

Copyright Infringement Issues in Fan Fiction

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Abstract: Since the 1990s, the popularity of Internet technology has promoted the rise of Fan Fiction creation platform, but Fan Fiction, based on the characteristics of original works, have been in the gray area of copyright disputes for a long time. This article focuses on non-deductive Fan literature works and conducts research on their infringement determination and fair use issues. Research suggests that in the determination of infringement, the copyright ability of virtual characters needs to be analyzed through each case study based on the “idea-expression dichotomy”. The determination of substantial similarity requires a comprehensive analysis of overall perception and elements. In the defense of fair use, the theory of “transformative use” and market substitution evaluation are key. Fan Fictions can enhance their transformability, while their non-profit and cultural dissemination functions reduce market substitution risks, and it is not simply judged by whether they constitute fair use based on profitability or not. The conclusion points out that the existing law lacks clear provisions on the boundaries of role copyright and fair use standards. In the future, it is necessary to clarify the scope of protection of virtual roles in legislation and improve the system of fair use.

1 INTRODUCTION

Since the 1990s, with the continuous development of the Internet and the growth and maturity of online communities, the co-creation platform represented by AO3 (Archive of Our Own) and Lofter has constructed a new creation ecology of online literature. The popularization of social media and We media tools makes “user-generated content (UGC)” break through the traditional publishing barriers, and a large number of fellow enthusiasts gather on the platform and communicate in real time. This “participatory culture” reconstructs the subjectivity of literary creation, brings about the rise of co-literary works, and also brings about a series of copyright problems due to its particularity based on the original works (Jenkins, 2016).

There are obvious gaps in the current legal regulation of fan fictions.

On the one hand, the existing laws and regulations do not clarify the legal status of the fan fiction, and the characteristics of the fan fiction based on the original work make them stay in the gray area for a long time, resulting in long-term disputes over the legality and infringement of the characters and plots of the original work.

On the other hand, the law lacks a clear definition of the boundary between the rights of the original author and the fan author, and the ambiguity of the law leads to an increase in the cost of rights protection. A large number of fan literature works are likely to harm the legitimate rights and interests of the original author, while fan authors also face the dilemma of unclear infringement boundaries, causing them to worry about whether their creative behavior is legal and, to some extent, suppressing their creative enthusiasm.

This article mainly focuses on the issue of infringement determination and fair use of fan fiction.

2 THE DEFINITION AND CLASSIFICATION OF FAN FICTION AND THEIR DISPUTE

2.1 Definition of Concepts

Fan fiction originates in Japan, where the anime culture is prosperous, and includes various forms such as paintings, novels and videos. As an imported word, its conceptual definition has not formed a unified standard. Generally speaking, it is defined as

a form of creation that is not influenced by commercial factors, does not aim for profit, and uses the original as the basis for secondary creation.

The fan fiction works discussed in this article are one of the main forms of expression of fan fiction, and their core feature is that they are secondary creations based on original elements (characters, background, plot), mainly non-profit.

2.2 Classification

According to the different themes and types reflected in the relationship between fan fiction and the original works, the author thinks that they can be mainly divided into deductive fan fiction and non-deductive fan fiction.

2.2.1 Deductive Fan Fiction

Such works are rewritten or continued with the original as the blueprint, such as writing a new ending for a classical novel and supplementing the branch plot that has not been expanded in the original work. The most typical example is Gao E's continuation of *The Story of the Stone* (Wang, 2017). Due to the direct use of the narration structure and character relationship of the original work, it is usually recognized as constituting an adoption of the work's protected expression under copyright doctrine, rather than mere utilization of abstract ideas, and is more likely to be recognized as infringing upon the copyright of the original author without obtaining the authorization of the original author (Wang, 2017).

2.2.2 Non-Deductive Fan Fiction

Such works usually only borrow the original characters or background settings, creating new content outside the original story framework, such as the case of Jin Yong v. Jiangnan's "The Youth Here".

2.3 Legal Dispute

The legal disputes over such works mainly focus on whether the original virtual characters are protected. The academic community generally believes that simply using character names and basic personalities usually does not constitute infringement, but if a character possesses unique characteristics (such as special styling, classic lines), it may be considered a protected expression of originality (Wang, 2017). The problem lies precisely in the lack of clear legal provisions regarding the copyright of virtual characters and the reasonable limits of using character characteristics, which may result in completely

opposite judgments in similar cases in different regions. This also leads creators to rely on industry conventions for self-restraint, making it difficult to have accurate legal standards to guide them.

In summary, there is a basic consensus in the academic community on the issue of infringement in deductive fan fiction. This article mainly analyzes the infringement issues in non deductive fan fiction and elaborates on them from different perspectives.

3 DETERMINATION OF COPYRIGHT INFRINGEMENT IN FAN FICTION

3.1 Copyright of the Character

The biggest characteristic of fan fiction is that it often utilizes original characters for new text creation. Therefore, whether the use of virtual characters in the original work constitutes infringement, the first step is to determine whether the characters themselves have copyright. Although the Copyright Law of the People's Republic of China (hereinafter referred to as the "Copyright Law") does not explicitly protect certain roles, it does not exclude them from the scope of protection. Therefore, a case-by-case analysis should be conducted for specific situations.

For this issue, scholars often refer to the testing methods used in American judicial practice, namely the "sufficient description standard" and the "story standard" as criteria for determining the copyrightability of characters: the former requires that such virtual characters are originally conceived and presented sufficiently, while the latter requires that the virtual character be the core component of the story and cannot be separated from it (Wang, 2025).

The application of two standards in practice is controversial: sufficient description has strong subjectivity, uncertainty, and is easily misinterpreted in practice, even surpassing the binary framework of thought and expression; The story standards are often considered too strict, requiring infringing works to be almost entirely descriptive of the character and not exhaustive, and cannot classify the "virtual character" itself as expression. Based on this, some scholars further propose to distinguish between character types, pointing out that stereotyped characters should belong to the public domain due to their lack of originality, while the use of original characters that deeply integrate with the original plot in fan works requires permission (Cong & Liu, 2021).

The first case of Chinese fan fiction, *Jin Yong v. Jiangnan*, is a typical case regarding whether utilizing original characters constitutes infringement. In the first instance, the court held that the use of characters did not constitute copyright infringement (China Intellectual Property News, 2018). However, the court of second instance considered that although it is difficult to identify a single character as the object of copyright protection, when the character gets a full and unique description in the development of the plot, it may be protected by the copyright law (Chinese Copyright Association, 2023).

In a word, the essence of role infringement is the overlapping use of original expression, rather than simply exploiting names or accumulating images, which mainly depends on whether the role forms an “original personality” through specific expression. In other words, the copyrightability of characters is possible, but it still needs to be analyzed in detail from the aspects of character, character relationship, and specific plot development.

The problem is that the current law does not explicitly provide for this, and the two standards proposed by the judicial practice of the United States are somewhat vague: The former does not specify the “sufficient” quantitative scale, while the latter may exclude most roles from the scope of protection, and it is difficult to fully prove the copyright-ability of roles. Therefore, although these two standards have certain reference significance, they still need to rely on the discretion of judges in case analysis. On this premise, the author believes that the determination of role infringement still needs to return to the “dichotomy of thought expression”.

3.2 Dichotomy of Thought Expression

According to the second paragraph of Article 9 of the TRIPS Agreement, the dichotomy of thought and expression has always been the basic principle for judicial practice to define copyright infringement, which emphasizes that copyright law only protects the original expression of ideas, not the ideas themselves. When applied to the analysis of infringement of fan fiction, it is necessary to define which elements of the original work used by fan fiction belong to the idea and which elements belong to the original expression.

As mentioned above, generally speaking, the use of the original elements in fan fiction is mainly to borrow a series of elements such as names, relationships and so on, which are extended with the role as the core. The question is how to define whether the use of the relevant role belongs to thought

or expression, which is also an argument for the copyright of the role.

Some scholars believe that if the character centered plot in the original work is substantially used, such as the continuation of the work, the new plot is based on the plot of the original work, which constitutes infringement; If only the symbolic use of a simple character, rather than the use of similar circumstances, it does not constitute infringement (Wang, 2017).

That is to say, the role name, basic character tag, and general character relationship (such as master apprentice) belong to the ideological category, which allows free use and is not protected, while the plot with the role as the core, the “original personality” formed through the specific plot and interactive mode, should belong to the expression category, such as the character judgment in *The Story of the Stone*, which integrates the original author's unique expression and thought projection, and should be protected.

Some scholars have cited the first instance verdict of the case of *Jin Yong v. Jiangnan* as an example, stating that “if fan fiction only uses static elements such as the names and personalities of original characters, and does not involve complex relationships or personalized plots of characters, it is difficult for copyright law to determine its infringement behaviour (Hu & He et al, 2019).” This determination is reasonable, but it ignores that the static elements, such as the character's name and character, should be analyzed in a unified way according to the principle of integrity. The character's name, character, relationship, background and so on shape a role, reflecting the choice of the original author, forming an original and logical structure, which should be identified as expression, which is also the basis for the second instance of this case.

To sum up, symbolic and labeled elements such as character names, basic relationships, and simple characters should belong to the ideological level, allowing co-creators to freely use them. However, if the characters form a unique fate track, interaction mode, or similar experience due to the development of the plot, it may constitute an original expression, and if their use reaches a substantial similarity, it will constitute infringement, which can be defined with the help of the story standard mentioned above to a certain extent.

On the basis of the dichotomy of thought and expression, it is necessary to judge whether the borrowing of the original expression is substantially similar to analyze whether it constitutes an

infringement of expression, which will be discussed in detail below.

3.3 Contact Plus Substantial Similarity

The dichotomy of thought and expression analyzes the objects protected by the Copyright Law, and the principle of contact plus substantive similarity analyzes and judges whether the use of the original expression in the fan fiction of the same person meets the infringement standard.

Since fan fictions are based on the original works, it can be assumed that they have the possibility of contact. Instead of analyzing the judgment basis, it is only necessary to judge the substantial similarity standard.

There are three main ways to judge whether a substantial similarity is formed: first, the external standard, that is, text comparison, verifies the similarity through sentence-by-paragraph comparison. Second, the internal standards, the overall perception, and the reading of successive works are based on the impression of general readers on the two works. Third, abstract standards, constantly abstract out the traditional ideas and distinguish the unprotected parts (Zecevic, 2006).

Some scholars also mentioned that the description of the role in the original work should be a combination of complex and diverse text narration, plot arrangement, character relationship and other elements. Only in this way can the continuous description of the role in the fan fiction of the same person be substantially similar (Cong & Liu, 2021). Similarly, when the description of the original characters in the fan fiction composes a combined description of the various complex expression elements of the original characters, it may constitute substantial similarity and constitute infringement.

The author believes that in the existing standards, the mechanical text comparison is easy to ignore the value of secondary creation, and there are also rigid limitations. The originality of literary roles is precisely derived from the superposition of details such as name, character, and behavioral logic. When the works of the same person continue the intrinsic behavior pattern and destiny of the original characters, even if the text is not copied directly, it may still constitute infringement. Therefore, single standard should be abandoned and make a comprehensive judgment from the two levels of overall perception and element analysis. From the perspective of general readers, readers can read and judge whether the whole work forms a substantial similarity with the original work and then make a

quantitative comparison between the specific elements (such as the originality of plot transition, the similarity of complex human and material relations, etc.) and the original work.

Based on the above three entry points for judging infringement: the copyright of the role, the dichotomy of thought and expression, and the contact and substantive similarity, the author believes that to judge whether a literary work of the same person constitutes infringement, firstly should analyze whether the original role used by the author is copyrightable, and then refer to the cases of “full description standard” and “story standard” to specifically analyze whether the description of the role in the original work by the author of the original work constitutes an original expression, and then judge whether it constitutes a copy of the expression according to the dichotomy of thought and expression, and finally judge whether it constitutes a substantive similarity. If infringement is constituted, then it should be judged next whether there is a defense of fair use in the creation of the co-creator based on the original work.

3.4 Fair Use Defense

The fair use rule of the Copyright Law of China mainly adopts the three-step test method and lists the relevant matters. Obviously, the use of original works in fan fictions is difficult to directly cover the provisions of the law, so it should be analyzed through specific cases.

A number of scholars have suggested that the application of the fair use system can refer to the four-element standard of the United States, which specifically includes: the purpose and nature of use, the nature of the work used, the quantity and quality of use, and the impact on the market. Some scholars have pointed out that from the perspective of the purpose and nature of use, if fan fictions have non-profit and strong conversion, they can be more recognized as fair use; At the level of market impact, attention should be paid to whether fan fictions may be exempted if they do not substantially replace the original work market (Zecevic, 2006).

On this basis, many scholars put forward the theory of “transformative use” which can be used for reference in American judicial practice. The theory of “transformative use” is the deepening development of the element of “the purpose of using works” in the four-element standard.

Some scholars believe that, based on analyzing the particularity of using original virtual characters in fan fiction, two very important points are whether the

purpose of using the work constitutes transformative use and whether it has an impact on the potential market or value of the original work (Cong & Liu, 2021). Some scholars have further proposed that when secondary creative works are more transformative, even if they have commercial purposes, they can still constitute reasonable use (Wang, 2006).

In terms of “transformative use”, it refers to “adding new expression, meaning or information to the original work for other purposes or different properties to change the original work (Campbell v. Acuff-Rose Music, 1990).” The birth of fan fiction is based on fans' love for the original work, integrating their own thoughts and expressions into the original work, and reproducing the original work. The original intention of fan fiction authors is not simply to imitate or continue writing the original work, but to express themselves through the original work and communicate with other enthusiasts, which is a manifestation of “transformative use”.

In terms of market alternatives, scholars generally believe that this is the most important reason for the reasonable use of fan works. Based on the unique characteristics of their participatory culture, fan literature creators not only do not have market substitutability for the original work, but may even promote the development of the original work in the market in reverse. Therefore, it is generally not considered to have a negative impact on the market or value of the original work.

However, there is still some controversy regarding the profitability of fan works. Although the creation of fan works begins with the creator's love for the original work, usually without commercial purposes, and can be distinguished by readers, there is also the possibility of seizing the market space of the original work; Scholars usually advocate that non-profit is more likely to constitute fair use (Sun & Li, 2020). However, with the development of the Internet, a large number of works of colleagues in reality make indirect profits through the network platform, blurring the boundaries of “commerciality”. It would be too harsh to deny the exemption of fair use.

The author believes that on the basis of case analysis, we should appropriately refer to the “transformative use” theory, give priority to evaluating the degree of conversion of the fan fiction, such as whether to give new themes, introduce new backgrounds, and give new role connotations, and then analyze its market substitutability, review its impact on the original derivative market, and avoid excessive squeezing of the original creation space,

rather than simply determining whether it is profitable to judge whether it constitutes a reasonable use.

4 CONCLUSION

With the vigorous development of Internet culture, fan fictions, as a unique form of creation, not only enriches cultural diversity, but also brings new challenges to copyright law. This article reveals the ambiguity and lag of the current legal framework in addressing the issue of secondary creation by analyzing the legal status, character copyright, boundaries between ideas and expression, and principles of fair use of fan fictions.

Although attempts have been made in judicial practice to balance the interests of all parties through individual discretion, the lack of unified legal standards still leads to unclear boundaries of rights, which may suppress creative enthusiasm and also harm the legitimate rights and interests of the original author. In the future, it is necessary to further clarify the scope of copyright protection for virtual characters at the legislative level, improve the applicable standards of the fair use system, and encourage the establishment of industry self-discipline and diversified dispute resolution mechanisms, in order to achieve a dynamic balance between protecting originality and promoting secondary creation, and provide a more inclusive legal environment for cultural innovation in the digital age.

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