

# Study on Copyright Protection for the Rights and Interests of Anime Characters Merchandising

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## Abstract

In recent years, the phenomenon of merchandising of animation characters has become increasingly prominent, which has brought great economic value to enterprises as well as good prospects for the development of the cultural industry. However, in the process of merchandising of animation characters, infringing behaviors occur frequently, making the animation industry market mixed. This not only makes the legitimate rights and interests of the creators of animation characters not effectively protected but also hinders the good development of the animation market economy. Given this, this paper analyses the necessity of protecting the rights and interests of animation character merchandising, identifies the shortcomings, and puts forward feasible suggestions.

## Keywords

Anime Characters; Merchandising; Infringement.

## 1. Introduction

Since the twenty-first century, the booming development of the world economy has brought unprecedented prosperity to China. Especially in the animation industry, due to the change of consumption concepts of young groups, the animation industry is in a booming stage, in which the phenomenon of merchandising of animation characters is becoming more and more prominent, and a large amount of capital is pouring into the animation market to get a share of it. However, the rapid economic development has also led to the lack of laws and regulations, making the animation market extremely chaotic. In recent years, under the huge commercial benefits and good market prospects of the animation industry, the phenomenon of animation characters being used in the commercial field has become commonplace. Although the merchandising of anime characters can bring huge economic benefits to businessmen, businessmen usually go for secondary exploitation of anime characters without obtaining the authorization of the copyright owners in China's anime market, which has led to frequent infringement of copyright in the market of merchandising of anime characters. This also makes us realize that the protection of the rights and interests in the merchandising of cartoon characters has become more and more urgent. At present, there is no systematic provision for the merchandising rights and interests of characters in China's legal regime, which leads to the existence of many loopholes and shortcomings in China's judicial practice. Animation characters are the derivatives of the animation industry, which is the foundation of the whole animation industry. However, in China's Copyright Law, the object of protection does not include animation characters, which is defective in the legislation.

## 2. Overview of Anime Character merchandising

(1) The phenomenon of the merchandising of anime characters

According to the World Intellectual Property Organization (WIPO), character merchandising can be defined as the adaptation or secondary exploitation by the creator of a fictional character

or a real person, or by one or several authorized third parties, of the essential personality features (such as name, image or appearance) of a character in relation to a variety of goods or services, with a view to creating in a prospective customer a desire to purchase those goods or use those services as a result of their affinity to the character. [1]The emergence of the phenomenon of the merchandising of anime characters has been accompanied by a boom in the cultural industry. The earliest recognition of the merchandising of cartoon characters can be traced back to the Walt Disney Company in the United States, which is famous for its creation of cartoon characters "Mickey Mouse" and "Donald Duck". The company had set up a secondary development department to exploit its cartoon characters, and because of this initiative, Disney gained considerable economic benefits. Merchandising refers to the exploitation of an object that was not originally in the competitive market to bring it into the realm of market transactions and create economic benefits [2].

The merchandising of anime characters is actually the secondary commercial exploitation of anime characters, which is mainly manifested in the fact that the copyright owners of anime characters use the anime characters created by themselves or authorize others to use the anime characters created by themselves, inject the relevant creative design, and develops a series of goods or services. In the whole process of merchandising, the businessmen take advantage of the consumers' preference for a well-known anime character, and develop not only the appearance of the anime character but also the name and pose of the anime character. Moreover, with the rapid changes in the market, the commercial use of anime characters is not only limited to toys, clothing, and other product lines but has also given rise to new industries such as "theme parks".

#### (2) Overview of the merchandising rights

The concept of the merchandising rights originated from the Robertson case in the United States in 1902, in which the protection of a person's name and portrait for commercial and advertising purposes was first proposed. In 1956, in the Hyland case, the U.S. Court of Appeals for the Second Circuit reversed the District Court's decision, with Judge Frank holding that in addition to a separate right to privacy, an individual has a right to the economic value of his or her portrait, which can be called the right of publicity. [3] In this case, Judge Frank did not adhere to the traditional notion of the right to privacy, and no longer confined the commercial use of another person's identity to the scope of emotional distress. Since the introduction of the American right of publicity system in Japan in the 1960s, Japan has gradually developed its own unique right of merchandising system and has conducted in-depth discussions on it. Compared with the United States and Japan, China's research on the merchandising rights started later, and the concept of the merchandising does not exist in China's legal regime, and the discussion on the system of the merchandising rights still remains at the academic level. At present, in China's academic circles, on merchandising rights, there are mainly the following doctrines: intangible property, intellectual property rights, personality rights, and so on.

### **3. The Necessity of Copyright Protection for the Rights and Interests of Anime Characters merchandising**

#### (1) Commercial value of anime characters

In recent years, the animation industry has been developing rapidly, and with the support of national policies, animation characters have shown great commercial value in today's commercial market, not only because the image of animation characters in animation works is deeply rooted in people's hearts, but also because they can become the IPs of all kinds of products, which promotes the development of various commercial activities. Anime characters are the pillars of the industry chain for the exploitation of subsequent derivatives in the anime industry, and they are almost indispensable for the secondary exploitation of any derivatives.

For example, anime characters can be licensed to various products for secondary exploitation. The images of anime characters can be licensed to toy companies for the production of dolls, models, and other merchandise, or to clothing companies for the design of clothing, accessories, and other fashionable items, or even to gaming companies for the development of mobile phone games, video games and so on. The sales of these derivative products can not only bring more attention and heat to the anime works but also bring considerable revenue to the licensor. In addition, because of their distinctive character traits, anime characters can also become advertising spokespersons to endorse various brands. Many well-known anime characters have unique personas and personalities and are loved by fans, so they can be the best choice for brand promotion. Through the image endorsement of anime characters, branded products can attract more young consumers and enhance brand awareness and reputation, thus driving the growth of product sales.

The animation industry is a huge industrial chain. In this industry chain, the animation character can be regarded as the most core element. Through the subsequent development and utilization of the character, the copyright owner and the related copyright owner can obtain considerable profits, and when the copyright owner enjoys the economic benefits brought about by the animation character, he/she will inevitably increase his/her enthusiasm for creation, and in this way, a benign cycle of the industry chain will be formed.

#### (2) Serious infringement of Copyright

Due to the huge commercial profits, rights holders of animation characters often face infringement problems. In China's judicial practice, anime characters are considered a work of fine art and are protected by the Copyright Law. In practice, the more popular anime characters are, the more serious the infringement will be, which is mainly manifested in the following ways: piracy of anime products, imitation of anime character derivatives, and malicious registration of the trademark of anime characters. The infringing parties of anime characters are usually some production and sales enterprises, in order to seek more economic benefits, the infringing enterprises will generally put the infringing products into the market for sales and thus gain revenue. In terms of the performance of infringement, since the infringing parties generally cannot obtain the original work of the anime characters, the infringing parties mainly implement the infringement by providing copies to the public. In practice, once the popularity of an online anime remains high, infringing products of the anime character will appear in the market. The infringing party will generally, without authorization, print the anime characters created by the copyright holder of the anime on their own products, or directly produce the appearance of the anime character for sale, this infringement is very common in China's consumer market. Since this kind of infringement does not produce a very large economic cost, the price of the infringing products in the market is often too low than the genuine products, which will cause the phenomenon of "Gresham's Law". In today's IP era, the animation industry also relies on the IP licensing of animation characters to boost the industry's economy. Once the infringement phenomenon occurs frequently in the market, it will inevitably cause the animation industry to suffer a huge blow, which not only compresses the profit margins of the creators of the animation works but also dampens the creative enthusiasm of the creators of the animation works. In addition, as mentioned above, the animation industry is a huge industrial chain, and when a certain link of the industrial chain has problems, it will cause paralysis of the whole industrial chain.

## **4. The Dilemma of Copyright Protection of the Rights and Interests of Anime Characters Merchandising**

#### (1) Limited copyright protection

Whether the names of anime characters should be protected is a debatable issue. According to copyright law, the names of anime characters are usually not protected by copyright. Copyright law mainly protects works with originality and expressed in certain forms, such as literary works, musical works, and works of fine art. The names of anime characters, however, usually belong to general symbols and signs, lacking originality, and therefore do not meet the protection criteria of the copyright law. The names of anime characters are often relatively short, usually consisting of two to five words as a simple name, and such short names of anime characters are usually difficult to obtain protection under copyright law. The legal basis that anime characters can be protected by copyright law is that anime characters are works of original expression. In China, anime characters are usually protected as works of fine art, but in practice, the names of anime characters often do not conform to the composition of works of fine art and are not protected by copyright law. Therefore, if the infringing party uses the name of the anime character without using the anime character, the infringing party will most likely not constitute infringement under copyright law.

In the Popeye case in Japan, the Japanese court gave a positive answer to the question of whether the name of an anime character could be protected. The focus of the case was on whether the name of the character constituted a reproduction of the anime character "Popeye". The Japanese court held that "Popeye" is a widely known anime character and the mere mention of its name conjures up an image of the character, so merely printing the name "Popeye" without the image of the anime character is a reproduction of the character. The value of this case is that only the name of the anime can also constitute a copy of the anime image. The unauthorized use of the name of the anime character also constitutes infringement. In addition, in the case of "How to Train Your Dragon", the Trademark Review and Adjudication Board held that: "How to Train Your Dragon" is the name of the movie. The words themselves cannot independently express the thoughts and feelings of the work, and do not have the elements of a work in the legal sense, so they are not works protected by the copyright law. Fine works in the Copyright Law refer to flat or three-dimensional works of art in the form of paintings, calligraphy, sculptures, etc., which are composed of lines, colors or other means and have aesthetic significance, and are protected by their forms of expression, excluding the names of the works. "HOW TO TRAIN YOUR DRAGON", as the name of a work of fine art, does not fall within the scope of protection of the Copyright Law for works of fine art, therefore, Dreamworks claimed that the registration of the opposed trademark damaged its prior copyright was not valid on the grounds of re-examination. However, the case eventually entered into judicial proceedings, and the Court of First Instance held that: As the name of a well-known movie, "How to Train Your Dragon" has a certain degree of distinctiveness. Taking into consideration of the fact that the movie work to which the opposed trademark directly and explicitly refers has a strong reputation and influence, and that the goods or services designated by the opposed trademark have a high degree of crossover with those derived from the well-known movie and there is a high likelihood of confusion and misunderstanding, it can be concluded that the scope of the merchandising rights of "How to Train Your Dragon" as the name of a well-known movie work covers the scope of the merchandising rights of the name of the famous movie work registered in Class 41, Education, Entertainment, and Provision of Goods and Services on Computer Networks. The registration of the opposed trademark has squeezed out the commercial value and trading opportunities of "How to Train Your Dragon" in the derivative goods and services enjoyed by DreamWorks, and has damaged DreamWorks' merchandising rights of "How to Train Your Dragon" as the name well-known movie work.

From the above cases, it can be concluded that the names of anime characters can be protected by the law, only that they present different patterns in the way of protection. The name of an anime character is a symbol for the anime character. In the digital age of the Internet, the mode of commercial marketing has developed rapidly, and the use of the name of anime characters

to promote products or services is no longer a novel method. When the name of an anime character is mentioned, the public will associate it with the anime character, which can trigger the public's desire to buy the merchandise and bring more trading opportunities for businessmen. In the current Chinese market, the name of anime characters has a certain commercial value and should be protected by law. Moreover, in judicial practice, the lawsuits against anime characters are mostly based on copyright infringement, but there is no corresponding law to protect the name of anime characters in China's copyright law, which makes some merchants use the name of anime characters directly to create additional economic benefits for their products or services.

## (2) Difficulty in the infringement determination

The Copyright Law does not specify what kind of works anime characters should be classified as for protection, but in judicial practice, judges usually classify them as works of fine art for protection. Although the infringement of the merchandising of anime characters can be classified as a work of fine art for protection, it often creates certain difficulties in the infringement determination. Firstly, in determining whether the rights and interests of the owner of anime characters are infringed, the court mainly follows the rule of "substantial similarity", but the criteria for determining substantial similarity are difficult to grasp. In determining the similarity of anime characters, the appearance, costumes, and character are all the elements to be considered, because these elements are the reason why the anime characters have originality. Secondly, in determining whether anime characters are copyrightability, the courts have different standards, with some courts making formal examination on the basis of whether the copyright is registered, while others prefer substantive examination on the basis of whether the anime character is original. The reason for the different examination standards is that it is still to be examined whether some of the anime characters can meet the composition standard of a work of fine art. The drawing style of some of the anime characters in the anime works can be said to be very common, and the materials used for their creation should be attributed to the public domain, which may not meet the composition standard of a work of fine art at all. The constituent elements of any work must be original, and the criterion of originality is considered to be a necessary element for constituting a work, but there is a lack of a uniform criterion as to what kind of originality meets the composition of a work. Due to the lack of originality standard, the court often can only formally judge whether it constitutes a work when trying a case, i.e., simply judge whether the work is registered or not, which tells the truth that the court in fact does not have its own judgement standard but solves the problem with the help of the administrative organ's registration procedure.

## (3) Unreasonable standard of compensation

The creation of anime works is very time-consuming. In the animation industry chain, the secondary exploitation of animation characters is the economic pillar of the creation of animation works, and once the secondary exploitation of animation characters is affected by the infringement of copyright, it will inevitably cause the overall dynamism of the creation of the animation industry. In addition, the core of anime works is anime characters, and in today's anime industry, character design is an important part of creation, and once infringement occurs, the damage caused to the original author is often incalculable.

Firstly, the existing compensation standards for infringement are relatively low. According to Copyright Law and other relevant laws and regulations, the amount of compensation for infringement is generally based on the market value of the original work or the profit derived from the infringement. However, due to the complexity and specificity of the animation industry, it is difficult for the court to accurately assess the market value of the anime character, which results in the amount of compensation often being on the low side and unable to truly serve as a disciplinary and compensatory measure. Moreover, in most of the infringement cases, the copyright owner simply cannot prove their property losses, and it is also difficult to prove

the economic gains obtained by the infringing parties, which also makes it impossible for the court to find a reference basis when deciding the amount of damages. Secondly, the penalty for infringement is insufficient. In some cases of infringement, the infringing parties often only need to pay a relatively low amount of compensation to get away with it, and there is no effective punishment for the infringement. This situation is likely to lead to the frequent occurrence of infringement, which seriously undermines the original author's creative enthusiasm and rights and interests. In addition, in litigation, the burden of proof lies upon him who affirms, based on which, the copyright owner needs to spend a lot of human and material costs to find evidence, and the lengthy litigation process has been increasing the cost of the copyright owner. Compared with the copyright owner, the infringing parties' infringement cost is very low, especially in today's digital economy, the diversification of infringement forms, low cost, and other characteristics make the infringing parties carry out the infringement frequently without concern.

## **5. Suggestions for Copyright Protection of the Rights and Interests of Anime Characters merchandising**

### **(1) Establish the merchandising rights**

The Copyright Law currently does not make clear provisions on the merchandising rights and interests of anime characters, which is a loophole. In academic research, the viewpoints on whether to apply the protection mode of merchandising rights can be divided into the following: one viewpoint is that China should construct the independent merchandising rights of animation characters, because it is different from the traditional intellectual property rights that have the object of protection. [4] Another view is that it is not necessary to create a new type of right specifically to provide protection for animation characters, because comprehensive protection of animation characters is provided by copyright law, trademark law and anti-unfair competition law[5].

Anime characters are protected by the copyright law as works of fine art, but anime characters have their special characteristics, i.e., they can be used commercially. In the process of merchandising, not only the overall image of the anime character is included, but also other factors such as the name of the anime character and dubbing. Although anime characters can be protected by the copyright law, other elements attached to the characters such as their names cannot be protected by copyright law. Therefore, it is possible to try to introduce the merchandising rights into copyright law as a new type of right to protect the rights and interests of merchandising of anime characters. The introduction of the merchandising rights into the copyright law is of great significance. The establishment of this right is not only conducive to the protection of the rights and interests of the creators, but also promotes the prosperity of the cultural industry, economic growth, and social progress, and reduces the occurrence of infringement. The primary purpose of the Copyright Law is to protect the copyright of authors of literary, artistic, and scientific works, as well as the rights and interests related to copyright, to encourage the creation and dissemination of works beneficial to the construction of the socialist spiritual civilization and material civilization, and to promote the development and prosperity of the socialist cultural and scientific undertakings.[6] Obviously, the merchandising rights is to provide the copyright owner with the right to develop their works for secondary exploitation. This means that copyright owner can legally promote their works to the market, commercialize them, and obtain economic returns from them. As mentioned above, in the process of merchandising, the copyright law is unable to protect the names of anime characters, and businessmen often exploit the loopholes in the law and commit acts that infringe on the rights holders. However, if a new type of right, the merchandising rights, is introduced into the

copyright law, the legitimate rights and interests of the copyright owners of anime characters will be fully protected.

The establishment of laws and regulations must be forward-looking. Nowadays, the phenomenon of merchandising of cartoon characters has become very popular, and the problem of infringement has gradually increased, so the introduction of the merchandising rights is necessary. However, when introducing the merchandising rights, attention should be paid to the object of protection, the scope of protection. In terms of the object of protection, it must be anime characters with certain popularity to be protected, not all anime characters can be protected, and some anime characters are just insignificant accompanying characters in the whole anime, and their drawing style design is just simply sketched out by a few lines, and does not have its originality. In addition, in terms of the scope of protection, the merchandising rights does not intervene in all acts of merchandising but considers merchandising factors that have greater influence and commercial potential.[7] For example, the names of anime characters, dubbing, iconic movements, etc. need to be included in the scope of protection of the merchandising rights.

## (2) Improve the criteria for infringement determination

In judging the infringement of anime characters, the first thing that should be addressed is whether the work is copyrightable, and the core issue in judging whether anime characters are copyrightable is whether they are original. The issue of originality standard has always been a hot topic. The U.S. has gone through two major standards, from the "the distinct delineation test" to the "the story being told test", but its major standards have not solved the problem of originality determination.[8] The distinct delineation test is difficult to apply. it is vague and asks judges to assume the roles of literary critics, and it is often applied wrongly leading to overprotection, and it does not necessarily protect the most developed characters.[9] The same dilemma applies to "the story being told test".

Since the determination of originality is inclined to subjective cognition, courts around the world are not uniform in their determination of originality, so the problem should be solved through judicial practice, and the Supreme People's Court can issue some guiding cases so that the courts around the world tend to unify the determination of whether anime characters are copyrightable or not. Secondly, on the standard of substantial similarity, the appearance and image of anime characters is an important judgement standard, the appearance mainly includes the clothing, facial features, hairstyle, etc. of anime characters, if the infringing products are very similar in their appearance, then it can be concluded that the infringing products constitute similarity in appearance. However, similarity in appearance does not necessarily constitute substantial similarity, and the character traits and background stories of the anime characters should also be taken into account. In addition, it should also be considered whether the anime characters are in the public domain of society. If an anime character is in the public domain, some of its rights will not be protected by the copyright law, in which case the use of the anime character for secondary exploitation will no longer be an infringing act. For example, the copyright of Mickey Mouse, a cartoon character of the Disney Company of the United States, has expired, and the public can use the cartoon character free of charge.

## (3) Construct reasonable standards of compensation

The confirmation of the standard of damages for copyright infringement is an important part of protecting the legitimate rights and interests of copyright holders and maintaining market order. According to the Copyright Law, in the event of infringement of copyright or copyright-related rights, the infringer shall pay compensation in accordance with the actual loss suffered by the copyright owner as a result of the infringement or the infringer's unlawful income; if it is difficult to calculate the actual loss suffered by the copyright owner or the infringer's unlawful income, compensation may be paid by reference to the copyright royalty charges. Although the

above legal provisions stipulate the order of compensation, the principle of fairness and reasonableness still needs to be taken into consideration when determining the amount of compensation, which should take into account the rights and interests of the copyright owner and the affordability of the infringer, so as to avoid unfairness due to the excessively high or low amount of compensation. At the same time, it is also necessary to take into account the impact of infringement on the market order and industry development, to avoid adverse effects on the market. In addition, the compensation standard for copyright infringement should also be punitive, which can not only play a role in punishing infringement and maintaining the copyright system but also serve as a warning to potential infringers and reduce the occurrence of infringement.

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