

Abstract

**Appropriation Art and Fair Use:
Inconsistencies and Alternatives**

- Focusing on the U.S. cases involving fair use in the appropriation art -

Lee, Soomee*, Park, Hyun Kyung**

Appropriation art, which involves taking the copyrighted works of others to merge them into a new work, takes the risk of infringing copyrights of others, while the appropriation artists argue that their acts constitute a fair use. The laws of the U.S and Korea adopted the fair use doctrine as a statutory defense to copyright infringement and enumerate four factors to be considered in determining a fair use. The problem is, however, the boundaries of fair use under the laws are not definitive. The four factors stated in the laws lack full explanation on what facts should be considered in the assessment of the four factors and how to find a equitable balance between those factors. Therefore, people who cross the unclear border of such fair use bear the risk of liability for copyright infringement. In the absence of clear boundaries of fair use, only those who can afford the attorney fees are able to create a work of art without fear of being sued for copyright infringement.

In copyright infringement lawsuits against Jeff Koons and Richard Prince, the U.S. federal courts weighed in the reputation of artists, top-class gallery exhibitions, wealthy buyers and high price in the determination of a fair use and decided in favor of the artists. In those two cases, the transformative use was a determinative factor in finding of a fair use. If the use is transformative, this is more likely to weigh in favor of fair use even without assessment of the other factors. Another case where the court considered all four factors after criticizing the shortcomings of heavy reliance on the transformative use to determine a fair use is also discussed in this paper. We suggest

* Professor, Inha Law School, Incheon, Korea.

** S.J.D. Student, Yonsei University Law School, Seoul, Korea.

supplementations to the current remedies of the copyright infringement and expansion of the merger doctrine as alternatives to the fair use in the appropriation art works.

Keywords

Appropriation Art, Copyright Infringement, Fair Use, Derivative Works, Transformative Use, Reasonable Observer, Merger Doctrine

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