Research on the Protection of Derivative Works from the Perspective of China

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Abstract. The current derivative work system in China has problems such as the malfunction in adjustment objects and the imbalance of interests in exercising rules. In order to overcome the above drawbacks, some scholars have proposed such theories as the theory of infringing works, copyright negative protection mode, copyright blockade protection mode and unjust enrichment protection mode. Although such theories have some saving grace, defects still exist. The introduction of accession protection mode is the best solution for the current derivative work system to march towards the reform of interests equalization, which allows the right holder to agree on the attribution of the derivative work, allows the party who has made the larger contribution to obtain the copyright of derivative work under the circumstance that no agreement is made or the agreement is inexplicit, and makes up for the corresponding input and income of the other party.

Introduction

The term “derivative work” is not an indigenous product of China, and it comes from the west. In the west, derivative work is the product of copyright expansion. Before the middle of the 19th century, the right of reproduction was mainly regulated for copyrights, and later, the derivative behaviors such as adaptation and translation were gradually incorporated into the scope of adjustment to copyrights. Although the term "derivative work" has not been explicitly enshrined in law in China, from the view of mainstream, it is believed that Article 12 of the current Copyright Law in China is a norm about derivative works, learning from the provision of Article 2.3 of Berne Convention. Although the derivative work system in China almost copied Berne Convention during the process of law transplantation, the connotation of the derivative works failed to be fully comprehended due to the reasons such as translation and legislative techniques. To this end, by keeping a foothold on China's ontological context, this paper applies the traditional civil law theory to the legal protection mode of derivative works, and takes the concept of balance of interests as the guide, aiming at revitalizing the derivative works system in China.

Defects in the Derivative Works System

The disadvantages such as malfunction in adjustment objects and interest imbalance in terms of exercising rules exist in the current derivative works system in China, which is detrimental for the innovative subject to break through the bottleneck of the old expression mode through the new combination of expression.

Malfunction in Adjustment Objects of the Derivative Works System

The provision on "derivative works" in China was borrowed from the provision of Article 2.3 of Berne Convention, "Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work." China made corresponding changes in the process of legal transplantation, changing it into the provision as follows: “where a work is created by adaptation, translation, annotation or arrangement of a pre-existing work, the copyright in the work thus created shall be enjoyed by the adaptor, translator or arranger, provided that the exercise of such copyright shall not prejudice the copyright in the original work.” Although there was no big change to the provision, it lost the value of the derivative work itself, which means, China did not encourage "secondary creation" at a
tolerant attitude, causing the adjustment objects falling into disorder due to their malfunction. The manifestation is as follows: (1) *Berne Convention* stipulates an open-ended article for derivative forms, under which "other alterations (secondary creation)" can be protected; while the *Copyright Law* is closed, limited to the four forms of adaptation, translation, annotation and arrangement only. The *Copyright Law* is similar to the *Property Law*, and both of them emphasizes the legalism of rights, which makes remixed works, doujin works and other secondary creations unable to be protected by law; (2) the disadvantages such as misunderstanding during translation and too mechanical application of law exist in the law transplantation in China, resulting the situation that the behaviors of punctuation and collation of ancient books which are not "created secondarily" are endowed with the status of derivative works in the juridical practice. Even though the legal norm of the term of "derivative work" is less used explicitly in the different legislations in various countries and international treaties, most of the countries have adopted an open-ended legislative mode to adjust the secondary creation based on existing works, which is superior to China's closed legislative mode to a certain extent. Therefore, China urgently needs to explicitly define the adjustment object of derivative works system so as to encourage the “secondary creation” of literary and artistic works.

**Interest Imbalance in the Derivative Works System**

From the view of mainstream, the basic function of intellectual property law is to encourage creativity. [1] The *Copyright Law* in China carries out rule design with the "encouraging creation theory" as the functional orientation, and emphasizes the contribution of "creative labor" in terms of the source of copyright. However, when *Copyright Law* in China and its juridical practice are standardizing the derivative works system, they inclined improperly in terms of protection of rights. For example: (1) The law protects the interests of the original authors too much in the use of derivative works. Although Article 12 of the *Copyright Law* in China stipulates that "where a work is created by adaptation, translation, annotation or arrangement of a pre-existing work, the copyright in the work thus created shall be enjoyed by the adaptor, translator or arranger" that means, the authors of derivative works obtain the copyright of the derivative works. However, in order to effectively protect the creative labor of original authors in law, it stipulates that the permissions from all prior authors shall be obtained before the positive copyright of the derivative works is exercised, which restricts the efficiency of the use of derivative works; (2) The interests of the prior authors are protected in priority in judicial practice for the infringing derivative works while the rights of the authors of infringing derivative works generated in the secondary creation and the difference between the beneficial infringement and injurious infringement are neglected. The derivative works created without the permission of the prior authors are often ordered to stop the infringement, and thus the derivative works can no longer continue to circulate in the market, which restricts the enthusiasm of the authors of derivative works to re-create, and also hinders the public's access to excellent derivative works. Therefore, the rules for exercising derivative works need to be reconstructed in order to achieve the legal effect of balance of interests.

**Discussion on the Existing Theory of Derivative Works Protection Mode**

In order to overcome the above-mentioned drawbacks of derivative works system in China, some scholars have proposed such theories as the theory of infringing works, copyright negative protection mode, copyright blockade protection mode and unjust enrichment protection mode. Although such theories have some saving grace, defects still exist.

**Theory of Infringing Works**

The theory of infringing works refers to the theory under which infringing derivative works created without the permissions of the prior authors cannot be legally protected. Scholars who hold this argument often take the attitude of the U.S. towards treating illegally derivative works as an example. *Copyright Law* of the U.S. clearly stipulates not to protect illegal derivative works. This type of protection effectively defends the theory of "Unclean Hand", which means, "judges will not
give remedies such as bans or damages to the parties who commit unfair or improper conduct[2], which can have a certain deterrent effect on the dishonest persons. Nevertheless, this paper does not agree with this protection mode. First, although the principle of good faith is an emperor clause in the civil field, the principle of fairness is also one of the important principles of civil law. Even if it is an infringing derivative work, it is also embodiment of the original labor of the author of a derivative work. In the case that the public interests are involved, the author of the derivative works has no malicious intention, prior authors have no loss and even make profits, it is also unfair to refuse in law to provide legal remedies for infringing derivative works. Furthermore, although the U.S. refuses to provide protection for infringing derivative works in the statutory law, the phenomena of “infringement does not stop” represented by Stewart v. Abend in the judicial case occur frequently, which have loosen the implementation of the “theory of infringement protection”. Therefore, the theory of infringement protection should not be adopted by China. It is a manifestation of the one-sided view of protection of interests, and even more conservative than the provisions of the Chinese Copyright Law on derivative works.

Copyright Negative Protection Mode

Under a copyright negative protection mode, it is believed that the infringing derivative works can also obtain negative copyright protection based on their original expression, which means when others use their infringing derivative works without permission, the author of the derivative works may claim rights against them but cannot exercise active derivative rights. This protection model is eclectic, which not only prevents the unreasonable phenomenon of the equal protection of the infringing derivative works and the legal derivative works, but also avoids the unfair rules of negating the infringing derivative works. It balances the interests of the prior authors and the authors of infringing derivative works to some extent, and thus it is favored by more scholars. The argument basis for adopting this protection model is related to the second revision of the Copyright Law 2010 of China. The Copyright Law before 2010 stipulates in Article 4.1 that “works the publication or distribution of which is prohibited by law shall not be protected by this law.” In view that this provision was inconsistent with Berne Convention and the principle of automatic acquisition of protection of works agreed under TRIPs, China deleted the article at the time of the revision of the law in 2010 after the case of “the U.S. v. Intellectual Property Protection and Enforcement Measures of China”. Thus some scholars believe that prohibited works (including infringing works) can also be protected by the Copyright Law. However, because the Copyright Law also stipulates that “Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests”, they believe that only negative copyright protection can be obtained for the infringing derivative works. This is the historical interpretation and systematic interpretation made by scholars according to the historical evolution of the Copyright Law and the context of the legal provisions, but there are still logical drawbacks from the perspective of semantic interpretation because “infringing derivative works created without permission” is not the same as “works the publication or distribution of which is prohibited by law”. Although the former is infringing, but they do not necessarily “stop infringement”, that is, “prohibition of publication and distribution”; while the latter has been set to be in a status of “stopping infringement”. Therefore, this merely indicates that the derivative works ordered to stop the infringement only enjoy negative copyright protection, but it cannot be inferred that all infringing derivative works including those “do not stop infringement” can get negative copyright protection only. Therefore, the negative copyright protection mode cannot cover all types of infringing derivative works.

Blocking Copyright Protection Mode

According to research, the "blocking copyright protection mode" was first proposed by Professor Lemley, who drew on the proposal of "blocking patent". "Blocking patent" originally meant that “the basic patentee and the unauthorized improved patentee could not use the other party's technical solution in any active way without the permission of the other party”[3]. Professor Lemley believed that the blocking patent system was similar to the derivative works created without permission, so it
could be borrowed to the copyright law, and thus the term “blocking copyright” was derived. After analysis, the connotation of the negative copyright protection mode is actually richer than that of the blocking copyright protection mode, and both of them emphasize that the unauthorized authors of derivative works cannot obtain positive copyright, but the question whether it can obtain negative copyright protection has not been answered under the blocking copyright system. Hence, the copyright negative protection mode is more progressive than the blocking copyright protection mode in fact.

Unjust Enrichment Protection Mode

According to Article 92 of the General Principles of the Civil Law, if profits are acquired improperly and without a lawful basis, resulting in another person's loss, the illegal profits shall be returned to the person who suffered the loss. Therefore, there is a view[^4] that an unjust enrichment protection mode should be adopted for illegal derivative works. The secondary creation made by authors of derivative works through the unauthorized use of the prior works gains interests for themselves while harms the interests of prior authors, which is the manifestation of unjust enrichment, and thus the authors of derivative works should compensate for the loss suffered by the prior authors. In fact, the unjust enrichment generated by the beneficiary’s performance of infringement act is called “unjust enrichment from infringement to the interests of others” in the German doctrine[^5], and the non-payment type unjust enrichment arising from the infringement act will result in competition and cooperation between infringement and improper conducts, and the parties are allowed to choose in theory. But either the legal relationship caused by the infringement act or the unjust enrichment is one of the manifestation patterns of obligations. The use of the method of obligation law to protect the derivative works is inconsistent with the positioning of the Copyright Law itself, because intellectual property rights including copyright, similar to the real right, are “right in rem”, while the obligation is “right in personam”. In view of the fact that the unjust enrichment system cannot solve the issue of attribution of derivative works, and this is precisely one of the focuses of the legal relationships to be adjusted in the Copyright Law, the unjust enrichment protection mode is not suitable for the protection of derivative works.

In addition to the drawbacks mentioned above, the above-mentioned derivative works protection modes have a common defect, that is, most of them only apply to the discussion on the derivative works created without authorization, and cannot effectively adjust the legal relationship of the authorized derivative works. Thus road to exploring the mode of protection of derivative works has not yet ended.

Re-Discussion on the Derivative Works Protection Mode

The "property distribution theory" is one of the important basic functions of the property law, and the Copyright Law is an important property law with its scope of adjustment including permission and assignment of the copyright and other dynamic behaviors, that is, “property and obligation assignment law with the purpose of protecting the assignment order of property and obligation”[^6]. Returning to the function of "property distribution theory", adapting to the development needs of multi-stakeholders, rather than one-sided protection of one party, is the trend of development of the property law. In the whole field of civil law, theories that satisfy the multiple stakeholders coexisting on the same object, differentiate rights and interests, and fully exploit the property value mainly include the accession theory of traditional real rights, the theory of usufruct right and the related rights of copyright law (i.e., the neighboring rights), which are different from the theory of infringing works, copyright negative protection mode, copyright blockade protection mode, unjust enrichment protection mode and so on mentioned above. In the context of maintaining the attribution order of derivative works and promoting the dissemination and re-creation of the works, this part of the paper intends to explore usufruct right and related rights protection mode, and the accession protection mode will be discussed later to highlight the superiority of accession protection mode.
Usufruct Right Protection Mode

Usufruct right is the real right with the use value of controlled property, such as surface rights and easement [9]. They can be listed in the same object with ownership. The achievement of multi-polarized and socialized use of properties is not only the direction of the evolution of the property law, but also the track of the development of the entire private law. [8] In the protection of derivative works, the introduction of the usufruct right protection mode can meet the interest demands of the original author, the performer, the public and other subjects coexisting in the same literary and artistic works, and achieve the multi-polarized use of the works. However, the difference in land ownership system leads to a big difference between the usufruct rights in China and traditional ones. The usufruct rights in China reflect nationalism and have the nature of examination and approval system. If the usufruct right protection mode is to be adopted, it means that the generation, permission or assignment of the derivative works in China will be examined and approved by the competent national authority, which will limit the efficiency of the dissemination and re-creation of the derivative works.

Related Right Protection Mode

Related right, also known as neighboring right, was originally the right specially created for encouraging the creation or investment acts that do not have originality in copyright law but still require encouragement. [9] In general, the related right is the right obtained based on the general labor or capital or other contribution made by the communicator. It is committed to eliminating the gap between the original authors, the authors of derivative works and the public, distributing the property interests of the works fairly, and promoting the dissemination and re-creation of the work. For derivative works, the copyright protection can be granted to the original authors, and the related right protection can be granted to the authors of secondary creation through the introduction of the related right protection mode. In the mode of protection of related rights, the related right holder should obtain the permission of the original authors in addition to the reasonable use and legal permission when he wants to derivate the original work, and the third person should obtain the dual permission of the original author and related right holder (the author of the derivative work) when wants to obtain the permitted use right of the derivative work. In this way, the sense of self-identity of the author of derivative work can be satisfied in the secondary creation, and the interests of the original author can be protected to encourage him to make continuous creation. However, the related right protection mode also has its drawbacks. Under the background of the dual system of differentiating narrow copyright and related rights in the current copyright law, the derivative work itself is "work" defined in a narrow sense, and is required to have "originality". It should be classified into the copyright system in a narrow sense, and should be differentiated from the related rights. Therefore, the related right protection mode should not be applied to the protection of derivative works.

Proposal of the Accession Protection Mode

The accession theory, coming from Jus Gentium of ancient Rome, refers to the theory of the combination of different owners’ things to form inseparable objects or objects with new properties. [10] The derivative work is a re-creation based on the existing works. It is inseparable from the prior works and has strong accession characteristics. Since the requirement of compilation of a Civil Code was proposed at the Forth Plenary Session of the Eighteenth CPC Central Committee, it is necessary to strengthen the universalizing civil law research on intellectual property law. Through the coordination in real rights and obligations in the accession theory to solve the objects, rights attribution and benefit sharing of derivative works, the shortcomings of the existing derivative work system and other protection modes explored in the theoretical circles can be overcome, and the legal effect of determining the ownership can be achieved in the judicial practice.

First, in terms of adjusting objects, accession protection mode can bring the derivative works system back to the original intention of encouraging "secondary creation." The biggest difference
between derivation and reproduction lies in the new original element added to the derivation, and the use of the results of others to make "secondary creation" is actually the embodiment of the accession rules. In view of the fact that China's current "Copyright Law" has not yet clearly defined the derivative works and the scope of adjustment is relatively narrow, it cannot effectively provide effective relief for the secondary creation activities other than "adaptation, translation, annotation and arrangement". While under the accession protection mode, the adjustment object of the derivative work system can be adjusted to the author's re-creation, translation, annotation, arrangement and other re-creation of existing works, it has the substantial differentiated originality, inseparable from the original work, and is expressed as the work of processing or attachment type. It provides a survival space for the remixed works, doujin works and other secondary creations, and excludes non-original behaviors such as punctuation and collation of ancient books from the scope of derivative works.

Second, in terms of exercising rules, the accession protection mode can balance the interests of various stakeholders of the derivative works. In this mode, the right holder is allowed to agree on the attribution of the derivative work, and it can be regulated by law as a share-based relationship if it is not agreed or the agreement is inexplicit. Compared with the dual permission system of the current derivative works, the accession rule can better promote the use efficiency of derivative works; in the infringing derivative works, the usual practice of judicial practice is to give priority to the protection of the interests of the original authors, while ignoring the creative labor of the authors of derivative works, which is unfair. But under the accession rule, a infringing derivative work is allowed to continue to circulate in the case where the author of the derivative work is subjectively non-malicious, the legitimate interests of the original author will not be harmed, and social public interests and other factors are involved in, and the losses of the original author will be covered by compensation so as to achieve the legal effect of equity and justice.

In summary, the accession protection mode fully embodies the function of “property distribution theory”, has the function of promoting best use of things and improving the use efficiency of derivative works. It not only can overcome the defects such as the tedious examination and approval procedures and low use efficiency of the above usufruct right protection mode, but also avoids the drawbacks of inconsistency between the related right protection mode and the current copyright law system. Moreover, it overcomes the shortcomings of the imbalance of interests in the modes such as the negative protection of copyright as mentioned in the existing theory. It is believed in this paper that the attached protection mode is the best solution for the current derivative work to march towards the interest balanced reform.

Conclusion

Through the introduction of the traditional accession rule of real right into the protection mode of the derivative work, the right holder is be allowed to agree on the attribution of the derivative work, the party who has made the larger contribution is be allowed to obtain the copyright of derivative work under the circumstance that no agreement is made or the agreement is inexplicit, and the corresponding input and income of the other party will be covered, which is conducive to perfecting the adjustment object of the derivative works exercising the rules, promoting the continuous creation of literary and artistic works, and solving the conflict of rights between the prior authors and the authors of derivative works, the public in judicial practice. Whether it is in judicial practice or it is out of the need of theoretical exploration, the application of the accession protection mode to the protection of derivative works has certain prospective and application value.

References


