

# The Concept, Type, and Rules of Use of "Works that Can be Exploited Separately"

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**Abstract:** "Work that can be exploited separately" is a category of work within audiovisual works that can be used alone rather than a specific work defined by Article 3 of China's Copyright Law. Depending on the time and intention of its creation, the work can be classified as "pre-existing work" or "work for others." Based on the derivative nature of audiovisual works, it is possible to establish rules for the use of pre-existing works, i.e. non-audiovisual means of exercising copyright over portions of audiovisual works that can be used separately. The rules for the use of works for others can be based on the cooperative characteristics of audiovisual works; for instance, copyright can only be claimed for the original expression of the work, and the exercise of rights shall not infringe the overall copyright of the audiovisual work and shall be limited by the filming contract.

## 1. Introduction

Audiovisual works typically consist of moving or continuous images, regardless of whether the carrier can be fixed to a specific medium or not, and can be displayed using projectors and other mechanical equipment [1]. In terms of the longitudinal dimension of time, audiovisual works are frequently derived from previous works, and their content is typically complex. And in terms of the horizontal dimension of the product subject of audiovisual works, the creation of audiovisual works is the result of the creative labor of multiple subjects, including screenwriters, directors, and photographers, illustrating the composite nature of the creative subject. Due to the complexity of audiovisual works, copyright is also complex: copyright exists not only for the entire work but also for its individual components. How can the copyright of works that can be exploited separately be exercised? How to deal with its relationship with the copyright of audiovisual works? Such matters require clarification.

Article 15, paragraph 2, of China's "Copyright Law", confirms the existence of "works that can be exploited separately" in audiovisual works and clarifies that the author of such works has the right to exercise copyright alone. It did not, however, explain the concept, type, and specific usage rules of these works. With the refinement and specialization of production technology, the production of audiovisual works is more multi-layered and three-dimensional, and there are an increasing number of production subjects. Are the creative achievements of these subjects works that can be exploited separately? If the usage rules of "works that can be exploited separately" cannot be further refined, it will inevitably lead to contradictions and conflicts in the exercise of copyrights. For example, because of the diversification of copyright operation of audiovisual works, disputes over the ownership of the copyright to characters in audiovisual works frequently arise in practice. When there is no agreement or the agreement is not clear, the creator of the character and the producer of the audiovisual work each claim that they own the copyright of the character, resulting in a dispute over the ownership of the rights. Different courts have different understandings on the ownership of copyright while facing these disputes. For example, in the cases of "Qu Jianfang v. Beijing Afanti Company" [2] and "Shanghai Animation Film Studio v. Hongyu Company's Copyright Dispute Case" [3], the two courts held completely different views of what is a "work that can be exploited separately". In the previous case, the court held that the producer only owned the copyright to the audiovisual work as a whole and the author of the character can claim independent copyright for his creation, thereby confirming that the character is a work that can be exploited separately. In the latter case,

after affirming that the character belongs to a work of art, the court adjudicated that the produce owns the copyright to it, denying that the character image belongs to a work that can be exploited separately.

Theoretically, there is no consensus regarding "works that can be exploited separately" in audiovisual works. Regarding the extent to which copyright holders of original works can regulate the use of audiovisual works, scholarly opinion varies. According to Professor Qu Sanqiang and other scholars, once a producer obtains permission from the original author to film an audiovisual work, the original author loses control over the work's use [4]. In contrast, Wang Qian and other academics argue that once the owner of the copyright to the original work permits the producer to create derivative works, he retains control over the use of the audiovisual works [5]. Clearly, the lack of theoretical research and consensus makes it difficult for academic theory to meet the needs of practice.

In view of the ambiguity and controversy surrounding the copyright issue of "works that can be exploited separately" in the legislative and practical circles, as well as the lack of theoretical research, this article will build its usage rules on the basis of clarifying the concept of "works that can be exploited separately".

## **2. Definition of "Works that Can be Exploited Separately"**

Without the use of specific and well-defined concepts, it is impossible to resolve legal issues in a clear and logical manner [6]. The absence of fundamental concepts in legislation contributes to blurring right boundaries. As a result, we should first define the concept of "works that can be exploited separately" and then use it as a foundation for developing usage rules.

A complete definition should include the upper concept of the defined object and its commonalities [7]. According to this, a creation classified as "work that can be exploited separately" must have the characteristics of work, which are originality and usability. On the one hand, it is impossible for the creative achievement to become a "work that can be exploited separately" if it cannot constitute a work in the legal sense. Therefore, the judgment of whether it constitutes a work that can be exploited separately should first identify the most basic originality. On the other hand, the difference between a work that can be exploited separately and a general work is that the former exists within the audiovisual work meanwhile can be used alone. "Separative Usability" contains two aspects of meanings: one is the possibility of separation. Only when the creation can be separated from the audiovisual works and given independent forms of expression can the author possibly exercise the copyright on its own [8]. The other is possibility of usability, a copyright can only be exercised because it will bring the author economic benefits. There is an opinion that a work that can be used independently after being separated from the original work should not be identified as a work that can be exploited separately because its method of use is rarely adopted by people or difficult to produce substantive meaning [9]. In contrast, the expression in Article 15, Paragraph 2 of the Copyright Law, does not restrict the ways of achieving "Separative Usability". Similarly, In practice, some works that are difficult to utilize through conventional means or their uses that are difficult to generate significant economic benefits may be separated from original works and meet the conditions for works that can be exploited separately. Therefore, the authors' rights to exploited the work separately must be reserved. To summarize, when determining the possibility of usability, it is not necessary to emphasize whether the method of use is widespread or of substantially importance.

In summary, determining whether a creative achievement can be considered a "work that can be exploited separately" requires examining whether it meets the originality standard and can be used separately. The possibility of separation and the possibility of usability are both included in separative usability. On this basis, in conjunction with the definition's requirements, a work that can be exploited separately can be defined as: a work that exists in audiovisual works and has separative usability.

## **3. Classification of "Works that Can be exploited Separately"**

"Works that can be exploited separately" can be subdivided into "pre-existing works" and "works for others" on the basis of the production time and creative purpose of the work. Due to the fact that these two categories of works are distinct from one another, their legal relationship with audiovisual

works is not the same, resulting in differences in the rules of use between them, so they must be discussed separately.

### **3.1 "Pre-existing works" as the Basis for the Creation of Audiovisual Works**

From the standpoint of the law of creation, audiovisual works are generally based on the adaptation and production of pre-existing works. The film "The Best of Us," for example, is based on Ba yue Chang'an's novel of the same name. The novel was written and published independently by the author prior to the filming. As a result, the novel's author is unquestionably entitled to copyright. Similarly, scripts, music, dance, and artistic images completed prior to audiovisual works for independent purposes are considered pre-existing works.

Audiovisual works and pre-existing works typically have different objective forms in terms of expression. Prior works were also created earlier than audiovisual works in terms of creation time. As a result, there should be no difficulty distinguishing between the two. However, there are different voices in academic circles on whether novels should be regarded as works that can be exploited separately. In fact, if the law provides adequate legal protection for novels, it is unnecessary to distinguish whether they are works that can be exploited separately or not because the original intention of the legislation to identify "works that can be exploited separately" is to protect the portion of audiovisual works that should have copyright. As a written work, the novel itself already enjoys independent copyright, so its legal protection as a prior work is no different than that of an original work.

### **3.2 "Works for Others" Created for the Production Needs of Audiovisual Works**

In addition to the pre-existing works prior to filming, some works are usually created in the production process of audiovisual works to meet the needs of filming. Certain works among them can be considered work that can be exploited separately due to their separative usability. An example would be the composition of songs specifically for audiovisual works or the design of artistic images. Furthermore, some audiovisual works that are "broadcasting while filming" require the script to be modified in response to market feedback, such as audience ratings. The goal of creating such scripts is highly subject to the needs of filming and produced during the production of audiovisual works, so they are also "works for others".

Concerning the scope of works for others, there are always controversies in theoretical circles regarding whether characters and single-frame images are "works that can be exploited separately". The question of whether characters are "work that can be exploited separately" should be answered in the context of the characteristics of audiovisual works. As a single frame picture or unique art design, the character can not constitute audiovisual works or fragments of audiovisual works because it does not have the characteristics of activity and continuity [10]. And Furthermore, character constitutes a work of art because it meets the originality standard and has an independent form of expression, so it can be protected as a work that can be exploited separately. Meanwhile, it is worth noting that the producer further designs and recreates based on the previous character, and the new character generated after adding new original expressions should be considered a derivative work of the original character [11], with the producer owning the copyright. A single frame, on the other hand, is more likely to be considered a photographic work rather than a "work that can be exploited separately," because the single-frame picture is a copy and screenshot from the audiovisual work, and no new creation has been produced, so the copyright belongs to the producer [12]. In fact, rather than a simple copy and screenshot, audiovisual works produced by cinematography can process and add new creative elements to the final image presentation[13]. It will be difficult to meet the needs of reality if single-frame pictures are protected solely through photographic works, which may make it difficult for some single-frame pictures with special effects to be recognized as photographic works and thus protected. As a result, protecting a single frame through audiovisual works is more logical. Similarly, a single frame should be regarded as a work that can be exploited separately due to its originality and separative usability.

## **4. The Construction of "Works Can be Exploited Separately" Use Rules**

### **4.1 The Construction Basis of "Works Can be Exploited Separately" Use Rules**

#### **4.1.1 Derivative Attributes of Audiovisual Works**

The premise of developing rules for using pre-existing works is to clarify the legal relationship between audiovisual works and pre-existing works. Although the completion of an audiovisual work based on an adaptation of a pre-existing work has a distinctly derivative character from the standpoint of production rules, it is not entirely reasonable to characterize audiovisual works as derivative works of pre-existing works. First, filming is not listed as a form of derivation in Article 13 of the Copyright Law. Second, the creation and distribution of audiovisual works do not strictly adhere to the "dual licensing" rules for derivative works.

In order to clarify the legal attributes of audiovisual works under copyright law, we can begin by conducting an examination of the pertinent provisions contained within the Berne Convention ( hereinafter referred to as the "Convention" ). The exclusive right of the author of the pre-existing work is stipulated in Article 14, paragraph 1, of the Convention. Based on this provision, some academics draw the conclusion that the "Convention" considers audiovisual works to be derivative works of the original works [14]. However, the convention already states in Article 14 bis, paragraph 1, that audiovisual works should be protected as other original works. As a consequence of this, it is important to have a discussion about whether or not audiovisual works can be considered derivative works. Does this imply that the convention rejects the idea that audiovisual works have a derivative attributes? In point of fact, no. To begin, the presumption of legalisation found in Article 14 bis, paragraph 2(b) of the convention provides producers with the right to use audiovisual works even in the absence of a specific agreement or one that explicitly contradicts it. Second, paragraph 3 of the article excludes screenplays, lines, and musical compositions composed for films. According to what was said in the earlier section on the pre-existing works, it is clear that these works have been completed or published before the production of audiovisual works, and the authors of those works undoubtedly have independent copyright. The purpose of the "Convention" is clearly to express the recognition of the derivative attribute of audiovisual works through legalization presumption and presumption exception [15], as well as to protect it as an original work. This kind of setting leaves legal space for those countries that consider audiovisual works to be joint works.

Despite the fact that the Copyright Law does not place audiovisual works within the framework of rules governing derivative works, in light of the derivative nature of the creation rules for audiovisual works as well as the spirit of the convention, it is essential to take into account the derivative nature of audiovisual works when developing the using rules for "works that can be exploited separately".

#### **4.1.2 Collaborative Features of Audiovisual Works**

Audiovisual works are, in a sense, the most complex forms of collaborative works because they involve the creative efforts of a number of individuals, including directors, photographers, and many others [16]. It is possible to divide joint works into two categories: divisible joint works and indivisible joint works, and the distinction lies in whether or not the individual parts of the work can be used independently. As a result, audiovisual works are a special category that exhibits both of the attributes of joint works. Is the work that can be exploited separately considered a divisible work? The fact of the matter is that such a conclusion can be logically established but does not accord with the facts. On the one hand, audiovisual works have various attributes, such as derivative works, works made for hire, and joint works at the same time, and are not strictly joint works. On the other hand, despite the fact that works that can be used independently and divisible joint works share some similarities, the impact of their independent use on the original work is not the same. For example, songs are separated by different singers singing, and the author separately publishes the chapters independently created in the cooperative novels, which has a greater impact on the market of the original works and is essentially substitutable. In contrast, the market for works that can be exploited separately does not overlap too much with the market for audiovisual works because of the significant differences in the expression forms of the various components of audiovisual works. For instance,

works such as soundtracks for the movie and character have different audiences than audiovisual works. To sum up, a work that can be exploited separately is distinct from a joint work that can be divided, but both types of works share a common characteristic.

Despite the fact that works that can be exploited separately are not the same as divisible joint works, considering the collaborative nature of audiovisual works. The fact that such works share characteristics with divisible works is still a consideration that cannot be neglected when developing the rules of their use.

## **4.2 The Usage Rules for "Works that Can be Exploited Separately"**

### **4.2.1 Rules of Use of Pre-existing Works**

The copyright holders of pre-existing works, such as novels, scripts, and music, are granted copyrights that are distinct from the overall copyrights of audiovisual works. The basis for these copyrights is the legal protection accorded to general works. However, it is unclear to what extent the owner of the copyright to the preexisting work can exercise this copyright.

Based on the derivative nature of audiovisual works, the usage rules of pre-existing works can be deduced reverse from the producer's scope of rights. According to the expression of Article 17, paragraph 1 of the "Copyright Law", producers seem to be able to exercise the copyright in any way, and the boundaries of their rights are blurred. According to one point of view, the owner of the copyright to a work that already exists does not have the legal right to exercise any form of control over the author's use of the audiovisual work by the producer [17]. In a similar vein, there is the point of view that once the audiovisual work has been completed, the copyright owner of work that can be exploited separately authorizes the producer to shoot his work into an audiovisual work, then the subsequent use of the audiovisual work by the producer cannot be prevented, and the producer owns the overall copyright of the film work. Finally, the third party can use the work with the producer's permission [18]. This point of view is not universally accepted. On the contrary, some people believe that in order to exercise the copyright in derivative works, one should first obtain permission from the owner of the copyright to the original work, which is in accordance with the general rules of derivative works [19]. From the perspective of authorization, based on the requirements of filming audiovisual works, the owner of the copyright to the pre-existing work must grant the producer permission to exercise exclusive production rights. However, the adaptation of audiovisual works after the completion of production of audiovisual works is not required for the dissemination of film works, so there is no need for the copyright owner of the pre-existing works to grant such rights to producers. This is because the adaptation of audiovisual works after the completion of production of audiovisual works is not required [20]. From the perspective of the balance of interests, when the copyright owner of the pre-existing work considers the consideration obtained by authorizing the producer to film, it is impossible to estimate the market revenue generated by the secondary use of the audiovisual work. Therefore, after the audiovisual work has been completed, the producer is not required to obtain the consent of the copyright owner of the pre-existing work for reproduction, distribution, public performance, and other uses that are consistent with the purpose of the audiovisual production, while permission should be obtained for secondary uses such as adaptation of the audiovisual work for the reason that the copyright owner of pre-existing work only authorizes the producer to exploit its work within the scope of the production and distribution of audiovisual works.

There is no controversy regarding the general use of scripts, such as adapting scripts into stage plays and recording songs onto records, as long as they do not affect the overall copyright exercise of audiovisual works. As for the second authorization of pre-existing works, even though such use will have an effect on the market of original audiovisual works, after all, the option to renew is not a legal right, and the most appropriate way to resolve this issue is through the use of a contract. Both sides should follow the principle of good faith to promote the completion and dissemination of audiovisual works. In a nutshell, the copyright owner of the pre-existing work has the right to exercise the copyright in a non-audiovisual manner.

#### 4.2.2 The Use Rules of Works for Other

From the perspective that audiovisual works have the characteristics of cooperation, the use of "works for others" that are components of audiovisual works shall not infringe the copyright of audiovisual works as a whole. Therefore, the owner of the copyright may only use the works for others in their original form, and they may not incorporate the producer's newly created intellectual achievements when creating audiovisual works. Using the soundtrack of an audiovisual work as an example, the copyright holder may only use the words or music of the soundtrack, but not the image of the audiovisual work, because the use of the soundtrack with images is essentially the use of the audiovisual work. In addition, the copyright of the animation image based on the original role-modeling sketch should belong to the creator of the new intellectual achievements in the audiovisual production process. Moreover, according to the principle of autonomy of will, the exercise of copyright for the copyright owner of works for others is also limited by the filming contract signed with the producer. The scope of rights exercisable depends on the type of rights granted to the producer by the copyright holder. Consequently, the separate use of works for others cannot conflict with the contract's intent.

In a nutshell, the owner of the copyright of "works for others" can use the works in a manner that is non-audiovisual, and they must not obstruct the producer's dissemination and use of audiovisual works in audiovisual form. The scope of use is also restricted by the filming contract, and the independent use of works for others shall not be contrary to the contract's purpose.

#### 5. Conclusion

The complex nature of audiovisual works creates the complex nature of their copyrights. There is both a copyright for the entire work and a copyright for each individual work. Consequently, in addition to the producer, the author of the portion of the audiovisual work that can be exploited separately has limited access to the audiovisual work's copyright. In order to resolve the long-standing issues of ambiguous concepts and unclear rules of use regarding works that can be exploited separately, this article first clarifies the concept of such works and then separates the two types of works from the pre-existing works and works for others. From the perspective of type analysis, derivative attributes, and cooperative characteristics of audiovisual works, the usage rules for works that can be exploited separately are constructed.

#### References

- [1] Yu Huanzhi. Research on copyright ownership of audiovisual works[D]. East China University of Political Science and Law, 2015:18.
- [2] See the Civil Judgment (2007) Er Zhong Min Chu Zi No. 210 of the Second Intermediate People's Court of Beijing.
- [3] See Shanghai Higher People's Court (2009) Hu Gao Min San (Zhi) Zhong Zi No. 7 Civil Judgment.
- [4] Qu Sanqiang. On the legal relationship of film and television works [J]. Intellectual Property, 2010,20(02):16-22.
- [5] Wang Qian. The Redefinition of "Film Works" and the Improvement of Copyright Ownership and Exercise Rules[J]. Law, 2008(04):83-92.
- [6] [US] Bodenheimer. Jurisprudence: Legal Philosophy and Legal Method [M]. Translated by Deng Zhenglai. Beijing: China University of Political Science and Law Press. 2004:504.
- [7] Wu Handong. Research on the Basic Theory of Intellectual Property System [M]. Beijing: Intellectual Property Press, 2009:10.
- [8] Liu Chuntian. Intellectual Property Law [M]. Renmin University of China Press, 2009: 100.
- [9] Zhang Yanbing. Analysis on copyright ownership and benefit distribution of audiovisual works

- [D]. Beijing: China University of Political Science and Law, 2015: 29.
- [10] Yu Huanzhi. Research on copyright ownership of audiovisual works [D]. East China University of Political Science and Law, 2015:18.
- [11] See the Civil Judgment (2014) Hang Bin Zhi Chu Zi No. 634 of the People's Court of Binjiang District, Hangzhou City.
- [12] Feng Shiming. Research on "works that can be used alone" in film works [D]. East China University of Political Science and Law, 2011:12.
- [13] Lan Hao. Attribute identification and referee considerations of single-frame film and television screens [J]. Science and Technology and Law, 2020 (02): 54-62.
- [14] Wang Xiaoyang. Reconstruction of the rights and interests of the copyright subject of audiovisual works [D]. East China University of Political Science and Law, 2013:8.
- [15] Zhang Jin. The definition of "works that can be used independently" in the sense of copyright attribution and research on the exercise of rights [J]. Law Journal, 2020, 41(06): 1-10.
- [16] Wang Qian. Course of Intellectual Property Law [M]. Beijing: Renmin University of China Press, 2009: 188.
- [17] Ye Jin. Research on copyright ownership of film works [D]. East China University of Political Science and Law, 2018: 35.
- [18] See Shanghai Higher People's Court (2005) Hu Gao Min San (Zhi) Zhong Zi No. 137 Civil Judgment.
- [19] Wang Qian. The Redefinition of "Film Works" and the Improvement of Copyright Ownership and Exercise Rules[J]. Law, 2008(04):83-92.
- [20] Chen Shaoling. Research on "works that can be used alone" in film works [J]. Hebei Law, 2011, 29(06): 99-104.