

Study on the Legal Characterization of Copyright and Infringement of Characters in Fanfictions

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Abstract. With the development and popularization of the Internet in China, fanfiction culture has simultaneously flourished. As this culture garners increasing public attention and begins to enter the commercial sphere, conflicts arise between fanfiction characters and the copyrights of original works. These conflicts inevitably lead to disputes over the copyright infringement of fanfiction characters. However, China's current copyright law does not explicitly recognize the concept of "fanfictions," and gaps remain in the legislative framework and judicial practices. These gaps result in uncertainty regarding the copyrightability of characters, inconsistencies in methods for judging infringement, and overly stringent criteria for determining fair use in fanfiction copyright infringement cases. To address these issues, improvements to relevant laws and regulations are necessary. This can be achieved by targeting existing challenges, incorporating characters into the scope of copyright law, clarifying the elements required for a character's copyrightability, establishing standards for determining substantial similarity between characters, and expanding the fair use doctrine.

Keywords: Fanfiction characters, Copyright infringement, Copyrightability, substantial similarity, Fair use

1. Introduction

With the popularization and development of the Internet, fanfiction culture has become widely disseminated. However, fanfictions inherently depend on original works to varying degrees, as they often use character elements and other components from the original works. This reliance allows fanfictions to gain visibility by leveraging the popularity of the originals but also raises significant issues of copyright infringement.

In October 2016, renowned novelist Jin Yong filed a lawsuit against author Jiangnan, alleging that Jiangnan's work *Here They Were* used elements of characters and storylines from multiple Jin Yong martial arts novels without authorization. Jin Yong claimed this constituted copyright infringement and unfair competition. In August 2018, the Tianhe District People's Court in Guangzhou City delivered its first-instance judgment. The court concluded that while the plaintiff's and defendant's works were abstractly and formally similar, they did not meet the threshold for substantial similarity and thus did not constitute copyright infringement. However, the court ruled that the defendant's actions constituted unfair competition. Dissatisfied with the ruling, the defendant appealed the decision. In April 2023, the Guangzhou Intellectual Property Court issued its second-instance judgment, finding that many elements in *Here They Were*, such as character names, were highly

similar to those in Jin Yong's original works. The court determined that the defendant's actions amounted to plagiarism and copyright infringement.

This case brought the concept of "fanfictions" into public discourse. It raised critical questions about whether the character elements of fanfictions should be protected under copyright law. The resolution of such questions will have profound implications for the future survival and development of fanfictions as a cultural phenomenon.

2. The current situation of copyright infringement of character images in fanfictions

2.1. Current development of the fanfiction industry and classification of roles

With the advancement of digital networks, the fanfiction industry has experienced rapid growth and exhibits unique characteristics. Creative communities continue to grow, driven by the popularization of the Internet and the rise of social media platforms such as NetEase, Lofter, and other secondary creation platforms that attract a large number of young creators and enthusiasts. These platforms provide a broad space for the fanfiction culture to flourish. However, with the growth and development of the fanfiction community, the trend toward commercialization is becoming increasingly apparent, leading to copyright disputes. The so-called "fanfiction circle" refers to a collection of smaller communities revolve around a specific original work. It can be compared to a lively square in the backyard of the literary world, where there is a lively exchange, but one that is usually limited to a niche audience and self-indulgent creativity. The case of Jin Yong v. Jiangnan has brought fanfictions into public view and highlighted intellectual property protection. The introduction of such protective measures not only safeguards the rights and interests of original authors and maintains their enthusiasm, but also ensures the healthy functioning of the market and enhances national competitiveness. Despite this growing recognition, the term "fanfiction" does not exist in China's Copyright Law, and court rulings in similar cases vary significantly, so people remain confused over the nature of copyright infringement in fanfiction. As the scale and influence of fanfiction have continued to expand, clarifying these issues has become increasingly urgent.

Fanfiction, which is a concept originating from Japan, refers to "the creative output of fanfiction writers based on original works or prototypes" [1]. By nature, fanfiction depends on the original work. This is because the use of the term "fanfiction" suggests that such works borrow from the original work, especially characters, to a greater or lesser extent. On the other hand, fanfiction also takes advantage of the popularity of the original work for it to circulate far and wide. Fanfictions can be categorized according to various classification criteria. From the perspective of the types of original works, fanfictions can be divided primarily into textual, artistic, and audiovisual categories. From the perspective of their forms of expression, fanfictions include fanfiction novels, fanfiction artwork, fanfiction films, and more [2].

Characters are among the most important elements of a work, and in fanfictions, they can be divided into literary characters and artistic characters based on their forms of expression. Compared to the intuitive visual characteristics of artistic characters, protecting literary characters is more challenging. Textual descriptions may be conveyed in a myriad of ways, and an imitator may well achieve a substantially similar character through changes in detail or alternative word choice. In addition, literary characters often emerge through progressive development in a narrative, and thus the test of distinctiveness and, consequently, copyrightability involves a qualitative analysis of the work as a whole, considering context, plot, and other factors. Because these factors are complex, determinations of copyright infringement become decidedly more challenging.

2.2. Judicial practice in litigation over roles in fanfictions

There is already a consensus that deductive fanfictions fall under the category of derivative works, where the characters, plot, setting, and other elements of the work remain fundamentally the same as those of the original work. This means that, unless authorized by the author of the original work, the creation of such fanfictions is typically recognized as an infringement of the right holder's adaptation rights. However, an exception exists when the creator uses the original work solely for personal purposes and does not engage in commercialization [3].

It is in cases of non-deductive fanfictions that practical difficulties arise. Unlike the deductive ones, the relationship between non-deductive fanfictions and the original work exists only in the borrowing of some elements of the original work in the course of its secondary creation. For instance, *Here They Were* applies most of the characters and their interrelations found in the original work but transfers the action to a school campus and changes the details of the plot [4]. Now, the substantially similar issue to constitute infringement is a highly arguable question in these cases.

3. Definition of the attributes of the copyright of characters in fanfictions under the copyright law

3.1. Ingenuity inquiry

For a character to be protected under copyright law, it must meet the requirement of originality. In determining originality, the character should be evaluated as a whole rather than through a localized comparison of individual elements. Even if certain aspects of a fanfiction character resemble elements from the original work, as long as the creative process and the resulting character demonstrate originality, the character should be assessed in its entirety. Consequently, the originality of the fanfiction work as a whole cannot be dismissed solely based on individual similarities [5]. For example, in the cartoon *Big Headed Son*, *Little Headed Dad*, if the head and body of *Big Headed Son* are considered separately, his head may not exhibit significant differences from those of other children's cartoon characters. However, when the head and body are combined, the stark contrast between their sizes becomes the character's defining feature, distinguishing him from other cartoon characters and demonstrating the author's ingenuity.

Essentially, the level of originality for the identification of characters across various forms of fanfictions needs to change dynamically with the medium. For example, in the case of a character in a written work, when transformed to a graphic piece of art, the creative effort of the transformation process must be up to the level of originality, even while the idea remains the same. In the case of a literary character, the creativity should be reflected both in the process and the product. That is to say, the character must be endowed with imagination and creativity sufficient to meet the threshold of originality.

3.2. Dividing thought from expression

Because characters in works of art are easier to identify than those in literary works, this article focuses on the copyright of characters in literary works. A fundamental principle of copyright law is that it does not protect ideas but rather the specific expression of ideas. Although China's copyright law and its implementing regulations do not explicitly address the dichotomy between ideas and expressions, this principle is widely recognized in both theoretical and practical contexts. The controversy surrounding this dichotomy—a copyright theory that has achieved global consensus—lies in distinguishing between a character's thought and its expression under specific circumstances [6].

It follows that a character that is fully and clearly depicted, and capable of standing independently outside the context of a plot, should be regarded as expression rather than idea. Is borrowing a character from an original work infringement? If the character borrowed is sufficiently well-defined to be independent of the original work and plot, it is a borrowed expression and thus protected under copyright. Here, substantial similarity is highly likely, and homage works are more likely to infringe. However, this is again largely theoretical as in practice, it is very difficult for a character to be so fully depicted that they can exist outside of the plot independently; most characters are inherently abstract and vague.

Some have thus argued that things like character names and personality can, as a whole, be protected by copyright law separate and distinct from the particular storyline in which they appear [7]. The decisive factor distinguishing thought from expression, however, is whether the work has been described with sufficient detail to be capable of perception and appreciation by the public. If a character is held to be protected because it has "many qualities" or due to its "crowded portrait," then the line separating thought from expression is too blurred. This approach shrinks the creative area for fanfictions and makes judgments on infringement even more uncertain.

4. Fair use and infringement boundaries of characters in the creation of fanfictions

4.1. Scope and determination of infringement - determination of substantial similarity

In practice, the primary criterion for determining whether a work constitutes infringement is the "exposure plus substantial similarity" standard. Exposure refers to the possibility that the creator of the alleged infringing work had access to the right holder's work. Substantial similarity, however, is more complex and is typically evaluated through four main approaches: the overall view, the three-step approach, the intrinsic test, and the abstract test.

In the case of *Here They Were*, the defendant's work, while incorporating the names of the main characters from the original work, did not directly use or substantially replicate the plot of the original work. The setting of the story was relocated to a school campus, and the detailed features and development of the plot—such as how the two main characters meet and interact on campus—were unrelated to the original work's expression. Consequently, the defendant's work was deemed a new creation with its own literary impact, rather than a copy or adaptation of the original work.

In most copyright infringement disputes, the combination of the "overall perception" method and the "abstract separation" method have been adopted by courts both domestically and internationally. However, in judicial practice, the application order of the above-mentioned methods to the same kind of work is often inconsistent and lacks unity. The stress of different methods of judgment may lead to self-contradictory conclusions. Some scholars believe that the "overall perception" method may lead to the over-expansion of copyright protection because its application to infringement determination may involve ideas, elements from the public domain, and other unprotected components. On the contrary, it is difficult to determine infringement by using the "abstract separation" method, probably leading to a situation where nothing is eventually protected by copyright law [8].

In contrast, the abstract separation method tends to slice a work into different components such as characters, character relationships, plot, and story structure and then compare each of these individually, finding likenesses among them. The following would explain the judgment in the case of *Jin Yong v. Jiangnan* [9]. If the homage compares only select plot elements in isolation, it can well avoid a number of illusions of overall similarity between the homage and the original. Most of these illusions arise due to similarities in independent elements, such as character names, traits, or relationships.

In the case of applying the overall perception method, the audience can easily generate a preconceived notion that these two works are similar in their wholeness and thus may not pay much attention to the specific details of the story. This method is similar to a subjective evaluation, for without actual data or any other form of evidence, the decision would greatly depend on the subjective judgment of the judge. On the other hand, when the abstract separation method is applied, the specific plot and structure of the story of the homage and the original work are taken apart and compared element by element. It is then easier to determine whether these components show substantial similarity. This method is fairer and more reasonable than the overall perception method because it rules out subjective factors to a greater degree.

4.2. Defenses to copyright infringement - fair use

Copyright law aims to achieve the dual goals of protecting the legitimate rights and interests of creators in their works, in order to encourage creative endeavors, while also acknowledging that derivative works, such as fanfictions, are protected by copyright as well. To a degree, the establishment of fanfictions will not infringe upon the legitimate existence of the original work's copyright. Since most disputes are based on the application of the doctrine of fair use as a defense to infringement, this section will discuss the issue of fair use without going into other defenses.

When considering whether the use of a work falls under the category of fair use, many nations, including the United States, refer to the four-factor test laid out in Section 107 of the U.S. Copyright Act [10]. By contrast, China's judicial practice is based on Article 24 of the Copyright Law which lists twelve particular conditions that comprise fair use, plus a 13th clause—a catch-all clause covering "other circumstances." This model of exhaustive legislation cannot keep pace with the endless new forms creative works may assume in the digital age. The result is that the fair use regime in China is not very practical, and often proves inflexible. Relatively few cases are able to fall within its framework, and even within these, strict conditions must be met—such as not affecting the normal use of the work and not unreasonably damaging the legitimate interests of the copyright owner. Article 24's first and second subparagraphs are often used as defenses by fanfiction creators and appear superficially to meet these requirements. In practice, these provisions are hard to apply effectively as defenses to non-infringement. This is the case due both to practical realities and the vagueness of the definitions provided in the law.

Initially, the purpose of personal use in fanfiction is often cited as a defense. However, fanfictions are typically shared on platforms that surpass the bounds of personal use, especially when traffic and network redistribution are involved. The fanfictions that give rise to litigation disputes with original copyright holders are generally high-quality, widely circulated works. These works often achieve a high level of enjoyability, making them candidates for commercialization. Consequently, they may crowd out the market for the original work, with loss of economic interest serving as a primary motivation for the original copyright holder to pursue legal action. In an Internet era where "traffic is king" and views translate to revenue, it is increasingly unlikely that highly viewed fanfictions will remain non-commercialized. As a result, the scope for applying Article 1—pertaining to personal use—is shrinking.

Secondly, it is difficult to define the concept of "appropriate citation." Although fanfiction often uses the expression of the original work, but most of the time, without reproducing its identical expression, so can this be regarded as "citation"? The answer is no [11]. Citation means that the source should be clearly indicated, and even though most fanfictions have labels that refer to the original work, this is not adequate under the legal definition of citation. Furthermore, some fanfictions directly quote parts of the original works, but until now, the judicial practice still has not developed a unified standard for how to identify the appropriate extent of reference. Moreover, fanfiction as a genre is complicated. In different kinds of fanfiction, the elements that vary, as well as the methods and forms

of expression, are quite different, which results in the impossibility of standardizing the definition of "appropriate citation."

It goes without saying that the prerequisites of fair use, as envisioned under the copyright law, still remain too severe. Even when a fair use defense is raised, the chances of its success are slim and largely considered at the discretion of the judge. This places the authors of fanfiction in a fundamentally passive position with limited legal protection.

5. Legal responses to protecting the copyright of character images in fanfictions

5.1. Clarify criteria for copyrightability of characters

Under the current framework of China's Copyright Law, virtual characters are not explicitly recognized as eligible for copyright protection. This omission means specific cases involving virtual characters fall outside the scope of the Copyright Law, placing judges in a difficult position when interpreting and applying the law.

As repeatedly emphasized in this article, copyright protects original expressions. In this context, "originality" refers to independent creation by the author, encompassing a "sufficient quantity" of expression that subjectively conveys the author's ideas. Determining whether this "quantity" is sufficient requires verifying whether the author invested original intellectual effort into the virtual character and provided the necessary funds and technical expertise to create a distinguishable and recognizable character. Criteria such as the character's appropriate depiction and development serve as reference points for this assessment.

Besides those, additional conditions for a virtual character being protected through copyright include the following: Concrete Reproducibility: The character has to be concretely reproducible, directly recognizable, usable, and reproducible. Legality: It needs to conform to public order and morals and cannot violate public order, morals, or recognized norms of conduct. Commercial Value: The virtual character should possess commercial value. Copyright protects only those characters that create disputes or conflicts based on their economic value. Only such virtual characters shall be protectable under copyright, provided that they are in the above conditions.

In Chinese judicial practice, however, virtual characters are often treated as ideas rather than expressions. However, virtual characters have their own characteristics. While the descriptions of various components that constitute a virtual character may be deemed to be ideas, the integration of these components into an integral whole constitutes an expression of an idea. As such, the integration is entitled to protection under copyright.

It may be unworkable and unrealistic for virtual characters to be directly included in the scope of objects that are clearly protected by the Copyright Law. However, judicial interpretation or guiding cases can make this clear. Namely, it can be specified that only those virtual characters that, in view of their originality, can be detached from the storyline of the original work and represent original expressions are copyrightable. This will accord with the basic principle of copyright law: protection for expressions and no protection for ideas.

5.2. Criteria for establishing substantive similarity between characters

Current judicial practice shows that the most problematic issue is the lack of uniformity in the criteria that courts apply to determine whether works of the same type are substantially similar. The most important thing in copyright infringement cases is the identification of the original elements of the plaintiff's work. From another point of view, though a new work is permitted to borrow or refer to materials from other works, it should not be defined by such borrowed material. Such material constitutes an organic whole by selection and arrangement, so that the work is unique. Therefore, in ascertaining substantial similarity, one should adhere to the fundamental approach of abstract

consideration and then overall consideration. In particular, abstract consideration means identifying the elements of the plaintiff's work protected by copyright and simultaneously verifying whether the defendant's work incorporates the plaintiff's original expression. Subsequently, in the comprehensive analysis, the degree of infringement is determined by evaluating the defendant's actions concerning the work as a whole.

However, although abstract consideration followed by comprehensive consideration is the basic approach for judging substantial similarity, it is not of universal application. Judicial decisions are to be made in light of that basic approach, but also to be adapted to the particular characteristics of different types of works. Concrete determinations are to be made concerning specific characteristics and circumstances of individual cases.

In addition, subjective perception by the readers or audiences of the fictional characters of the original work may also be an important factor in establishing substantial similarity. This subjective perception may greatly influence the popularity and impact of the homage work, thereby creating a contrast between the homage work and the original. When such subjective perception of the original work's literary experience is used only for purely creative and not commercial purposes, the new work may not constitute a substantially similar work to the original. However, if the actions of the creator are beyond this purview, a more stringent analysis of substantial similarity that the new work has with the original is required [12]

5.3. Improving the criteria for determining fair use

The current system of fair use places limits on works that are hardly applicable in each individual case. This law does not account very well for the nature of fanfiction works. Because of this, many non-profit works for enjoyment and interaction are considered counterfeit, restricting the authors' free expression and distribution.

The introduction of the concept of "transformative use" will upgrade the criteria for determining fair use. Recent Chinese case law suggests that many courts have already applied this standard in their decisions. Derivative works made by using the original work's fictional characters, like fanfiction, would be considered transformative use when they add value, function, or purpose that serves to change the primary purpose or function of the original work. Such transformative use may be deemed fair use without the need for further consideration of additional factors.

However, the standard for transformative use seems to be in conflict with the four factors of fair use, especially when the "qualitative and quantitative dimensions of the use of the original work" and "impact on market value and attention of the original work" are considered. The essential conflict here is whether fan use of a work's virtual characters in derivative creations, if found to be transformative, exceeds permissible "qualitative and quantitative standards." Derivative use—particularly in fan works involving virtual characters—is exactly the type designed to challenge and broaden such standards. Even if a substantial number of characters or core elements from the original work is used, it may still be accepted as derivative use provided it does not cause harm to the market interests and value of the copyright holder. When an act satisfies the standard of derivative use and causes no harm to the market value of the original work, there is still room for its establishment as fair use. This approach will better serve the legislative purpose of copyright law and promote practical utility in judicial practice. By confirming transformative use as the single standard, courts—especially when handling fan-created works—can build a more flexible and effective mechanism for determining fair use. This standard not only meets the legislative intent of copyright law but also offers greater clarity and operational feasibility for judicial practice.

6. Conclusion

In disputes over copyright infringement involving fanfiction works, fanfiction is often mistakenly perceived as fundamentally different from general original works. In reality, various challenges arise, including uncertainty over whether it qualifies for copyright protection, inconsistencies in infringement determinations, and overly strict interpretations of fair use. Due to the absence of legal loopholes or established case law, fanfiction authors are often placed in an unstable position and frequently face liability for alleged infringement.

The primary purpose of fanfiction is typically to pay homage to and promote the original work. Given the substantial difference in popularity and influence between fanfiction and the original work, most fanfiction creators neither intend nor possess the ability to replace the original work's commercial market or cause adverse effects. While copyright infringement disputes may protect the original copyright holder's interests in the short term, they risk stifling the creative enthusiasm of the fanfiction community and hindering the dissemination and development of high-quality fanfiction in the long run.

In this paper, proposals have been presented to improve the copyright protection framework for virtual characters in fanfiction under Chinese law. These suggestions aim to address the legal characterization of copyright infringement and provide potential solutions for creators caught in infringement disputes. However, given the current limitations in domestic judicial practice, it is necessary to continue empirical research based on emerging cases in China. Such research will allow for a deeper analysis of the feasibility and effectiveness of the proposed measures and their practical application in defending copyright infringement claims related to fanfiction.

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