

# *The Fair Use of Copyright in Fan Works*

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**Keywords:** fan works, copyright, fair use.

**Abstract:** The fan works are produced and widely distributed on the Internet, and are dependent on the original works, but have their own originality. Therefore, whether it is protected by copyright law and whether it infringes on the copyright of the original work has become the focus of academic debate. Despite the possible conflict of copyright with the original work, the law should not completely deny the legitimacy of fan works based on its own characteristics and public interest as well as the needs of social and cultural development, but should regulate the elements of its legitimacy on the basis of clarifying its legal attributes and seek reasonable ways to protect the legitimate rights and interests of the original work.

## 1. Introduction

With the rapid development of the age of Internet, fan works, which were originally intended for small-scale entertainment, are becoming more and more widespread. In a modern sense, fan works originated in Japan and gradually developed into a part of the country's cultural industry, while in Europe and the United States it also has a long and solid history. Fan works emerged relatively late, but the sheer number of people involved has allowed them to grow very quickly. However, there is relatively few or even no corresponding legal provision, which has kept it in a grey area between legality and illegality, and thus it is in conflict with the original rights-holders.

The law also fails to clearly define the concept and conditions for the application of copyright to fan works, or to stipulate the rights and obligations of fan creators and the relationship between fair use and fan creation. It is hoped that the law and the system can better guide and regulate the development of fan works and harmonize the relationship between fan creators and original authors, so as to reduce the disputes.

Although there are a variety of forms of fan works, they all have strict constitutive elements, including dependence on the original work, a certain degree of originality, and a non-profit purpose. The legal nature of these works cannot simply be classified as derivative works, but should be differentiated according to their different characteristics. In the process of borrowing from the original work, a conflict of rights may arise with the original work, but it should also be noted that the promotion and dissemination of the same work has played an important role in enhancing the popularity of the original work. At the same time, as the influence of the same work continues to grow, the public's enthusiasm for creation continues to rise, which to a certain extent promotes the development and popularity of social culture and the spreading of the same work. It is also important to promote the appropriate use and development of fan works.

## **2. The definition of fan works and the problems of their use**

### **2.1. Literary definition of fan works**

A fan work is inevitably based on the characters, storyline and values of the original work to create something different, with a certain degree of similarity to the original work, but also incorporating the creator's own creativity and ideas. Generally speaking, the creation of fan works is merely an "entertaining" creation made by fans of the original work to express their respect for the original work and to enrich their own spiritual activities. Fan works are mostly spontaneous creations, rarely for profit. "For example, in Europe and the United States, during the development of fan works, when serialized novels were not updated, fans imagined, continued and exchanged ideas about the storyline out of anticipation and interest in the original work. Even when they are published, they are characterized by spontaneous self-creation, self-publishing and small-scale distribution, and the creators do not aim to trade the work for profit. Although the spreading speed has increased and the scope of dissemination has increased, the authors of these works are generally not professional writers and do not focus on the literary value of their works, but only add their own thoughts, emotions, and in-depth analysis of the original work out of their love and interest in it.

### **2.2. Legal definition of fan works**

The popularity and influence of fan works is growing rapidly, but there are also questions about their legality. The root cause of this is the grey area of the law that has appeared for the creation of works of the same genre. There is no specific legal provision on the legal nature and positioning of works of the same name, and there are no clear regulations on whether or not they should be protected and how they should be regulated. The lack of such laws and regulations has also made it possible for works of the same name to be controversial since their emergence, and the creators of works of the same name have been "on the verge of being legal or illegal". Therefore, when discussing the legality of fan works in copyright, we must first study their legal nature, and only by clearly defining their connotation can we better clarify the issue of their conflict with other rights in copyright.

### **2.3. Reasons for the lack of recognition of fan works**

Disputes between creators and original rights-holders are frequent. The original rights-holder believes that the recreation of the original work infringes on his personal and property rights, reduces the potential consumers of the original work, affects the relevant market, and in some cases even affects the reputation of himself or his work, which should be regarded as an infringement, while the creator of the fan work believes that the free creation is his own right, and since it has no commercial purpose, it should be a legitimate use. The lack of legal provisions makes it difficult to effectively resolve the conflict between the two sides. Secondly, there is a controversy over the legal nature of a work of authorship. As a work of authorship is a re-creation based on the original work, it is impossible to discuss the legal issues without resolving the fundamental question of whether it should be classified as a work of interpretation or be differentiated according to its degree of originality. Finally, there are questions about the legitimacy of fan works. Some people believe that the use of an original work without the permission of the original author is an infringement of the law, and that the existence of fan works is illegal and should not be protected by law. In reality, the rapidly growing number of fan works is facing the embarrassing situation that their nature is unclear, the law does not protect them, and they may fall into infringement if not being careful.

### **3. Analysis of issues related to the copyright of fan works**

#### **3.1. Analysis of the legality of fan works from the legislative purpose of the copyright law**

As we all know, the copyright law does not protect the ideas that exist only in the mind, but protects the formed and existing works. The protection of copyright owners under the copyright law is not to create monopoly, but to promote creation by inspiring more people to participate in the creation of works. In this way, while protecting copyright, we can allow the expression of ideas in a variety of forms, produce richer works, expand the scope of their dissemination in the society, enhance their influence, and ultimately achieve the purpose of promoting cultural development and improving the quality of all people. The content of the copyright law varies from country to country, but they all share a common purpose – to protect the personal and property rights of copyright owners, to ensure that they enjoy the legitimate interests arising from the works they create, and to promote the wide dissemination of works and the interactive exchange of culture. Therefore, when discussing the legality of fan works, we must first consider their important role in the process of social and cultural development and dissemination.

#### **3.2. Analysis of fan and interpretative works**

Some scholars support the view that fan works are derivative works, and regarding fan works as derivative works is one of the most widely supported forms of protection in this field. The main reason is that many existing copyright disputes over fan works centre on the right of derivation in a broad sense. If fan works are included in derivative works, only the treatment of derivative works can be applied in infringement disputes, instead of using the dichotomy of ideas and expressions, which can effectively reduce the possibility of "different judgments in the same case" and maintain the stability of the legal system. However, this article argues that the legal basis for the use of the relevant elements of the original work varies according to the degree of use. At present, derivative works of the same person can fall within the scope of the right of derivation in China, and the doctrines in the relevant judicial interpretations or guiding cases can be applied to resolve copyright disputes over derivative works of the same person. However, non- derivative works of the same kind can be protected as separate works because they are less dependent on the original work, and such works cannot be covered by derivative works and are therefore not protected by law. In addition, as mentioned above, contemporary works of authorship do not fit into the traditional 'authorization-before-use' model, which is precisely the model derived from the legal provisions. The aforementioned irreconcilable contradictions and conflicts between the two are what make it difficult to protect a work of authorship as a direct work of deduction. What is more, China's copyright law does not directly provide for derivative works or the right of derivation, but rather the theoretical framework of this field and the recognition of judicial practice, and it can be said that the development of the right of derivation in China is not yet mature, and it is slightly inappropriate to protect fan works as derivative works.

#### **3.3. Analysis of the legality of fan works from the perspective of the objects of copyright law protection**

The object of copyright protection is literary and artistic works, so how can one determine whether a work falls within the scope of the copyright law? This Law is enacted in accordance with the Constitution in order to protect the copyright of authors of literary, artistic, and scientific works, as well as the rights and interests related to copyright, to encourage the creation and dissemination of works beneficial to the construction of socialist spiritual and material civilization, and to promote the development and prosperity of socialist cultural and scientific undertakings. To determine whether a

work can become a "work" under the Copyright Law and be protected by the Law, whether it has originality must be judged first, which is the most important criterion for judging a work and the most basic condition for obtaining protection. Although 100% originality is not required, there must be a minimum requirement. This means that the creator must put in independent and active mental work in the process of creation, such creation is distinct from any other person, and the work created must reflect the novelty of the author in terms of ideas. A simple revision of the original work alone cannot form a new work, and will not be protected by the copyright law.

### **3.4. Analysis of the conflict of rights between a fan work and the copyright of the original work**

However, the reliance on the original work not only makes it easy for the public to confuse it with plagiarism, but also enhances the competition between the fan work and the original work in the market, especially as the lack of a clear legal position and the complex types of the same work make it more difficult for judges to judge whether the fan work is infringing.

It is difficult to adapt the traditional licensing model of "authorization-before-use" to the creation of a fan work. In general, permission should be obtained from the original copyright owner to exploit the fan work, and if the fan work is used without permission or authorization, it will often be deemed to be infringing. This traditional "authorization first, and use later" model is effective in deterring illegal acts of improper use or plagiarism of the original work. In practice, however, there are difficulties in obtaining authorization from the original author. [1] It is difficult to effectively contact the original copyright owner. Generally speaking, it is difficult for authors to know the effective contact information of authors through sharing platforms, and even if they contact them directly through the platform, they may not get a reply from the author. [2] Some scholars have suggested that the particular form of creation (such as comic parody and the genre of delay) and the unstable quality of the work are important reasons that affect the authorization of the original work. The original copyright owners cannot accept certain types of adaptations, nor can they control the positive or negative impact that the creation and publication of a fan work will have on the original work, which makes many original copyright owners reluctant to authorize fan authors. [3] Given the large number of fan works, if the original copyright owners were to consider the ability of each fan author and review each fan work, it would not only reduce the efficiency of the creation, but also add to the original copyright owners' work. As a result, some of the original copyright holders simply refuse to grant authorization in a "one-size-fits-all" manner, which in turn exacerbates the conflict between the fan author and the original author.

## **4. Fair use system and fan works**

### **4.1. Criteria for Judging Fair Use under the Copyright Law**

Fair use is an important system in copyright law, which means that, according to the provisions of the copyright law, a work may be used in certain ways without the consent of the copyright owner and without payment of remuneration to him/her. As we all know, the development process of society is inevitably accompanied by the conflict and reconciliation of various interest subjects. At the same time, interests are also the core and considered element in the process of creating a legal system. "The basic element of rights is, first of all, interests, which are not only the basis and fundamental content of rights, but also the target of rights, and the purpose that people set the legal system to achieve. The primary purpose of the copyright law is to protect the legitimate rights and interests of authors from infringement, so as to motivate authors to create works and promote the prosperity of cultural and scientific undertakings. At the same time, however, the Constitution grants citizens the fundamental rights of freedom of scientific research, freedom of literary creation and freedom of cultural activity,

which means that while protecting the rights of copyright owners, certain restrictions need to be imposed on them so that the public can share and disseminate the fruits of their intellect in a reasonable manner, thereby satisfying the public's demand for cultural knowledge. Therefore, in order to promote the development of public education, literary and artistic prosperity, and social progress, and at the same time to prevent copyright owners from turning their rights into a tool for monopolizing the dissemination of their works and restricting the re-creation of others, the law has established the fair use system to limit the exclusive rights of copyright owners. The purpose of the fair use system is not to "deprive" creators of their rights, but rather to appropriately guide and utilize such rights to meet the public's demand to create or share the spiritual wealth of society. It thus serves to mitigate contradictions and balance the interests of a plurality of subjects competing for their rights. The fair use system balances the conflicting interests of creators, users and distributors, and the relationship between public and private interests". From the perspective of the purpose of the fair use system, the borrowing of an original work by a fan work is, in some cases, in line with it. On the one hand, although the fan work is based on the original work, it is not plagiarism, but contains the author's original work, and should be protected by copyright law. On the other hand, the creation and dissemination of a fan work is itself a form of publicity for the original work, and can help to increase the popularity of the original work. So, if fan works are banned, the dissemination of the original work will also be restricted to a certain extent. Therefore, under certain conditions, allowing more people to freely use a published work can yield more benefits than the absolute protection of the original work. Of course, not all works of authorship can be used as a fair use defence under all conditions, and the following issues need to be borne in mind when doing so.

#### **4.2. Whether fair use applies to the distribution of online works.**

Most of the works are created out of the author's love for the original work, in order to deepen his understanding, to broaden his mind, and to communicate better with his fellow fans of the original work. However, many authors post their works on forums, blogs, and websites, and because the Internet is highly open and fast-spreading, once posted, the works are accessible to many unspecified people through the rapid spread of the Internet, thus going beyond the author's purpose. Therefore, when sharing their works via the Internet, authors should actively take measures to ensure that the use of their works is limited to personal study, research, and appreciation. The first is to write the words "for personal use only" and "not to be reproduced or used commercially without the author's permission" in obvious places on the work, so as to do their utmost to remind others of their obligations. The second is to make use of existing technical measures, such as setting passwords, prohibiting copying, and setting access rights to the shared work, in order to prevent it from being used illegally.

#### **4.3. Criteria for judging appropriate citation.**

The ideas expressed by the creator of a fan work in the process of creation may be new ideas that are completely different from the original work, or other ideas that have not yet been expressed by the original author. Then, to judge whether the quotation of the original work by the fan work constitutes fair use, the criterion of "appropriate quotation" in item 2 is particularly crucial. If the creation of a fan work distorts or vilifies the character of the original work, or even turns the original work into a pornographic, violent, or other inappropriate work, such a citation is inevitably inappropriate. Secondly, the number of references should also be considered, so as to determine intuitively whether the work is original. If a fraction or even half of the content of a fan work comes from the original work, it is obviously not an appropriate reference, but an act of plagiarism, which exceeds the scope of fair use.



#### 4.4. Whether a fan work for profit constitutes fair use.

In theory and judicial practice, whether or not a work is created for profit is one of the criteria for determining whether or not it complies with the "fair use". If the work is created without the original right-holder's permission and used for commercial purposes, such an act will have a certain impact on the market for the original work, reduce the potential consumer base of the original work, harm the legitimate interests of the original right holder, and even adversely affect the reputation of some original right holders. As one of the important characteristics of a work of authorship is its non-profit nature, a work of authorship for profit should be characterized as a work of derivation, and the fair use system should not be applied.

#### 5. China Creative Commons and fan works

The Creative Commons (CC), a non-profit organization initiated by Creative Commons.org, aims to create a reasonable and flexible copyright system at a time when the default restrictive rules are becoming increasingly restrictive. However, this agreement also has limitations. Firstly, the CC Agreement is not mandatory, so the decision to share a work through this mechanism is left to the author. Therefore, the number of authors authorized to use the CC Agreement is quite limited. Secondly, the CC Agreement clarifies to a certain extent the rights and obligations between fellow authors and original authors to facilitate the communication of information, but it still does not solve the problem of unclear rights and obligations between them. Lastly, the profit to be gained by both the original author and the intermediary platform providing the sharing service is small, which may result in fewer authors being willing to share their works in this way, and, with the exception of some well-funded sharing platforms that are able to support their spending on copyright declaration services, other intermediaries may give up due to difficulties in maintaining their operations.

Both peer-to-peer marks and CC Agreements are based on the original copyright holder giving up some of his or her rights. However, if rights holders are required to give up their rights, it would defeat the legislative purpose of the copyright law and affect the incentive of rights-holders to participate in open licensing. Public policy should perhaps be involved in the popularization of open licensing in terms of procurement and subsidies, and play a positive role in the introduction and development of open licensing. Furthermore, it should be emphasized that the introduction of open licensing agreements also requires the regulation of the copyright law. The use of open licensing may increase the risk of infringement by the original copyright owner, and new conflicts and contradictions are bound to emerge. Thus, it is necessary to clarify the liability for infringement and the corresponding remedies under the foreseeable premise.

#### 6. Conclusion

The growing popularity of fan works has become an inevitable trend, and its influence has expanded indefinitely. At such a time of controversy and contradiction, it is the right time for the law to come into play. However, the current copyright law lacks clear provisions on the concept, nature, and rights instruments of fan works, making it difficult to clarify the legal responsibilities of both parties when resolving disputes between fan work creators and original authors, thus making it difficult to reach a convincing solution. Inevitably, when citing original works, some conflicts of rights may arise, and some works may even damage the reputation of the original author and the work, but we should not suppress them and should see the characteristics and role of the works themselves. On the one hand, although they are creations based on the original works, they contain the creators' own ideas and emotions, forming independent ideas and innovative expressions, and this degree of originality should be protected by the copyright law. The copyright law also promotes the use of the original work. At the same time, the fundamental aim of the Copyright Law to promote the development of the culture

of the society is also in line with the role of the fan works in promoting the dissemination of culture. Therefore, it is necessary to recognize the legitimacy of fan works and give them corresponding protection, and by including fan works in its scope of protection, it is necessary to balance the interests of fan creators and original authors, promote social and cultural development, and improve people's quality across the nation, which is the proper purpose of the copyright law.

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