

The “Substantial Similarity” Judgment in Copyright

From the Perspective of Jin Yong V. Jiangnan Case

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Abstract—This paper introduces Jin Yong v. Jiangnan case, reviews the historical origin of “substantial similarity”, defines its legal connotation, and discusses the legal conditions that constitute “substantial similarity” in two situations with similar works. Finally, the judging elements of “substantial similarity” are summarized: “substantial similarity” is the similarity of original expression in the original works. In the case of fragmented literal similarity and comprehensive non-literal similarity, if the plot and statement are clearly expressed similarity or the plot constitutes the overall similarity of the works, “substantial similarity” is constituted; if the subject matter and the thought are similar, but there are significant differences in the specific plot arrangement and detail expression, “substantial similarity” is not constituted.

Keywords—*substantial similarity; originality; expression*

I. INTRODUCTION

“Substantial similarity” as an imported concept introduced with the Copyright Law, it is a relatively new concept in China. Because there is no unified standard in the judicial circle, the judges are used to explain it according to their own understanding and judgment during specific jurisprudence. Therefore, it is imperative to unify the legal connotation of “substantial similarity” as soon as possible and to clarify the judgment of “substantial similarity”. This article starts with Jin Yong v. Jiangnan case, and introduces the dispute point of what does “substantial similarity” mean in copyright? To clarify whether the similar parts of the work in the case are “substantially similar”, we must first clarify the origin and legal connotation, and then discuss the two situations in which the works are similar, and what legal conditions these two situations should meet in order to constitute “substantial similarity”, and finally a simple comment on Jin Yong v. Jiangnan case.

II. THE QUESTION IS RAISED: THE DISPUTE FOCUS OF JIN YONG V. JIANGNAN CASE

On April 25, 2017, Zha Liangyong (pseudonym is “Jin Yong”, hereinafter referred to as “Jin Yong”) v. Yang Zhi (pseudonym is “Jiangnan”, hereinafter referred to as “Jiangnan”) and other copyright infringement and unfair competition disputes (hereinafter referred to as “Jin Yong v. Jiangnan case” or “this case”) was heard in Guangdong. The case has received widespread attention from the beginning of the prosecution. On one hand, due to the special status of the two parties, the plaintiff Jinyong is a well-known martial arts

novel writer, the defendant Jiangnan is also a benchmark figure in the literary world. On the other hand, this case is regarded as a “The first case of domestic fan work”, its judgment results will play a model role in how to regulate the “fan works” in the future.¹

In the case of Jin Yong v. Jiangnan, the plaintiff claimed the defendant Jiangnan copy the classic characters in “Legends of the Condor Heroes” including the names of the characters, the relationship of the characters, and the personality traits without the permission of the plaintiff, the same plots were tailored in different environments, and the original character of the plaintiff is adapted without authorization; and the defendant argues that there are a lot of differences in the work “There they were” with the work plaintiff advocates in the type of work, theme, background of the times, face of the characters, relationship of the characters, structure of the story, and storyline. And the original expressions in the plaintiff’s works are not used, so they do not constitute substantive similarities. In summary, the focus of the dispute in this case is that the plaintiff believes that the “similarity” of the relationship between the characters, the character traits and the storyline in the “There they were” is “substantially similar” in the sense of copyright. This question also directly determines whether the defendant infringes the copyright of the plaintiff.

III. THE HISTORICAL TRACEABILITY AND LEGAL CONNOTATION OF “SUBSTANTIAL SIMILARITY”

Before discussing whether the “similarity” involved in Jin Yong v. Jiangnan case is “substantially similar”, the author believes that the meaning of “substantial similarity” must be clarified first.

The “substantial similarity” was first appeared in 1914. New York District Court first proposed the concept of “substantial similarity” in the case of Chautauqua School of Nursing v. National School of Nursing. In 1935, the District Court of Virginia in California again referred to “substantial similarity” in the case of Echevarria v. Warner Bros. Pictures, Inc., et al. case, but the term has been lacking a clear definition, so that it was called by Professor Nemo. Known as “one of the most difficult issues in copyright law”.² Until

¹ See Tianhe District People’s Court of Guangzhou City, Guangdong Province (2016) Guangdong 0106 Minchuzi No. 12068.

² See Melville Nimmer and David Nimmer, Nimmer on Copyright, New York: Matthew Bender & Co. Inc, 2007§118.09(A) at 8-114.

1946, Judge Frank gave a certain explanation of “Substantial similarity” in the *Arnstein v. Poter* case: “It is not the analysis of the written expression of the music or the analysis of the trained musician’s evaluation of the music or other comparisons of the music....but whether the defendant has plagiarized a large amount of music that the general amateur listeners like from the plaintiff’s work, which makes the defendant misappropriate the plaintiff’s protected works”.³ Although after the *Arnstein v. Poter* case, the US judicial decided the “ordinary observer” is the subject of judgment of “substantial similarity”, but this interpretation still avoids the definition of “substantial similarity” from the positive side.⁴

The meaning of “substantial similarity” from the surface can be interpreted as: the same or similarity of the substantive parts between the works involved. The substantive part has nothing to do with the proportion of the work, even if the proportion is low, it may constitute a substantial part of the work. As far as China is concerned, “substantial similarity” as an exotic product has no unified introduction in the theoretical circle of our country. However, in actual judgments, it can be found that judges often quote “substantial similarity” to judge infringement. For example, in the case of *Jin Yong v. Jiangnan* discussed in this article, the People’s Court of Tianhe District of Guangzhou stated “substantial similarity” is such: There is an abstract form similarity between the character name, character relationship, character traits and storyline of “There they were” and the plaintiff’s work that does not lead to the reader’s experience of the same or similar appreciation. The two do not constitute a substantive similarity”. Although this judgment cites “substantial similarity”, it still does not clearly define “substantively similar”. It can be seen that the concept of “substantial similarity” is unclear in China’s judicial circles. Judges often understand “substantial similarity” based on subjective feelings.⁵

In order to determine whether a work constitutes “substantial similarity”, it is necessary to clarify the content of the substantive part. “Substantial similarity” is often mistakenly considered to be “similarity of the main part of the work”, even if the main part of the work is similar, as long as it is not a copy of substantial part, is not infringement. For example, in *Jin Yong v. Jiangnan* case, the names of the characters involved in the defendant’s works, the personality of the characters and the relationship of the characters are all customary expressions of the novels, therefore, the elements of these works should not be considered as infringement similar to the plaintiff’s works. So, how should we understand the “substantial similarity” in the legal sense?

Substantial similarity in some aspects, is actually a conclusion that the defendant’s copyright infringement was established only when the work in question has a substantially similar result. The act of producing

substantially similar results is the act of plagiarizing the plaintiff’s copyrighted work, manifested as the same or similar reproduction. From the behavioral level, the legal “substantial similarity” means that the defendant’s work is identical or similar to the original expression of the plaintiff’s work. Therefore, the substantive part of the work is the original expression of the plaintiff.⁶ China has had the wrong view that “It should be considered as infringement as long as the defendant’s work is similar to the result of the plaintiff’s work, regardless of whether the similar part is the original expression of the plaintiff”, so *Jin Yong v. Jiangnan* case, because of the names and personality of the characters are similar in the involved work, so the “There they were” should be regarded as infringement. As a result, all the fan works in the limelight will be judged as infringing works, which undoubtedly reduces the enthusiasm of the creators and is contrary to the purpose of the copyright law. Obviously this view cannot be established.⁷

IV. THE TWO TYPES OF “SUBSTANTIAL SIMILARITY”

Professor Nemo of the United States mainly divided the similarities of works into two types: fragmented literal similarity and comprehensive non-literal similarity. Fragmented literal similarity means that there are several pieces of the same or similar parts between the works, such as the similarity of the sentence and paragraphs in the text works, the partial picture similarity in the art works, etc.; the comprehensive non-literal similarity means that the overall systemic structure of the works is the same or similar, for example, the fan work involved in *Jin Yong v. Jiangnan* case, the content or framework of most fan works are derived from the original works, at this time, it constitutes a comprehensive non-literal similarity. However, if only the above two similar situations exist, it will not necessarily lead to “substantial similarity”, some statutory conditions need to be met as well.

A. *Fragmented Literal Similarity*

Fragmented literal similarity can be divided into synonymous substitution similarity and sentence-by-sentence similarity. If the original work is entirely copied, there is no need to distinguish whether the similarity is the original part of the original work, but if it is partial similarity to the original work, then it is necessary to further identify whether the part is a “substantial part”. Therefore, the key to determining whether there is “substantial similarity” is the proportion and quality of similar parts in the original works. When the expressions are identical, as long as the same part belongs to the original expression of the original work, it should constitute “substantial similarity”. When the expression is only similar, the specific judgment needs to be combined with the attributes and originality of the original work.

³ See *Arnstein v. Poter*, 154 F2d 464 473(2d Cir.1946)

⁴ See Yang Xianwen: “Judgment and Enlightenment of Substantial Similarity in American Judicature”, *China Copyright* 2012 (05).

⁵ See Xu Bo: “The Determination in the Scope of Copyright Protection and Judgment of Substantial Similarity — From the Perspective of Historical Script Works”, *Intellectual Property Rights* 2012 (02).

⁶ See Huang Xiaoxun: “Research on Similar Infringement of Works”, Ph.D. Thesis of Southwest University of Political Science and Law, March 2015.

⁷ See Liang Zhiwen: “The Judgment of Substantial Similarity in Copyright Law”, *Jurists* 2015 (06).

First of all, similar to the compilation works, its expressions are limited, leaving other authors with less creative space, so only when the expressions of the two works are very similar or even close to the same, it can constitute "substantial similarity".

Secondly, for literary works, its expressions are richer. If only replaced the original part of the work with synonyms, it should also be regarded as "substantial similarity". In addition, the determination of the similarity of such works requires consideration of the originality: if the originality of similar parts is low, it usually does not constitute "substantial similarity", if the similar part belongs to the core content of the original work, it should constitute "substantial similarity".

Fragmented literal similarity situations are often associated with alternative spaces expressed by the original work. The more expressive means of the same meaning, the lower the quality requirements and quantity requirements for similar parts in the substantial similarity, on the contrary the requirement will be higher.

B. Comprehensive Non-literal Similarity

It is more difficult to judge whether there is substantial similarity in the case of comprehensive non-literal similarity than fragmented literal similarity, because this situation usually appears in deductive works, compilation works and computer programs, as well as the fan works which rapid developed in recent years. Most of the works do not have the same specific expressions with the original works, or the similar parts belong to the public domain, so the judges feel more difficult to grasp the whole.

To judge whether there is a "substantial similarity" problem in a comprehensive non-literal similarity situation, the first is to determine the scope of the similar part of the work, and then to study whether there is "substantial similarity". In this case, the specific expression of the fragments is often different, and it is necessary to compare the substantial similarities between the works from the whole. The condition for the overall comparison is to first find out the expression that is not in the category of thought, then remove the part that belongs to the public domain, and finally compare it. If the remaining part is an original expression, then the works accused of infringement exist same or similarity in this part, which constitutes "substantial similarity".⁸

C. Judging Requirements of "Substantial Similarity"

In summary, the author summarizes the following judgment requirements of "substantial similarity":

1) *"Substantial similarity" is the similarity of the original expression in the work*

a) *Protection is for expression not thought*: When judging whether it constitutes "substantial similarity", we must first clarify the object of copyright protection, so the

⁸ See Lu Haijun: "On the Substantial Similarity of Works and the Path Choice of Copyright Infringement Judgment - Reduction and Overall Concept and Feeling Principles", *Political and Legal Theory* 2015 (01).

thought should be excluded. For example, in *Qiong Yao v. Yu Zheng* case, the court considered that the organic combination of character setting, plot structure and internal logic relationship could constitute the expression of copyright law protection.⁹ Abstract elements of novels, works, language styles, etc., are not included in the expression of copyright protection. For example, in the case of *Zhuang Yu v. Guo Jingming*, the court held that "the concept of the work and the style of the language do not belong to the expression of the work".¹⁰

b) *The expression of protection needs to be original*: Whether a work is original or not, the key is not whether the expressed thought is original, but whether the expression itself has the condition. Judging whether the work involved constitutes "substantial similarity" is actually a value judgment of the originality of the work, and often only the original expression part of the work can produce the effect of restricting the behavior of others.

2) *"Substantial similarity" in the case of "fragmented literal similarity" and "comprehensive non-literal similarity"*

- The works in which the plots and sentences are obviously similar or the work connected by plots are generally similar, then it constitutes "substantial similarity". For example, in the case of *Zhuang Yu v. Guo Jingming*, the court held that there were a large number of obviously similar plots and expressions in the works infringed by the defendant, which could not be explained by "coincidence".
- The subject matter, theme, and thought are similar, but there is a big difference in the specific expression of the plot arrangement and details, which does not constitute "substantial similarity". For example, in the case of *Cai Xin v. Rui Century (Dongyang) Film and Television Media Co., Ltd.*, the court held that although the works involved were the love story between the star and the female agent and the process of intrigue in the workplace, there is a significant difference in specific expressions in the plot arrangement and details, so it does not constitute "substantial similarity".¹¹

V. COMMENTS ON JIN YONG V. JIANGNAN CASE

A. Comparison of Personality Traits and Relationship Between Characters

"There they were" and the plaintiff's works are similar in the character characteristics which are "smart", "arrogance", "sincere and honest" and "helping others", but their specific expression in the fragment is completely different, legally "substantially similarity" means that the defendant's work is

⁹ See Beijing Higher People's Court (2015) Jingmin Zhongzi No. 315.

¹⁰ See Beijing Higher People's Court (2005) Gao Min Zhong Zi No. 539.

¹¹ See Beijing Xicheng District People's Court (2016) Jingminchuzi No. 11200.

identical or similar to the original expression of the plaintiff's work, so apparently it does not constitute "substantial similarity". In addition, for the question of whether the relationship between the characters in "There they were" and the original works are "substantially similar", first of all, this is to judge whether the works have "substantial similarity" under the comprehensive non-literal similarity situation, according to the author's previous statement, the public domain should be excluded from the expression, and the relationship between parents, teachers, students, couples, etc. belongs to the public domain. To form the expression, it is necessary to combine the corresponding storyline, therefore, the similar relationship of the persons complained by the plaintiff does not constitute "substantial similarity" in the sense of copyright.

B. Comparison of the Storyline

For example, the story of Guo Jing and Huang Rongchu's first acquaintance, "There they were" describes: "Huang Rong accidentally met Guo Jing because she avoided the 'dangerous hand', and used his honest and dull character to ask him to do something, and Guo Jing also pleased to agree, at last Huang Rong was moved by Guo Jing's trust". "The Legend of the Condor Heroes" describes: "Huang Rong avoid the shopkeeper's chasing and encountered Guo Jing, then she used the tested Guo Jing, Guo Jing saw Huang Rong's pity so agreed all of her requirements, at last Huang Rong was deeply touched". Obviously, the abstract plots in the two works are similar, but these abstract plots do not constitute a specific expression in the original works, and this kind of plots that male and female encountered by accident and then they are mutually affected with each other is common in the field of novels, so it does not have the conditions of originality. Moreover, there are significant differences in the promotion methods and details of the development of the plot, which cannot constitute "substantial similarity".¹²

In summary, although the "There they were" and Jin Yong's classic works have similar personality characteristics, character relationships and story plots, these similar situations have not reached some statutory conditions, such as whether similar parts belong to the public domain, whether the works belong to the original expression in the original works and so on, so it does not belong to the "substantially similar" situation in the sense of copyright, but is the abstract form similarity.

VI. CONCLUSION

The similar situation of the works usually has two kinds of "fragmented literal similarity" and "comprehensive non-literal similarity". In these two cases, there is not necessarily a "substantial similarity", and certain statutory conditions need to be met. "Substantial similarity" refers to the same or similarity of the substantive parts between the works involved, and the substantive part refers to the original expression of the defendant and the plaintiff's works, rather

than the part in the scope of thought or belonging to the public domain.

REFERENCES

- [1] Tianhe District People's Court of Guangzhou City, Guangdong Province (2016) Guangdong 0106 Minchuzi No. 12068. (in Chinese)
- [2] Melville Nimmer and David Nimmer, *Nimmer on Copyright*, New York: Matthew Bender & Co. Inc, 2007 §118.09(A) at 8-114.
- [3] *Arnstein v. Porter*, 154 F.2d 464 473 (2d Cir. 1946).
- [4] Yang Xianwen: "Judgment and Enlightenment of Substantial Similarity in American Judicature", *China Copyright* 2012 (05). (in Chinese)
- [5] Xu Bo: "The Determination in the Scope of Copyright Protection and Judgment of Substantial Similarity — From the Perspective of Historical Script Works", *Intellectual Property Rights* 2012 (02). (in Chinese)
- [6] Huang Xiaoxun: "Research on Similar Infringement of Works", Ph.D. Thesis of Southwest University of Political Science and Law, March 2015. (in Chinese)
- [7] Liang Zhiwen: "The Judgment of Substantial Similarity in Copyright Law", *Jurists* 2015 (06). (in Chinese)
- [8] Lu Haijun: "On the Substantial Similarity of Works and the Path Choice of Copyright Infringement Judgment — Reduction and Overall Concept and Feeling Principles", *Political and Legal Theory* 2015 (01). (in Chinese)
- [9] Beijing Higher People's Court (2015) Jingmin Zhongzi No. 315. (in Chinese)
- [10] Beijing Higher People's Court (2005) Gao Min Zhong Zi No. 539. (in Chinese)
- [11] Beijing Xicheng District People's Court (2016) Jingminchuzi No. 11200. (in Chinese)
- [12] Wang Qian: "The Copyright Law", Peking University Press, 2007, p. 31. (in Chinese)

¹² See Wang Qian: "The Copyright Law", Peking University Press, 2007, p. 31.