Proceedings of the 4th International Conference on Global Politics and Socio-Humanities
DOI: 10.54254/2753-7048/2026.33430

Prevention of Infringement Risks in Secondary Creation

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Abstract. In the digital era, the creation methods and communication channels of secondary creation are increasingly rich, which has also caused more and more infringement disputes in judicial practice. Cases involving secondary creation infringement lack a unified infringement identification standard and regulation path. Based on Article 13 of The Copyright Law of The People's Republic of China (amended in 2020), this paper classifies the secondary creation into derivative, reconstruction, and reference types to identify its possible infringement risks and regulatory methods, and analyzes the core differences of the three types of secondary creation with the help of the transformative use standard. The research suggests that the derivative type of second innovation should avoid infringement through legal permission, the reconstruction type of second innovation infringement regulation should take the fair use system as the core, and the reference type of second innovation should judge whether it constitutes substantial similarity through the "dichotomy of thought and expression".

Keywords: Secondary Creation, Typological Construction, Reasonable Use, Transformative Use

1. Introduction

In today's environment of in-depth development in the era of Web2.0, artificial intelligence technology is widely used, and the new forms of expression of works have become diversified, and are no longer limited to the types clearly listed in Article 3 of the Copyright Law. Some Chinese scholars are also advocating the construction of work types. Among them, the secondary creation of works, as a new form, not only needs to rely on the content of the original works but also integrates other original expressions on this basis. This "intermediate state" also leads to the difficulty of identifying its infringement. In judicial practice, there is no clear and unified standard for identifying and regulating the infringement of secondary creation. At present, the academic circle has formed rich research results on the infringement regulation of secondary creation, and has put forward many constructive theories, including the fair use system, and judging whether the secondary creator constitutes infringement through the "three-step test". Some scholars put forward the legal permission system, and believed that in the creation scene of "efficiency first", the profit-making secondary creation could not be covered by the rational use system, and the use of works based on legal permission should be created [1]. However, there are also different types of secondary creations, and their dependence on the original works and contribution to originality are also

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DOI: 10.54254/2753-7048/2026.33430

different. There is still a gap in the academic research on this aspect. The infringement determination of secondary creations is still at the stage of using a unified standard to judge. In practice, there are also cases where "reasonable use is difficult to define and substantive similarity is difficult to determine" [2].

Therefore, this study advocates the typological construction of secondary creation. Combined with the three dimensions of the degree of originality of secondary creation, the expression association with the original work, and the transformation of creative behavior, the secondary creation system is constructed into three types: derivative, reconstruction, and reference. The infringement risk and regulation methods are analyzed, so as to promote the new work to be incorporated into the legal regulation system more quickly.

2. Identification and infringement regulation of derivative secondary creation

2.1. The concept and identification of derivative secondary creation

Derivative secondary creation refers to the creative behavior of local modification, adaptation, translation or editing of the original work within the expression framework of the original work, retaining the core expression, basic plot, or main picture of the original work. The new work formed is substantially similar to the original work in terms of expression but also adds some original contributions of the secondary creator. Its originality is reflected in the optimization and adjustment of local expression, forming a "derived and derived" relationship with the original work.

This study believes that the means of derivative secondary creation include not only traditional adaptation and other means, but also emerging technical means such as the use of AI creation tools. The core lies in whether the original contribution of the secondary creator makes the secondary creation have some original new expression or substantive reconstruction. Although the degree of originality is relatively low, it is still necessary to distinguish it from simple replication. This view is also consistent with the legal theory stipulated in Article 13 of The Copyright Law Of The People's Republic Of China, that is, the act of "adaptation, translation, annotation and collation of existing works" can also produce copyright, but the exercise of its rights shall not infringe the copyright of the original works. It is also supported in the current academic research. Some scholars pointed out that although some Erchuang short videos have been partially modified, their transformative value is low because they retain the core expression of the original works [3]. Chen Lin, a scholar, also put forward in his research that the originality of simple editing and splicing is insufficient, and it is difficult to constitute a reasonable use [4].

2.2. Infringement risk and regulation of derivative secondary creation

According to the "dichotomy of thought and expression", the original expression of a work is protected by the copyright law, but derivative secondary creation usually retains and uses the original expression, and the original contribution made by secondary creators is low, which is highly likely to form a "substantial similarity" with the original. In terms of market impact, due to the high degree of similarity between the two, derivative secondary creation is likely to have a competitive relationship with the original work, which will "affect the reasonable use of the work by the original copyright owner; unreasonably damage the legitimate interests of the original copyright owner" and then constitute infringement.

Because derivative secondary creation needs to use the original creative expression and may have a "substitution effect" in the market, which will affect the use of the copyright of the original author,

DOI: 10.54254/2753-7048/2026.33430

this study believes that such secondary creation should adopt a legal licensing system, and the creation behavior should obtain the permission of the copyright owner of the original work. The secondary creation platform should bear a high duty of care, especially for the derivative secondary creation of audio-visual works, music works, written works and other large-scale dissemination. The secondary creation subject can use the secondary creation platform after paying reasonable remuneration to the original copyright owner without obtaining a separate license, unless the copyright owner declares that it is not allowed to use it. In case of infringement, the secondary creation platform should take measures of "Notification - deletion" in time.

3. Identification and infringement regulation of reconstructed secondary creation

3.1. The concept and identification of reconstructive secondary creation

Reconstructive secondary creation refers to breaking the expression framework of the original work, re deconstructing and creating the core elements and themes of the original work and endowing the original work with new values and functions through new expression forms and narrative structures. Its originality is reflected in the substantial reconstruction of the original work, forming a "core element borrowing, new expression form" relationship with the original work.

Such creations, such as the new story creation with the original animation image as the core, the reverse interpretation of the theme of the original film and television works, and the creation of adapting the original literary works into a new art form, belong to the reconstruction type of secondary creation.

As for the composition of the reconstructed secondary creation, it is required that it must have a high degree of transformative use characteristics and give the original work new value and function. In principle, it should be recognized as a reasonable use in the copyright law. Only when it exceeds the boundary of reasonable use and damages the market interests of the original work can it be recognized as copyright infringement. This concept is highly consistent with the principle of "transformative use" put forward by academia, and it is also the core type of legal secondary creation. Sun and Lu put forward that the core of transformative use is that the second creation works give the original works new expression, new value, and function [5]. Scholars Li Ruiqi and Tang Lingli also pointed out that the real legal second creation should have transformative value, rather than simply copying the original work [6].

3.2. The infringement risk and regulation of the reconstructed secondary creation

Although the reconstituted secondary creation has a high degree of original expression and transformative use, and it is less likely to form a substantial similarity, but generally, the reconstituted secondary creation is a reverse interpretation of it, but it may lead to the query and irony of the original work, and even damage the evaluation of the original work, thus infringing the market value and copyright of the original work.

This study believes that the infringement regulation of the reconstructed secondary creation should focus on "fair use". If the reconstructed secondary creation conforms to the legal situation of fair use stipulated in the Copyright Law, it is recognized as a legal use in principle, without obtaining the permission of the original copyright owner and paying remuneration. If it is not clear whether it constitutes a reasonable use, it should be combined with the dual standards of transformative use and market impact. If the reconstructed secondary creation does not replace the market demand of the original work and does not damage the legitimate rights and interests of the

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copyright owner of the original work, it should be recognized as legal; If excessive use of the substantive expression of the original work directly substitutes for the market dissemination and use of the original work and damages the interests of the copyright owner of the original work, it is recognized as infringement of the copyright of the original work [7].

4. Dentification and infringement regulation of reference type secondary creation

4.1. The concept and identification of reference type secondary creation

The reference type of secondary creation refers to the work that only uses the original work's creative ideas, creative methods, style characteristics and other ideological content for reference, without using the specific expression of the original work, and forms a new work through independent creation. Its originality is reflected in the complete independence of the work's expression, which is only related to the original work's "thinking reference, expression independence".

The common means of reference type secondary creation include: using the narrative techniques and creative styles of the original works for reference to create independent words, films, and art; using the technical ideas and process methods of the original works for reference to create computer software, design works and other independent creations and using the theme and creative ideas of the original works for reference to form a new creative behavior to express the results.

4.2. Infringement risk and regulation of reference type secondary creation

According to the theoretical concept of "dichotomy of thought and expression", the ideological level and expression level of works are separated and protected. The thoughts of works are not included in the protection scope of copyright law. Therefore, the reference type of secondary creation does not use the original creative expression, but uses the original creative style for new expression, which should not be blamed for infringement from the theoretical level.

For the infringement regulation of reference type secondary creation, the difficulty lies in whether the original creative expression is used, rather than what theory should be applied for legal condemnation. Therefore, if the reference type secondary creation does not use the specific expression of the original work, it should not be recognized as an infringement of the copyright of the original work. It does not need to obtain the permission of the copyright owner of the original work, and it does not need to pay remuneration. It should be regarded as an independent work to protect the complete copyright of its copyright owner.

5. Analysis of the core differences between the types of secondary creation

The core meaning of the above typed construction of secondary creation is to transform it into judicial practice for application. Therefore, it is a top priority to clarify the core differences between different types and distinguish them.

5.1. Degree of independence of secondary creation

The degree of originality of the work should be reflected in the degree of dependence on the original work and the degree of originality. In general, the degree of originality of the reference type secondary creation is higher than that of the reconstruction type secondary creation, while the reconstruction type secondary creation should be higher than that of the derivative type of secondary

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creation. Its original expression also depends on the level of transformative use of the expression of the original work. When determining the nature of second creation works in judicial practice, the court should maintain a balance between encouraging second creation and protecting copyright and make a comprehensive evaluation at the expression level. The degree of transformative use includes two dimensions of evaluation, namely, "transformative character" and "transformative purpose". Therefore, the minimum recognition standard for transformative use should be to add new content, purpose and characteristics to the original work, and transform the original work with new expression, meaning and theme [8]. The core of distinguishing plagiarism from derivative secondary creation is whether new content and meaning are added. Derivative secondary creation should be loosely recognized as transformative if the audience can perceive new expressions and comments, and the court has no right to deny it. If only the original work is rewritten and no new meaning is generated, it can only be recognized as the deduction of the original work [9]. On this basis, the further identification of derivative secondary creation and reconstruction secondary creation is reflected in the use of the original works, and the adaptation means of reconstruction secondary creation should have more originality and characteristics of secondary creators; The distinguishing standard between the reconstruction type secondary creation and the reference type secondary creation lies in whether the reference is at the expression level or only at the ideological level.

5.2. Reference level of secondary creation

In this regard, the judgment should be strictly based on the dichotomy of thought and expression. Derivative secondary creation and reconstruction secondary creation should be allowed to quote the original creative expression of the original work to a certain extent. The identification of reference expression should be strictly identified as referring only to the ideological level. In the classic judgment of Jin Yong v. Jiangnan's youth here, the court split the character background and story plot and considered that the character characteristics and background "have been fully described and specific enough to form a structure with strong logical connection between internal elements", which belongs to the "expression" protected by copyright law, while the story plot only constitutes the ideological level.Reference rather than copyright infringement does not constitute plagiarism [10].

5.3. Infringement avoidance means

China's copyright law only protects the copyright at the expression level. Both derivative secondary creation and reconstruction secondary creation draw lessons from the original works' original creative expression to a certain extent. If the adaptation form is deviated, it is possible to constitute copyright infringement. Therefore, for the existing identification of infringement avoidance, derivative secondary creation, Prospective makers must know objectively that they should ask permission when interested in creating one or more of the nine exemplary derivatives and close analogues to those set forth in the statutory definition [11]. In addition, the reconstituted secondary creation needs to comply with the determination of "reasonable use". If it cannot be achieved, it can be judged as infringement in judicial practice; Because of the strict standard of its identification, the reference type of secondary creation does not have the reproach ability and illegality of infringement in theory. The criteria for differentiation are summarized in Table 1 of this study.

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Table 1. criteria for distinguishing three types of secondary creation according to the degree of originality

Differentiation criteria	Derivative secondary creation	Reconstructive secondary creation	Plagiarism
Plagiarism	Whether the derivative secondary creation has added new content and significance	On the basis of adding new content and significance, whether the means of adaptation are more original	
Derivative secondary creation		whether the means of reference are more original and innovative	
Reconstructive secondary creation			On the basis of adding new content and significance, whether the means of adaptation are more original
Reference type secondary creation	Whether it can only be used for reference at the ideological level		

6. Conclusion

In this study, the secondary creation is systematically typed into derivative, reconstruction and reference secondary creation. The degree of originality is also gradually increased, and the possibility of infringement is reduced in turn. It also provides different ways to avoid infringement, including "legal licensing system", "reasonable use standard" and "should not be identified as infringement". This provides a feasible way for today's growing judicial needs and theoretical gaps. However, this study failed to further discuss the identification of legal permission and clear standards for fair use. In the future, it can continue in-depth discussion on this basis to improve the theoretical basis and research gap.

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