

Analysis of Copyright Protection Issues for Characters in Works

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Abstract: The use of characters in various types of prior works in modern society has raised questions about whether characters can be regarded as subjects of copyright. Based on copyright legislation and jurisprudence, regardless of the type or scale, the determination of whether any intellectual creation is eligible for copyright protection rests solely on the criteria of originality and replicability, unrelated to factors such as the commercial value of the characters. Various standards applicable to the issue of copyrightability of characters, as practiced in both Chinese and American judicial contexts, emphasize the consideration of specific descriptive elements inherent in characters. Guided by the "idea-expression dichotomy" principle, deconstructing characters reveals that only when characters are concretely and adequately described, and when they have transcended the realm of conceptual ideas to constitute an expression of originality, can they independently become subjects of copyright separate from the work they originate in. The protection and use of characters in works should respect the objective laws of cultural creation, inheritance, and development, in order to ultimately achieve the fundamental principles and goals of copyright legislation.

Keywords: characters, idea, expression, originality, copyright

1. Introduction

In recent years, a series of cases involving unauthorized use of characters from prior works has raised the question of whether characters in works are protected under copyright law. This issue is not new. In the United States, disputes centered around this issue emerged as early as the 1930s. Setting aside issues of unfair competition for the moment, in order to determine whether the use of characters constitutes copyright infringement, it is essential to address the preliminary question of whether characters can independently qualify as subjects of copyright protection. As for whether the use of characters meets the necessary degree of substantial similarity for infringement, this becomes a subsequent inquiry only after affirming the aforementioned preliminary question. The logical sequence for assessing the issue must not be reversed, and no step should be omitted. Some scholars have proposed a two-step analysis for identifying character infringement, which involves first comparing the similarity of the characters involved to determine if it surpasses the level of conceptual similarity; if it does, then assessing whether there exists substantial and sufficient similarity to establish infringement [1]. Upon closer examination, the first step of this analysis seems to assume that the character allegedly being infringed upon contains an aspect of original

expression beyond the conceptual level, presupposing that the character has copyrightable elements. Thus, when examining copyright infringement related to character use, the copyrightability of the character is an unavoidable theoretical issue.

In the age of the internet, the adoption and utilization of characters from prior works is more likely to occur in the creation of works involving real or virtual images, such as animations, literature, films, video games, and software. This article focuses on the range of virtual characters within the scope of copyright law, as characters with real-life attributes inherently belong to the realm of factual information, lacking the requisite originality to be considered copyrightable subjects. The author seeks to find answers from the fundamental principles of copyright law, irrespective of the potential considerations of fair use and unfair competition. By deconstructing works and their constituent elements based on the primary commonality of copyright subjects, analyzing the essence of the idea-expression dichotomy, and taking into account the objective principles observed in cultural creation, inheritance, and development, the goal is to address the question of whether characters in works are eligible for copyright protection.

2. Analysis of Relevant Concepts

2.1. Concept of “Work”

In copyright law, a "work" is neither a "thing" nor a creative act, but rather a combination of specific expressions carried on tangible media. Some scholars refer to it as a collection of signals capable of conveying certain ideas [2]. For instance, literary works consist of combinations of linguistic elements, such as words and punctuation; musical works involve combinations of musical notations, tonality, and musical forms; visual art works incorporate combinations of lines, colors, and lighting. Copyright protection extends to specific combinations of expression forms. According to Article 2 of the Implementation Regulations of the Copyright Law of the People's Republic of China, a "work" is defined as an "intellectual creation in the literary, artistic, and scientific fields that is original and can be reproduced in some tangible form [3]." Literally interpreted, for a work to meet the requirements under China's copyright law, it must satisfy two criteria: originality and replicability. If the characters or animal figures in a work meets these requirements as specific expressions, they may also qualify as subjects of copyright protection.

2.2. Constituent Elements of a “Work”

Not all constituent elements of a work are incapable of forming a work themselves. Overall, a work is composed of various combinations of expression forms, and the work as a whole demonstrates creativity by converging and manifesting the creativity inherent in its constituent elements. Therefore, related expressions within a work can also possess copyright protection [4], and a single work can encompass multiple independently copyrightable subjects, as long as they meet the statutory requirements for a work, with originality being a pivotal criterion. While the demand for a high degree of creativity is not excessive, it does require substantial differentiation, i.e., essential distinctions when compared to elements or element collections within the public domain. Assessing whether there is an essential distinction involves analyzing whether the specific expressions and overall effects of a "work" differ from resources within the public domain. Representations based on naturalistic depictions might not be protected by copyright because describing certain subjects or objects might necessitate habitual, commonplace, or even the sole conventional expressions inherently linked to that subject or object. Such conventional expressions belong to the public domain of knowledge and are not covered by copyright protection [5,6]. Virtual characters such as humans or animals within a work, if detached from plot, setting, and other expressive elements, generally lack specific and unique representations and usually lack substantial differences compared

to similar elements in the public domain. Conversely, if characters have specific expression forms that meet the requirements for a work, they may also qualify as subjects of copyright protection.

2.3. Concept of “Character”

Characters are the images that authors create in the process of artistic creation. Depending on the manner of portrayal, virtual characters can be categorized as pure characters, literary characters, visual characters, and cartoon characters [7]. Generally, the components that constitute characters include their names, appearances or physical features, personalities, habits, and styles (referring primarily to their dressing, behavior, and mannerisms) [8]. In nature, characters are generally informational elements existing at the conceptual and factual level, and they belong to the public domain. Unless a character represents a unique expression, it is not protected under copyright law as an independent entity separate from the work it originates in. Whether a particular character embodies originality depends on the specifics of its expressive aspects.

3. Essence and Significance of the Idea-expression Dichotomy Principle

The division of "work" in copyright law into "idea" and "expression" stems from provisions in the United States copyright law [9]. Similar provisions are also found in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) [10]. "Idea" refers to the abstract elements such as thoughts, viewpoints, emotions, themes, concepts, principles, and methods that creators convey within their works. "Expression" refers to the concrete methods and forms in which works manifest the abstract elements of idea, representing the tangible aspect. The idea-expression dichotomy principle establishes the fundamental tenet of copyright law – protection is not conferred to ideas themselves, but rather to the expression of those ideas. Expression is an integral component of a "work" in copyright law. Isolated from specific expressions, elements from the realm of idea such as thoughts, emotions, viewpoints, concepts, and principles are abstract, generic, and hollow. Due to their lack of specificity, they cannot be conveyed to individuals in concrete, distinct ways. Furthermore, analyzing and comparing specific, distinct forms of expression is pivotal to distinguishing "this work" from "that work," as unique expressions embody the core essence of a work's originality. Rooted in the principle of protecting the expression of ideas rather than the ideas themselves, the idea-expression dichotomy principle is of significant guiding importance in determining the scope of copyright subjects.

This principle is in accordance with the constitutional principle of freedom of idea [2]. If elements from the realm of idea were included in the legislatively protected scope, it would imply that thoughts, viewpoints, and concepts must undergo legal scrutiny and control. This clearly contradicts the spirit of freedom of idea inherent in constitutional principles. Moreover, extending the scope of copyright protection to encompass ideas and factual aspects would undoubtedly subject thoughts, viewpoints, objective facts, and principles to individual monopolies and control, limiting the shared use of resources within the public domain. This would run counter to the legislative goal of fostering the creation and dissemination of literary, art and scientific works. It is evident that the distinction between idea and expression in the context of copyright law is deeply rooted in constitutional principles and jurisprudence.

4. Approaches to Judgment on Characters in Chinese and American Judicial Practices

4.1. Emphasis on Originality in Expression

Generally, the use of character names and personality traits from pre-existing works, when devoid of essential content and expressions unique to the particular work in question, such as character

names and personality traits, does not constitute an infringement of the original work's adaptation right [11]. In the case of Hong Kong Minghe Publishing Limited v. Beijing Fire Valley Network Technology Co., the court held that the use of character names and personality traits in the Wuxia Q Chuan game software did not encompass the essential expressions unique to the specific novel, but merely utilized the ideas or concepts from the original work, such as character names and personality traits, without utilizing the content or expressions. Thus, it did not infringe upon the original work's adaptation right [11]. Evidently, characters at the abstract conceptual level are not protected under copyright law.

Character elements like names and relationships generally need to be integrated into the work's plot to be considered expression, thereby eligible for copyright protection. Simultaneously, it must be recognized that character development, relationships, and plot design constitute the core elements of a work's originality in expression [12,13]. For elements like characters, plot, and scenes involved in adaptations for film, television, and games, a case-by-case analysis should be conducted. The creative elements involved transition from idea to specific expression, manifesting a distinction between the abstract and the tangible. Specific creative elements like structure and character roles, if their selection, arrangement, and design demonstrate originality, should be protected under copyright law [14,15]. For specific themes or mediums, conventional and typical expression elements, due to their lack of established design rules, can also constitute expressions of originality through their selection and combination [16].

4.2. Emphasis on Specific and Clear Expression

Regarding the issue of copyrightability of characters, the United States case law has developed three criteria for judicial assessment. The first is the "Clear Description Standard" (Nichols standard). In the case of Nichols v. Universal Pictures Corp., the plaintiff alleged that a film produced by the defendant, Universal Pictures Corp., depicting the story of a Jewish family in New York, substantially resembled the plaintiff's script concerning a Jewish family in New York, thus infringing the plaintiff's copyright. Judge Learned Hand introduced the "Clear Description Standard" (Nichols standard) in his analysis of the case. He believed that characters deemed copyrightable should be conceived in an original manner and presented sufficiently [17]. The more fully a character is described and its features deeply explored, the more expressive it becomes, albeit with a weaker thematic content, enhancing the possibility of obtaining copyright protection [17]. The "clear delineation standard" positively underscores the decisive role of clear and original expression of characters in determining their copyrightability. In the case of Salinger v. Colting, the renowned author J.D. Salinger sued Swedish author Fredrik Colting for copyright infringement. Colting's novel shared similarities with Salinger's work "The Catcher in the Rye" in terms of character traits and setting. The court evaluated the macrostructure of the work, the plot, scene setup, and character features. It concluded that the character Caulfield had sufficient descriptive elements to qualify for independent copyright protection, reaffirming the direct link between copyrightability of characters and their specific and thorough descriptive expression [18].

The second criterion is the "Character-as-Story Standard" (Sam Spade standard). In Warner Bros. Animation Inc. v. Columbia Broadcasting System Inc., Columbia Broadcasting System Inc. was accused of infringing Warner Bros.' rights acquired through assignment for producing animations, television, and broadcast programs based on the character Sam Spade. The court adopted the "Character-as-Story Standard," stipulating that copyright-protected characters must be integral to the "story being told," rather than merely tools manipulated like pawns during storytelling [19]. The "Character-as-Story Standard" builds upon the "Clear Description Standard," providing a standard for clear delineation of characters. Characters must be portrayed as an integral part of the story, influencing the entire narrative [19]. While this standard's demand for characters to be an essential

part of the story might be stringent, it still underscores the necessity for characters to be fully and distinctly delineated.

In the case of *Shanghai Xuanting Entertainment Information Technology Co. Ltd. v. Zhang Muyue et al.*, the Chinese court's determination of the copyrightability of characters closely resembles the "Character-as-Story Standard" established in *Warner Bros. Entertainment Inc. v. Columbia Broadcasting System Inc.* In this case, the court stated that elements like character images in literary works often serve as mediums for advancing the plot and tools for the author's storytelling, making it difficult to be expressions in themselves. Only when elements, including images of characters, gain comprehensive and unique description through the development of the plot, becoming intrinsic to the work's narrative, can they be eligible for copyright protection [20]. The court also noted that elements such as character names and relationships must be integrated into the plot to qualify for copyright protection [20].

The third criterion is the "Three-Part Test Standard" proposed by the U.S. court in *DC Comics v. Towle*. The test requires that characters generally possess both external and conceptual attributes, must be adequately described to be recognizable as the same character, and should be particularly distinctive, featuring some unique expression [21]. The "Three-Part Test Standard" reiterates the importance of specific and clear description of characters and explicitly presents the requirement for copyright-protected characters to possess elements of original expression, further solidifying the core role of the distinction between idea and expression in copyright protection [8].

4.3. Distinguishing Virtual Characters in Specific Work Types

Virtual characters in different types of works possess distinct characteristics that require specific analysis. Expressions in literary works encompass both linguistic expression and the content of the story that the words convey. When character elements, plot choices, and scene designs in literary works reflect the author's unique choices, judgments, and decisions, they can qualify as expressions protected by copyright law [16]. For virtual characters in textual works, their eligibility for protection depends on whether there is sufficient description considering various aspects of the work's macrostructure, plot, scene design, and character attributes [18].

Visual works possess different characteristics than literary works. In *Walt Disney Co. v. Air Pirates*, the defendant used 17 animated character images owned by Disney in an adult cartoon magazine, altering their innocent image to portray them as willfully malicious, inappropriate caricatures. Disney claimed copyright infringement based on the use of their cartoon characters. The court distinguished fictional characters in textual and visual works, noting that the visual representation is more easily protected as the unique elements of these images, whether physical or conceptual, inherently contain expressive traits [22]. The Disney case adhered to the judgment pathway of clear, distinct, and original expression while differentiating the degree of specific clarity of character portrayal in different types of works.

5. Analysis of the Copyrightability of Character in Works

5.1. Criteria for Copyrightability of Characters in Works

Regardless of whether the U.S. courts apply the "Clear Description Standard", the "Character-as-Story Standard", or the "Three-Part Test Standard", or the positions taken by Chinese courts, or the principles proposed by Chinese scholars regarding the "unity and integrity of idea and expression [23]," the fundamental question of whether characters can be independently protected by copyright lies in whether there exist concrete elements of original expressive content beyond the realm of conceptual aspects. Characters encompass elements of idea and fact, such as character names, personalities, habits, and styles. To embody the theme of a work, characters inherently have

varying degrees of connection, either tight or loose, with elements of expression like storylines, background settings, and macrostructure. This varying degree of "adhesive" connection subtly influences the internal structure of characters. When certain unique expressive styles are linked specifically or even uniquely to characters, these expressions can be considered absorbed into the characters themselves, thus becoming specific, concrete and vivid forms of expression. Visual works exemplify this. Characters in visual works, such as cartoon characters, are more straightforward and visual, featuring easily identifiable or perceptible elements like physical or outward traits. Therefore, they can be treated as objects of copyright protection in their own right. In comparison, other types of works, such as literary and musical works, exhibit characters in forms that lack a strong connection to the level of recognition and perception. In these cases, achieving independent copyright protection for characters is more challenging. For characters appearing in any type of work, their eligibility as copyrightable objects rests solely on their becoming concrete original expression. If characters remain only at the abstract conceptual level without receiving specific and distinctive descriptions, they fall into the public domain and are not protected by copyright [1]. Whether the distinctive expression that characters should embody must feature "particularly significant" characteristics or achieve a certain level of renown, is not and should not be required according to copyright law.

5.2. Business Factors Are Not Considered for Determining Copyrightability

Literary, artistic, scientific works, and neighboring rights works, as stipulated by copyright law, are intellectual products [2]. The determinative factor of intellectual products is creativity. Even if influenced significantly by business models and commercial thinking, the statutory requirements for being objects of copyright remain unchanged. To qualify as copyrighted works, they must exhibit originality and be reproducible in tangible form, with no consideration for commercial aspects. Neither the academic nor practical sectors acknowledge a relationship between commercial factors and the qualification as objects of copyright. In the history of Chinese copyright protection of characters, the "Sanmao Case" served as a classic example. In this case, the Shanghai High Court did not comprehensively argue that the "Sanmao" character qualified as a copyright subject. Instead, it ruled against the defendant on the basis that the defendant, well aware of the widely recognized cartoon image of "Sanmao," infringed upon the plaintiff's copyright by using the artwork as a trademark without authorization [24]. However, the premise for identifying infringement was the recognition of the "Sanmao" character as copyrightable. The justification in this case did not scrutinize whether the involved character met the statutory requirements for copyrightability, except for considerations of character recognition and commercial value, which deviated from the original intent of copyright protection [8]. Likewise, the "particularly significant" standard applied by U.S. courts in the DC Comics case excludes certain characters from being copyrightable, despite possessing specific descriptive traits but lacking prominent significance [8]. The exact meaning of "particularly significant" remains unclear, and whether it is synonymous or relevant to commercial reputation and recognition is also uncertain. Therefore, to determine the copyright protection of an element solely based on the high commercial reputation of characters or potential or actual commercial utilization and substantial revenue generated, without considering the constituent requirements of copyright, appears far-fetched and lacks both legal and logical grounds. Confusion surrounding similar concepts and standards persists in recent judicial rulings as well [25].

6. Objective Laws of Cultural Creation, Heritage, and Development

Beyond legal analysis, the question of whether characters in works are copyrightable must also conform to the objective laws of social practice. Throughout the process of human cultural creation,

heritage, and development, inherent and objective laws have always been followed. Justice Story once said, "In the abstract, there is scarcely anything in truth, literature, science, or art, which is truly new and original. All literary and artistic works, as well as scientific achievements, must necessarily rely upon and utilize the creative accomplishments of predecessors." Drawing inspiration from predecessors is a common foundation for creativity and is not generally prohibited by law [26]. In the history of literary development in China, the creation of derivative works using characters from earlier works is widespread. This phenomenon has not hindered the creation and development of literature and art but rather constantly rejuvenated and transformed classic works based on the foundation of previous creations [26]. Based on the principle of the separation of idea and expression, copyright protection extends to expression rather than thought, concepts, emotions, procedures, principles, methods, and other elements in the realm of factual ideas. Characters in works are images created by authors in the process of literary and artistic creation, constituting fundamental elements of literary and artistic works. If characters remain abstract conceptual images, they lack copyrightability. Borrowing and utilizing elements from previous works in the domain of idea is entirely permissible under copyright law. In the realm of expression, copyright law permits the public to use copyrighted works after the copyright protection period expires, and it also establishes provisions for fair use within the protection period to balance the interests of copyright holders and the public.

In modern society, with the emergence of new media and the creation of various new types of works, elements that were originally in the domain of idea, including characters, are given new forms of expression in works. If the expressive features contained within characters are prominent, they may possess copyrightability. When these characters are unearthed and incorporated into works, copyright infringement issues related to such characters may arise. When addressing copyright protection issues related to characters in works, on one hand, in accordance with the basic principles of copyright law, characters with original expressive elements should be protected under copyright law and not be unlawfully reproduced or used. On the other hand, considering the functions of cultural accumulation and the objective laws of cultural generation, heritage, and developmental continuity, copyright protection for characters should be strictly confined to the scope of their original expression. It should not be expanded to encompass reasons beyond the constitutive conditions of copyright objects, such as the commercial reputation or commercial value of characters. Of course, legal relationships involving characters' commercial reputation or their commercial use can be regulated by trademark law or laws against unfair competition, but they fundamentally differ from the regulations of copyright law.

7. Conclusion

When discussing the issue of copyright infringement involving pre-existing characters, the prerequisite question to address is whether characters qualify as copyright objects. The standard for determining whether characters are protected under copyright law revolves around whether the characters themselves constitute specific elements of original expression and whether their images are sufficiently and concretely described. Analyzing the elements of character expression is crucial. From the perspective of copyright legislation and legal principles, the eligibility for copyright protection should depend on whether characters possess the criteria of originality and replicability, irrespective of factors such as recognition, commercial value, or commercial use. Rational delineation of the rights of copyright holders and the general public, balancing individual rights and the public interest, is the essence of copyright law and applies equally to the context of characters in works. Whether it pertains to the protection or use of characters, respect for the objective laws of cultural creation and heritage is paramount. Only by doing so can we ultimately better foster the creation and dissemination of literary, artistic, and scientific works.

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