

Research on Copyright Infringement of Network Short Video and Webcast

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Abstract

In recent years, with the rapid development of Internet communication technology and the continuous updating and upgrading of Internet terminals, especially smartphones and tablets, network short video and network live broadcast platforms have sprung up, and have a great impact on people's lives. The huge economic benefits also attract more and more people to invest in short video creation and webcast. However, the frequent occurrence of copyright infringements requires our attention and consideration. This paper will study the copyright infringement of online short video and live broadcast from three aspects: the copyright infringement of online short video, the copyright infringement of online live broadcast, and the liability determination of online short video and live broadcast platform.

Keywords: network short video, webcast, copyright infringement, platform responsibility

1. Introduction

With the rapid development of Internet communication technology, network short video and network live broadcast have set off a new trend. The emergence of online short videos and live webcasts has enriched people's leisure time and become a way for many people to make money. However, with the continuous expansion of the market scale of network short video and network live broadcast, the problem of copyright infringement is serious, which can not be ignored.

2. Copyright Infringement of Network Short Video

In recent years, short video apps such as TikTok and Kwai have been popular among the public. "Brush a short video when nothing to do" has become a portrayal of most people's real life. Short video refers to the form of video content that is edited and disseminated by relying on the network short video platform within a limited period. Common short videos include short documentaries, street interviews, self timer videos, mixed clip videos, etc. Sharing personal life on short video apps is gradually being sought after by the public, and the "influencer economy" and the huge benefits behind short videos also drive more and more people to invest in short video creation. The prosperity of short video creation also leads to the intermingled short video market, and the infringement of copyright by online short video occurs from time to time. The copyright infringement of online short video can be discussed from two aspects: first, some materials in the short video created by the creator infringe the copyright of the obligee's works (usually music works, audio-visual works, etc.); the second is the infringement caused by carrying other creators' short videos, which is also a controversial point of short video copyright infringement. The controversial point is whether the short video itself constitutes a "work". Next, we will discuss these two aspects.

2.1 Common Types of Short Video Copyright Infringement

Infringement of music works. We often see some online bloggers cover other people's published music works on the Internet. According to Article 24 of the *Copyright Law*, under the condition of reasonable use, for published

works, the copyright owner may not obtain permission or pay remuneration, but the name of the author and the name of the work shall be specified, and the normal use of the work shall not be affected, and the legitimate rights and interests of the copyright owner must be reasonably infringed. In other words, if the cover or performance of other people's musical works is not charged to the public or paid to the performers, and is not for profit, it is of a public welfare nature, and it can be performed without consent. Uploading cover videos on short video platforms is obviously a non-public welfare behavior for profit. Therefore, the music works they choose need to obtain the consent of the copyright owner. Otherwise, their legitimate rights and interests, such as performance rights and information network dissemination rights, will be infringed.

Infringement of audiovisual works. Many bloggers on the short video platform attract attention by editing film works. According to Article 23 of the *Copyright Law*, in addition to the personal rights of the author, such as the right of publication, the right of authorship, the right of amendment and the right to protect the integrity of the work, the protection period of other rights is 50 years. If the creator uses the film material that has been publicly published for more than 50 years for editing, in principle, the permission of the film copyright owner is not required. However, if the copyright of the film works has not expired, editing its film works on the short video platform without the consent of the obligee is likely to be suspected of infringement. In addition, if the material used in the short video involves the trailer and behind the scenes gags, as well as the plot of the recently released popular movies and TV series, it will also cause infringement.

In addition, in order to attract traffic, the theft of others' pictures and words in short videos is also an infringement, which should be severely punished by us.

2.2 Does the Short Video Constitute a "Work"?

According to Article 3 of the *Copyright Law*, works refer to original intellectual achievements that can be reproduced in some tangible form in the fields of literature, art and science. It can be seen that the work has two characteristics: originality and reproducibility. There is no doubt that online short video is reproducible. Therefore, the key to determining whether online short video belongs to "works" is to judge whether it is original.

2.2.1 The First Case of Copyright Infringement of Short Video—"TikTok v. Huopai Small Video" Case

In September, 2018, TikTok sued Baidu's "Huopai small video" on the grounds of infringing its right of information network dissemination. TikTok said that the famous VIP user "Heilian V" of its short video platform released "5.12, I want to tell you" video on TikTok platform on May 12, 2018. The short video constitutes the work created in a way similar to cinematography. With the legal authorization of "Heilian V", TikTok enjoys the exclusive right of information network dissemination and the exclusive right to protect the rights in the name of the plaintiff for the "I want to tell you" short video worldwide in accordance with the law. Without permission, the defendant spread the short video of "I want to tell you" on the "Huopai small video" and provided downloading and sharing services, so as to attract a large number of network users to browse and watch the short video, which infringed its information network dissemination right. Baidu argued, the short video is not original and does not constitute a work protected by the *Copyright Law*, and the short video is uploaded by network user. Baidu Netcom has fulfilled its prompt and management obligations under the law, and has deleted it in time after receiving the effective complaint from the plaintiff. Therefore, there is no fault and should not bear civil liability.

Whether the short video constitutes a work on copyright is one of the focuses of controversy in this case. In this case, the court cited Article 4 of the *Regulations for the Implementation of the Copyright Law*, which stipulates that "cinematographic works and works created by an analogous to cinematography works means works which are recorded on some material, consisting of a series of images with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means", and analyzed whether "I want to tell you" short video constitutes the work created by an analogous to cinematography works. The court held that the "I want to tell you" short video obviously meets the formal requirements of "recorded on some material, consisting of a series of images with or without accompanying sound projected with the aid of suitable devices or communicated by other means". Therefore, the key to judging whether the short video is a work lies in the judgment of its originality. After analyzing the originality of "I want to tell you", the court finally determined that "I want to tell you" short video is the selection and arrangement based on the existing materials, reflects the personalized expression of the producer, and brings the audience positive spiritual enjoyment, it is original and constitutes the work created in a way similar to cinematography.

2.2.2 Criteria for Identifying the Originality of Short Videos

In the above-mentioned cases, the court cited Article 15 of the *Interpretation by the Supreme People's Court on Some Issues Concerning the Application of Laws to the Trial of Civil Disputes over Copyright* to analyze the originality of the short video "I want to tell you". The article stipulates: "if the expression of a work created by different authors on the same subject is independently completed and creative, the authors shall be recognized as

having independent copyright.” According to this regulation, works are original, which should have two elements: 1. Works should be completed by the author independently, that is, works are created and completed by the author independently, rather than simply copying and plagiarizing the works of others. 2. The work is “creative”, that is, the work has a breakthrough and creation of the existing content, and reflects certain thoughts, emotions and personalities. With regard to “creativity”, the Beijing Internet Court held that “the creation and dissemination of short videos contribute to the diversified expression of the public and the prosperity of culture. Therefore, when judging whether short videos meet the requirements of creativity, it is not appropriate to be strict with the creation. As long as they reflect the personalized expression of the producer, they can be recognized as creative.”

3. Copyright Infringement of Webcast

Webcast is another trend in the new media era. At present, there is no unified and authoritative opinion on the definition of webcast. Paragraph 2 of Article 2 of the *Regulations on the Administration of Internet Live Broadcasting Service* issued by the State Council Information Office stipulates that “Internet live broadcasting refers to the continuous release of real-time information to the public in the form of video, audio, graphics and text based on the Internet”; Some scholars started from the factors such as the main body, content, mode and behavior of webcast, referred to the definitions of scholars and normative documents, and defined webcast as “the behavior of webcast producers (anchors, brokerage organizations) to disseminate works and other content to the public in real time through webcast service providers (platforms) based on the network in various forms such as audio, video, graphics and text.” this definition is adopted in this paper.

Similar to online short videos, the copyright infringement of webcast can also be discussed from two aspects: the copyright infringement of others by webcast, and the copyright infringement when webcast itself constitutes a work. The issue of whether webcast constitutes a work has also been the focus of controversy in the academic community.

3.1 Infringement of Copyright of Others by Webcast

Like short videos, the most common way of webcast is to infringe the copyright of music works and audio-visual works. During the live broadcast, many anchors cover other people’s published music works without the permission of the obligee to obtain traffic and attract fans; There are also many anchors who, without permission, record some film and television works, sports games or E-sports games and broadcast them during the live broadcast to attract attention. These are obviously suspected of copyright infringement. The occurrence of these infringements, on the one hand, is due to the current low awareness of copyright of some citizens in China, many people do not know that these are infringements; On the other hand, due to the immediacy of webcast, it is often difficult for obligees to find these infringements, and many people have fluke mind, which also makes it difficult to manage the copyright infringement chaos of webcast in practice.

3.2 Does Webcast Constitute a “Work”?

There is no direct conclusion about whether the webcast itself can constitute a work. In practice, different courts have different understandings and make different judgments. In the case of “Yaoyu v. Douyu”, the court did not believe that the webcast had the attribute of a work, but in the case of “NetEase v. Huaduo”, the Guangdong Provincial Higher People’s court finally ruled that the live video of the game constituted a work through the analysis of the originality and reproducibility of the online game. Similarly, different scholars have different views on this issue. In addition, it is also necessary to consider that different live broadcast types have different characteristics, and specific problems need to be analyzed in detail, which cannot be generalized. In a word, whether the live webcast constitutes a work is a complex problem, which needs us to further explore.

4. Responsibility Identification of Network Short Video and Live Broadcast Platforms

At present, the identification of copyright infringement liability of network service providers such as short videos and live broadcast platforms in China is mainly based on the “Safe Harbor” principle. The “Safe Harbor” principle originated from the Digital Millennium Copyright Act (DMCA) of 1998 in the United States. The “Safe Harbor” principle is mainly embodied in the “notice-takedown” rule, that is, when network users use network services to commit infringement, the obligee has the right to notify the network service provider to take necessary measures such as deletion, shielding, disconnection, etc., and after receiving the notice, the network service provider should timely transmit the notice to relevant network users and take necessary measures in time, otherwise it will bear joint and several liabilities for the expanded part of the damage. In addition, there is an exception to the “Safe Harbor” principle—“red flag” rule as a supplement. The “red flag” rule means that when the infringement is obvious, even if the obligee does not send a notice, the network service provider knows or should know that there is a network infringement, but does not take necessary measures, it shall bear joint and several liabilities with the network user. This also means that the platform needs to fulfill certain obligations of care and review. Articles 1194-1197 of the *Civil Code* of China stipulate the liability for network infringement,

and establish the principle of “Safe Harbor” and the rule of “red flag”.

For the establishment of the “Safe Harbor” principle and the “red flag” rule, the general consensus in the academic community is that it balances the interests of network service providers, obligees and network users to a certain extent. Most scholars also believe that this principle is an exemption protection for network platforms. However, some scholars, by combing the judicial practice, believe that the “Safe Harbor” principle in China has very limited exemption from the liability of online platforms. The current regulations give the platform the duty of care and the duty of review within the “reasonable limit”, which tends to expand gradually in judicial practice, and eventually leads to the platform bearing the duty of review in fact. Therefore, it is advocated to give the platform responsibility cautiously. In short, we need to further study how much the network platform should bear the tort liability, and what the standard of the “reasonable limit” of its duty of care and review obligation is.

5. Conclusion

The rise of online short video and webcast has greatly changed people’s entertainment methods, and has also attracted countless fashion trendsetters and companies to participate in the creation of short video and webcast. At the same time, there is also a chaos of copyright infringement that is difficult to control behind it. In the process of short video or live broadcast, the copyright infringement of the obligee occurs from time to time without the permission of the obligee. In addition, the occurrence of many events such as plagiarizing other people’s short videos and live broadcast scenes to attract traffic has also brought new challenges to copyright protection. There is constant debate about whether short videos and live broadcasts themselves constitute “works”, and how to protect rights when short videos and live broadcast scenes are stolen by others has not been well resolved. In my personal opinion, the theft of other people’s short videos and live pictures should be recognized as an infringement. Of course, specific events should be analyzed in detail and should not be judged hastily. Facing the chaos of infringement, the division of responsibilities of network service providers such as network short video and live broadcast platforms is also very critical. The platform has a certain duty of care and review, which is legitimate, but the “reasonable limit” of attention and review is still uncertain. Whether there are problems in the “Safe Harbor” principle and the “red flag” rule in China’s localization practice still needs us to further explore. But in the final analysis, the occurrence of infringement is still due to our citizens’ lower awareness of copyright. Therefore, we should further enhance citizens’ awareness of copyright, and law enforcement departments should also further strengthen the fight against infringement.

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