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研究課題名（和文）公衆の視点からみたパロディの著作権法における位置づけ

研究課題名（英文）Public Views on the Role of Parody in Copyright Law

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研究成果の概要（和文）：本研究の検証から次のことが示唆される。公衆が、著作物に対する逐語的複製に限らず、権利者から許諾を得ずに二次的著作物を創出することも不正行為に該当する場合があると認識している。著作物の変容的利用に対する公衆の評価は、それがユーモラスな改変といえるか否か、権利者に損害が生じているか否か、利益を得ているか否かなど、いくつかの要素に依存する。公衆が、一定の要件を満足した場合、問題のコンテンツを削除したり、著作物の利用によって取得した利益を権利者に引き渡す等の強制的措置を講じることを適切な救済策として認めているものの、許諾を得ずに著作物を利用して得た利益が直ちに不法利益に該当するとまでは考えていない。

研究成果の学術的意義や社会的意義

As the research results demonstrate when the public perceives the wrongfulness of producing derivative works, including parody, in the form of user-generated works without obtaining any licence from the concerned copyright holders, they are vital in improving the efficiency of copyright enforcement.

研究成果の概要（英文）：The research results show that the general public recognizes not only the wrongfulness of literary copying, but also of producing derivative works without obtaining a licence or any other permission from the concerned rightholder. The results also demonstrate that the public's assessment of the transformative copyright uses depends upon several factors, such as humorousness, caused harm and gained wrongful profit. The public thus perceives humorous transformative uses of copyrighted works as less wrongful than non-humorous ones, but deems causing any harm to the authors as wrongful even when such copyright uses are parodic. At the same time, people living in diverse cultural, social and legal environments and traditions deem enforcement measures, such as online content removal and demonetization, as appropriate under certain conditions, but they do not consider that any profit obtained by using another person's copyrighted work is automatically wrongfully gained.

研究分野：新領域法学関連

キーワード：copyright derivative work wrongfulness transformative use parody satire survey social norms

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1. 研究開始当初の背景

(1) Information and communication technologies have significantly lowered the costs of producing and distributing the results of cultural production. New content does not need to be produced only by large movie studios or record labels, but each individual with her smartphone can easily record a video in which she can explain her opinions on how to live a happier, healthier or more productive life, of successful investing or effective dieting, can sing songs or show off new dance moves.

(2) In addition, numerous online platforms enable the building of social networks through which millions of internet users can share their digital content with other members who have similar interests. Internet users can thus easily upload their content online without any considerable hurdles. Moreover, many platforms enable internet users to monetize their audience by using commercials and other types of advertisements and product endorsement. For a number of internet users, these revenues provide a significant amount of their income.

(3) Some online content shared on social networks is highly creative and innovative, while other content simply comprises unauthorized copies of popular copyrighted works. Many online uses of copyrighted works by millions of internet users on social networks and other online platforms for sharing auditory or visual digital content are therefore not presented only by slavish copying, but also often involve various forms of more or less creative transformations (*e.g.* youtube videos, blogs, commentaries, etc.).

(4) As complaints are regularly made by major corporate copyright holders and their representatives that the entire internet is flooded by copyright-infringing content, a variety of solutions has been proposed and some of them have already been adopted over the last few decades. The questions are to what extent those proposals and changes are necessary and efficient and what are the views of the public on the wrongfulness or social utility of such transformative uses of copyrighted works, especially in the cases of parodies and pastiches, when they are in the form of user-generated works.

2. 研究の目的

(1) The research aimed at filling the gap in the current copyright law literature in Japan as well as abroad, which is often heavily theoretical or doctrinal, by studying the role of transformative copyright uses, especially of parody and pastiche, in copyright law and policy in countries with different social, economic and cultural environments (*i.e.* France, Germany, the United States (US) and Japan). Contrary to my previous empirical studies, which concentrated on studying the non-commercial and non-transformative uses of copyrighted works (*i.e.* private copying and online file sharing), this study focused at two closely-related types of transformative uses which are parody and pastiche. It thus examined (i) factors which can affect the views of the public on the wrongfulness or social utility of parody and pastiche, (ii) relationships between public views and legal norms applicable to such uses of copyrighted works, and (iii) cross-country and cross-cultural differences between the four studied countries, which were Japan, the US, France and Germany, and which considerably differ in their approaches towards personal freedom and the role of social norms in regulating the human conducts. The project's aim was therefore to supply public policy discussions with so needed empirical data on the actual application of copyright law in everyday life by the public with regards to user-generated content.

3. 研究の方法

(1) As the research was an empirical, interdisciplinary and comparative study, it combined several types of qualitative and quantitative research methods. The qualitative analysis examined justifications used in courts' rulings, policymaking and literature dealing with transformative uses of copyrighted works (especially parody and pastiche) and copyright enforcement measures targeting the user-generated works. The results were employed in designing the coded vignettes used for collecting of views of the general publics on those aspects. The quantitative analysis then scrutinized the factors affecting individual users' views on the wrongfulness of the transformative uses of copyrighted works in the studied countries with different social, economic, and cultural environments.

(2) The public views on transformative uses of other people's copyrighted works were collected through 2 sets of online surveys with 500 respondents from each studied country.

The first set started to be collected on 30 July 2020, and its collection was completed by 17 August 2020 in Japan, by 27 August 2020 in the US, by 23 August 2020 in France and by 26 August 2020 in Germany, and the second one was executed between 15 and 24 November 2022 in all the four studied countries. These samples reflected age and gender compositions of studied populations between 15 and 49 years old in the studied countries, because they present main consumers of copyrighted works as well as frequent and active users of online social networks.

(3) The surveys relied on vignettes, which consisted of writing a fanfiction, using a cartoon character, music sampling, photograph distortion and video collage, and into which several factors capable to affect the respondents' judgments on the wrongfulness of such activities were coded. The coded factors consisted of circumstances under which such uses of other people's copyrighted works had occurred, *i.e.* parody's humorousness and creativity, target of criticism, fame of the used work, recognition of using another person's work, and the parodist's intent to harm the author of the used work. In addition, the factors contained aspects such as gained profit, type of caused harm, *i.e.* material or reputational harm, and causal nexus.

(4) In order to eliminate respondents' possible biases and mechanical answers without properly reading questions and offered answers, questionnaires contained several control questions.

4. 研究成果

(1) The study of courts' rulings, policymaking and literature in the studied countries showed significant differences between the US, Japan and both European jurisdictions (*see, e.g.*, Christophe Geiger, '*Fair Use*' through Fundamental Rights in Europe: When Freedom of Artistic Expression Allows Creative Appropriations and Opens Up Statutory Copyright Limitations, Workshop on "Recent Trends in Fair Use Exception", University of Tokyo, Graduate School for Law and Politics, Tokyo, Japan, 16 November 2021; and Branislav Hazucha, *Spracovanie diela a internetovi uzivatelia: Ujma, kritika a humor v autorskom prave*, in NOVE TECHNOLOGIE, INTERNET A DUSEVNE VLASTNICTVO VI (Zuzana Adamova ed., forthcoming)). While the US copyright law allows only so-called target parodies, *i.e.* parodies which target the used copyrighted works or their authors, the European Union (EU) copyright law, as well as the German and French copyright laws, permits so-called weapon parodies, *i.e.* parodies which using other copyrighted works for criticizing political or social problems unrelated to the used works. Although the Japanese copyright law seems to allow weapon parodies, strong moral rights tend to considerably limit any applicability of such parody exception.

(2) In addition, the analysis of data collected by online surveys conducted in all the four studied countries shed new light on the ways of how the general public views various transformative uses of copyrighted works (including parody and pastiche) and its results rejected several commonly presented and accepted arguments which tend to be quite influential in copyright policy and law making (*see, e.g.*, Branislav Hazucha, *Public Views on Disgorgement of Profits in Copyright Law: A Role of Harm and Wrongful Gain*, in RESEARCH HANDBOOK ON EMPIRICAL STUDIES IN INTELLECTUAL PROPERTY LAW 217 (Estelle Derclaye ed., 2023); and Branislav Hazucha「著作権法における利益吐出し型救済をめぐる公衆の意識 損害と不法利益に対する救済策の役割」吉田広志=村井麻衣子=Branislav Hazucha=山根崇邦編『田村善之先生還暦記念論文集』(2023年刊行予定・弘文堂)[高橋直子=趙珮怡=劉曉倩翻訳]). For instance, the US and French respondents deemed humorous transformative uses of other persons' copyrighted works as less wrongful than non-humorous ones. Differences in means of the degree of wrongfulness with regards to the humorousness factor in the fanfiction vignette in both countries were statistically significant in the *t*-test and their values were 0.353 ± 0.110 ($N=500$, $t(498)=3.2025$, $p<0.005$) and 0.264 ± 0.101 ($N=500$, $t(498)=2.6183$, $p<0.01$), respectively. The respondents in both countries therefore viewed parody and pastiche based upon other people's copyrighted works as less wrongful than producing other non-humorous types of derivative works without obtaining any licence from the concerned copyright holders. This confirmed the importance of the humorousness factor and explained the reason of its application by courts in several of the studied countries.

(3) Parody's humorousness is important especially under the Japanese and EU copyright law. However, the US courts refuse to take this aspect into consideration because it is considered as too subjective. They then distinguish between parody, which is covered by the fair use doctrine, and pastiche, for which it is required to obtain a licence from the concerned copyright holder. This distinction is often justified by pointing out that

in the cases, where the author or her work is criticized, it would be too difficult to obtain any licence from her, and thus the parodist's freedom of expression would be considerably restricted (see, e.g., Richard A. Posner, *When Is Parody Fair Use*, 21 J. Leg. Stud. 67, 73 (1992)). On the other hand, in the cases, where another person's work is used for criticizing anything else than the author or her work, it is suggested to be easier to obtain the copyright licence and thus it is not necessary to exclude such uses from the scope of copyrights (see *ibid.*, at 73-74).

(4) Nevertheless, this restrictive approach towards the parody exception in the US is routinely criticized and brings many tensions, such as in recent cases dealing with misappropriation art (see, e.g., Branislav Hazucha, *Pop art z pohladu autorskeho prava*, in *KOSICKE DNI SUKROMNEHO PRAVA IV: POCTA PROFESOROVI VOJCIKOVI 382* (Peter Molnar et al. eds., 2022)). This led some US courts to relax it to a certain degree. Moreover, the result of this study shows that the US approach to the parody exception is inconsistent with the much broader approach recognized by the general public in the US. At the same time, the French broad approach towards the parody exception reflects the views of the public on this issue.

(5) However, the analysis of collected data also showed that the public is quite sensitive when any harm is caused to the authors even by transformative uses of their works by other people (see, e.g., Branislav Hazucha, *Spracovanie diela a internetovi uzivatelia: Ujma, kritika a humor v autorskom prave*, in *NOVE TECHNOLOGIE, INTERNET A DUSEVNE VLASTNICTVO VI* (Zuzana Adamova ed., forthcoming)). In the vignettes into which the harm factors were coded, the most decisive aspect in assessing the wrongfulness of those transformative uses of copyrighted works was whether any harm was suffered by the author or other concerned persons. Hence, in the eyes of the public each parody has its limit and should not cause pecuniary or reputational harm to the author of the parodied work.

(6) The collected data also demonstrated that there are notable differences between the studied countries with regards to different types of harms. While the German and French respondents were quite sensitive to reputation harm, the US and Japanese ones were mainly responsive to pecuniary losses (see *ibid.*). Accordingly, in the cartoon character use vignette the differences in means of the degree of wrongfulness were statistically significant in the *t*-test with regards to the pecuniary harm factor in the US and Japan, having values of 0.275 ± 0.109 ($N=500$, $t(498)=2.5282$, $p<0.005$) and 0.190 ± 0.078 ($N=500$, $t(498)=2.4509$, $p<0.05$), respectively, and regarding the reputational harm factor in France and Germany with their values of 0.334 ± 0.111 ($N=500$, $t(498)=3.0008$, $p<0.005$) and 0.417 ± 0.105 ($N=500$, $t(498)=3.9839$, $p<0.0005$), respectively.

(7) Another important aspect in assessing the wrongfulness of transformative uses causing any harm to the author or other concerned persons was the intention to cause specific consequences of such activities (see, e.g., Branislav Hazucha, *Transformative Uses in the Eyes of Internet Users: A Role of Criticism in Parody*, the 7th Global Meeting on Law and Society, ISCTE University Institute of Lisbon, Lisbon, Portugal, 13-16 July 2022). For example, in the cartoon character use vignette the differences in means of the degree of wrongfulness were statistically significant in the *t*-test with regards to the intention factor in the US and Germany and their values were 0.227 ± 0.109 ($N=500$, $t(498)=2.0783$, $p<0.05$) and 0.313 ± 0.105 ($N=500$, $t(498)=2.9721$, $p<0.005$), respectively. This factor is used by the French case law, where the courts can decide in favour of copyright holders when the parodist's intention was to harm the author of the parodied work.

(8) As expected, it could be observed that respondents who were more active in uploading the user-generated content to online social networks had tendency to judge individual transformative uses of copyrighted works as less wrongful than other respondents (see *ibid.*). For instance, in the cartoon character use vignette the difference in means of the degree of wrongfulness for those who at least occasionally uploaded content to online social networks was statistically significant in the *t*-test and its value was 0.560 ± 0.069 ($N=2000$, $t(1998)=8.1307$, $p<0.0005$).

(9) As already mentioned above, several notable differences were observed between individual countries. To a certain degree, these variances can be explained by differences in the role of personal freedom and compliance with social and legal norms in the studied countries. The most significant divergence was that the Japanese respondents were more sensitive and critical to individual types of the transformative uses of other people's copyrighted works. They judged the uses as more wrongful and were more open to imposing sanctions of some sort for such uses than respondents from the other 3 studied countries. As to remedies, the German respondents, followed by French ones, were somewhere between

the Japanese ones on the one side and the US ones on the other in the cases where some harm was intentionally caused to the author or other concerned persons. These results only confirm that compliance with norms and use of remedies are more accepted by respondents from Japan and Germany, contrary to those from the US and sometimes France, which are characterized by a higher level of individualism.

(10) As to individual remedies, contrary to studies on non-transformative uses of other people's copyrighted works, the injunction was only one of several appropriate measures (638 (31.90%) out of 2,000 respondents in the fanfiction vignette; 871 (43.55%) respondents in the cartoon character use vignette; 787 (39.35%) respondents in the music sampling vignette; 995 (49.75%) respondents in the photograph distortion vignette; and 861 (43.05%) respondents in the video collage vignette) (*see, e.g.*, Branislav Hazucha, *Online Content Removal in the Eyes of Copyright Users*, 2022 Conference of Asian Pacific Copyright Association, National University of Singapore, Singapore, 14-15 November 2022). This difference between transformative and non-transformative uses of copyrighted works can be explained so that the respondents did not recognize this measure as much as they did in the cases of literary copying. Accordingly, in the cases of transformative uses the respondents still deemed this remedy as important, but at the same time they perceived that in many cases the other remedies, especially compensatory and profit-based damages might be more suitable.

(11) The other remedies frequently used by respondents were apology and compensation, which were followed by the transfer of gained profit (*see, e.g.*, Branislav Hazucha, *Public Views on Disgorgement of Profits in Copyright Law: A Role of Harm and Wrongful Gain*, in *RESEARCH HANDBOOK ON EMPIRICAL STUDIES IN INTELLECTUAL PROPERTY LAW* 217, 235 (Estelle Derclaye ed., 2023)). The compensation was selected as an appropriate remedy comparably by the respondents from all the four studied countries with minor variations between individual countries and vignettes.

(12) As to the restitution for wrongs (*see ibid.*, at 236), *i.e.* the transfer of gained profit, it was used the most commonly by the US respondents (*i.e.* 97 (19.40%) out of 500 respondents in the fanfiction vignette; 160 (32.00%) respondents in the cartoon character use vignette; 152 (30.40%) respondents in the music sampling vignette; 162 (32.40%) respondents in the photograph distortion vignette; and 105 (21.00%) respondents in the video collage vignette), who were followed by the French and German respondents. The Japanese respondents found this type of remedy as appropriate the least frequently on average (*i.e.* 89 (17.80%) out of 500 respondents in the fanfiction vignette; 78 (15.60%) respondents in the cartoon character use vignette; 82 (16.40%) respondents in the music sampling vignette; 105 (21.00%) respondents in the photograph distortion vignette; and 110 (22.00%) respondents in the video collage vignette).

(13) Copyright law, including its remedies, is therefore clearly based upon moral foundations in social norms recognized by the general public, and is not only a construct created by law in order to induce creators to produce new literary and other artistic creations. Apparently, the public perceives that it is wrong to use other persons' works of authorship unless there are certain mitigating circumstances, such as in the cases of parody or criticism. Moreover, the public even recognizes remedies such as online content removal and demonetization to a certain degree, where any harm was caused to the concerned copyright holder or any profit was gained wrongfully.

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〔図書〕 計0件

〔産業財産権〕

〔その他〕

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6. 研究組織

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7. 科研費を使用して開催した国際研究集会

〔国際研究集会〕 計0件

8. 本研究に関連して実施した国際共同研究の実施状況

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ドイツ	MPI for Innovation and Competition			