

# Analysis of Fair Use Standard in Short Video Creation

Yufei Jin

School of Intellectual Property, Nanjing University of Science and Technology, Nanjing, China

961249601@qq.com

**Abstract.** In copyright disputes concerning short video, fair use is the most common defense. However, there are several problems in the application of the traditional fair use system, such as unclear definition of "normal use", unclear conditions of "appropriate citation", difficulty in defining "reasonable scope" and ambiguity in "unreasonable damage", etc. In fact, the general judgment standard of fair use is inadequate, which is based on the "three-step test" supplemented by the "four-element judgement". In this regard, we should clearly distinguish different types of short video and discuss the judgment of reasonable use related to different short videos, so as to make up for the shortcomings of the existing standard which is too macro and abstract. At the same time, it introduces the theory of "transformative use" in practice, and no longer use commercial use as the basis for judging fair use. Commercial short video is supposed to be sheltered by the fair use system as long as they meet the conditions of transformative use, in order to improve the judgment standard of fair use in short video creation.

**Keywords:** short video; copyright; fair use; transformative use.

## 1. Problem Presentation

Internet has given rise to a boom in the self-publishing industry, bringing about the explosive development of short video. A study shows that as of December 2020, short video users in China was amounted to 873 million, an increase of 100 million from March 2020<sup>1</sup>. At the same time, copyright issues arising from the citation have attracted increasing attention, which also poses new challenges to the application of the copyright fair use system as the "shelter" for short video creation.

### 1.1 How to Define "Normal Use"

The requirement of "the quote work shall not affect the normal use" added to Article 24 of the new *Copyright Law* is a reference to the second step of the "three-step test" in the *Berne Convention*, but the current law does not define what "normal use" and "affecting normal use" are. In the case of Gu Amo, facing the plaintiff's claim, he argued that the work is a secondary creation, which does not affect its normal use but rather inspires more people to watch the film. Similarly, in the first "illustrating movie" infringement case in China, before determining whether it was a fair use, the court also judged whether a collection of pictures provided by the defendant that had an adverse effect on the normal use of the original work. Therefore, a clear definition of "normal use" is the first step in determining whether a short video is a fair use of another one. In terms of interpretation on such issue, the current legal provisions are clearly lacking.

### 1.2 The Condition of "Appropriate Citation" is Unclear

Among the cases of fair use listed in Article 24(1) of *Copyright Law*, "for the purpose of introducing or commenting on a work or illustrating a certain issue" is the most relevant to short video creation. Despite further provisions in Article 21 of *Regulations for the Implementation of the Copyright Law*, the conditions for "appropriate" have not yet been specifically defined in the legislation. Article 43(1) and 43(2) of *Copyright Law (Draft Revision for Examination)* published by the Legislative Affairs Office of the State Council in 2014 stipulates that the quoted part shall not constitute the main or substantial part of the original work. It means that the definition of "appropriate citation" absorbs the implication of "transformative use". However, the current law is short of its interpretation, so that the application of "appropriate citation" in judicial practice cannot produce the expected effect.

### 1.3 The "Reasonable Scope" is Difficult to Define

Short video facilitates the performance of official duties by state agencies in their flexible form. *Copyright Law* provides that the reasonable use of published works under such circumstances shall be within a reasonable scope, but how to define the "reasonable scope" is still unclear. In the case of Liang Tang and Changsha Radio & Television Digital Mobile Media Co., Ltd.<sup>2</sup>, the court denied that the latter is a corporate legal person rather a state organ. The evidence submitted by the defendant is insufficient to prove that the defendant is authorized by the state organ to use others' rights' works, thus denying that it is an act of a state organ exercising its official duties. However, the reality is complicated. When the subject meets the conditions of the state organs to perform official duties, it is necessary to further explore the boundaries of the "reasonable scope", but the current legislation and the judiciary have not given clear standards, so it is urgent to define the reasonable scope given the relevant factors.

### 1.4 The Scope of "Unreasonable Damage" is Ambiguous

Article 24 of the new *Copyright Law* also draws on the third step of the "three-step test" in *Berne Convention* as one of the standards for fair use of copyright. To be more specific, it "shall not unreasonably prejudice the legitimate rights and interests of the copyright owner". However, the scope of "unreasonable damage" is very broad, while in practice, when applying the three-step test to determine whether it is fair use, there is often no definite reference factor for the "unreasonable", which is very likely to result in an over-reliance on the discretion of judges. Therefore, it is particularly important to give a clear definition of the standards.

## 2. General Judgment Standard of Fair Use in Domestic Short Video Creation

The core of the fair use system, as a limitation and exception to copyright protection, is to balance the rights and interests of copyright owners and public creations. The three-step test of the fair use system stipulated in Article 9 of *Berne Convention* is one of the mainstream judgment standards at present, and has also been adopted by the new *Copyright Law* of China. Meanwhile, the four-element judgement stipulated in the *U.S. Copyright Law* is also increasingly affirmed by the theoretical circles and judicial practice domestically. In December 2011, the judicial opinion of the Supreme People's Court combined the three-step test with the four-element judgment for the first time<sup>3</sup>, which was then put into practice in cases such as "Yang Luoshu and China Pictorial Press", and "Illustrating Film".

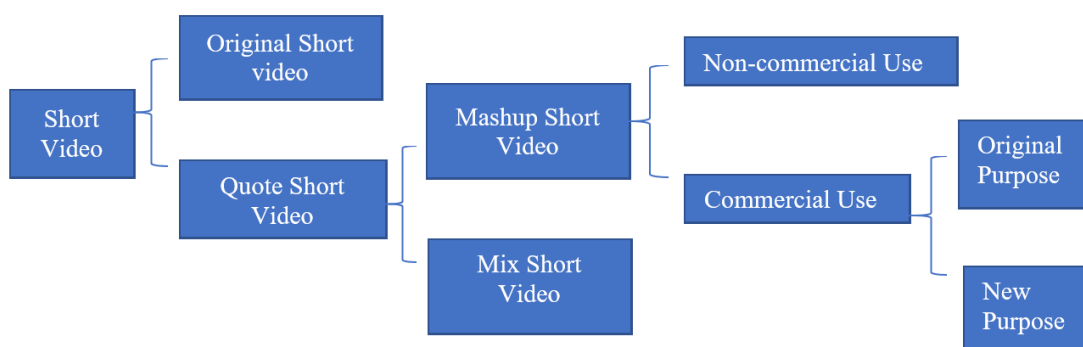
With regard to the aforementioned issues, the core lies in defining the relevant concepts and scope, in other words, unifying the standard for their definitions. The definition of "normal use" is related to the determination of "affecting normal use". In determining whether it affects the normal use of the original work, the Beijing Internet Court measured whether the creation plays a substantial substitute role for the original work, and combined the four-element judgement to identify the photo collection in the case of "Illustrating Film". Such method objectively quantifies the actual impact of short video on the original works, but it fails to take into account the citation of the short video itself. As a result, the short video, which is subjectively based on the original works but not objectively enough to substitute for them, narrowing the protection scope of the fair use system. In terms of the qualification of "appropriate citation", Guangzhou Intellectual Property Court pointed out that even if the images used in a short video (quoted works) are relatively few, as long as they constitute a substantial part of the short video or in view of the large number of short videos, they should be evaluated as a whole, and some of them should not be extracted separately for analysis<sup>4</sup>. In other words, we believe that whether the citation is appropriate should be evaluated as a whole rather than simply based on its proportion. The difference is that in the "Seven Calabash Brothers Image Infringement"<sup>5</sup>, the court emphasized the proportion of the quoted work to the entire work, and was inclined to identify that when the quoted work is of auxiliary, supporting or subordinate status, it is usually considered to be an appropriate citation. It is not difficult to see that, in current domestic judicial practice, the standard for judging whether a citation is "appropriate" are not uniform. In addition, the Shanghai Intellectual

Property Court has also borrowed from the "transformative use" rule and introduced factors such as the purpose and nature of use to judge "appropriate citation" with diverse standards. Therefore, in order to unify the judgment standard, it is necessary to make a specific analysis of the citation of the original work from various short videos. As for the definition of "reasonable scope", similar to Tang Liang's case, the current case practice is often limited to cutting off from the source and denies that it is the act of the state organ as the subject. And the judgment and definition of "reasonable scope" in the execution of official duties are lacking in the current theory. As for the definition of "unreasonable damage", it takes "Guangdong Hisense Refrigerator Marketing Co., Ltd. and Kong Qingyong" copyright right and infringement dispute<sup>6</sup> as an example. The plaintiff claims he has suffered from unreasonable damages, so he debates with the defendant on whether the defendant has subjective infringement intent and profit purpose in short video creation as well as their dissemination and influence. It indicates whether it is reasonable in current judicial practice to classify the damages based on the defendant's subjectivity. However, it is often difficult to prove the subjectivity in reality, and copyright owners invest a lot of time and money while may not even be able to collect evidence. Therefore, such method to define "reasonable damage" lacks operability and needs to be supplemented by more specific and efficient judgment standards.

In short, combined with the current legislation and judicial application in China, the general standard for judging the fair use of short video creation is still based on the "three-step test", supplemented by the "four-element judgment", which are integrated and complementary. However, in the face of the different content of short video and complex and diverse judicial practice, the current system standards are more general and ambiguous with relative weak operability and shortcomings in the aforementioned issues. For this reason, it is necessary to concentrate on the classification of short videos and to concretize the standard for fair use.

### 3. Judgment Standard in Different Types of Short Video Related to "Reasonable Use"

The length of short video is not a factor to deny their originality, which is increasingly recognized by judicial practice, while various short videos differ greatly in terms of length and quality. In light of the citation in a new video, it is difficult to make the clear boundary between infringement and fair use by a single standard. Therefore, the issue of fair use of short video should be based on a classification. Based on the exploitation of existing works and their own creative components, this paper classifies short video into two categories: original short video and quoted short video, among which the quoted short video is subdivided according to criteria at various levels (as shown below). It aims to study the standard and differences in the application of the fair use system to different types of short video, in order to clarify the definition of the aforementioned concepts from a microscopic perspective.



**Fig.1** Subdivided according to criteria at various levels

The original short video here should be interpreted in a narrow sense, which basically does not quote other's works but the efforts by the copyright owner. In this sense, it does not involve the fair use of copyright in such cases. On the contrary, the quoted short video is the most important one to

consider whether it is fair use. Quoted short video refers to short video creation involved both references to the original works and the maker's own intellectual achievements. If the judgment standard of the fair use system of such short video is not clearly defined to solve the problems aforementioned, it is easy to fall into infringement. Specifically, according to the number of short video creation quoted from others, their own originality and embodiment, the quoted short video is divided into mashup short video and mix short video.

### 3.1 Mashup Short Video

Mashup short video (hereinafter referred to as "mashup") is a secondary creation based on editing, in which works with the same or different themes are cut and directly pieced together. In other words, each frame of mashup is not original to the author, and its creation is reflected in the piece, connection and layout of each frame, and then combined into a complete video. This paper classifies them into non-commercial and commercial according to its nature.

#### 3.1.1 Non-Commercial Mashup

Non-commercial mashup refers to the creation of short video by quoting other's works not for commercial profit but for public interest. For example, for the promotion of the local natural scenery, some short videos have been re-edited to attract tourists and popularized the development of the tourism industry, by intercepting photos, videos of beautiful scenery by others or poems, words and songs composed by them. In this case, for works of a certain length such as quoted videos, words and songs, the non-commercial mashup usually does not quote the entire content, but the combination of intercepts including aesthetically pleasing images, words and rhymes helps to express the main idea of the newly created ones. As a result, when viewers are attracted to the quoted works by short videos, they will continue their appreciation of the quoted works, and are even inspired to watch or listen to the original works, which will prompt more viewers to purchase or click to play the full video and audio. The non-commercial mashup naturally does not affect the normal use of the original works, but even bring great economic benefits and reputation to the original copyright owner. On the contrary, if the quoted work is a picture, a photograph, or a short poem that the viewers can fully enjoy the original work, it is hard to imagine that people will compete to buy and watch them. Therefore, it can be concluded that the short video has affected the normal use of the original work and does not meet the standard of fair use. In other words, the definition of whether a non-commercial mashup affects the normal use of the original work should be judged from whether it is quoted as a whole or partially quoted, and ultimately the impact on the interests of the copyright owner of the original work.

Under the premise of non-commercial use, the purpose of "introducing or commenting on a work or illustrating an issue" is common in education. In the case of a teacher playing a short video in class, even if the teacher is playing a published film, video or other audiovisual work rather than his or her own work, as long as the author's name or title and the work title are specified, the standard of fair use is still met, which is in accordance with the principle "argumentum a maiore ad minus". In addition, if the short video are their own works and in line with the specification of relevant information of citations, then such short video shall fall within the scope of reasonable use. There is no need to limit the conditions for appropriate citation.

The non-commercial mashup is also applicable to the state organs when performing their official duties with the purpose to promote and inform rather than to seize the market, such as forwarding other's works with cultural and educational significance through networks to achieve spiritual and cultural promotion or policy publicity. Based on the non-commercial nature of the citation, it is necessary to exclude the interference of external market factors when judging fair use, and focus on the act of quoting others' works in short video itself to consider the definition of "reasonable scope". Combined with the provisions of Article 24(1)(7) of *Copyright Law*, whether for the purpose of propaganda, education or notice and guidance, such short video is created and used for the purpose of carrying out official duties, which is different from our common understanding such as seizure and attachment. Seizure, for example, is an administrative compulsory measure to prevent evidence from being destroyed, damaged or other circumstances, and is generally not replaceable or optional. The

use of short video to carry out official duties is different, as the staff of state organs create the short video, and there is obviously more room for autonomy in terms of whether they need to quote other's works and how much they quote. If short video creation is not the only way to achieve the purpose, or there is wide room for choice, creation and expression, there is no circumstance in which it is impossible to express the theme without using the works at issue. But the state organs still edit a large number of others and combine them into short video for use, then such short video shall not be determined as the use of other works within a reasonable scope considering the degree and the proportion of citation. In addition, according to this article, the premise of defining the reasonable scope is that state organs in official duties execution are usually not for profit, so it will not be defined in the commercial mashup later.

### 3.1.2 Commercial Mashup

The main purpose of commercial mashup is to make profits to gain eyeballs. According to the connection between the purpose of short video creation and the purpose of the original work, it can be subdivided into the mashup with original purpose and new purpose.

#### (1) Mashup with Original Purpose

Mashup with original purpose is that the makers create the short video with the same purpose as the original work copyright owner, or the telling of the story or the recording of the facts. Even if slightly altered, it is a streamlining or commentary of the original content, and does not involve substantive changes. It can be observed that the content expressed in such short video will be very similar to the original work. Therefore, judging the independence becomes the key to distinguish the two, and defining the condition of "appropriate citation" depends on it. Appropriate citation does not allow one to replace one's own creation entirely or mainly with another's work. However, the logical analysis of the mashup with original purpose, which introduces the words, discusses the point of view and elaborates on the issue, precisely separates the short video from the mere copy and paste, reflecting the dedication of the short video's maker. Thus, the more the maker's originality is, the more the maker's words and ideas can spark the viewer's interest in the original work, and the more the maker can prove the independence of the work and the appropriateness of the citation.

The aforementioned "X minutes to watch X movie" belongs to mashup with original purpose, "Gu Amor reduced the original work and added narration and commentary in the length of a very small proportion, and there is no essentially difference in terms of the overall ideas and content from the original work<sup>7</sup>." The short video and the original work not only created for the same purpose, while the content is also roughly the same. Compared with other audiovisual works, the short video owns the features of short, concise and fast dissemination. It easily exerts a substitution effect on the market and limits the use of the original work. In other words, to make the short video creation "shall not affect the normal use of the original work", should be based on its commerciality, to determine whether the original work produces alternative effects, and whether it will have an impact on its market demand. Some scholars pointed out that "shall not affecting the normal use of the work" mainly refers to the freedom of use as a restriction on the granting of the right not to "compete economically" with the rights implemented by the right holder<sup>8</sup>, while the external expression of economic competition concentrates on the market demand and share. Therefore, when defining whether it affects normal use, it should be seen in the light of economics, to determine whether the original purpose of the mashup has a substantial and potential impact on the market of the original work. The former refers to the actual impact of short video creation on the original work, such as the decrease in the number of purchases and clicks, etc. It has objective and traceable data, and the market substitution can usually be judged by relying on market surveys or data retrieval. But it should be noted that, as far as the user of short movie review is concerned, the substitution for 3D movies is much lower than that of ordinary movies, and thus the standard for affecting the normal use of the original work in 3D film criticism should also be more stringent. The latter lacks relevant reference indicators due to its potential impact, so it is necessary to focus on the short video itself and examine its citation. As long as the video is substantially similar to the original work and has the potential to

make the average consumer understand the content of the original work and no longer be willing to pay the price for viewing it, the video will be identified as infringement, regardless of whether it has actually interfered with the use of the original work.

## (2) Mashup with New Purpose

The mashup with new purpose is still based on the premise of commerciality, but the purpose of the maker is very different from that of the original copyright owner. The maker of the short video may choose a new aesthetic orientation and a new perspective on the basis of the original work and make a new understanding. The substitution of the short video dissemination for the normal use of the original work is significantly lower than that of the mashup with original purpose. To some extent, it can be said that the standard of transformative use of the original work has been reached. Generally speaking, transformative use is divided into two categories: expression transformation and purpose transformation. It is obvious that the purpose transformation is more typical for the mashup with new purpose. Therefore, the standard of "normal use" and "appropriate citation" need to be defined with the help of the theory of transformative use.

Among the short video formed by highly transformative use, "satirical parody" is the most typical, in which the maker changes the emotions and concepts intended to be expressed in the original work by editing and dubbing, generating a short video with a very different purpose from the original work. Even though the lines and words are basically the same, the original work only becomes a tool for the maker to convey his own views and criticize the original work itself for the purpose of satire, so it does not affect the normal use of the original work. In other words, as long as the "parody" of the original work does not go beyond the need to criticize and satirize the original work, such use constitutes fair use<sup>9</sup> and will not affect the normal use of the original work.

In terms of the mashup with new purpose, the definition of "appropriate citation" for short video should first be premised on the legitimacy of the purpose, that is introduction, commentary or illustration. For example, the mashup maker intercepts parts of several audiovisual works featuring a celebrity crying and integrates them into a film, with the purpose of illustrating the celebrity's excellent acting skills and attracting viewers to pay for watching. The purpose and content of the mashup is highly transformative compared to the original work, which meets the standard of transformative use, so that the creation does not achieve the goal of "glimpse of the whole" and does not affect the impressions of the original work. At the same time, the original work does not contribute much to the value and function of the new work due to the fragmented interception, and it is unreasonable to require the short video maker for permission and to pay for it<sup>10</sup>. Of course, if the new purpose is improper and does not contribute to the public interest of society or national cultural development, such as illegal capture, it is bound to be out of fair use and falls into infringement and violation of law.

## 3.2 Mix Short Video

Unlike the mashup short video, the mix short video (hereinafter referred to as "mix") involves the independent creativity of the short video maker in addition to editing. For example, a short video is made by shooting part of a movie, a picture of an exhibition to record one's life in a day and a combination with other shots as well. These short videos have different production purposes, and some of the original works are only included for the maker's own purpose of elaborating his or her point of view and goals, but the main content is still the original images taken by the maker instead of the original. Compared with the mashup short video, which is a combination of the original works, the mix short video is more original, and the presentation of the original works is often brief or partial, so it is difficult to reach the standard of market competition among the original works. Moreover, the short video makers usually indicate the name of the author and the source in the work, which is in line with the formal elements of fair use, so the normal use of the original work will not be affected.

In contrast, in judicial practice, "Seven Calabash Brothers Image Infringement Case" and "Tencent and Sunshine Culture Media" have proven that considering the appropriateness of the citation of the original work in short video creation is the top priority in judging the fair use of the mix. With the

popularity of smart devices and the diversification of photographic media, short video continues to expand the user market with their short duration and simple methods, and the possibility of being copied, imitated and forwarded has greatly increased, "In order to prevent probable plagiarism, the identification of the references amount is particularly critical<sup>11</sup>." The single piece of a short video is short in volume, which is only limited to the appropriate citation ratio to better clarify the original part of the mix, and the more the original part is conducive to the judgment of fair use. On the contrary, if the number of references to the original work is too large, it is inevitable to reduce the original parts, making the mix into the mashup. Once the entire film is composed mainly of the original work, and the combination of each part links with the original work, the makers' creativity is insignificant. In this sense, it is bound to increase the possibility of falling into plagiarism and infringement. At the same time, if the core idea expression of the short video relies on a large number of the quoted rather than the self-made,<sup>12</sup> it is impossible to use fair use as a defense if the video is substantially similar to the original work in that it uses similar techniques or conveys the same meaning for the consumers. In other words, the definition of "appropriate citation" in the mix should be identified from the "amount" of citation. When the "quantity" compressed original space or "quantity" covers the core idea of short video, it will undoubtedly promote the transformation of "quantity" to "quality". According to the formula of "contact + substantial similarity", the use of works in "quality" should not be considered as fair use.

As mentioned above, the reasonable scope of non-commercial mashup should be limited by combining the necessity and ratio of citation, while the originality of the mix is obviously larger than that of mashup, and the proportion of the quoted to the whole work is obviously lower with a higher originality, leading to more quoted works. Makers can choose among them and select the most suitable and relevant works to be quoted. The necessity of quoting other's works on each related topic is correspondingly weakened, and it is not feasible to combine these two factors to define the "reasonable scope". Therefore, the definition of "reasonable scope" of the mix for the execution of official duties by state organs should be expanded accordingly, and we can judge from the way the short video is used. Imagine that a quoted short video plays on the display screen in front of a state organ building for the purpose of official duties, compared with on the official website or other websites, the dissemination and reproduction speed of the latter will be significantly higher than that of the former. "Any work that is open on the Internet will be more readily available without compensation"<sup>13</sup>, which will also have a greater impact on the original work. In this case, the use of short video by Internet is often more likely to go beyond the reasonable scope of official duties execution.

#### **4. "Transformative Use" in Short Video Creation -- Definition of "Unreasonable Damage"**

Based on the general and specific analysis above, it is easy to find that in judging the fair use of short video creation, it is inseparable from the judgment of the purpose and content and the relationship between the two in the original work. In order to better identify the condition of "appropriate citation" and delineate the scope of "unreasonable damage", this paper considers introducing the theory of "transformative use" to improve the existing fair use standard.

The theory of "transformative use" originates from American jurisprudence, which states that the use of an earlier work can constitute a "transformative use" if it creates a nature and purpose different from that of the original work<sup>14</sup>. Some scholars have interpreted the nature of transformative use as the use of the original work by adding new aesthetic content, new perspectives, ideas or other means to give the original work a new value, function or nature in the process of being used, thus changing its original function or purpose<sup>15</sup>. It can be seen that the change of purpose is the ultimate inference of transformative use. For example, the adaptation of a novel into a movie is only an act of deduction in a different form, which does not constitute transformative use.

Therefore, an analysis of the purpose of short video creation is particularly important. The legal circumstances of fair use listed in domestic *Copyright Law* are mainly non-commercial use, but it does not indicate that commercial use is necessarily not applicable to the fair use system. On the contrary, this paper believes that we should attach importance to transformative use in commercial short video creation. On the one hand, in the case of commercial mashup, the mashup with new purpose that changes the function of the original work or add new value is not likely to cause competitive damage instead. Even if the maker intends to profit from the short video, it should also be regarded as a motivation to stimulate his creation. It is suggested to put transformative use into practice within the fair use, which is more conducive to stimulate the public's enthusiasm for creativity. On the other hand, "even if the maker does not have the subjective intention of making profit, he will not completely avoid obtaining economic benefits"<sup>16</sup>. For example, the maker makes a short video out of reverence and remembrance of a director, which inevitably quotes part of the director's works on display. After broadcasting on a platform, the short video attracts many viewers to praise and reward, bringing him economic benefits. In this case, it is more important to draw on the theory of transformative use to protect the creative interests of the public.

In essence, transformative use is a trade-off between individual interests and public interests, and similarly, copyright restrictions and exceptions are nothing but a compromise between the two sides. The fair use system will certainly bring some damage to the interests of copyright owners, but based on the need to promote innovation and develop popular culture, such damage will often give way to the public interests of society. Of course, there are limits to such damage, and the definition of "unreasonable damage" relies on it. "Unreasonable" is a consideration of damage, and its determination is highly subjective. The relevant domestic and foreign laws do not provide a uniform standard for determining "unreasonable" damage. In fact, any "use behavior" will cause damage to the copyright owner's expectable interests to a certain extent<sup>17</sup>. If such damage is controlled within a reasonable scope, the law will not be harsh, but once it exceeds this limit and breaks the balance of interests among relevant subjects, it is out of the fair use system and is suspected of infringement. When the short video creation is in line with the transformative use, the damage to the copyright owner is limited to a reasonable scope, and the copyright owner needs to have tolerance for it. But once the specific damage is exceeded, which is contrary to the value pursuit of transformative use, it is certainly out of the shelter of fair use system.

## 5. Conclusion

At present, domestic fair use judgment in short video creation is dominated by the "three-step test", which is also combined with the "four-factor judgment" in practice. However, in addition to the macroscopic identification of the current test, we should also classify short video from the microscopic view, and define the relevant concepts according to the characteristics of each type with the analysis of the four elements. Meanwhile, the fair use system is supposed to be extended to the commercial short video creation, and the theory of "transformative use" is expected to be introduced to improve the existing standards, so that the fair use system would play a better role in balancing the interests of video makers and copyright owners, as well as the interests of the public and individuals in short video creation.

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