

Abstract**A Study on the Perspective in Determining Substantial Similarity in Copyright Law**

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The main issue of deciding whether copyright infringement occurs is the existence of substantial similarity between plaintiff and defendant's work. Whether substantial similarity exists depends on the entity who judges the similarity, such as audience or expert. However, copyright law in most countries has based on the economic incentive theory. Thus, copyright infringement can cause the decrease of the demand of copyrighted materials and this results in the damage to copyright holders. This makes audience's perspective the standard to decide substantial similarity. Judging substantial similarity by the audience test has many problems in many ways. First of all, since the audience test is made by the spontaneous and immediate reaction of audience, in other words, it is done without any analysis or critical comparison, the judgement is not appropriate. Next, Judging substantial similarity is not simply to compare two works, and it has to constrain the scope of copyright protection and consider the exception of copyright protection. But, ordinary audience does not have such knowledge and this can bring about the erroneous decision. Finally, recent technological innovation makes it impossible for audience to judge the substantial similarity in functional works. Thus, the entity who judge the similarity more reasonably is required rather than the average audience.

As a way to supplement the audience test, the intended audience test has been proposed recently. The intended-audience test establishes audiences in each field of copyrighted materials and the intended audience decides the similarity. The intended audience has more specific knowledge than ordinary audience and therefore, this test could get more reasonable result. But, this test also has some difficulties in verifying the intended audiences and achieving the goal of copyright law, which is the balance between copyright

protection and fair use. Also, it is not good to differentiate the perspectives according to the types of copyrighted materials with regard to the legal stability. Therefore, more reasonable entity is required in order to judge copyright infringement more appropriately and achieve the copyright law's purpose. As the complementary method, I would like to propose the PHOSITA in patent law because he has a middle knowledge compared to audience and expert and he has been used to judge the doctrine of equivalents in patent infringement cases.

Keywords

Copyright Infringement, Substantial Similarity, Audience Test, Intended-Audience Test, Expert Perspective, Person Having Ordinary Skill In The Art(PHOSITA)