing copyright laws, which are aimed at regulating specific distributors such as commercial organizations, are inevitably uncomfortable when dealing with large-scale private users.

Taking copyright and fair use as the research object, a total of 888 court judgments from all over the world were obtained during the period of January 1, 2019 to March 24, 2024 by searching in NLM. Through statistics, we found that there were a total of 518 decisions, accounting for 58% of the total; 370 decisions, accounting for 42% of the total; and only 9 decisions mentioning "transformative use". It can be seen that the use of the original work without the permission of the right holder is very easy to be judged by the court as an infringement of copyright. By reviewing the existing protection rules of the copyright law, this article tries to explore a new type of copyright licensing mechanism, so as to realize the legitimization of the act of secondary

creation.

2. A review of the Rules of Protection of Established Copyright Laws

2.1 Limitations of Applying the Fair Use Regime to Secondary User Creations

Under the impact of digital network technology, the change of communication channels in the scope of dissemination, the cost of infringement, utilization and other aspects of the fair use of the specific application of the system of dysfunction, and is reflected in the system to regulate the content of the system, the system's functional positioning of the two aspects.

2.1.1 Failure of the Fair Use System to Regulate Content and Secondary Creative Behavior

The application standard of China's fair use system is theoretically known as the "three-step test", which adopts a detailed enumeration and a legislative model with a closed enumeration model[2]. The second "appropriate citation" clause under the legal situation of "Step 1" seems to provide a legal basis for the secondary creative behavior of users, In fact, the "proper citation" clause cannot cover the fact that users utilize works in a diversified and massive way.

From the viewpoint of subjective purpose, it is obvious that the purpose of the user's secondary creation network dissemination behavior is not limited to the subjective intention of "introduction, comment or description", and the user's subjective motives are complex and diversified. In terms of the number of objective references, the user's secondary creation often involves a large number of interceptions and splices of fragments of the original work, and even the new work is entirely derived from the handling of the original work, which has clearly exceeded the necessary limit, and it is difficult to recognize it as "appropriate"[3]. For example, in the case of *Chen Jie et al. v. Beijing Strength Dentsu Culture Development Co. Ltd. et al.*, a dispute over infringement of copyright in written works[4]. The court held that "taking into account both the quantity and content of the quotations, the use of the letters in question by the program in question has reached the level of basically reproducing the content of the letters in question, and thus is

not a proper quotation."

Some scholars advocate the introduction of the United States of America's transformative use rules into the "appropriate citation" clause. Examining the "degree of transformative use" from the dimensions of "purpose of use" and "content of use" in the specific judicial application. Incorporating into the scope of the fair use system secondary creative works that form new values, functions and expressions[5]. It seeks to expand the scope of the fair use system by seeking the experience of copyright law in Western countries. Scholar recognizes that the transformative use rule has its institutional value, but lacks the soil for survival in China's statutory law system, and therefore does not agree that it should be introduced from the level of copyright legislation, but only favors it to be referred to appropriately in the reasoning of judicial decisions[6]. It has also been argued that the expansion of purposive conversion in judicial practice will ultimately result in a loss of predictability in the fair use determination standard[7].

In the author's view, the introduction of the rule is premised on examining whether the legislative rights system and judicial application capacity can make the rule work well. First of all, the transformative use rule of the case law countries is difficult to coordinate with the closed type of fair use system in China. Secondly, in judicial practice, our judges tend to make decisions based on detailed and specific rules of law, the determination of the "degree of conversion" will give the judge too broad discretion, easy to blur the boundaries of infringement and fair use of the right, but also easy to cliff expanding the scope of the fair use of the system. It can be seen that there are still difficulties in applying the rule of transformative use to determine the legality of users' secondary creation and network dissemination behavior.

2.1.2 Mismatch Between the Functional Orientation of the Fair Use System and Secondary Creative Behavior

Back to the beginning of the issue, the fair use system is organized in the section on "Limitation of Rights", and the function of this system is to balance the interests of copyright and the public. To be recognized as fair use, the "quality" and "quantity" of the quoted

portion must be considered[8].

Mill's principle of exclusion of infringement, as discussed in *On Liberty*, embodies the intrinsic boundaries of the right itself: "In a civilized society, the only purpose for which a limitation of a right can be justly imposed on any individual against his will is that of preventing infringement of it by others." But for the exercise of copyright not to constitute a positive infringement of other rights, and there is no apparent conflict of rights, but rather a restriction of private rights based on the public welfare, this is called an external constraint, which must be permissible for the value objectives of the copyright law itself, or else it constitutes an undue infringement of private rights. The fair use system encompasses two levels of significance: it seeks to prevent the excessive expansion of the copyright owner's rights to the detriment of the public's legitimate access to and use of the work, and it seeks to avoid the excessive compression of the space for the application of private rights by the public welfare. It can be seen that the copyright provisions seek a dynamic balance between the rights of copyright owners and the public, with a view to achieving the legislative vision of copyright law to encourage creativity and cultural development and prosperity.

In the civil judgment of the first instance of the dispute over the infringement of the right to disseminate works on the information network of Hu Entai and Beijing Qihoo Technology Co[9]. The court held that "thumbnails have the function of transformative use, and the act of providing thumbnails is intended to better serve the function of the search engine, and the act of providing such thumbnails can generally be recognized as constituting fair use." The court recognized the fair use through the transformative use rule under the four elements of the United States. It can be seen that due to the limitations of the language itself and the new industry to create a complex and diversified use of works, the use of prior works of behavior has already broken through the old copyright industry model designed under the closed rights configuration system, the provisions themselves can not encompass the rich social reality. In addition, the secondary creation and network dissemination behavior of users contain huge market prospects and delayed income, and also form a relatively fixed consumption pattern and copyright

trading market, in which the diversion and promotion of the secondary creation works may greatly affect the normal use of the prior work and market share. Under this new development, it is difficult to reconcile the fair use system in the dispute between the interests of right holders and users. In view of the above, there is an urgent need to find a new adjustment plan to harmonize the needs of all parties.

2.2 Analysis of the Application of Traditional Licensing Mechanisms for Copyright

The system of fair use without permission is no longer able to provide a legitimate basis for the secondary creative behavior of users, and it is necessary to achieve the pursuit of the value of cultural prosperity under the premise of authorization and permission from the right holders. Traditional copyright licensing models include statutory licensing and centralized licensing.

2.2.1 Statutory Licenses Present Implementation Challenges in User Secondary Creation

Firstly, the statutory license model still adopts a typological enumeration approach, and its design jurisprudence is based on the restriction of licensing transactions to safeguard the basic public welfare of the society and the normal operation of the copyright industry, so the scope of the statutory license of the copyright law is quite limited. Secondly, China's copyright law also reserves the proviso for the right holders, China's Copyright Law newspaper reproduction, excerpts of the statutory license gives the right holders to declare the right to reserve. Therefore, in practice, it is inevitable that the user pays royalties before and the right holder declares that the conflict of reservation, increasing the instability of the licensing transaction and transaction costs. Finally, the statutory license is essentially from the legal level to weaken the exclusive rights of the right holder, the legislator does not have the advantage of the information cost of the market transaction subjects, pre-determined royalties will lead to the pricing mechanism is too rigid, and can not give play to the advantages of the market flexible pricing.

2.2.2 Centralized Licensing Works Poorly in Secondary Creation

As a kind of adjustment plan for redistribution of rights, the system design of centralized licensing does not break the traditional copyright allocation system, and the core of its operation lies in the purpose of centralized exercise of rights on behalf of right holders through the conclusion of licensing and transfer agreements between copyright collective management organizations and right holders. The problem is that, even through the addition of copyright collective management organizations to ensure that the exclusive rights of the right holder under the premise of releasing the dissemination efficiency of the work, but in the actual operation of the problem still exists. First, the copyright collective management organization has a strong administrative approval attribute, and the management personnel of the organization are mostly appointed by the administrative personnel within the system, and there is a functional deviation between its public law operation mode and the private copyright factor. Secondly, the exclusive licensing access mechanism of copyright collective management organizations has monopoly risk, and the internal operation mechanism is not transparent, and the standards for setting royalties are different, so the actual operation effect is greatly reduced. Third, under the impact of the Internet, it is also difficult to meet the demand of users for quantitative use. It can be seen that the traditional copyright collective management organization to play the advantage of the concentration of rights is not obvious, although to a certain extent can achieve the "separation of powers" of the social effect, but in the judicial operation is still not good.

3. Exploration of Viable Copyright Licensing Mechanisms

The content created by non-professional authors cannot completely replace the content created by professional authors, and the emergence of new creative subjects does not replace the traditional subjects of the copyright industry, but serves as a supplement to the copyright market. Therefore, creating new rules is not the optimal path, and the optimal solution is through extending the rules on the basis of not changing the established copyright legal relationship and rights configuration. It has been suggested that the basic principles of

tolerant regulation should be established and that a technology-neutral regulatory system should be constructed[10]. Some scholars have also pointed out that the authorization of short videos for secondary creation should be built around the "rules of responsibility"[11]. However, in order to solve the problem of copyright infringement properly, it is necessary to form the authorization system of first authorization, later use and then payment.[12]. Although the user's secondary creative behavior breaks through the subject boundary of the traditional copyright protection rules, the establishment of the electronic information protection platform for rights management can still be applied to the existing legal system of copyright law, clarifying the scope of copyright protection and to what extent it is protected.

3.1 Establishment of an Online Digital Copyright Trading Platform

The online digital copyright trading platform needs to ensure the participation of market players under the value tone of rights autonomy, not as a duplication of the collective management organization, but in order to guarantee the private law autonomy of the right holders, voluntary entry and exit mechanisms, and give full play to the information integration advantages of market players. In addition to this, the function of online digital copyright trading platforms is to provide a platform for the protection of electronic information for rights management. The role of the government is not to withdraw completely, but to encourage private actors to participate in the establishment and operation of online digital copyright trading platforms through the provision of tax incentives and other policies. At the same time, when the market fails, the government should supervise in time to avoid the platform being monopolized and manipulated by a few market players.

The trading platform needs to make reasonable use of big data, cloud computing, blockchain and other technologies to ensure all-round protection of electronic information for rights management in the process of work registration and inventory, pricing mechanism, and transaction negotiation. Through a series of measures, such as copyright code certificates, to reduce the cost of information

retrieval for copyright owners and users, so that the trading parties can quickly and conveniently obtain authorization online along the path of "searching and querying - determining the trading counterparty - negotiating the transaction - reaching an agreement". The authorization can be obtained online quickly and conveniently. Moreover, modules such as dispute mediation, rights identification and evidence preservation can be developed to reduce the legal and litigation risks of both parties to the transaction.

3.2 Create a Right-Sharing Mechanism Centered on Network Service Provider Platforms

The rights sharing mechanism with network service providers as the core continues the basic legal relationship of the existing copyright rights system, and tries to overcome the problems of high transaction costs and low licensing efficiency caused by the dispersion of rights subjects in the network environment under the premise of guaranteeing the autonomy of private rights and the advancement of licensing. On the one hand, under the premise of free "entry-exit", right holders sign knowledge sharing license agreements with network service providers. At the same time, the right holder can choose the scope of control of the right and the way of licensing. The essence of the Creative Commons agreement is the coexistence of transferring part of the rights and retaining part of the rights, which can not only avoid the problem of collective management organizations taking advantage of their dominant market position to force the right holders to sign the format terms and conditions, but also help the right holders to release their property rights and the users to obtain efficient authorization. In other words, network service providers do not only provide platform services as intermediary organizations, but also need to be given the status of the main body of copyright transactions by the law. On the other hand, as platform service providers, ISPs are directly oriented to right holders and users. From the perspective of right holders, the Creative Commons licenses meet the demand of right holders to participate in the pricing of exclusive rights such as the right of attribution, reproduction, interpretation, and the right of information network dissemination, etc., and

the platforms can also make use of digital technology to provide reference for the price ranges of the same copyrighted works. From the perspective of users, the platform has information and market advantages. The platform can flexibly adjust pricing according to changes in market supply and demand to ensure that the interests of right holders are maximized, and it can also satisfy the limited individuality needs of some users, who do not need to pay for all the ceded rights of right holders. Finally, in the event of a rights dispute, the right holder can not only pursue the platform's breach of contract based on the knowledge-sharing license agreement, but also request the user to stop the infringement and compensate for the loss based on the traditional remedies of infringement liability such as substantial similarity. Thus forming a two-tier protection mechanism for the right holder's rights.

4. Conclusion

Any creation is not purely original, and all non-original creations are bound to stand on the shoulders of others or even giants, so it is necessary to find a legalization path for users' secondary creative behavior. The establishment of an online digital copyright trading platform is conducive to promoting the flow of information and culture and enriching cultural diversity. At the same time, attempts can also be made to construct a knowledge-sharing licensing agreement mechanism centered on a network service provision platform, to give full play to its function of safeguarding the exclusive rights of right holders and the freedom of public use in society.

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