

Originality to Derivative Works: How to Use “Transformative” Rules to Judge Them

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Abstract—Originality to derivative works, has become one of the most important problems for these re-creations who want to gain copyright protection. The paper is trying to find the boundary between original works, derivative works, and copying rights by analyzing originality and derivative works based on copyright laws of UK and EU. Fanfictions will also be discussed in detail. Derivative works, including fanfictions, are the works which are created based on previous copyrighted works. It is almost impossible for these works to be completely created independently. For these works, even though always being used in US cases, transformative is meaningful while being judged. Since these re-creations are closely related to former original works, there is no need to use “transformative” rules or rule originality in derivative works area in a strict way.

Index Terms—Copyright, originality, derivative works, transformative, fanfiction.

I. INTRODUCTION

Copyright is a kind of intellectual property for creative works, including literary works, films, music, and so on. Generally speaking, copyright is a way to protect meaningful ideas which are expressed by authors.

Apart from this, there is a slight but important difference between copyright and other intellectual property rights. Unlike trademarks and patents, copyrights should not be registered, which is to say, once a creative work is built, it will earn copyright and be protected automatically.

Derivative works are the works that are created based on previous original works. Because of the secondary creation characteristic, derivative works sometimes have to face infringements. On the other hand, however, derivative works do have some advantages. As judges said in Warner Bros Entertainment Inc v RDR Books, reference books could not be forbidden because they could help readers understand original works better [1]. Basically, the core argument of derivative works is how to balance the relationship between new creating parts and referred parts from original works.

II. BASIC INTRODUCTION OF COPYRIGHT

A. History and Current Situation

It could be noticed that copyright has a long and complex history. In the UK, the Copyright, Designs, and Patents Act 1988 (CDPA 1988) is the existing law, which is created for intellectual property, which included copyrights, designs, and

patents [2]. However, it was not until 1911 when Copyright Act 1911 [3] was born that the copyright became what we know in modern lives.

For the EU, some authors have tried to provide more complete and detailed articles for its members to protect their copyrights. They published a draft code called “Written Code” [4] to assist their opinion.

After Brexit, the latest news is the Directive of the European Parliament and the Council on Copyright in the Digital Single Market. It is said that the United Kingdom would “not be required to implement the Directive”, and it “has no plans to do so” [5]. It is said that any changes to the UK copyright framework would be a part of the usual national policy.

Copyright does not need to be registered, which is different from patents and trademarks. Once it is created, it would be protected automatically [4]. Under CDPA 1988, for instance, it could be protected automatically even if authors come from another country [2]. It does not mean that registration is meaningless. Although registration is optional, works will be protected in a better way after being registered.

B. Types of Copyright

Under the current system, more and more works are being protected under copyright. Taking the UK as an example, based on current copyright law, 8 types could be protected as copyrights: 1) literary works; 2) dramatic works; 3) musical works; 4) artistic works; 5) films; 6) sound recordings; 7) broadcasts; 8) published editions [2]. These types have some slight differences, like different duration, owners, and so on, while they all could be protected under copyright.

It should be mentioned that one work might be protected in several types. For example, a video game could not only be protected as artistic work because of its character designs but its literature content could also be protected as literary work as well. Different types of copyrights are not either/or relations, they could be mixed in a particular work.

There are still some exceptions to it. For example, under CDPA 1988 in the UK, chapter III gives some acts which are permitted about copyright works, like disability, education, orphan works, public administration, and so on [2]. A similar situation happens in the US, and it is “fair use” rules [6]. They are created to keep a balance between authors’ and owners’ rights and public interests. So does international treaties. Under international rules, works which against moral or public policies would not be protected under copyright.

C. Origin and Fixation

There are two requirements of copyright protection: origin and fixation.

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Originality is one of the most important things for works. Under copyright, works should have something new and different when being protected. Such a difference is substantial, the immaterial difference will not be seen as new works.

For originality, the thing is, it does not need to have high quality or be accepted by most people, but it must be meaningful. For example, the fragment that was uploaded on Twitter could be protected. On the contrary, separate names and invented words would not be protected because they are meaningless, and so do titles and headlines [4].

However, there are some exceptions. For example, some settings are in the public domain, anyone could be allowed to use them without permission. It is acceptable for authors to use the same background when they create different stories.

Fixation has a deep connection with originality. The thing which could be protected under copyright is the content of the works. It is bodiless but could be expressed through tangible things. It is the truth that it is the story itself rather than physical books. However, only after being fixed that the text could be protected under copyright. For example, when an author has some ideas about a new story, it could be protected after being written down and become a book.

D. Derivative Works

Derivative work is a kind of work that was created based on the former works. Berne Convention ruled that “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”[7]. To earn protection, derivative works must have something new which does not exist in former original works and makes them different from the original ones.

Fanfiction is a classic kind of derivative work. For instance, Harry Potter provides an original story to its fans. As a response, the fans create various derivative stories which have original elements from themselves. In the beginning, fan fiction is created by fans to make up for their regret from the original story, they believe it is a good way to show their love for the story and communicate with other fans.

E. Current Problems and Aims of the Research

For “original” parts in these re-creations, there is no doubt that they should be protected. If derivative works would like to be protected under copyright, it is not necessary to ask for 100% creation. Substantial creation of some elements is enough [4]. However, it is difficult to say there is 50% original parts and 50% references part. How to judge the percentage of these two parts has become a problem. Generally speaking, originality is the problem that should be solved by derivative works.

One of the current problems is, because of the tight connection between original works and derivative works, it is not easy to distinguish between true derivative works and copying one. The point is, compared with other works, the originality of derivative works is more difficult to be clarified.

III. ORIGINALITY

For original works, even though there is no unified definition, it should be proved that they originated from authors rather than copied from other works[8]. Originality should be the result of authors’ independent intellectual creations and not be copied from other works.

There are some reasons for the discussion of originality. Firstly, without originality, not only authors could not express their ideas and thoughts, but also works cannot give unique expressions from authors [4]. Secondly, originality could be seen as a bar that is more difficult to achieve [4]. The requirement of originality is established to encourage and protect creation. Thirdly, based on the standards of originality, it is easier to recognize infringements [4].

It should be mentioned that not all the works should satisfy the requirements of originality. At present, based on national copyright laws like section 1 of CDPA 1988, copyright is a property right that “subsists...in the following descriptions of work: original literary, dramatic, musical or artistic works” [9]. For entrepreneurial works like-sounding recordings and broadcasts, originality is not an explicit requirement [9].

A. The Essential Characteristics of Originality

As was said above, originality is an essential requirement for some kinds of works, like literary works and so on. Based on what was mentioned above, it could encourage creations, protect originality and avoid infringement. To achieve these purposes, there are some characteristics of originality.

1) Originality requires personal intellectual creations

Originality could protect personality [10]. As was said above, originality asks for authors’ independent creations rather than copying from other works [4]. The requirement for originality is for authors. In the copyright area, originality is related to authors and their creations rather than the new works and prior creations [4]. For works that are seen as original ones, their creations could be seen as a kind of relatively novelty. It is different from patents which pay more attention to creations that do not appear before. Under this requirement, there is no need to ask for high quality, novelty, or uniqueness, which is required by patents [4].

2) Originality concerns expression

No matter what kinds of literary works they are, it is the content that is shown to people which could be protected under copyright law. However, it is difficult for copyright law to protect ideas or thoughts because others can’t know authors’ ideas which are abstract and only exist in authors’ minds without expressions. After being expressed, the works could be protected under copyright law if other requirements are satisfied. Even though copyright protected originality which was shown by the content of the work, it is the expression that provides the physical thing that could be protected in actuality[11]. After all, based on the idea-expression dichotomy, it is the expressions rather than ideas that could be protected under copyright law, even though the expressions cannot show the ideas perfectly sometimes [12].

3) Original works need to be non-functional

If the works are functional, they cannot be seen as original

works [22]. As it says, it is personal intellectual works rather than other things that deserve to be protected. Functional works restrict creations in some way. For example, specifications, which are more about characteristics, facts, and functions of works, could not be protected because they are the objective descriptions for products and do not have any creative content from the authors.

Non-functional does not mean meaningless [22]. Functional works are meaningful because they introduce the functions of products. They cannot be protected because of the lack of intellectual creation. As for meaningless works, they cannot be protected since they do not have enough meaningful content.

What is more, meaningful or not is not related to the attitudes of the content readers. For new work, after showing the author's thoughts and ideas through the text, it could be seen as meaningful and protected under copyright law. Whether it is accepted by readers would not affect its meaning in the copyright area. Only when the works are something new and different, which are created by the authors independently, that literary works would be thought of as meaningful works and could ask for copyright protection.

4) The creations for original works are low-level creations

As was said before, requirements like novelty, which is required for patents, are not necessary for copyright [10]. Novelty, ingenuity, and esthetic merit are not asked for copyright protection [10]. Copyright protection asks for new ideas and expressions from authors rather than new and different creations [10]. If taking fiction writing as an example, patents are more likely to create a new kind of fiction. As for original works, they would use some prior elements like the background and create their own stories, which could be protected in the copyright area. There is no need for authors to create a new kind of fiction, any original science fiction could be protected under copyright.

B. Originality in the United Kingdom and the European Union

Apart from the various characteristics mentioned above, because of the backgrounds and policies, different jurisdictions have different rules regarding the requirement of originality. In the copyright area, the EU chooses a new test. As for the UK, a traditional test is more accustomed to being used even though the new EU test is being accepted. Even though these two things are similar and have a tendency to mix, they cannot be seen as the same thing since they are different in actuality.

1) The united kingdom

In the early 1900s, case law did not give a clear determination to originality even though originality had become a common requirement in Copyright Act [4]. In a case which is known as *Football League Ltd v Littlewoods* [13], the court built up the "labor, skill and judgment" standard for judging originality, which is still used in modern lives [4].

The test requires that the "labor, skill, and judgment" must be substantial at the beginning [4]. However, the requirement

changes all the time. Now, it is set at a lower level. If the "labor, skill, and judgment" is not trivial, it could be seen as original works in the current copyright system [4].

No matter how it changes, the thing that should be mentioned is that originality still plays an important role in tests. Even though the level is lower than before, as the standard for the UK test, a considerable amount of "labor, skill, and judgment" is required all the time.

For the traditional UK test, mere skill could be involved, as was shown in *Walter v. Lane* case [14]. In this case, the reporters reproduced and rearranged the speeches from the Earl of Rosebery and published them [14]. The judgment drew a conclusion that due to the efforts, skills, and labors that reporters spent, even though there were not any creative parts [14]. As Lord Brampton said, a huge number of intellectual skills and brain labor were used while reporting the speeches [14].

The UK test could accept pre-expressive contributions as well [4]. In the *Ladbroke v William Hill* case, whether football betting coupons could be seen as original literary works and be protected under copyright law was discussed [15]. In the former parts of making coupons, a huge number of works were done by authors, which could be seen as a part of the process of completing creative steps and could not be ignored [15].

To sum up, the traditional UK tests would pay attention not only to the works themselves but also to some relevant messages. It is more likely to combine other elements to analyze the works.

2) The European union

EU established a new definition of the originality test. For the EU, the new test aims to adopt the new copyright changes.

One of the classic cases called *Infopaq International A/S v Danske Dagblades Forening* about it [16]. In this case, Infopaq is a company that summarized articles and sends them to their customer s[16]. In this case, the court needs to decide whether 11 words would be seen as a kind of infringement since 8 words of these 11 ones are similar to other original works [16]. The court said that it could be protected if the reproduction of the words is the expression of the authors' intellectual creation [16], which shows the importance of personal intellectual creations. In the end, the EU court decided that such activity of Infopaq should not be done without any permission [16]. This case made more people realize that the author's intellectual creations are required while new works are being created and protected under copyright law.

Under the new definition from EU copyright law, originality means that the works are created based on the "author's intellectual creation" [17].

The EU approach asks for personality and creative choice s [4]. It shows that the works must be created based on the authors' thoughts. This requirement asks for the combinations and choices of different elements by authors, which could be seen as "intellectual creations" [4]. After such a creative choice, authors could give a different and new work, such a process could be known as the "author's intellectual creation" [4]. The creative activities should bring a creative

result [4]. After giving such a result, the works could show their uniqueness which is based on former personal choices.

For the EU, as what was shown in its test, “authors’ intellectual creations” of works are almost the only thing that would be cared about. At the same time, under such a situation, there is no need to ask for the requirement of the number of intellectual creations when their quality is good enough to reach the level.

C. Summary of Originality

For originality, even though there are some differences in different jurisdictions, there still have the same requirements. As the core point, originality requires authors’ independent creations. Apart from this, original works should not be restricted while being created to make sure the needs of intellectual creations. Because of that, functional works like the content of product descriptions would not be seen as original.

IV. DERIVATIVE WORKS

A. Introduction to Derivative Works

Derivative works are the works that are created based on formerly copyrighted works[18]. Derivative works could be divided into reference parts and personal creating parts. For derivative works, to gain copyright protection, the transformation, and recomposition of original works, which show personal creations, must be substantial[18]. It could be noticed that, as original derivative works, personal intellectual creations and originality should be involved.

Based on the percentages of reference parts and original parts, derivative works could be divided into two kinds. The first kind of work just uses limited elements to create new stories[19]. The links between these stories and the original ones are loose. Derivative works could be created in a relatively free way. If re-creators rename these characters, the derivative works would be seen as new original ones. They almost deviate from the original stories or have different creating aims[19].

The second kind of work could be seen as the extension of original works[19]. There is a tight connection between this kind of derivative work and their original works. Original works and re-creations would have similar backgrounds, characters’ motivations, and storylines [19].

B. Transformative Use

Even though there are some differences, some rules from other jurisdictions would bring a positive influence.

Based on the literal meaning of transformative use, it seems that transformative works should be different from former works, which have strict rules. Partial changes cannot be regarded as transformations. Personally speaking, it is unnecessary to judge the transformations of derivative works in such a strict way. Derivative works, as mentioned, are combined with referenced parts and new-creating parts. Such a nature determines that derivative works would use something from original works. They can’t be created without any lessons from original works since they are re-creations essentially. If the requirements of transformations

of derivative works are high, seldom derivative works could be protected and gain copyright protection, which is not conducive to creativity.

Transformative use is a kind of fair use, which is important in judgments. For fair use, based on Section 107 of US copyright law, there are 4 factors would be involved while analyzing: 1) Purpose and character of the use; 2) Nature of the copyrighted work; 3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole; 4) Effect of the use upon the potential market for or value of the copyrighted work [6].

There is a US case, called *Suntrust Bank v. Houghton Mifflin Co* [20]. It is related to Margaret Mitchell’s famous novel, *Gone with the Wind*, and Alice Randall’s re-creations, a parody called *The Wind Done Gone*. As a parody, *The Wind Done Gone* shows the author’s opinion about slavery. It is a fact that some of the original parts from *Gone with the Wind* are being used. As the judges agreed, *The Wind Done Gone* could be seen as “an encapsulation” of the former story which referred to the “copyrighted characters, storylines, and settings” of *Gone with the Wind* [20]. However, it could be noticed that these two stories are different. The former story describes “the romantic, idealized portrait of the antebellum South during and after the Civil War” while the latter one is against the opinion of *Gone with the Wind*, which is, “blacks and whites were... better off in the days of slavery” [20]. *The Wind Done Gone* shows a highly transformative nature, which “provide[s] social benefit, by shedding light on an earlier work, and, in the process, creating a new one” [20]. Finally, the court judged that the copyright of *The Wind Done Gone* could be protected [20]. The court agrees on the importance of the transformation of new creating works.

Transformative is more theoretical and does not have too many regional attributes even though it is always used in the US. It could be accepted by many different jurisdictions. Even for some jurisdictions that cannot use it strictly, it is still meaningful for their copyright. In the UK, even though there is no clear expression about transformative use, its essential meaning of it has already been used while judging. There is a case, *Fisher v Brooker*, which is about originality [21]. In this case, the claimant would like to join a band. The first defendant suggested every member give this contribution to a song called ‘A Whiter Shade of Pale’. The claimant did it. In the song, there is an organ solo which is different from other parts. The core point of the case is, whether the “definitive solo” created by the claimant could be seen as “original contributions” [21].

The case could be discussed easily if the requirement of transformative use is accepted. Based on the former requirement, this four-minute part created by the claimant is very different from others. The solo part accounts for a considerable proportion of the whole song. It could be distinguished by ordinary people easily. Both its character and the amount and substantiality could satisfy the requirement of transformative use. Under such a situation, this part is transformative enough. There is no doubt that the claimant could gain relevant copyright.

C. How a Derivative Work can Show Originality

Although the requirement for the quantum of originality is the same legally [10], to be seen as original works and be protected under copyright law, the actual workload of personal creations should be “higher” than what it is for original works. Creators need to avoid copying too much from original works and make sure the original parts of re-creations could reach the legal requirement of originality. For example, the expressions of derivative works should be more specific than what they were in original works. Based on their natures, derivative works are more likely to be seen as infringement if more unique expressions from original works are being referred to.

It could be noticed that originality always plays an important role when judging derivative works. For these works, to gain copyright protection, authors’ creations are the things that should be focused on. Even for derivative works which might infringe other previous copyrighted works, if their original parts could reach the requirement of originality, these parts could be protected as well [22]. For derivative works, if they could show substantial differences while being compared with former works, they could be considered original.

V. FANFICTION

A. Introduction to Fanfiction

Fanfiction is a kind of derivative work. They are generally created to express personal thoughts for original works. The referencing parts of fan fiction should be set at a proper level. Whether too much or too less is not appropriate. If the referencing parts are too much, fan fiction might infringe on original works. If the referencing parts are too less, these works would not be seen as fanfictions because of the lack of similarities between re-creating works and original works.

Generally speaking, there are several kinds of fan fiction, which are a little bit different from the types of normal derivative works. The first kind of them is the unofficial continuation of original works, including prequels and sequels [23]. It could be noticed that there is a tight connection between these fanfictions and original works. This is to say, to gain copyright protection, these fan fictions need to give high standards of personal intellectual creations.

The second kind of them is AU (alternate universe) [24]. They partially or completely change the background and character settings of the original work. Based on small rewriting within the framework of original works, for example, how the story would develop if Harry Potter's parents were still alive, is also included within this kind of fan fiction. The more the backgrounds of original works are changed, the fewer references they will make to original works.

Compared with the former type, fan fiction which is AU will rely more on personal imaginations rather than original works. There is also have a kind of fanworks which are different former kinds. They were created for different purposes. Most of them would not reject to gain economic benefits. Parody is a classic example of these kinds of derivative works. For them, fair use could be a good reason to counter the protest from the original works. They could

prove the importance of transformations and origins of derivative works. However, since they are very rare and have different characteristics from fan fiction, they are not sufficiently representative or discussed in this part which is about fan fiction. Based on former messages, for fan fiction, to gain copyright protection, they need to be combined with “something new and different”. These new creating parts need to at least go one step further than the original unique expressions which could show the intellectual creations of fan writers.

B. Originality to Fanfiction

Based on former parts, to gain copyright protection, fan fiction should be transformative enough. For fanfiction, transformation means they have enough original parts, which are personal unique expressions being created by fan writers. To some extent, the highly transformative nature of fan fiction means enough originality.

Original fanfictions need to be created by authors independently [10]. To achieve the requirement of intellectual creations, original parts of fan fiction should be created by re-creators independently. What is more, original parts of fan fiction should satisfy the following standards. Firstly, the quantities of them are required. If the quantities of original parts of fanfictions are minor, seldom fanfictions could be seen as original works because of the lack of original parts [10]. Quantities are not the only thing that needs to be considered. The qualities of original parts of fan fiction should also be involved to judge the originality of fan fiction. Original works always have unique expressions which are created by authors independently [10]. They are the parts that could earn originality and help original works gain copyright protection. For fan fiction, to gain originality, as analyzed before, fan fictions need to have original parts, even though proper references from original works are needed. Based on the minimum standard, the original parts need to be not trivial [12]. To distinguish fan fiction and original works, the unique expressions of copyrighted works should not be used in a straight way while re-creating. It should be transferred and substantial enough to show the differences between the two works [25]. Both quantities and qualities would be involved while judging. They are combined to estimate the originality of fan fiction.

The connections between fan fiction and original works should be shown clearly since fanfictions are created based on original works. Because of such a connection and references, some authors object to the creation of fan fiction. For example, George R R Martin, the author of *A Song of Fire and Ice*, cannot accept fan fiction, including non-commercial ones [26]. So does Anne Rice, the author of *The Vampire Chronicles* [25]. In their opinions, fan fictions infringe their copyright, even though they are created for fun and does not bring actual damage. Understandably, original authors have negative attitudes to fan fiction since some of these works may infringe on original works and copyright [27]. However, it cannot be accepted. Based on former analyses, derivative works could be protected. As a kind of derivative work, there is no doubt that fan fictions are valuable enough to be protected under copyright law.

In addition, a huge number of fanfictions are created for fun. Most of this non-commercial fanfiction would not bring actual damage to original works. What is more, some fan

fiction does play a positive role in advertising original works even though most of them are spread in a limited range. Because of that, some copyright owners could ignore the infringement in a restricted scope.

All the analysis proved that there is no need to give a high standard for fan fiction. Although the differences between fanfiction and original works may not be substantial enough, these fanfictions should be protected if they are not insignificant which is obvious enough to be distinguished by ordinary people. Satisfying the requirement for “not trivial” originality is sufficient to fan fiction.

However, if fan fiction does harm the benefits of original works, these re-creations would not be allowed. Commercial fan fiction might not only infringe the copyright of original works but also affect other benefits, like economical incomes, of them. To protect personal interests, authors would be against the publication of fan fiction.

It should be mentioned that not all kinds of commercial fan fiction would be seen as an infringement. For instance, parodies would not be seen as infringements since they are created to express personal ideas about something which are different from the ideas of the original ones. Parody aims to imitate original works[27]. The creations of parody are not only for fun, but also to express personal ideas and thoughts of original works, which is also transformative enough. As a parody, *The Wind Done Gone* shows the writer’s personal opinion of US slavery by re-creating the original novel, *Gone with the Wind*[28]. Because of that, even though *The Wind Done Gone* was published and earned economic benefits, it would not be punishment.

C. To what Extent that Fan Fiction Could be Seen As Transformative Works

As mentioned in the former parts, transformative is essential for copyright protection of derivative works. For fanfiction, as a kind of derivative work, some natures are similar to derivative works. As with most derivative works, fanfictions are combined with some referenced parts which are from original works, and new-creating parts that are created by fan writers.

3) Natures of fan fiction compared with normal derivative works

For transformative, it is always used to judge to what extent the original works are being referenced. Since fan fiction must refer to unique parts from original works, it is possible to use the requirement of transformative. There are two types of transformative use in the fanfictions area. The first type is, fan fictions have unique expressions which are different from original ones. These original parts are transformative. The second one is, that fanfiction is created for a different purpose. Because of the different purposes, re-creations would not make readers confused. They could be distinguished easily. Both of these types are mixed while re-creating.

Even for some kinds of fan fiction which have earned economic benefits, transformative use is still meaningful. For example, in *Suntrust Bank v. Houghton Mifflin Co* case, the court judged that even though the parody was for commercial use, it could be protected[28]. In the *Gone with the Wind* case, even though the backgrounds and some characters of these two stories are similar, the two stories are different. It

provides another view of the story of *Gone with the Wind*. As a parody, *The Wind Done Gone* aims to express the author’s thoughts. *The Wind Done Gone* was created to show the authors’ opinions about US slavery. Based on that, the description in *The Wind Done Gone* is very different from the former work, which is meaningful enough to be protected.

4) Definition of “transformative” in the fanfiction area

Generally, transformative works are works that are different from original ones. Nevertheless, such a definition cannot be used in the fanfiction area. For fanfiction, as a kind of re-creations, they are required to have both referenced parts and original parts. The lack of referenced parts would make the works be excluded from fan fiction. In other words, it is not easy for fan fiction to be transformative works in the usual sense. In addition, in actual cases from different jurisdictions, works like fanfictions do not need a high level of originality. These works could be protected if the original parts are not trivial. Because of that, the high requirement for transformative in fan fictions areas conflicts with the actual situations. In the fanfiction area, transformative is not as strict as what it is in other areas.

For fan writers who want to gain copyright protection, they must add a considerable degree of creation to their re-creations. In theory, if these new-creating things are not trivial, they could be protected. For most ordinary readers who know the original stories, fanfictions are valuable enough to be protected if these readers could realize that the fan fiction is created based on a former original one but add something which does not appear in the original work. People should not feel confused while reading these two stories.

5) The use of “transformative” in the fanfiction area

For transformative, it is from transformative use in the US. In Section 107 of US Copyright Law, there are 4 factors of fair use, which are: 1) Purpose and character of the use; 2) Nature of the copyrighted work; 3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole; 4) Effect of the use upon the potential market for or value of the copyrighted work [6].

For the first factor, “whether and to what extent the new work is ‘transformative’” is the key point [1]. For fanfiction, if they are created by adding new things to original unique expressions, which could create new works, the creations could be seen as transformative. Apart from this, if the purpose of the fanfictions is different from the original works, which would not be seen as the substitutes for previously copyrighted works, they could also be seen as transformative works. It should be mentioned that the number of fan fiction with different purposes is not as many as the first ones, since most fanfictions are created to express personal imagination to original works rather than give guidance or personal comments. For the second factor, the more unique expression that original works have, the more likely they are to gain copyright protection [1]. Because of the fact that creative and fictional works have more unique expressions, they are “generally more deserving of protection than factual works” [1]. Under such a situation, since most original works in the fanfiction area are fictional works, they are more meaningful to be protected, which is not a good thing for fanfictions who want to gain copyright protection. For the third factor, it means that unique expressions which belong to original

works should be referred in a proper way. In the fanfiction area, it firstly requires that the quantity of referring parts of fanfictions should be no more than necessary references. Too many references would infringe the copyright of original works. Then, the substantiality of referring parts is required. For fanfictions, they are created based on original works. It is impossible for them to avoid using unique expressions of original works. The point is that these references to the substantive part cannot exceed the necessary limits for recreation. For the final factor, it would judge the “the effect of the use upon the potential market for or value of the copyrighted work”, which would include the market for both copyrighted works and derivative works. If fanfictions would affect the sales of originals and official derivatives, these recreations may not be protected. However, as mentioned, since most fanfictions are created for fun and would not be published, their influence is very limited. This is to say, the current and potential market of copyrighted works and official derivative works would not be seriously affected.

These 4 factors have a tight connection with transformative use. They give a relatively clear way to judge the transformations of derivative works and fan fiction. Based on Section 107, transformations of fan fiction could be judged by analyzing them in terms of quantity, quality, purpose, and so on. Even for fan fiction which are neither aims to gain economic benefits nor be seen as fair use, their characteristics determine that they are more similar to the latter one. Therefore, factors in Section 107 which could judge transformative use could be used in a proper way to judge fan fiction.

All in all, fan fiction must satisfy two rules. Firstly, they are created based on previous works, which could be noticed by most people. Secondly, they should have enough original parts which could help people distinguish them and original works.

VI. CONCLUSION

Copyright is meaningful to derivative works and fan fiction. Copyright is built to protect personal intellectual creations. Since these re-creations have original parts which could be seen as personal intellectual creations, there is no doubt that they could be protected by copyright law.

For fan fiction and other derivative works, how transformative the works are could be used to judge their originality. In the derivative works area, re-creating works are tightly combined with original copyrighted works. Even though they have original parts, they are created based on original copyrighted works. Because of that, the requirement of originality to these re-creations does not need to be ruled strictly. The rules of transformation should be lower than what it is in other areas. For these re-creations, if their new-creating parts are not trivial, they could gain copyright protection.

CONFLICT OF INTEREST

The author declares no conflict of interest.

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