

Abstract

Analysis of the Cases regarding the Fair Use Factors in the U.S. Copyright Law

Song, Jae-Seop

Recently, the general provision of a fair use was introduced in the Copyright Act §35-3 as a 'KORUS FTA' implementing legislation. According to this provision, in determining whether a use of a copyrighted work is a fair use, four factors shall be considered; (i) the purpose and character of the use including commercial or non-commercial property, (ii) the nature and uses of the copyrighted work, (iii) the amount and substantiality of the portion used in the copyrighted work, (iv) the effect of the use upon the present or potential market for or value of the copyrighted work. These factors actually follow four factors of 17 USC §107. The U.S. courts considered the fact that the use was commercial, the copyrighted work had been unpublished, or the use had likelihood to harm upon an actual or potential market for the original work as a decisive element against a finding of fair use for some time. However, courts are now evaluating all four factors according to the Supreme Court cases and the revision of the Copyright Act. Nevertheless, actually in many cases, the problem whether secondary use is transformative or not has a tendency to play a dispositive role in the fair use test. Considering that the purpose of the Copyright Act is "to promote fair use of works in order to contribute to the improvement and development of culture and related industries," the U.S. courts' practice of evaluating all four factors, but especially whether the use is transformative or not, may be a good reference for construction and application of the Copyright Act §35-3. It is a way to overcome ambiguity and abstraction of the fair use factors provisions to present more consistent standard in each case, and to prevent abuse of copyright to restrain on free speech and free press.

Keywords: Fair use, The purpose and character of the use, The nature and uses of the copyrighted work, The amount and substantiality of the portion used, The effect of the use upon the market for or value of the copyrighted work, Commercial use and Transformative use