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An Empirical Study on the Second Creation Defense in the Chinese Copyright Law

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Abstract: In the era of "We Media", network communication is decentralized and arbitrarily enhanced, which brings challenges to network monitoring. In judicial practice, online works are frequently complained by the original copyright owners. Due to the game of interests, all parties still reached no consensus on the boundary of the second creation works. In this regard, it should not only discuss the extension of secondary creation from the Copyright Law itself, but also determine the scope of secondary creation as a reasonable defense from the judgment of judicial practice.
Keywords: Copyright; the New Copyright Law; Secondary Creation; Empirical Analysis

Introduction

In recent years, the development of the network communication platform has been unstoppable. According to the 2020 China Network Short Video Copyright Monitoring Report released by the 12426 Copyright Monitoring Center, a total of 30,095,200 suspected infringing short videos were monitored from January 2019 to October 2020.The mainstream view in China believes that the intention of the Copyright Law is to protect the interests of copyright owners to encourage the development and prosperity of literary works. Some scholars believe that the mainstream view only emphasizes the protection of the original copyright owners, but cannot deal with the conflict of copyright protection of the second created works.[1] Therefore, it is inevitable to balance the interests of the original copyright owner and secondary creators.

1. Empirical analysis of the 252 judgments

Using the network platform, the author found: reasonable use; case cause: copyright ownership dispute; case type: civil case; trial procedure: first instance procedure; document type: judgment, a total of 252 judgment retrieved, analyzed based on the search results.

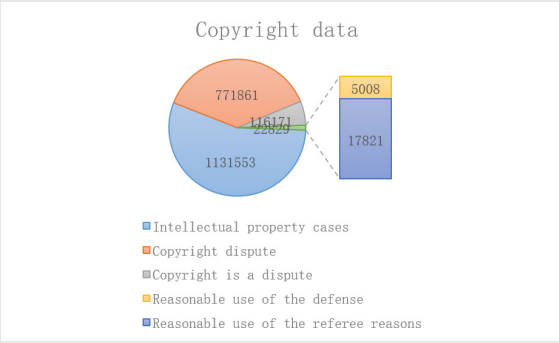

figure1 Sample analysis pie chart

1.1 A plea of reasonable use under big data

The author found 771,861 copyright disputes and 71,861,and the defense used 5,008, less than 4.31%.The court used reasonable use of 17,821, accounting for nearly 15.34%.Of cases up to nearly 110,000, only 38 courts listed reasonable use as the focus of controversy, while only six successful cases argued with a success rate of 15.78%.

From the above data, it is not difficult to find two problems with reasonable use in China. First, the court actively reviews and the defense as a conflict; second, the conditions for reasonable use are too strict and the losing rate is extremely high.

1.2 Institutional regulation and its standardized use

First is that the court actively reviews the reasonable use of procedural architecture. The question as procedural law is whether the court may actively apply reasonable use as judicial grounds. The legal principle behind it is related to the legal nature of reasonable use. There are "defense" and "rights and interests". The former court can not apply the law actively, while the latter can.[2]If reasonable use is taken as a defense, the defendant may not apply to the court.

The second is the reasonable use of the boundaries as a defense. Chinese courts tend to expand the boundaries of reasonable use, and at many cases even break through the law itself. The above problems can draw lessons from the legislative model and relevant systems of the United States and Germany, and then interact with the system from the judicial practice level, so as to determine the extension of China's reasonable use system in China.

2. Interest measurement

2.1 Based on the benefits of secondary creators

[3]Some scholars have pointed out that "copyright involves two economic phenomena". On the one hand, it needs to protect the original creation and investment of originators, otherwise unrestricted imitation will turn the interests and economic incentives of creators into nothing. But on the other hand, copyright will suppress the use of second creators. It is necessary to consider the consistency and conflict between the two in the system design to maximize social interests.

2.2 Interest measurement based on the we-media platform

The "safe haven" rule was first born in the United States, which is an active defense. The US courts cannot actively apply, only by the network platform itself to make the defense.[4]At the beginning of the century, China's Internet industry has expanded rapidly, and a large number of Internet companies have developed rapidly in this wave. China also recognized the rule at the beginning of this century, the current level of Internet development does no longer need such strong asylum, formulate corresponding rules to choke.

A supplementary role is the "Red Flag Standard". Lawmakers need to take into account both the duty of care of the network service providers, but also should not ignore the subjective intention of some network providers on the infringement. Restricted by the traditional infringement law stipulates that when Chinese judges identify infringement, they cannot form a subjective and mutually verified thinking while flexibly distinguishing subjectively and objectively. Therefore, the Red Flag Standard has some reference significance in China's judicial practice.

2.3 Difficulties of scope boundary determination

From the perspective of the second creation itself, how to identify the infringement boundary

of the second creation is a difficult problem. For example, the valley Aamo series of short videos, the purpose is to let the audience watch a few hours of film in a few minutes, not to review a certain film.[5]The company believes that Gu Amo refers to others for the purpose of comments, and the video put on the network platform belongs to the second created work, so it does not constitute infringement.

To judge whether the infringement should be viewed from two dimensions, one is to see whether its profit, the second is to judge whether it belongs to the principle of reasonable use. Whether profit is a very elusive standard. The hidden profits brought by the infringement to the infringer cannot be measured, and the profits obtained by the infringer are likely to be inconsistent with the losses suffered by the infringed.

Moreover, the second creation works are not all for profit, many of them are out of the audience's love for the original work, and they want to add their own creative composition on the basis of the original work. Excellent secondary creation works can not only produce value-added effect and publicity effect, but also deepen and enrich the content of the original work, and the original author does not identify it as infringement. Under the stimulation of economic benefits, the value of many secondary creation works is far higher than the original works. At this time, whether the secondary creation author enjoys copyright is still questionable.

3. The standard of defense

3.1 The US "four elements" standard

Article 107 of the United States Copyright Law provides for the system of reasonable use, which adopts the "four elements" standard. The United States, which has a tradition of case law, has adopted quantitative standards to prevent uneven cases caused by the abuse of justice. When receiving a case, a judge will often consider a reasonable defense, and then consider whether the defendant's behavior is legal, which does not directly judge whether it belongs to the category of the second creation work

3.2 Germany's "three-step test method" standard

The German reasonable use system, as an exemption, is divided into: personal use, for cultural and economic use and for the public interest.[6]After the game of interests of all parties, the copyright law summarizes two conditions: one, the original works can only be used as the source of thought; the other, the purpose of using the original works is to create new works.The most obvious difference between free use and reasonable use is that the original content of the new work is more influential than that of the original work.[7]

3.3 Mixed standards in China

Reasonable use is an important defense of China's copyright law. " Although there are flexible judgment steps for different types of works, it follows the' four elements' judgment of the United States.[8]"In the combination of relevant theoretical guidance and specific application in practice, the reasonable use of the judgment requirements can be classified into the following three aspects.[9]

One is the purpose of the use of the work. A large number of information created by users is added, deleted or interpreted on the original information, and there is a large number of unauthorized use.[10] However, at the institutional level, the design of the adaptation needs permission, which raises the threshold of the adaptation works in a sense.

Second, in the process of adaptation, the degree of reference is an important measure. We can roughly divide the works into written works and non-written works. The amount of references of written works can be judged quantitatively, but the non-written works cannot be simply measured by the length of reference. The quoted part of the non-written work cannot be used as a major component of the secondary creative work, namely, " the quoted work will not constitute a 'substitute' for the cited work." [11]

The third is the citation influence of the work. "Such references can only be within the extent necessary and should conform with fair practice.[12] "The meaning of the copyright Law is to protect the economic interests of the original author, and full consideration should be given to the impact of the second creation on the original work, which includes not only the current market share and economic interests, but also the expected market share and economic interests.

Conclusion

The current reasonable use system is to some extent, the era of digital, international emergency measures, China has accumulated certain practical experience and case basis, should start from the Chinese legal system, take the opportunity of the copyright law revision, the virtue evaluation standard into the Chinese defense system to expand the scope of reasonable use, and the reasonable use system as a "rights and interests", allow the court to actively apply. However, it is necessary to be alert to the tendency of blind expansion, and fully maximize social benefits on the basis of fully protecting the interests of the original authors.

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