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Fair use may not extenuate infringement on right of paternity

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Introduction

The basis for and types of discretion of fair use in the Copyright Act are set out in Articles 44 to 63 and Article 65(2). Further, Article 65(1) provides that "fair use of a work shall not constitute infringement on economic rights in the work". However, should an exploiter of a work be considered to be infringing the author's right of paternity if he or she exploits the work within the reasonable scope of fair use, as specified in the act, but fails to provide a clear indication of the source of the work in accordance with Article 64?

The IP Court provided conflicting opinions on this in Judgment 102-Min-Zhu-Su-Zi-57 (August 6 2014) and its appeal 103-Min-Zhu-Shang-Zi-26 (June 25 2015). The Supreme Court, in Judgment 106-Tai-Shang-Zi-215 (February 2 2017), held and affirmed that 'fair use' might not extenuate infringement on the right of paternity.

Facts

The plaintiff claimed that in order to help the general public better understand varicose veins he wrote and uploaded a series of articles explaining this disease on his clinic's website, but later found that an article entitled "Varicose Veins" had been published on the defendant's hospital website (for further details please see "Can fair use protect from infringement of right of paternity?"). The article had been plagiarised by cut-and-paste and unauthorised revision from the original before being combined with works of other hospitals and doctors, which the defendant hospital had also copied without consent. The defendant did not indicate the plaintiff's name, but marked the article with the term "Copyright©. All rights reserved by [the name of the defendant]" and attached the name of the hospital to the webpage in a conspicuous manner. The plaintiff claimed that the defendant had infringed his economic rights and the right of paternity. The first and second-instance courts confirmed that the plaintiff was the copyright owner and that the defendant had indeed used his work, but held that such exploitation was within the reasonable scope of fair use.

So, does a failure to provide a clear indication of the source of works constitute infringement of the right of attribution enjoyed by the copyright owner? The IP Court has provided conflicting opinions. According to the first-instance court, the exploitation of the works at issue by the defendant was within the reasonable scope of fair use, and did not therefore constitute infringement of any economic rights, as provided in Article 65(1) and Article 66; however, fair use does not automatically extenuate infringement of the right of paternity. The defendant's failure to properly indicate the portion of references it exploited that were authored by the plaintiff might mislead others into believing that the works were created by the defendant. Therefore, the court held that the defendant infringed the plaintiff's right of paternity. However, a conflicting judgment was rendered by the second-instance court, which affirmed the defendant's failure to indicate the source of the works as required in Article 64, but held that the required elements of fair use, as specified in Article 65, had been met and extenuated infringement of both economic rights and the right of paternity. The case went to the Supreme Court, which reversed the second-instance judgment and remanded it to the IP Court. The Supreme Court found that Article 64 clarifies that a person who exploits the work of another must provide a clear indication of the source of the work to indicate the name or appellation of the author in a reasonable

manner, unless the work is anonymous or the author is unknown. Moreover, Article 96 further provides that a fine up to NT\$50,000 (approximately US\$1,667) will be imposed for violations of Article 64. The Supreme Court remanded the case and indicated that the IP Court should re-examine whether the defendant's failure to indicate the source of the works constituted any infringement of the plaintiff's economic rights or the right of paternity.

Comment

Although the Supreme Court did not specify whether a failure to indicate the source of works constitutes infringement of economic rights or the right of paternity, it concluded that fair use may not extenuate infringement on economic rights or the right of paternity. Comparing the judgment with Article 65(1), the court should state that the indication of the source of works stands apart from moral rights, and further, whether a failure to indicate the source of a work constitutes infringement depends on whether such a failure misleads others into believing that the work is anonymous or the author is another person. In other words, the Supreme Court seemed to prefer the first-instance judgment. It will be worthwhile following the retrial to see how the IP Court will clarify the relationship between fair use and an indication of the source of a work or the right of paternity.

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