

Research on Fair Use of Fan Creation in the Context of the Internet

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Abstract: With the advancement of the Internet and the benefits of technological progress, fan creations in China have flourished unprecedentedly, giving rise to significant legal and societal issues. Due to the inherent conflict of rights between fan-created works and original creations, arising from their derivative nature and shared interests, coupled with the inadequacies of current legislation, the determination of copyright infringement in fan-created works remains challenging. To better reconcile the tensions between original authors and fan creators, this paper examines the current status and issues surrounding the development of fan-created works in the context of the Internet. It also analyzes the main theoretical frameworks for fair use in both Chinese and international contexts, such as the "Three-Step Test" and the "Four-Factor Standard", aiming to strike a balance between copyright protection and public interest, and to more effectively regulate the development of fan culture.

Keywords: Fan-Created Works; Fair Use of Copyright; Interest Balance; Four Elements; Transformative Use

1. Introduction

The development of the Internet has given rise to numerous emerging cultural products and media landscapes, with a growing trend towards the decentralization of cultural product production and dissemination. Among these, fan culture stands out, as it often involves the recreation of original works, inevitably impacting the related rights of the original creators. From the copyright disputes surrounding *A Murder Case Caused By Steamed Bread* (2006) and *The Promise* (2006), to the infringement issues involving *Ghost Blows Out the Light* (2015) and *Mojin Returns* (2015), to the 2018 lawsuit filed by Wang

Guozhen's mother against the author and publisher of *The True Wang Guozhen*, and the prolonged legal battle between Jin Yong and Jiang Nan over *The Juvenile Here*—the issue of "fan creation" infringement has remained in the public eye in recent years.

2. Copyrightability and Infringement Risks of Fan-Created Works

2.1 Overview of Fan-Created Works

Fan-created works have existed in China for centuries. Initially a niche literary form with a limited audience, it was primarily enjoyed by a small, specific group of enthusiasts. However, with the widespread adoption of the Internet, more and more individuals have come into contact with fan culture, contributing to its surge in popularity. Scholars tend to agree on the definition of fan-created works, which refers to creations made by fans who harbor a deep affection for literature, animation, games, and film, among other works. These enthusiasts, motivated by their desires to fulfill their expectations for the original works and to express their own creative urges, engage in secondary creation based on the original, producing various forms of fan-created works[1]. Depending on their degree of reliance on the original work, fan-created works can be categorized into derivative and non-derivative fan-created works[2].

To meet their expectations for the original works, fans, drawing from their understanding and personal emotional investment in the original content, engage in independent secondary creation, resulting in fan-created works. This form of creation is not simply a matter of copying or repurposing; it can be viewed as a blend of "partial borrowing" and "partial originality". As such, fan-created works are both dependent on and original in nature. Initially, these works were created and shared voluntarily by enthusiasts, driven by their expectations for the development of the

original storyline. At its core, fan creation is more aligned with social rather than commercial intentions[3].

2.2 The Legal Basis for the Protection of Fan-Created Works

2.2.1 Legal Foundation for the Copyright Protection of Fan-created works

Firstly, the right to create is a fundamental right granted to citizens by the Constitution. The Constitution of China guarantees freedom of speech, and fan-created works serve as a form of personal expression in which creators convey their ideas and perspectives on a subject, often based on their own interpretations of existing works. Protecting the copyright of fan-created works is consistent with the constitutional spirit of safeguarding individual freedoms, including the freedom of expression.

Secondly, the protection of fan-created works aligns with the legislative objectives of copyright law. The primary aim of *Copyright Law* is to safeguard the rights of creators and, in doing so, to encourage further creativity and innovation. As noted earlier, fan-created works are independent and original creations[4], and therefore should be protected under copyright law, as they meet the legal criteria for originality.

2.2.2 Practical Basis for the Copyright Protection of Fan-created works

Firstly, the protection of fan-created works follows the principle of balancing interests. The optimal copyright protection model seeks to maximize the benefits for both the creators and the public[5]. Fan-created works, as a form of literary expression, contribute to this balance, and therefore deserve protection under *Copyright Law* in order to safeguard the interests of all parties involved.

Secondly, fan-created works hold significant cultural and social value. The growth of fan culture fosters cultural diversity, catering to the aesthetic and emotional needs of people across different age groups. Moreover, it encourages more people to engage in creative processes, thereby enhancing the public's ability to create and contributing to the overall development of societal culture.

Thirdly, fan-created works have tangible economic value. As intellectual property laws inherently accommodate economic analysis[6], fan-created works generate economic benefits

through various channels such as online platforms, content sharing, and offline events. This, in turn, contributes to the creation of economic value in the national cultural market.

2.3 The Infringement Risks of Fan-Created Works

Fan-created works occupy a unique space where copyright rights and limitations intersect, embodying the tension between exclusive rights and freedom of expression[7]. With the advancement of internet dissemination technologies, many platforms now feature tipping systems and paid content, challenging the non-commercial nature of fan-created works and escalating conflicts between original creators and fan creators.

2.3.1 Conflict with the Moral Rights of the Original Author

Firstly, there is a conflict with the right of attribution. Most fan creators, when producing their works, assume that the original work has been widely disseminated and that the public is aware of the original creator's name. Consequently, it is rare for fan creators to include the original author's name in their work, which may lead to a violation of the original author's right to attribution.

Secondly, there is a conflict with the original author's right to the integrity of the work. Fan-created works are often based on the original creation, drawing upon other elements of the source material and modifying them to reflect the fan creator's expectations. This inherently involves rewriting or reinterpreting the original work, which places fan-created works at significant risk of infringing on the original author's right to maintain the integrity of their work.

2.3.2 Conflict with the Economic Rights of the Original Author

The majority of fan-created works are derivative works produced without the original author's consent and without compensation. As market economies evolve, many individuals are increasingly profiting from fan-created works. This, in turn, infringes upon the original author's economic rights, including their rights to reproduction, adaptation, and distribution. The most notable conflict arises with the right of adaptation. However, unlike moral rights, which are perpetual, economic rights have a finite protection period. Once this period expires, fan

creators may use this as a defense in cases of infringement.

3. Difficulties and Reasons Behind the Assertion of Fair Use for Fan-Created Works in the Context of the Internet

3.1 Legislative and Judicial Status of Fair Use

The fair use system is a unique framework established by copyright law to balance the protection of intellectual property with the public interest. At its core, this system allows for the use of a work without the author's permission or payment under specific circumstances, as explicitly outlined by law. In China, the *Copyright Law* adopts a "closed enumeration + principle-based restriction" model, which clearly specifies 12 specific scenarios where fair use applies. After the 2020 amendment, a catch-all clause was added, ensuring alignment with international conventions like the *Berne Convention* and the *TRIPS Agreement*, while also addressing China's domestic cultural development and social governance needs.

Despite this, the judicial landscape remains ambiguous, largely due to certain inherent characteristics of fan-created works, such as their dependency on the original work and the diversity of fan-created genres[8]. Furthermore, due to the rapid pace of societal change and the slower pace of legal development, the legal provisions surrounding fair use in the context of fan-created works have not been clearly defined. While various viewpoints exist in academic discussions, no unified standard has emerged. Consequently, judges, when adjudicating cases, tend to balance the goals of copyright protection, cultural development, and public interest, often interpreting fan-created works as fair use based on certain "socially accepted" or "implied" practices. The main scenarios in which fan-created works are often regarded as fair use include:

3.1.1 Recognition as Parody Works

Although the law does not explicitly recognize parody works, they are frequently acknowledged in practice. Parodic excerpts, which may not fit the prescribed fair use scenarios and sometimes fail to cite the original work, are commonly accepted as "fair use" in real-world applications. For example, a user may alter the title of a work like *My*

Skateboard Shoes to *My Shampoo* for comedic or satirical purposes and share it online.

3.1.2 Implied Permission for Rewriting by the Original Author

The primary creators of fan-created works in China today are the general public, with the majority being "fans" of the original works. These fans engage in the creation of fan fiction driven by their affection for the original material, not for profit. To a large extent, such creations have also contributed to increasing public awareness of the original works. The positive impact of this often outweighs any potential harm to the original market. As a result, many original authors implicitly accept the occurrence of such fan creations.

3.2 Analysis of the Challenges in Asserting Fair Use for Fan-Created Works

3.2.1 Differences Between the Internet and Non-Internet Environments

On one hand, the applicability of fair use has been restricted. Unlike traditional environments, certain scenarios outlined in China's *Copyright Law* are not applicable in the online environment. The reduction in fair use scenarios under the *Regulations on the Protection of the Right of Communication to the Public via Information Networks* highlights how fair use has been "shrunk" in the online context. Consequently, in the digital realm, traditional legal defenses are no longer sufficient, and new forms of creation are constantly emerging, which further complicates the application of fair use to fan-created works. On the other hand, the digital transmission of data in the internet environment has led to the innovation of cultural creation forms. The development from printed materials in the pre-internet era to magnetic tapes, photographs, and, more recently, electronic databases, has expanded the scope of copyright protection. For example, fan-created works, once confined to handwritten manuscripts and printed works, have evolved to include audio, short videos, and other digital formats. Therefore, compared to non-internet environments, the development of fan-created works in the online space is more prone to legal challenges.

3.2.2 Lack of Clear Institutional Guidance

On one hand, there is a lack of specific provisions and guiding principles regarding the fair use of fan-created works. China's

Copyright Law does not provide fan-created works with a distinct legal status, nor has it established a clear framework for determining fair use in relation to fan-created works. As a result, judges lack a uniform standard when adjudicating cases. On the other hand, the enumerative approach to fair use provisions fails to address new instances of infringement. While the law specifies 12 exempt scenarios, these enumerated provisions offer clear guidance in certain situations and limit the discretion of judges. However, as fan creation platforms on the internet grow, the diversity of themes increases, and the forms of creation become more varied, the enumerated provisions cannot fully cover the new forms of work usage emerging in the digital age. Consequently, this limitation reduces the applicability of the law. Although the 2020 revision introduced a catch-all clause, its scope remains narrow and fails to address all emerging scenarios.

3.2.3 Weak Awareness of Fair Use Among Fan Creators

The expansion of fan creation platforms in the internet age has brought a growing number of participants, which complicates the supervision of creative activities by relevant authorities. While the increase in creators has contributed to the prosperity of fan-created works and promoted the development of China's cultural sector, it has also led to a significant burden on regulatory oversight. The sheer scale of participation makes it difficult for authorities to manage effectively, particularly since many creators are unaware of the legal implications of their actions. Moreover, the low barrier to entry on the internet means that many individuals, with varying levels of legal education, engage in creative activities. Many creators are unaware of fair use principles and often fail to "reasonably" utilize others' works when creating their own. This lack of understanding and the absence of a fair use defense during disputes further complicates the application of the fair use system in the realm of fan creation.

4. Suggestions for the Improvement of the Fair Use Criteria for Fan-Created Works in China

4.1 Legislative Adjustments

4.1.1 Clarifying the Status of Fan-Created

Works as Objects of Copyright Protection

As demonstrated in the previous discussion, it is indisputable that fan-created works are objects of protection under copyright law. It is only upon establishing this premise that we can proceed to further explore the issue of fair use in relation to fan-created works. Article 3 of the *Copyright Law* defines a work as an intellectual creation in the fields of literature, art, and science that possesses originality and can be expressed in a tangible form, using both an enumerative and an all-encompassing approach. Fan-created works fall within the realms of literature, art, and science, incorporating original creative contributions from the creator, thereby qualifying as intellectual achievements. Moreover, these works are often expressed in forms such as novels, music, and films. Therefore, based on the comparison outlined above, fan-created works are undoubtedly protected by copyright law and should have their legal status clearly defined within the framework of intellectual property law.

4.1.2 Clarifying the Rights and Obligations of Fan Creators

Fan creators should be granted corresponding rights. First, the right to freely express their creative work should be affirmed, allowing creators to choose their style and form of expression. Second, as fan-created works fall under the scope of copyright protection, provisions should be made regarding both the moral rights and economic rights of the fan creator, in order to better maintain the order of creation and communication within the fan community. Third, fan creators should possess the right to protect their copyright, enabling them to take legal action if their legitimate rights and interests are infringed upon, thus safeguarding their creative enthusiasm.

Correspondingly, as derivative works based on the original, fan creators must also bear certain obligations. First, they must respect the moral right of attribution by clearly indicating the original work's title and the name of the original creator. Second, they should honor the integrity of the original work, refraining from intentionally distorting or altering the content in ways that could harm the original creator's reputation or interests. Legal responsibility should be imposed for any such harmful alterations. Third, if the original creator has stipulated that commercial use or further

adaptations require permission, fan creators must comply with such legitimate restrictions.

4.2 Establishing a Fair Use System Combining the "Three-Step Test" and the "Four-Factor Standard"

4.2.1 Clarifying the Application Steps of the "Three-Step Test"

In determining whether fan-created works constitute fair use, the first step should be to ascertain whether the use falls under "certain special cases", as outlined in the 13 specific situations defined by China's *Copyright Law*. If the fan-created work meets one of these specified fair use categories, it may be deemed a case of fair use. However, in judicial practice, many fan-created works do not conform to these 13 categories. Thus, further analysis is required to determine whether the use "does not conflict with the normal exploitation of the work" and "does not prejudice the legitimate interests of the copyright holder", both of which must be satisfied simultaneously. In practice, however, there are no clear standards for what constitutes "normal exploitation" or "legitimate interests". This lack of specificity often makes the "three-step test" ineffective in cases involving fan-created works[9]. Therefore, it is necessary to adopt a comprehensive approach, incorporating the "Four-Factor Test" from U.S. law for a more thorough evaluation.

4.2.2 Comprehensive Application of the "Four-Factor Standard"

The United States has established the "Four-Factor Standard" for evaluating fair use of works. First, the purpose and character of the use. Generally speaking, non-commercial uses are more likely to be deemed fair use compared to commercial uses, particularly when the use is personal and non-commercial, as it has a lesser negative impact on the original work's market. However, it is important to note that not all commercial uses are inherently unreasonable. Second, the nature of the copyrighted work. Copyrighted works possess originality, and the degree of protection afforded to them varies based on their nature. Fictional works receive stronger protection than derivative works, and original works with greater creativity tend to enjoy more robust protection compared to works of adaptation or transformation. Third, the amount and substantiality of the portion used.

Generally, the greater the proportion of the original work used in the fan creation, the more substantial the usage, and the less likely it is to be considered fair use. Conversely, if the fan-created work uses only a small portion of the original, and is less dependent on it, the likelihood of being deemed fair use increases. Fourth, the effect of the use on the potential market of the original work. It is important to note that "market" refers not only to the current market but also to potential markets[10]. The impact of the use on the original work's market is not limited to actual occurrences but also includes potential harm. The key factor in assessing this impact is not whether the new work profits, but whether the original copyright holder's interests are harmed due to the new work's creation, distribution, or use[11].

4.3 Introducing "Transformative Use"

The concept of transformative use first emerged in the United States, with the U.S. Supreme Court adopting this idea in the landmark *Campbell* case. Although Chinese law does not explicitly define "transformative use", many judges in practical legal cases have adopted this standard in their rulings. This aligns with the legislative intent of China's *Copyright Law*, which permits the "appropriate quotation of others' previously published works for purposes such as commentary, criticism, or explaining a particular issue"[7]. Integrating the standard of transformative use into Chinese judicial practice holds significant importance in the context of domestic legal realities. Firstly, the work being used must be a published work. If an unpublished work is used for secondary creation, it would undoubtedly constitute an infringement. Secondly, the resulting fan work must possess "new content", "new functions", and "new value", incorporating the original, creative ideas of the fan author and expressing content that is substantively different from the original work. Finally, the new work does not necessarily have to be non-commercial. If the user has provided a novel expression and has articulated ideas that differ from those in the original work, it may still qualify as transformative use.

5. Conclusion

The development of fan fiction is an inevitable

trend; however, as long as the law remains unregulated and fragmented, issues of copyright infringement will continue to arise. Currently, China is in a period of cultural flourishing, and as people's intellectual and artistic needs grow, it has become increasingly important to establish clear regulations on fan-created works and the standards for fair use. China must align its legal framework with the evolving cultural landscape by drawing on the legislative experiences of other countries, while adapting these lessons to its own national context. It is essential to develop reasonable regulations that promote legal awareness among creators, fostering an environment where intellectual property rights are respected. With the joint efforts of all sectors, a well-structured and harmonious fan culture can be cultivated, ensuring that both creators and consumers benefit from a balanced and fair system.

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