

The Dilemma and Outlet of the Identification of Fair Use of Copyright—— from the Perspective of Short Video of Film Commentary

Xu Chu

Anhui University of Finance and Economics, Bengbu 233030, Anhui, China

Abstract: The fair use system has a unique value in the copyright law, and the identification of fair use is a key part of judging whether copyright infringement. The copyright fair use system itself has many problems such as insufficient coverage of statutory circumstances and vague definition of general judgment elements. When dealing with the determination of the fair use of short video of film commentary, there are difficulties such as inability to accurately judge the rationality of the quotation behavior. Therefore, it's particularly important to clarify the specific structure and its identification rules of the fair use system. This article aims to find the outlet of the identification of fair use of copyright by analyzing the evolution of the legal situation of fair use, sorting out the general judgment elements, and discussing the difficulty of judging "appropriate quotation" based on the characteristics of the secondary creation attribute of the short video of film commentary and the compatibility with the copyright fair use system.

Keywords: Fair Use; Appropriate Quotation; Short Video of Film Commentary

1. The dilemma of the identification of fair use of copyright

In judicial practice, there are many difficulties in determining the fair use of copyright, such as insufficient coverage of the legal list of fair use, vague definition of general judgment elements, and difficulty in judging "appropriate quotation" [1]. Specifically, to short film commentary videos, it is still controversial whether the short video of film parody can be included in the specific circumstances of fair use listed in Article 24 of Copyright Law of China. Whether the specified obligation emphasized by "should specify the author's name or title" is a necessary requirement, that is, whether the film commentary does not indicate in its video the name or name of the right holder of the earlier film work quoted does not necessarily constitute fair use. The two judgment conditions that "Be not allowed to affect the normal use of the work" and "Be not allowed to unreasonably damage the legitimate rights and interests of the copyright owner" have problems such as unclear connotation and mixed internal relationships. Moreover, how should they apply and operate in infringement cases related to short film commentary videos? "Appropriate quotation" is another unique criterion for the purpose of introducing and commenting. How to judge the appropriateness of quoting previous film works in short videos of film commentary? These are the problems and dilemmas that the copyright fair use system is facing and urgently needs to be solved.

1.1 Insufficient coverage of statutory enumeration types

Regarding the issue of insufficient coverage of the legally listed types of fair use, it is specifically in the short video of film commentary, which reflected in there is still controversy whether the short video of film parody can be included in the specific circumstances of fair use listed in Article 24 of Copyright Law of China. Some scholars believe that the short videos of film parody do not belong to any of the existing legal conditions for fair use, and advocate a new legal situation for "parody". The expansion of the existing statutory circumstances can certainly increase the predictability of the laws related to the fair use system, and avoid the dilemma of impossibility and unregulated regulations that accompany the emergence of

such new types of works. However, in the future, what should be done when new works conforming to the attributes of fair use appear again, but the existing statutory conditions still cannot cover it? Should we continue to expand the existing statutory conditions of fair use, and continue to add specific conditions to improve the predictability of the statutory conditions of fair use? This model of newly added specific situations is essentially a model of "treating the head for headaches and treating the feet for foot pain", which is obviously not a long-term solution that is conducive to the stability and adaptability of the Copyright Law.

1.2 Fuzzy definition of general judgment elements

The determination of fair use in Copyright Law of China has always adopted the statutory enumeration model, that is, only when the act of citing prior works meets the statutory conditions of fair use enumerated in the Copyright Law can it be considered as fair use. Closed legislation has many drawbacks, such as adapting to the development of new technologies. At the same time, new citing behaviors emerging in the network environment urgently need to be identified and resolved in the copyright law. Therefore, the Copyright Law of China revised in 2020 includes the two determination conditions "Be not allowed to affect the normal use of the work" and "Be not allowed to unreasonably damage the legitimate rights and interests of the copyright owner" in the relevant provisions of Article 24 of the fair use system. However, terms such as "normal use" and "unreasonably damage" are too general, which makes it difficult for the general judgment elements to play their due value guiding role, and may also lead to the expansion of judges' discretion in judicial practice. At the same time, there is a certain overlap in the logical relationship between the two elements, and the dispute in the theoretical circle has not yet been resolved. The revision of the Copyright Law does not provide a concrete explanation for the direct transplantation of the judgment elements. How to apply and operate in the infringement cases related to short videos of film commentary has become another problem in the fair use system. At the same time, whether the specified obligation emphasized by the other general judgment element "should specify the author's name or title" is a necessary establishment element for fair use, and whether the degree of fulfillment of the specified obligation in audiovisual works and textual works is equivalent is also questionable. Specifically, for short videos of film commentary, whether the film commentary does not indicate the name or title of the right holder of the previous film work cited in the video does not necessarily constitute fair use, and it still needs to be further explored.

1.3 Judgment dilemma of "appropriate quotation"

Quotation is one of the ways to use copyright works, which is essentially the use of the rights of copyright owners^[2]. The "right" of the second creation comes from the abandonment of the rights of the copyright owner of the previous work, or in other words, the second creation enjoys only the use of the rights of the copyright owner of the previous work. The Copyright Law is based on the balance of interests and incentives for innovation, and the rights of copyright owners are appropriately restricted, and only then can there be a place for the rational use of secondary creation. Article 24 Paragraph 1, Item (2) of the Copyright Law of 2020 of China stipulates the situation of "appropriate quotation", that is, "to introduce or comment on a certain work or explain a certain issue, appropriately quoting others in the work for published works, the user does not need the permission or payment of remuneration." "Appropriate quotation" is another unique criterion for the purpose of introducing reviews. How to judge the appropriateness of quoting previous film works in short videos of film commentary is already a problem that needs to be solved urgently.

2. The outlet of the identification of fair use of copyright

2.1 The evolution of the legal situation of fair use

The revision of Copyright Law of China is being tried in this direction. Article 24 of the Copyright Law of 2020 adds an additional item of "other circumstances stipulated by laws and administrative regulations" as a comprehensive clause for the statutory circumstances of fair use. The legislative purpose of this additional clause is to make up for the shortcomings of the original closed statutory enumeration type, in order to adopt legislative amendments to adapt to the progress and development

of today's society and new ways of proper quotation of works that may appear, and to make the copyright restriction clauses more flexible. However, there are no other circumstances stipulated by laws and administrative regulations on the fair use of copyright in China, and this clause may be at risk of being falsely emptied for a long period of time. Only in the future, when the copyright fair use system faces urgent problems to be solved and promotes the relevant legislative process, this additional clause may be given applicable space and value.

2.2 Clarification of general judgment elements

In the copyright infringement litigation of short video of film commentary, the short video creator as the defendant often invokes the provisions of Article 24, Paragraph 1, Item (2) of the Copyright Law of China for the purpose of claiming that the quotation constituted fair use to defend the allegation of infringement. However, this paragraph puts forward further restrictions on the quotation for the purpose of introducing reviews, that is, when the general judgment conditions are met, the conditions of "appropriate quotation" must be met to constitute fair use. Summarizing the elements for reasonable use of short film commentary videos are: statutory circumstances (introduction and commentary purpose + appropriate quotation) + general judgment elements = fair use. However, the two elements of "Be not allowed to affect the normal use of the work" and "Be not allowed to unreasonably damage the legitimate rights and interests of the copyright owner" have their own problems such as unclear definition of connotation and mixed internal relations. They are used in short video of film commentary related infringement cases. It is difficult to apply, and it is urgently necessary for relevant judicial interpretations to clarify the connotation definition and functional zoning of the two general judgment elements to enhance the operability of the general judgment elements.

2.3 Judgment path of "appropriate quotation"

The evaluation of the appropriateness of the quotation behavior is the ex post value judgment of the quotation behavior. It should be combined with the purpose of use, the degree of use of the work, and the influence on the used work to make a comprehensive judgment and confirmation.

2.3.1 Purpose of usage

Appropriate quotation belongs to the content of Article 24, Paragraph 1, Item (2) of the Copyright Law of China, and its purpose should be to introduce the purpose of the comment, which is a restriction on the purpose of quotation. At the same time, since fair use is the regulation and abandonment of the rights of copyright owners for the balance of social welfare, the appropriate quotation purposes in fair use should also be non-commercial, otherwise it will cause injustice to copyright owners.

2.3.2 The extent to which the work is used

The rationality of quoting behavior is not decisive by quantity and quality, but depends on the reasonable needs of introduction, comment or explanation. In the case of short videos of film commentary, the quoted movie fragments should serve for introduction, comment or explanation. The main part of the explanation should not be for the purpose of simply showing the movie clips^[3].

2.3.3 The impact on the works being used

The impact on the used work includes the impact on the value of the work and its potential market, which can be considered with reference to the stage of communication of the work. If the used work is obtained and quoted by illegal means before it has been published, it will directly constitute an infringement of its right to publish. If the used work is still in the early stage of publication, its social evaluation and economic market will often be oriented and affected by the quotation behavior. In the later mature stage of film works, its social evaluation and market have been relatively fixed, and quoting it will not cause excessive market impact. On the contrary, in the final stage of dissemination, the relevant market of the film works itself is no longer sluggish, and quotations and explanations can even bring a secondary dividend of market revenue.

At this time, the original right holder is likely to be negligent in protecting rights.

Fund Project: Anhui University of Finance and Economics Postgraduate Research and Innovation Fund Project
"Research on Copyright Infringement of Short Video of Film Commentary" (Project Approval Number: ACYC2020467)

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