

This article was published in the *International Law Office IP Newsletter* on March 13, 2017.

Intellectual Property, Taiwan

Can fair use protect from infringement of right of paternity?

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Article 65(1) of the Copyright Act provides that "[f]air use of a work shall not constitute infringement on economic rights in the work". Nevertheless, the IP Court took two different views in Case 102-Min-Zhu-Su-Zi-57 (August 6 2014) and its Appeal 103-Min-Zhu-Shang-Zi-26 (June 25 2015) regarding whether fair use can protect an individual from infringement of the right of paternity if the person exploiting the author's work does not provide a clear indication of the work's source work pursuant to Article 64 of the Copyright Act.

The plaintiff was a cardiovascular surgeon. For the benefit of the public, he had compiled his experience relating to the causes, types and symptoms of varicose veins, as well as tips on self-checking, medical check-ups, treatment and prevention, in a series of articles which he had written and uploaded on his clinic's website. Subsequently, the plaintiff discovered that under an article entitled "Varicose Veins" published by the defendant hospital's website, some of his work on symptoms, selfchecking, prevention and healthcare had been plagiarised by cut-and-paste and unauthorised revision from the original before being combined with the works of other hospitals and doctors, which the defendant hospital had also copied without consent. In addition, the plaintiff's name was not indicated on the defendant's website. In fact, the defendant had audaciously inserted the term "Copyright (C). All rights reserved by [the defendant]". The defendant also stated its hospital's name in a prominent position on the webpage. As such, the plaintiff alleged infringement of his moral rights and economic rights of authorship. The court in the first and second instances held that the plaintiff was the copyright owner and that the defendant had used his work. However, the court in both instances held that fair use defence should apply to this case, considering that:

- the defendant's webpage was for public health education, not commercial purposes;
- the plaintiff's copyright involved works of expression of existing facts;
- neither quality nor quantity of the plaintiff's works had exceeded fair use; and
- the defendant's use of such works had had no impact on the potential market.

However, regarding whether the defendant had infringed the author's right of paternity by failing to expressly attribute the source, the court in the first and second instances held contrasting views.

The first-instance court held that under Article 65(1) and Article 66 of the Copyright Act, although the defendant demonstrated fair use of the materials and did not infringe the economic rights of authorship, fair use per se does not prevent infringement of the right of paternity. Since the defendant had failed to reasonably explain that certain parts were copied from the plaintiff's work, there was a likelihood of it misleading others into thinking that they were original works of the defendant hospital. The court held that the defendant had infringed the plaintiff's right of authorship. Nevertheless, the second-instance court held a different view. It said that although the defendant failed to indicate the source in accordance with Article 64 of the Copyright Act, so long as it met the conditions for fair use under Article 65 it would not amount to infringement of the right of authorship.

Indeed, in other precedents (eg, 103-Min-Zhu-Su-Zi-57 (August 6 2014)), the IP Court was inclined to accept the firstinstance court's view in this case. It held that fair use does not necessarily protect an individual from infringement of the right of paternity. Instead, this depends on whether such action

would have misled others into thinking that such work was by an anonymous author or another individual. Obviously, this view is contradictory to the second-instance court's view, which held that fulfillment of the conditions for fair use under Article 65 of the Copyright Act would not have amounted to infringement of the right of paternity. Therefore, the relationship between the fair use of a work and annotation of its origin and the right of paternity has yet to be resolved.

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