

Abstract

Common Origin of Substantial Similarity and Fair Use Doctrine, and Defining Copy Normatively in Copyright Act

Park, Junu*

The purpose of this article is to search for the source of the problem that second level creation, which did not diminish the market value of the plaintiff's copyrighted work, has severely been hindered by copyright, and to propose a legislative solution to the problem. This article made the following conclusions.

First, 'substantial similarity' means that copyright is infringed even when the defendant did not publish the whole part of the plaintiff's work, verbatim. 'literal-fragmented or comprehensive-non-literal similarity,' 'substantial similarity,' or 'feeling substantial attributes' is no more than repetition of 'similarity.'

Second, three factors of fair use doctrine in *Folsom* was actually 3 factors to consider in determining 'substantial similarity,' which had long been considered by 18th and 19th century courts before *Folsom*. However, since the meaning of 'copy' had changed from 'normative one' to 'physical one,' the meaning of 'substantial' had also changed from 'diminishing the market value of plaintiff's copyrighted work' to 'feeling substantial attributes of plaintiff's work.' Consequently, those three factors in determining 'substantial similarity' had become the factors of fair use defense, which had also transferred the burden of proof from plaintiff to defendant.

Third, those three factors are related with each other, that is, one is prerequisite factor to the other. For example, 'the value of plaintiff's work, which is diminished by defendant's use,' cannot be considered until the effect of the defendant's use to the plaintiff's market value is determined. And where

* Professor, Sogang University Law School.

plaintiff and defendant are not in the same market, ‘the effect to the plaintiff’s market’ cannot be considered until it is determined whether plaintiff could be allowed to realize profit from defendant’s market.

Fourth, most scholars, judges and members of the society have already agreed that ‘unjust copy,’ not mere ‘physical copy,’ is the infringement of copyright. To make the agreement happen in copyright dispute, this article proposed that ‘to satisfy the public needs’ should be added to the definition of ‘copy’ or ‘reproduction,’ which would turn the definition of ‘copy’ from physical one to normative one.

Keywords

substantial similarity, fair use doctrine, copyright history, Statute of Anne, normative copy, physical copy, copyright reform

참고문헌

1. 국내문헌

- 권세진, 공정이용 요건의 적용을 통한 저작권 침해의 위법성 도출에 관한 연구: 복제권 침해를 중심으로, 서강대학교 박사학위 논문(2014).
- 권영준, 『저작권침해판단론: 실질적 유사성을 중심으로』, 박영사(2007).
- 김현철, 『디지털 환경하의 사적 복제 문제에 관한 비교법적 고찰』, 한국저작권위원회(2004. 12).
- 박성호, 『저작권법』, 박영사(2014).
- 오승중, 『저작권법』, 박영사(2016).
- 이해완, 『저작권법』, 박영사(2015).
- 최경수, 『저작권법 개론』, 한울아카데미(2010).
- 최승재, 『원소스멀티유즈와 저작권 침해』, 커뮤니케이션북스(2016).
- 계승균, 저작권법 개정안에 대한 소견, 『강원법학』, 제27권(2008. 12).
- _____, 저작권법상 패러디에 관한 일 고찰, 『동아법학』, 제57호(2012).
- 김경숙, 저작권 침해판단에서 “실질적 유사성” 개념의 재구성: 유사성의 판단기준에 관한 대륙법계 국가와의 비교법적 검토를 통하여, 『계간 저작권』, 제111호(2015 가을).