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Fair use doctrines in creative economy

Chen Peng[1] Li Wanting[2]
[1]Master of Law,City University of Macau.
[2]Master of Law in International Business Law,University of Macau.
Corresponding author, E-mail: 759492088@qq.com

Abstract

Copyright played a key role in stimulating the growth of the creative economy. The doctrine of fair use in copyright has had an extraordinary impact on the creation of intellectual products. This article introduces the development process of test criteria for judging fair use doctrine, analyzes it with relevant classic case in the united states. According to case study, discuss the transformative use gradually established in judicial precedents. Focus on the perspective of trial practice, and makes investigate on how fair use doctrine can fully stimulating innovation potentials through re-innovation ways thereby promoting market economy prosperity.

Fair use doctrine is flexible and adaptable over a long period of time. By utilizing this doctrine, potential creators can create new works by accumulating wisdom from existing works, in other words, “standing on the shoulders of giants” which it ultimately benefits society as a whole. Nowadays, Copyright encourages development related technologies such as artificial intelligence, digital search and algorithms which stimulate creative works and have major impacts on innovation. However, with the rapid development of the Internet, in turn it also brings challenges for fair use. In the internet-era's, it become a very serious problem. Clarify the boundary of fair use in judicial precedent, and appropriate relaxation of fair use conditions can be solved this problem appropriately.

This article is aim at explores the new roles of fair use in the era of creative economy, promotes dissemination and utilization knowledge products. Creation of new works depends on knowledge sharing that fully absorbs and effectively learns from existing intellectual achievements. Therefore, copyright protection should promote the sharing and using of knowledge to its fullest extent through the principle of fair use.

Keywords

copyright, fair use, creative economy

1.Introduction

The Fair Use doctrine allows for the use of part of a content protected by copyright without obtaining permission from the original copyright holder in certain circumstances. It does not provide a right to the user, but presents an infringement defense. Courts have thus developed this doctrine, eventually named Fair Use, which permits unauthorized copying in some situations so as to further “copyright’s very purpose: 'To promote the progress of Science and useful Arts.’”

The fair use doctrine is meant to balance public interests and personal interests. On one hand protecting authors' copyrights, while on the other allowing access to rich and valuable knowledge products within the

public domain. The ultimately goal is to promote the creativity and utilization of literary and art works. Promoting the progress of innovation and development of human civilization.
Copyright systems play a significant role in developing creative economies; within this context, the fair use doctrine has an extraordinary impact on creating intellectual works and broadening public knowledge.

2.Regulatory framework of fair use

Fair use doctrine is flexible and adaptable over a long period of time. From the “three-step test” of the Berne Convention to the “four factors” standards for judging fair use in the US Copyright Act, and the transformative use gradually established in judicial precedents. In order to adapt to the development of artificial intelligence and the data age, the European Union regulate “Text and data mining for the purposes of scientific research” to the Directive on copyright and related rights in the Digital Single Market in 2019. The fair use doctrines have evolved with historical tides, continuously adapting to society's development, playing a role in promoting economic growth to some extent.

3.Fair use in creative economy

Innovation is a gradual process, and innovation-driven development has become a national development strategy. Creative economy occupies an important position in the national economic development strategy, and the protection tendency of the intellectual property has an important impact on encouraging innovation and development. Copyright encouraged the development of related technologies, such as artificial intelligence, digital search and algorithms, which could in turn stimulate creative works, and had a major impact on innovation.
What are the themes of the creative economy? creativity. By using the fair use doctrine, potential creators can create new works by accumulating the wisdom of existing works, in other words, “standing on the shoulders of giants.” Ultimately, the public will benefit.

3.1 Fair use in digital search

The “transformative” fair use doctrines originated in the United States, has undergone many years of judicial practice, and achieving considerable development, gradually confirming the rules in the case law. Under the doctrine of fair use, copying a portion of a copyrighted book without the permission of the copyright owner for the purpose of research might be considered fair use. With the rapid development of the Internet, netizen often search for information online, make or use videos on social platforms, can this also be considered as fair use? Is it a violation of the author's rights if a company scans copyrighted books and makes them searchable on the Internet for users without the permission of the copyright owner? The Authors Guild v. Google Inc. copyright infringement dispute is related to it. Google scans copyrighted books and presents snippets to the public for digital searching. The court concluded that “The purpose of the copying is highly transformative, the public display of text is limited, and the revelations do not provide a significant market substitute for the protected aspects of the originals. Google’s commercial nature and profit motivation do not justify denial of fair use.” In the judicial practice of the United States, transformative use is almost decisive when determining

whether fair use is established. Such use is justified if the user is not intended to replace the market of original work, but is used for a new purpose or manner different from the original work, and if such use contributes to the realization of the public interest, the judge is inclined to conclude that such conduct constitutes fair use. The controversy surrounding judgment on Google's digital copy has provided useful enlightenment regarding development pertaining to internet-era's fair-use doctrines: identification standards help activate innovation consciousness within markets while encouraging creation & stimulation creative enthusiasm amongst creators; playing guiding role promoting creative economy altogether.

Transformative use, which have gradually expanded from the initial parody to art and technology fields such as search engines, game live broadcasts and short video. With the application of transformative use into the fair use doctrines, it has provided the legality of using element basis for re-creation, promoted the dissemination and utilization of knowledge products, and fully stimulated the innovation of potential works in a re-innovative way, thereby promoting the prosperity of the market economy.

3.2 Fair use in emerging media

The development of the creative economy has driven economic benefits far beyond those of the traditional economy. In this era of big data, the emerging media industry is growing exponentially, particularly in regards to short video. According to the 2021 Research Report on the Development of Online Visual Tracking in China, “The users of short video, integrated video, webcast, and web audio are 873 million, 704 million, 617 million, and 282 million, respectively, and the average daily usage time is 120, 97, 60, and 59 minutes respectively. The development of short video and live broadcast, as emerging information dissemination methods, is constantly integrating with e-commerce, tourism and other industries, and the communication scenarios continue to expand, and has gradually become the basic function of other applications, driving the development of its own industry.” Douyin, Bilibili, YouTube and Facebook, those social platforms allow users to share short videos have created huge economic benefits. But at the same time, a series of problems have been exposed. Copyright disputes emerge in endlessly, and whether the fair use doctrines can be applied to short videos has become another difficult problem in judicial practice. It is an urgent issue, which has a great impact on the development of creative economy.

When making short videos, a large number of Internet users or self-media creators often use the content of related film and television dramas without permission from the copyright owner, give personal comments and explanations, or adapt funny imitations of the original work to form a short video in order to gain clicks and views. The creation of short videos often borrows elements from the original author. As the emerging industry, it brings great profits for economic developing, however, it urgently needs fair use doctrine to protect and promote its thrived. In the case of Matt Hosseinzadeh v. Ethan Klein and Hila Klein, the plaintiff posted a 5-minute video on YouTube under the title of “Bold Guy”. The defendants uploaded a 14 minutes reaction video on the YouTube which editing the original footage of “Bold Guy” up to about 3 minutes, besides, inserting his own comments and criticism on the video. Plaintiff request platform a takedown notification, and YouTube omitted it. Then the defendants sent a counter notification. The plaintiff arguing that the defendant had infringed the its copyright. The court judged of fair use and hold that “Here, the ‘extent’ and ‘quality and importance’ of the video clips used by defendants were reasonable to accomplish the transformative purpose of critical commentary.” Short videos that are transported obviously are more likely to constitute copyright infringement, for example, all or part of the original video be displayed in the re-created works; but if the vid-

eo is processed, edited or created for the purpose of commenting or criticizing are not simple reproductions of the original video images, and it may not be recognized as infringement because it may accomplish the transformative use. “As for non-profit use, citations of smaller percentages and immaterial content, and citations made to review works, the fair use defense can be invoked, undoubtedly for the convenience of public access and to reduce the cost of creation and information dissemination.”

3.3 challenges to fair use doctrines

With the rapid development of the Internet, it brings challenges for fair use doctrines. Digital creations, utilization and dissemination of works are becoming increasingly complex and diverse, as users create and utilize more varied types of works. Users freely obtain massive information in the Internet, and immerse themselves in entertainment, work, consumption. However, this has also created more complicated copyright disputes due to the difficulty in clearly defining the nature of original digital works when they are disseminated through various technical means such as copying or altering them. In the face of the emerging media, it was extremely difficult in determines the value of the digital works and the impact of using copyrighted works. There are some measures be taken by many countries. For example, Digital Millennium Copyright Act of 1998 (DMCA) regulate a “safe harbor rules” that shield platforms from liability for copyright infringement. It was called notice-and-takedown system. According to ‘standard technical measures’ or using the algorithms to deal with the issue. Besides, technological protection measures were used as a tool to weaken fair use doctrine, such as encryption technology and digital watermaking technology, prevent the public access and use of digital works, and protect the private property rights of the copyright owner. However, the characteristics of the knowledge are sharing, dissemination and accumulation. To a certain extent, it obstructs the general public to lawfully access, quote and reproduce the works. “The Copyright Office’s Study should have explicitly called for the protection of the doctrine of fair use from the rise of algorithmic technology by advocating for the preservation of the current safe harbors and rejecting both DMCA+ and notice-and takedown systems as potential Standard Technical Measures.” Thus, strictly limit the scope of application of fair use or regulate strong copyright technical protection measures was unfavorable to the development of the copyright industry. It will be exacerbated contradictions between copyright owners and the public interest. How the fair use doctrines can play its role in the era of digital economy has become a new problem. On the one hand, if the fair use doctrines are abused, Internet piracy and infringement will become more and more serious, making it difficult to obtain evidence and supervise in the virtual world. On the other hand, if the fair use doctrines are excessively restricted, it will hinder people's enthusiasm for recreation and make it difficult to adapt the demand for information in the high-speed of Internet era. Clarify the boundary of fair use through judicial precedent, and appropriate relaxing its conditions can help solve this situation.

4.Feasibility of fair use in creative economy

What are the significant effects of the fair use doctrines in the new era? In the creative economy, the copyright fair use doctrine is still necessary. Firstly, the fair use doctrines provide legal grounds for the use of raw materials of original works in new works. When owners of original works claim their work has been infringed upon, those who have used such material without permission can defend themselves by citing fair use as a copyright infringement defense. By the transformative use allows a certain degree of copying and utilization

of the original work, providing a sufficient basis for potential creators to use the original work more conveniently and creatively. It provides the opportunity for users to re-creation, maximizes the value of original works, and provides continuous drive for innovation. Especially in the era of information explosion, the speed of information update is extremely fast, which means that the traditional way of dissemination of information is far from meeting the demand in today's era. The fair use doctrine, it is the basis to provide users with convenient and free creative materials, which make the internet to update the information in a very short time, so that more audiences can browse the information. In short, fair use doctrines provide legality when using protected materials as a defense against copyright infringement claims.

The second is to clear the barriers between the copyright holder and the user, avoid the cumbersome licensing process and the risk of being arbitrarily denied permission even if the copyright owner's permission is obtained, and speed up the frequency of creation and update. If the licensing procedure is too tedious, potential creators will lose interest in creating, which is not conducive to the innovation and development of intellectual products; the fair use doctrines allows the use of copyrighted works without the consent of the copyright owner are also an embodiment of efficiency, if the censorship is too strict, and the use of any raw materials needs to be authorized by the copyright owner, it means that the creation will be repelled by the cumbersome procedures of censorship, the enthusiasm for creation will be lost, and the cost of creation and the time of production will also be increased. It affects the dissemination of information and the renewal of intellectual products. Besides, through fair use doctrines it helps the original work become more widely disseminated, this will increase the awareness of the original work.

The third and most important one is to add creative content to the original works, bring new works into new fields or new markets, fully promoting the dissemination and utilization of knowledge products, promoting innovative achievements, smoothing the channels of innovation, and promoting the rapid burst of social creativity. The continuous of innovation, and then promote the continuous emergence of re-innovation. This is a key part of the creative economy. Judges support fair use, not for misappropriation, copying, and content porters, but for encouraging the expansion of new markets, new fields, which is the key to an active market. Whether, in order to be “transformative” under the fair-use exception to copyright, the use of the copyrighted work must produce "new expression, meaning, or message” as this Court stated in Campbell.

5.Conclusion

Nowadays, metaverse, artificial intelligence and blockchain technology have all brought new economic growth points, and the development trend is in full swing. Over the coming years, digital economic innovation and industrial chain upgrading will drive the rapid evolution of the creative economy.

The creation of new works depends on knowledge sharing that fully absorbs and effectively learns from existing intellectual achievements. Therefore, copyright protection should promote the sharing and utilization of knowledge to the greatest extent through the fair use doctrines. On the base of protecting the reasonable rights of creators, driving the explosive growth of the creative economy.

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