

Determination of Fair Use for User-Generated Short Video Content

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ABSTRACT

This paper employs comparative and theoretical research methods to systematically analyze the dilemmas faced in determining fair use for User-Generated Short Video Content (UGSVC) in China. It proposes optimization solutions, including refining relevant fair use provisions and adopting categorized analysis in judicial practice, to promote the healthy development of the UGSVC industry.

KEYWORDS

User-generated short video content; Secondary creation; Fair use

1 Introduction

With the rapid development of network technology and the proliferation of short video platforms, User-Generated Short Video Content (UGSVC), often involving secondary creation, has entered a golden period of development. Characterized by low production barriers, this type of video has attracted massive user participation, enhancing the content ecosystem. However, it has also sparked widespread debate regarding copyright ownership and the boundaries of fair use. While the creation and dissemination of UGSVC promote cultural diversity, they also pose challenges to the traditional copyright law system. This paper aims to analyze the legislative and judicial issues in the fair use determination of UGSVC and propose systematic optimization solutions to balance the rights of original creators with creative freedom, thereby fostering the healthy development of the industry.

2 Concept and types of UGSVC

2.1 Concept and characteristics of UGSVC

UGSVC refers to short-duration video content created by users through secondary creation—such as editing, reorganizing, commenting on, or imitating—based on existing video materials. Its core characteristics include: mass participation of creators (user autonomy), dependency on original source material (utilizing audiovisual elements of pre-existing works), and network-based dissemination channels (relying on internet platforms for diffusion). While a unified legal definition is lacking in academia, it is generally recognized that UGSVC is not entirely original but constitutes a transformative use of the original work.

2.2 Types of UGSVC

Based on creative techniques and purposes, UGSVC can be categorized as follows:

Clip Compilation Videos: These involve cutting longer videos into segments or highlights, emphasizing key content (e.g., collections of climactic scenes from films/TV shows). These short clips present the most exciting or representative moments to the audience.

Edited Commentary Videos: This format combines video editing with personal commentary. Key features include: 1. Content derived from others' works: Often edited from existing video content. 2. Personal insights or commentary: Creators add their own viewpoints, analysis, or humorous comments to the selected clips.

Creative Imitation Videos: These videos imitate the concepts or themes of existing video content but do not involve direct visual or auditory copying. Although based on existing works, the imitation must possess originality, requiring creators to incorporate unique creative elements.

Parody Videos: These videos achieve satirical or critical purposes through exaggerated imitation of a specific work, author's style, or genre. Parody videos must reference existing works but must be distinct from the original and contain humorous or critical elements.

3 Problems in fair Use determination for UGSVC

3.1 Problems in Legislation

3.1.1 Stringent criteria for "personal use"

Article 24(1) of the Copyright Law stipulates fair use for "personal learning, research, or appreciation" of published works, implicitly requiring that the subject must be an "individual," the purpose must be "non-commercial," and the act must involve "no public dissemination." However, this provision appears rigid for UGSVC. The core value of UGSVC lies in its wide dissemination via online platforms, which is an integral part of the creation and value realization process. Furthermore, creators often build fan bases and convert influence into revenue through the "fan economy," making it difficult to categorically exclude many secondary creations from commercial purposes. Strictly excluding commercial purposes from fair use would render most UGSVC ineligible, unduly restricting its development space.

3.1.2 Ambiguous scope of "appropriate quotation"

The use of published works in UGSVC under "appropriate quotation" must comply with Article 24(2) of the Copyright Law. This provision requires meeting a dual standard: first, the purpose must be proper, limited to introducing, commenting on a work, or explaining an issue, rather than merely displaying the original. Only if the purpose is proper can the proportionality of the quotation be assessed. Second, the proportion quoted must be appropriate, limited to what is necessary, avoiding excessive use that substitutes for the original expression (Li Jiani, 2019). However, the "appropriate proportion" requirement is relatively vague, lacking clear quantitative standards. Judicial practice necessitates comprehensive consideration of factors like the purpose of quotation, substantiality of the content used, and market substitution effect, leading to significant discretionary power for adjudicators. This ambiguity can result in divergent judgments in similar cases.

3.1.3 Residual clause is overly formalistic

The 2020 amendment to the Copyright Law introduced a residual clause for fair use circumstances: "other circumstances provided by laws or administrative regulations." This shifted the fair use system from a closed list to a semi-open legislative model, aiming to enhance legal flexibility to adapt to technological developments. However, this clause still has significant limitations in theory and practice. Theoretically, its connotation and denotation are unclear, lacking specific criteria to guide the identification of new fair use circumstances. Furthermore, the clause requires that any new circumstance be explicitly stipulated by "laws or administrative regulations," constraining the interpretive scope. Practically, it leaves UGSVC creators and platforms reliant on yet-to-be-enacted laws or regulations, perpetuating legal uncertainty regarding their legitimacy. Overall, the residual clause's effectiveness is limited, struggling to address challenges posed by emerging creative forms effectively.

3.2 Problems in judicial practice

3.2.1 Divergent judicial standards for fair use

Judicial standards for determining fair use for UGSVC in China are inconsistent. Some courts strictly adhere to the twelve specific circumstances enumerated in Article 24 of the Copyright Law, denying fair use if the case does not fit. Others adopt more flexible standards, such as referencing the "three-step test" or drawing from U.S. doctrines like the "four factors" or "transformative use." This inconsistency stems partly from the previously insufficiently concentrated and clear legislative incorporation of the complete "three-step test" requirements. It is also influenced by international copyright adjudication concepts, particularly U.S. case law. This can lead to different judgments in similar cases across different courts or even judicial levels, undermining legal predictability and judicial credibility.

3.2.2 Complex perspectives in fair use determination

In copyright fair use adjudication, judges must comprehensively apply legal knowledge and common-sense judgment, exercising discretion to evaluate the actor's conduct based on specific facts and relevant legal standards (Ye Jinqiang, 2015). The "reasonable person standard" is often used informally to gauge reasonableness. Courts primarily adopt two perspectives: first, the creator's perspective, focusing on the original author's intention, purpose, and creative process; second, the general reasonable person perspective, assessing from a public standpoint whether the secondary work's use of the original would allow viewers to grasp the core content without seeing the original and whether it adversely affects the original's potential market value. The differing focuses and value considerations of these perspectives can lead to different conclusions about the nature of the use, contributing to "different judgments in similar cases."

3.2.3 Lack of categorized consideration in fair use determination

UGSVC encompasses diverse creative methods, with significant differences in production techniques and originality among different types (Lu Haijun, 2019). Judicial practice often lacks differentiated consideration for these variations. The rapid rise and evolution of UGSVC may outpace the existing legal framework. Laws, being normative and general, struggle to formulate specific rules for each UGSVC type. Thus, accurately distinguishing among diverse UGSVC and conducting appropriate fair use evaluations presents a new challenge (Huang Yunping, 2018).

4 Specific solutions for optimizing fair use determination for UGSVC

4.1 Improving specific fair use provisions in legislation

4.1.1 Appropriately relax the "personal use" standard

The current strict limitation of "personal use" in Article 24(1) to non-public dissemination is ill-suited to the core characteristic of UGSVC relying on online dissemination. To balance cultural dissemination and technological innovation, the interpretive standard for this clause should be moderately relaxed. First, the reasonableness of online dissemination for UGSVC should be acknowledged, as its creative value heavily depends on widespread platform diffusion, which can enhance the original work's visibility and popularity. Second, criteria for distinguishing commercial from non-commercial use should be refined, focusing on whether the use aims for direct profit. While many UGSVC do not charge fees directly, they may generate indirect benefits (e.g., fan accumulation). Judicial practice should prioritize "whether profit is gained directly from the short video activity" as the core criterion. More lenient fair use consideration should be given to non-directly profit-driven creations to protect creative vitality. Clarifying the adaptive interpretation of "personal use" in the online context and defining commercial purpose can provide necessary legal space for UGSVC development while safeguarding copyright holders' rights.

4.1.2 Interpreting "appropriate quotation" with a "transformative use" lens

Although the Copyright Law does not explicitly mention transformative use, courts have referenced this standard in practice. Therefore, when determining "appropriate quotation," the standard of transformative use can be considered. The core of transformative use lies in substantially altering the content or purpose of the original work to create new expression or meaning. However, caution is needed as copyright includes adaptation rights concerning content alteration. Incorporating transformative use into the interpretation of "appropriate quotation" must be done carefully, considering other factors, particularly ensuring it does not harm the rights holder's market interests. Uses that compete with the original market or affect the copyright owner's market interests should generally fall outside fair use (Kimbrough A, 2011).

4.1.3 Incorporate "social public interest" purpose into the residual clause

Given the inadequacy of current enumerated fair use circumstances for UGSVC, it is recommended to add a residual clause in implementing regulations based on the criterion of "serving social public interest purposes." This is justified because: firstly, the legislative intent behind the twelve enumerated circumstances often relates to public interests like education, news reporting, or personal study, showing a public interest orientation. Secondly, laws need stability and foresight. A flexible standard can provide judicial discretion to address new creative forms spurred by internet technology, avoiding legislative lag hindering cultural innovation. Using "social public interest purpose" as the core of a residual clause can reserve space for UGSVC with genuine public value, balancing creator rights, creative freedom, and public interest (Huang Yazhou, 2021).

4.2 Clarifying the application of fair use in judicial practice

4.2.1 Issue guiding cases to unify adjudication standards

Recognizing the growing importance of case guidance, the Supreme People's Court regularly publishes typical cases to guide lower courts, gradually improving the guiding case system (Liu Kongzhong, 2018). As the revised Copyright Law appropriately expands fair use, related guiding case analyses should be compiled to unify the application rules for fair use in copyright infringement determinations. Specifically for UGSVC, the Supreme People's Court can issue guiding cases on fair use for various types, selecting representative examples, abstracting key points and reasoning, and forming a relatively complete set of adjudication guidelines to promote unified trial philosophy and standards.

4.2.2 Conduct categorized analysis for UGSVC fair use determination

(1) Clip compilation videos generally do not constitute fair use: These videos typically involve simple cutting and reorganization of original content. Although short and using small proportions, they often extract core plots or highlights, essentially lacking originality or transformative value. Their purpose tends towards "substitutive display" rather than "introduction, comment, or explanation," failing to meet the "appropriate quotation" requirement of Article 24. If the content substantially substitutes for the original and is disseminated without permission, even with attribution, it likely constitutes infringement.

(2) Apply the "three-step test" to edited commentary videos: These videos, often aimed at "introduction, comment, or explanation," fit the statutory purpose under Article 24 but require comprehensive analysis using the three-step test. First, assess if the use conflicts with the normal exploitation of the original work, focusing on market substitution effect. For recently released works, showing core content may substitute the market; for classics or lesser-known works, it might have a promotional effect. Timing of release and audience demand are key factors. Second, examine if the use unreasonably prejudices the legitimate interests of the copyright holder. Evaluate the substantive impact on the original's market value (e.g., reducing willingness to view the complete work), while acknowledging potential positive effects (e.g., clips boosting viewership of the original, as seen with *Empresses in the Palace*). Balance transformativeness, market effect, and socio-cultural benefits, avoiding a one-size-fits-all approach.

(3) Focus on "transformative use" for creative imitation videos: The core of these videos lies in innovatively expressing by borrowing the original's style or elements (e.g., imitating performance styles for new storylines), not directly copying content. The key is whether they achieve a change in purpose or function. If the video injects new creativity or perspective (e.g., social satire), creating expressive value different from the original, it is more likely to be fair use. Caution is needed to avoid conflict with adaptation rights, ensuring transformative use does not harm the original's derivative markets. Although not explicitly listed, the "transformative use" theory can provide a basis for recognition, promoting cultural innovation and expressive diversity.

(4) Explicitly include parody videos in statutory fair use circumstances: Parody, using humorous imitation and criticism, faces scholarly debate regarding fair use. This paper advocates explicitly including parody videos in the statutory fair use circumstances of the Copyright Law to simplify judicial determination and promote cultural innovation. Parody is grounded in the constitutionally protected right to freedom of expression; its satirical/critical purpose has constitutional basis. To achieve critical effect, parody necessarily references the original to make the object recognizable, which is functionally reasonable. Parody injects individual style, creating new expression with transformative value, not mere copying. Parody differs significantly from the original in purpose, expression, and meaning, unlikely to cause confusion or market substitution. While critical content might affect the original's reputation, unless maliciously defamatory, criticism relates to the work's own qualities. Parody can also generate new attention for lesser-known works. Given its originality, transformativeness, and public interest value, parody videos should be explicitly recognized as a statutory fair use circumstance to balance copyright protection and creative freedom.

About the Author

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