

Criteria for the Identification and Ownership Classification of New Types of Audio-Visual Works

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Abstract: In China's Copyright Law, the concept of "film works and works created using methods similar to cinematography" has been replaced by "audiovisual works". Although the amendment enlarges the coverage scope of original works, it only changes the original conceptual expression of audio-visual works, and it still lacks a clear definition of audio-visual works and relevant supporting system. With the development of internet technology in the digital era, new types of audio-visual works, such as short videos, live videos of online games and live videos of sports events, need the protection of copyright laws. This article will analyze and induce the criteria for the identification and classification of new types of audio-visual works by comparing and studying the existing materials, in order to provide some suggestions on the identification and protection of new types of audio-visual works in judicial practice.

Keywords: New Types of Audio-Visual Works; Identification; Classification of Ownership; Protection Scope of Copyright, Originality

1. Introduction

Driven by new media technology, the entertainment industry has developed rapidly, in particular the film and television and game industries. Online games, animated films, live broadcasts and other new types of works are too numerous to handle, and various related difficult cases are constantly filed with the courts, challenging the judicial capacity of China's copyright law. However, the definition of "cinematographic works and works created using a process analogous to cinematography" in China previously was biased, resulting in frequent errors in the judicial identification of "film-like works". [1] Some courts strictly controlled the "filming" element, excluding some "works" that satisfy the expression form of

"film-like works" from the scope of protection. We cite the Civil Judgment ((2009) Hai Min 9477) rendered by the People's Court of Haidian District, Beijing. Meanwhile, in China's copyright law, the titles of relevant films and television works are in different ways, resulting in difficulty in the identification of such works. Different courts have adopted different views of "cinematographic works", "film-like works" or "audio-visual works" to describe animations and games. Therefore, it is not uncommon for the parties to deliberately select the right court to win a case in the same case, which severely affects the judicial authority and credibility of copyright law. [2] Under such circumstances, the 3rd revision of China's Copyright Law replaced "cinematographic works and works created using a process analogous to cinematography" with "audio-visual works".

2. Necessity of Exploring the Identification and Classification Criteria for New Types of Audio-Visual Works

In this Amendment to Copyright Law, the original term "Generic Works" is changed into "Audio-Visual Works", which to a certain extent expands the coverage of the original generic works, responds to the demand for protecting the live broadcast images of online games, live broadcast and other new types of audio-visual works, by including the live broadcast images of online games and other new types of works that may emerge in the future digital era, and strengthens the protection of some new types of works, such as short videos with originality. However, in this Amendment to Copyright Law, it only changes the original conceptual expression of audio-visual works, but does not clarify the relevant scope of audio-visual works. Therefore, to a certain extent, there are still no clear definitions of the audio-visual works and no supporting regulations. In addition, China's Copyright Law in 2021 has not adopted the suggestion on the deletion of video recordings

specified in the Draft Revision, giving rise to controversy over the boundary between original works and video recordings. In fact, under the PRC Copyright Law system, if a new type of audio-visual work wants to be truly protected by the PRC Copyright Law, it should first fall within the scope of works stipulated in the Copyright Law, i.e., it can be constituted as a work. Only when such work constitutes a work in accordance with the PRC Copyright Law can the author claim the application of compensation rules when others infringe upon such work's copyright. Therefore, the legal attribute of such work is the premise and basis of the copyright protection system of such work. Another major innovation of this Amendment is that the ownership of rights of audio-visual works can be divided into two categories: the first category is the copyright of cinematographic works and television dramas, which belongs to the producers, which is the same as the Copyright Law in the PRC. The second category is the copyright ownership of audio-visual works other than cinematographic works and television dramas, which is agreed upon by the parties. In the absence of the agreement or the agreement is explicit, the copyright ownership of audio-visual works belongs to the producers. Therefore, the classification of new-type audio-visual works will play a key role in the protection of such works. [3]

3. Definition of the Scope of Audio-Visual Works

Currently, China adopts an open model based on the type of works. Even if the new-type works do not belong to a specific type, they are still protected by the Copyright Law. Certainly, the ownership of rights to different types of works may vary as the law has special provisions on the ownership of rights to certain types of works. As discussed above, the recognition of certain new-type works as audio-visual works will lead to different protection and compensation rules. Therefore, the purpose of defining the scope of audio-visual works is to include the new-type audio-visual works that satisfy the requirements of audio-visual works into such scope for special copyright protection. The following methods can be used to determine whether a work belongs to audio-visual works.

3.1 Determine Whether the Work is Copyrightable.

Determine whether the "work" as a whole meets the requirements of works, such as whether the "work" can be expressed in a certain form, whether the "work" is independently created, the degree of creative difficulty, whether the "work" expresses the author's emotion, and whether the "work" as a whole has originality. Any type of works is affected by the originality, but audio-visual works are most affected by the originality. Through the criteria of "relatively high originality of audio-visual works" and "relatively low originality of video recordings", and considering the originality of the work as a whole in combination of all its aspects, the "work" has a relatively high degree of originality and satisfies the definition requirements of "work"; the "product" has a relatively low degree of originality and thus does not satisfy the definition requirements.

3.2 Determine Whether the Work has the Characteristics of Audio-visual Works

If the two requirements that the work is an intellectual achievement protected by copyright law and the work has a relatively high degree of originality are satisfied, the work has the copyright protection attribute compared to the product. Then judge whether the work belongs to the category of audio-visual works according to the characteristics of audio-visual works, that is, judge whether the work has the characteristics of visibility, continuity and fixity, and the work that has these characteristics is audio-visual works, and the work that doesn't is not audio-visual works.

3.2.1 Visibility

Audio-visual works can be known as the works that can be seen, or in other words, can be seen and heard, both from their names and from their forms of expression. Through the combining of the related concepts of audio-visual works in foreign countries and the discussion of audio-visual works by scholars in our country, it can be concluded that visibility is a necessary condition to constitute audio-visual works. Audibility is not considered as a necessary condition of audio-visual works, the most typical example is the mime, because the limited level of science and technology at that time resulted in the image and sound could not be presented at the same time on the same carrier, but now technology has solved this problem. Therefore, it is best if the audio-visual works can have visibility at the same time, if not, it must have visibility.

3.2.2 Continuity

Most countries require audio-visual works to be composed of related images or continuous frames, here continuity refers to continuous frames or images. From the form of expression of audio-visual works, the images that constitute the audio-visual works must be continuous, rather than static frame by frame, that is, audio-visual works require movement.

3.2.3 Fixity

The work requires that it can be expressed in a certain form, and the judgment of the category and attribute of the work depends on its own form and value. Some judges believe that "shooting on a certain medium" stipulated by the original film and film-like works is the embodiment of its fixity. Shooting on a certain medium can be understood as using a shooting method to stably fix on a certain medium, the creator must prove the existence of the work, so from the definition of the film and film-like work we can see that fixity is the premise of its protection. [4] At the same time, fixity should be understood in a broad sense, not in a narrow sense as prior fixation. The completion of the audio-visual work is the time of fixation of the audio-visual work, and fixation includes fixed and synchronous fixation. The citation here is the Civil Judgment (2015) Jing Zhi Min Zhong Zi No. 1818, Beijing Intellectual Property Court. For example, a film watched in a cinema is a film-like work that has been fixed in advance, but when watching a live sports event that needs to be carried out in a network environment, this situation is also a manifestation of fixity, because it can be fixed through cloud storage technology, and then broadcast as recorded. [5]

3.3 Distinguishing Audio-Visual Works from Video Products

After the legal category of works is defined as "audio-visual works" in the Copyright Law, the concept of "video products" is retained in the provision of neighboring rights. However, based on current judicial practice, the boundary of originality between audio-visual works and video products is not very clear, and there are certain divergences of views. Here are my opinions on how to distinguish the originality of audio-visual works and video products.

However, it is worth mentioning that although the current Copyright Law distinguishes between audiovisual works and video products, the first three revision drafts of the Copyright

Law all deleted the video products, which means that video products have been included in the scope of audiovisual works in those three revision drafts. To be more precise, video products have been included into other audiovisual works for protection. Only later on, the neighboring rights system added the video products into the scope of audiovisual works, which means that not only in terms of its form of expression or production method, video products are extremely similar to audiovisual works. Therefore, the distinction between the two can only be made through the degree of originality of the two.

Through a comprehensive consideration of audio-visual works, the degree of originality can be categorized into three types: "upper", "middle" and "lower" originality. "Upper" refers to a work with a high degree of originality and belongs to audio-visual works; "middle" refers to a work with a low degree of originality and can be included in the video products for protection; "low" refers to a work with a low degree of originality and cannot be protected as audio-visual works or video products. Nowadays, many cameras installed in homes only record images and sounds, which do not reflect creative thought. Therefore, they cannot be considered as original works. However, if the photographer contributes his/her own intellectual creation during the filming process, the originality cannot be denied. Therefore, the following two situations will exist. The first situation is that, after comprehensive judgment from multiple perspectives, the photographer's intellectual creation has a low degree of originality and cannot meet the requirement of originality of audio-visual works, but for the purpose of broadcasting or requiring protection of property right, the audio-visual works that fall within the scope of neighboring rights will be protected. The second situation is that, after comprehensive judgment, the photographer's intellectual creation has a high degree of originality and can meet the requirement of originality of audio-visual works, so the audio-visual works can be classified as audio-visual works for protection. Therefore, for the controversial question whether a "novel audio-visual work" should be classified as an audio-visual work or a video product, the abovementioned approach may also be applied for a comprehensive consideration from multiple perspectives. [6]

4. Classification and Protection of the Ownership of New Audio-Visual Works

After a work is recognized as an audio-visual work, the ownership of its copyright is still not determined. This is because, according to the Copyright Law, audio-visual works are divided into two categories: cinematographic works, television drama works and other audio-visual works. Cinematographic works and television drama works form one category, and other audio-visual works form the other category. For cinematographic works and television drama works, the law provides that the copyright belongs to the producers and the ownership of copyright shall not be changed by agreement. For other audio-visual works, the law provides that the copyright ownership can be decided by agreement and the copyright will only be owned by the producers if there is no agreement. Therefore, as long as a cinematographic work and a television drama work can be identified as such, the audio-visual works which are not recognized as cinematographic works and television drama works will be considered as "other audio-visual works". Therefore, the most critical issue is how to identify a cinematographic work and a television drama work.

In fact, compared to the indefinite and subjective criteria such as the length, producer, creative method, investment amount and episode number of the audio-visual works, etc., in practice, it is more appropriate to identify cinematographic works and television drama works by referring to the laws and regulations on the administration of film and television works. The reasons are as follows:

4.1 The Identification is Clearer and Definite

Taking cinematographic works as an example, for the administration of cinematographic works, China has formulated the Film Industry Promotion Law, the Film Administration Regulations and other regulatory documents, which clearly define a film and prohibit the contents of a film, etc. Meanwhile, China's laws and regulations on cinematographic works adopt a film filing, examination and approval system, which requires that the script before the shooting of a cinematographic work shall be filed with the relevant authorities for record before the shooting of a cinematographic work can proceed. In order to protect the physical and mental health of the young, adhere to the domestic

mainstream culture, and develop and point out beneficial culture, the content of a cinematographic work shall be examined by the relevant authorities. After the completion of shooting of a cinematographic work, a screening license shall be obtained before the film can be screened in the market. Apart from the requirements of filing and public notification before the shooting of a TV drama work, the procedures for the administration of a TV drama work are similar to those for cinematographic works. It can be seen from these regulations that the process of script examination before the shooting of a film or TV drama, through examination during the shooting and examination after the completion and screening shall be filed or licensed by the administrative authorities. For instance, the establishment of a radio station or TV station and the conditions for broadcasting the film or TV drama shall be examined and approved by various levels of administrative authorities. The reason why such strict procedures are set for cinematographic works and TV dramas is to better regulate the operation of the film and TV drama industry, and maintain the market order of films and TV dramas. Since the essence of the Copyright Law is to encourage the creation and broadcasting of cinematographic works and TV dramas, its value orientation shall be the same, rather than encouraging the creation and broadcasting of cinematographic works and TV dramas in any form or with any content. Therefore, when there is no clear definition of films and TV dramas under the Copyright Law, a clearer result could be obtained by referring to the definitions of films and TV dramas and the relevant provisions in the laws and regulations on the administration of film and TV works. [7]

4.2 More in Line with Legislator's Original Intention

During the deliberation of the Amendment to the Copyright Law, the ownership of the rights of audio-visual works was not differentiated initially. However, some experts, the public and entities later pointed out that since the scope of audio-visual works is larger than that of films and cinematographic works in the past, it is not appropriate to unify the ownership of the rights of films and television dramas and other audio-visual works. In this case, it is necessary to distinguish the ownership of the rights of films and television dramas and other

audio-visual works. The Second Review Draft and the subsequent finalized drafts adopt such a view and distinguish the ownership of the rights of films and television dramas and other audio-visual works. Therefore, it is deliberate of legislators to divide audio-visual works into cinematographic works, television dramas and other audio-visual works, and to have different attribution rules for audio-visual works. Such different attribution rules are in line with the provisions of the Berne Convention, as the member states of the Convention are free to formulate their own attribution rules for audio-visual works according to their domestic laws. With reference to Article 14bis (2) of the Berne Convention for the Protection of Literary and Artistic Works (1971 Revised). However, in China, in addition to the Copyright Law, the regulations on cinematographic works and TV dramas are mainly based on administrative laws and regulations relating to cinematographic works. Under the background that the administrative filing, examination and licensing system has been implemented for film and TV series works in our country for a long time and the same is administered in accordance with administrative laws and regulations, legislators still intend to divide audio-visual works into film and TV series works and other audio-visual works, without the possibility of referring to the administrative laws and regulations on film and TV works. As pointed out by some scholars, there is no relevant provisions in the copyright law of the PRC with respect to TV plays. The nature of films and TV plays are continuous pictures producing dynamic audio-visual sensation, so there is no need to give a special explanation about TV plays. Simultaneous listing of films and TV plays reflects the absorption of administrative standards for films and TV plays, and is a way of classification with reference to administrative standards. [8]

5. Examples of the Recognition of New Audio-Visual Works

Take the above mentioned short video works as an example to illustrate the identification process of new types of audio-visual works. As a typical new type of audio-visual works, short video has the value of entertainment, communication and creation in social life. The disputes over the attribute of short video works mainly include the following: whether short videos are works; whether short videos are

cinematographic works; and whether it is necessary to specify which type of audio-visual works the short videos belong to. To solve the above disputes, the procedures for identification of works -identification of audio-visual works -identification of audio-visual works -identification of audio-visual works can be followed. [9]

First, the communication and creation of short videos in social life need to be protected by copyright. Since the short videos can be expressed in a certain form, whether they are highly original may be comprehensively judged on the basis of the creation process, frame selection, shot selection, and other aspects of the short videos involved in the case. If the short videos have relatively high originality, they are works; if the short videos have relatively low originality, they are video recordings and shall be protected by neighboring rights. Second, the short videos involved in the case are highly original and fall under the category of works. If the short videos satisfy the characteristics of visibility, continuity and fixity of audio-visual works, they can be identified as audio-visual works; otherwise, they can be identified as other types of works. Third, if the short videos involved in the case are audio-visual works, the category of audio-visual works they belong to can be determined based on the administrative filing and examination licensing methods. If the short videos have been approved by the administrative filing and examination authorities for cinematographic works or television drama works, they fall under the classification of cinematographic works and television drama works and the rules on ownership of cinematographic works and television drama works apply. If no administrative approval has been obtained, the short videos fall under the classification of other audio-visual works and the rules on ownership of other audio-visual works apply. Finally, if the short videos fall under the category of "other types of audio-visual works," the identification of the categories of new types of audio-visual works encountered by judges in judicial practice may be used for reference in order to facilitate direct application when there is a need for categorized protection of short videos in the future.

6. Conclusion

Due to the lack of definition of audio-visual works in the current Copyright Law, the

identification of new types of audio-visual works has become a hot debate. In addition, the ownership classification of new types of audio-visual works can be incorporated into the administrative filing and examination licensing standards for the identification of cinematographic and television drama works. If a new type of audio-visual work is not a cinematographic or television drama work within the scope of audio-visual works, it should fall under the category of "other types of audio-visual works," which would facilitate the identification of the ownership of new types of audio-visual works.

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