

〈특집: Current Developments in International Economic Law〉

## UCC (User-created Contents) and Fair Use in Korea\*

- In Light of “Son Dam-bi” Decision -

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### Abstract

UCCs came to be sensational in recent years with easier ways to create sophisticated UCCs and the web’s enhanced ability to connect users. Creating UCCs, especially when accompanied by the use of existing copyrighted works, may give rise to problems of copyright infringement and fair use. Seoul High Court’s 2010 decision that a blog post with a video recording of a child singing and dancing to a hit Korean song constitutes fair use is only a beginning to the upcoming surge in copyright disputes surrounding UCCs.

Recent decisions by Korean Courts on unwarranted use of existing works engage in fair use analysis by means of Article 28 of the Copyright Act on fair quotation, but the increase in fair use disputes calls for a general provision on fair use. Bills to incorporate a general provision have been submitted, most of which include a four-factor test from 17 U.S.C. §107. Even when a general clause is incorporated, specific ways in which the clause is interpreted and applied would have to come from the courts. All four factors do play a role, but whether the use of the work is “transformative” should be critical in assessing all of the variables.

Keywords: Son dam-bi, UCC, fair use, transformative use

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## I. Introduction

UCCs are phenomenal everywhere: it may be the hottest invention on the web since e-mail. It is fun, fast-paced, and above all, created by “you”. Internet users free themselves from being passive consumers to become creators and producers of the infinite information online. However, people are not always comfortable with creating a work of one’s own. A large number of UCCs online, in various degrees, make use of copyrighted works without licensing or consent of use. This could bring up issues of copyright infringement. In the beginning days of UCC, copyright holders were not bothered by such amateur use of their works. As the UCC fever spread, however, they began to exercise their rights, often through civil (and at times criminal) actions against individual creators of UCCs. In what ways existing works can be used to create UCCs became a major concern for the copyright holders, as well as people who want to be creative on the web.

In October 2010, Seoul High Court confirmed the lower court’s decision<sup>1)</sup> that a blog post with a video recording of a child singing and dancing to a hit Korean song constitutes a fair use. What has come to be called the “Son Dam-bi<sup>2)</sup> case” aroused interests as one of the first lawsuits regarding UCCs to engage in specific analysis of fair use requirements and to order damages to the copyright holder who requested takedown on the seemingly infringing material on the web. A similar case had been an issue in the U.S. as well, regarding a video recording of children dancing to a song playing in the background.<sup>3)</sup> With more ways for people to create UCCs, the boundaries and scope of fair use on the web will be a crucial issue for both the copyright holders and secondary authors. The following

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1) Judgment of Feb. 18. 2010, 2009GaHap18800 (Seoul South District Ct.).

2) Son Dam-bi is the singer of the song <I am Crazy> to which the child in the video sang and danced.

3) Lenz v. Universal Music Corp, 572 F.Supp.2d 1150 (N.D. Cal. 2008). Lenz posted on YouTube a home-made video clip of her children dancing to the Prince’s song “Let’s Go Crazy” playing in the background. Universal Music Corp. sent YouTube a takedown notice in compliance with DMCA requirements, which led to YouTube’s removal of Lenz’s clip. Lenz sued Universal for misrepresentation under the DMCA and sought from the court that her use of the song was not an infringement of the copyright.

will look into the Son Dam-bi decision and discuss the fair use on the internet, especially in the Korean legal perspective.

## II. Son Dam-bi Decision: Judgment of Oct. 13, 2010, 2010Na35260 (Seoul High Ct.)

### 1. Summary of the Case

In February 2009, Plaintiff, a blogger and a father of a 5-year-old, posted on his Naver<sup>4)</sup> blog a video clip of his daughter singing a popular Korean singer Son Dam-bi's hit song <I am Crazy>. In this 53-second-long clip, his daughter sang a part of the song, at the same time imitating the signature dance sequence of the song (so-called the "chair dance"). In June of the same year, the Korean Music Copyright Association (KOMCA) issued takedown notices to NHN regarding 16,462 internet postings. Plaintiff's video clip was part of the notice: according to KOMCA, Plaintiff's video clip infringed copyright of the song <I am Crazy>, management of which KOMCA was entrusted upon. On such notice, NHN temporarily took down the Plaintiff's posting, and informed him of NHN's actions as well as procedures he could take to reverse the measures taken.

Plaintiff requested that the block on his page be lifted, but NHN refused to comply saying that the Plaintiff did not present material justifying his use of another person's copyrighted material, neither did he observe the time limit for reversal procedure (30 days from the notification of takedown). In response, the Plaintiff sought declaration from the Court that his video clip was not an infringement of KOMCA's copyright, and sought damages of 5,000,000 KRW (approximately 4,420 USD) from KOMCA and NHN respectively.

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4) "Naver" is a popular search portal in Korea, operated by the defendant of the case NHN Corp. It began its blog service in 2005 and currently is one of the largest blog service providers in Korea.

## 2. Relevant Legal Issues – Merits on Claim for Damages

### A. Whether Plaintiff's Actions Constitute “Reproduction” and “Transmission” of the Copyrighted Work At Issue

There is an undisputed consensus that the song at issue, Son Dam-bi's <I am Crazy>, falls into the scope of “musical works” as defined in Article 4 Paragraph (1) 2.,<sup>5)</sup> thus subject to protection by the Copyright Act. The author of a work possesses the right of reproduction and public transmission. Whether Plaintiff posting the video clip on his blog (without the consent of the author) falls into the scope of “reproduction” and “transmission” of the original song is the issue.

Article 2 Clause 22 defines “reproduction” as follows: “the fixation or the reproduction in a tangible medium by means of printing, photographing, copying, sound or visual recording, or other means”. Recording the daughter singing and dancing to a copyrighted song on a video camera, along with uploading and saving the recording on NHN’s computer server is “fixation in a tangible medium”, and thus constitutes an act of “reproduction”. Plaintiff argues that it does not, because the video clip of his daughter mimicking Son Dam-bi’s performance has no substantial resemblance to the original song, and accompanies only a small fragment of the entire song. However, despite the considerable differences in rhythm, melody, and the lyrics, the part that Plaintiff’s daughter sang is the “refrain” containing the repeated phrases symbolic to the song <I am Crazy>, and naturally associates with the song. Therefore, the video clip has substantial resemblance to the copyrighted work, and creating/posting the video shall fall into “(partial) reproduction”, the right of which is exclusive to the author by Article 16.

Regarding “transmission”, Article 2 Clause 7 states “public transmission shall mean transmission of a work, a performance, a phonogram, a broadcast, or a database or making such available to the public by wire or wireless means intended for reception or access by the public”. Posting the video clip at issue on a Naver blog with no screening or limitation as to who may view the post at what time constitutes “public transmission” of the clause.

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<sup>5)</sup> Jeojakgwonbeop[Copyright Act] Article 4 (Examples of Works, Etc.) (1) The following shall be the examples of works referred to in this Act: 2. Musical works.

### B. Whether There is Copyright Infringement

As indicated, the posted video clip itself, and the posting which includes the lyrics of Son Dam-bi's song is partial "reproduction" of the song <I am Crazy>, and putting it on the blog constitutes "public transmission". It is apparent that the author did not grant the Plaintiff any right to use, reproduce, or transmit the work. Therefore, unless a "special circumstance" exists, Plaintiff's act constitutes infringement of defendant's right of reproduction and public transmission.

Plaintiff asserts that there is indeed a "special circumstance", that his usage of the work falls into "quotations from a work already made public" and thus does not infringe the copyrighted work. Article 28 of the Act states: "it shall be permissible to make quotations from a work already made public: provided that they are within a reasonable limit for news reporting, criticism, education, and research, etc. and compatible with fair practices". One of the ultimate goals of the Copyright Act is to seek improvement and development of the culture and related industries, and copyright, as a result, can be limited to balance between personal interest and benefits to culture in general. Article 28 provides a way for people to quote the copyrighted works in a creative and productive way in pursuing the goal of the Act. In addition, considering the objectives of Article 28, the listed purposes "news reporting, criticism, education, and research, etc" are only exemplary. Therefore, when a work is reproduced for creative and productive purposes and is within reasonable limit and compatible with fair practices, it may be considered as just "quotation" permitted by Article 28.

In deciding whether the quotation was made within reasonable limit and is compatible with fair practices, the Court must consider comprehensively the purpose of the quotation, character of the original work, content and amount of the quotation, the manner and form of the quotation, general perception of the audience, whether it replaces the demand for the original work, etc.

Considering the following aspects, the Court finds that Plaintiff's use of the song in the video clip was in fact within a reasonable limit and is compatible with fair practices:

- ① the clip is a video recording of the Plaintiff's young daughter merely

mimicking Son Dam-bi's singing and dancing, which itself is an original, copyrightable work;

- ② the clip was not made and transmitted for commercial use;
- ③ singing and dancing of the song by a young girl was in a very crude and rudimentary manner without any accompaniments;
- ④ the quoted amount is only 7 to 8 verses among the total of 74 verses in the song, seemingly the smallest possible quotation for the purpose;
- ⑤ tone, beat, and the words are considerably disparate from the original song;
- ⑥ only the first 15 seconds out of 53 seconds of playing time can be recognized as singing the song;
- ⑦ for the reasons above, Plaintiff's clip cannot convey the same musical feeling, substitute the demand for the original work, not damage the original song's value;
- ⑧ and finally, Plaintiff's posting reasonably identifies the source of the quotation by mentioning the artist of the song (Son Dam-bi).

Along with the video clip, the blog post contains Plaintiff's personal comments about his daughter's performance and photographs taken in the same place, which make the blog post itself a new copyrightable work. The quotation of the blog post is also within a reasonable limit and is compatible with fair practices.

Thus, the video clip and the blog post containing the clip do not constitute infringement of the author's property rights as they have been quoted within a reasonable limit and is compatible with fair practices. Plaintiff is granted rights to reproduce and transmit them.

### C. Whether the Defendant is Liable for Damages

Article 103 Paragraph (1) of the Copyright Act states: "any person who claims that his copyrights or other rights protected under this Act are infringed upon due to the reproduction or interactive transmission of works, etc. by the use of services provided by an online service provider may request such online service provider to cease the reproduction or interactive transmission of such works, etc."

after providing evidence for such fact". At the same time, the Paragraph (6) of the same Article states: "any person who requests that the reproduction or interactive transmission of works, etc. be stopped or resumed in accordance with foregoing Paragraphs (1) and (3) without any legitimate rights shall make compensation for any damages incurred thereby". Here, the claimant "without legitimate rights" should be read as the claimant who "cannot prove that his or her rights have been infringed". So, the case when the use (reproduction, transmission) of a work does not infringe the copyright as it falls under the limitations of copyright protection (such as Article 28) may also be the circumstance where the author has no legitimate rights to request the online service provider to cease the reproduction and transmission. Thus, the defendant may be liable for compensation according to Article 103 Paragraph (6). As this provision embodies the tort provisions in the Civil Act, defendant's actions must be intentional or from negligence. The fact is that the defendant made 332,992 takedown notices regarding video clips of the copyrighted songs to NHN and Daum from June 1 to 29 of 2009. The notice was made in a collective manner: the 332,992 postings were not individually reviewed. The defendant had not foregone close and sincere scrutiny of whether the video clip of the case infringes its copyright, which makes the notice negligent. Therefore, the defendant is liable for damages according to Article 103.

### III. UCC and Copyright Issues

#### 1. What is a "UCC"?

The above Son Dam-bi decision is significant as it illustrates the court's view on the clash between copyright and fair use of copyrighted work. The ever-expanding use of the internet and people's active production of UCCs pose many problems similar to that of the Son Dam-bi case. To further discuss the UCC's copyright issues, it may be worthwhile to discuss what UCCs are.

User-created Contents (UCCs), or more widely referred to internationally as User-generated Contents (UGCs), are literally contents created by internet users.

To put it in more sophisticated words, they are contents created in whole or in part using tools specific to the online environment and/or disseminated using such tools.<sup>6)</sup> People most often use the term UCC to mean multimedia-type contents such as video clips: however, the broadest meaning of UCC can encompass virtually any work created by ordinary internet users, for example, reply threads of internet newspaper articles. If understood in its broadest meaning, UCCs may well have been around for as long as internet has existed. Although UCCs initially acted as a supplement to contents produced by internet corporations, their independent values came to be appreciated in recent years. This is well illustrated in the TIME magazine choosing “you” as the person of the year in 2006, recognizing millions of people who anonymously contributed to user-generated content on Wikipedia, YouTube, MySpace, Facebook, the GNU/Linux operating system and the multitudes of other websites featuring user contribution.<sup>7)</sup>

## 2. Types of UCCs

Categorizing different types of UCCs is not an easy task, as UCCs can take a wide range of different forms and characteristics. Nonetheless, evaluating ways into which UCCs can be categorized may facilitate the analysis of copyright infringement and fair use regarding UCCs. Three standards exist in categorizing types of UCCs.<sup>8)</sup>

### A. Categorizing by Medium

UCC may take one of the following forms: text, audio, image, video, or multimedia. Examples of text UCCs are any original writings posted online, replies on articles, tweets on Twitter, Facebook wall news feeds, etc. Audio UCCs are recordings of

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<sup>6)</sup> Daniel Gervais, The Tangled Web of UGC: Making Copyright Sense of User-Generated Content, 11:4 *The Vanderbilt Journal of Entertainment and Technology Law*, 841, 842 (2009).

<sup>7)</sup> Lev Grossman, Time's Person of the Year: You, *Time* (Dec. 13, 2006), <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

<sup>8)</sup> Yoon-Taek Sung, The Descriptive Study on Type of UCC and Reply: Focused on Pandora TV, 23 *Journal of Cybercommunication Academic Society*, 69, 79-83 (2007).

amateur music performance, cellular phone ring tones provided by individuals, etc. Image UCCs may be an original picture, photo, or drawing, as well as modified versions of existing copyrighted images. Video/multimedia UCCs include flash movies, home-made videos posted online, edited version of existing videos, etc. Recently, multimedia UCCs that are combinations of audio, text (caption, summary, song lyrics, information on copyright holder, comments, etc), and images (steel shots, posters, etc) are sometimes labeled as UPCs(User-packaged Contents).

#### B. Categorizing by the Purpose of Production

UCCs may be categorized into Informational UCCs (I-UCCs), Entertainment UCCs (E-UCCs), and Business UCCs (B-UCCs) depending on the main purpose of UCC production. Wikipedia, Naver Jisik-in,<sup>9)</sup> and Ohmynews<sup>10)</sup> may be some of the most famous sites where I-UCCs are created and collected. E-UCCs seem to take up the largest percentage of UCCs. While some of the E-UCCs may be purely original, most E-UCCs create fun by twisting, modifying, and building upon the existing works. As UCCs become a large part of the internet, users are striving to find ways to profit from the UCCs. Many UCCs are created to endorse certain products or services. Some users have found ways to create their own home-shopping shows on the internet. Such profit-oriented UCCs may be regarded as B-UCCs. In reality, however, many UCCs have more than one of these features: they provide information, fun, and at the same time are commercially affiliated, indirectly if not directly.

#### C. Categorizing by the Degree of Originality

UCCs can be categorized into UGCs (User-generated Contents), UMCs (User-modified Contents), and URCs (User-recreated Contents) depending on how existing copyrighted material is incorporated into the UCCs. UGCs, in their narrower

<sup>9)</sup> “Naver Jisik-in” is a Naver service providing arena for people to post everyday questions and answer them.

<sup>10)</sup> “Ohmynews” is a Korean internet news provider, famous for having articles by ordinary citizens (“Every citizen is a reporter” is their slogan).

sense, refer to UCCs that are for the most part original in their format or content.<sup>11)</sup> Posting one's own writing, painting, or picture would be considered as creating a UGC. On the other hand, UMCs and URCs are based on other copyrighted works. Of the two, UMCs refer to UCCs that have been modified from another original work by modifying or implementing some other content to it. UMCs often share the purpose or essential intent with the adopted work. Creating a highlighted version of a sports game broadcast would fall in the category of UMC, as well as collection of screen shots from a movie. URCs differ from UMCs in that they are created for “different purposes” from the adopted work. These may adopt format or essential content of the original work, but are often modified in a manner that intends to create different effect on the viewers of the UCC.

### 3. UCC and Copyright Issues

The use of copyrighted material and issues of infringement was doomed to emerge as UCCs came to be sensational. At the dawn of UCC, most of the social and academic focus was on “non-transformative” infringement of copyrights, such as sharing of copyrighted material by means of P2P(peer to peer) sites and webhard services. Following the precedent of Napster, Korea’s largest P2P site “Soribada” had experienced series of civil and criminal lawsuits, which finally ended with Soribada signing contracts with 50 management companies, and beginning to charge its users for the service. The Soribada case brought about phenomenal change of perspectives regarding copyright on the web. The public came to learn that downloading mp3 music files free of charge is not to be taken for granted, and came to respect the rights of original authors. Until recently, however, the users and the copyright holders remained rather indifferent to the “transformative use” of copyrighted material in the form of UCC. The first UCCs created by users of the internet were non-professional, mainly intended to have fun and share with friends. People had not perceived UCCs as means of creating

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<sup>11)</sup> In Western hemisphere, the term “UGC” is more often used to mean what is referred to as UCC in this paper.

profit, either directly or indirectly. However, several factors worked to arouse copyright issues in UCCs as well.

One is the web's enhanced ability to search and provide access to UCCs. The first boom of UCCs came together with the rise of blogs. Some blogs are just like personal homepages, but many of them are created and maintained in the platforms provided by large internet portals. UCC postings on blogs are easily searchable through search engines, and some portals even provide services that have organized and categorized UCCs on the web.<sup>12)</sup> The current SNS (Social Network Service) environment makes it even easier to access UCCs. SNS like Youtube, facebook, twitter, and cyworld provide simple, immediate, and ubiquitous access to UCCs *via* personal computers, tablet PCs, smart phones, etc. Secondly, it is possible to create sophisticated UCCs with qualities that can rival or even supersede that of the original work. People can easily find programs that facilitate easy and convenient editing of image, video and audio files. While the first UCCs were purely original (previously categorized as UGCs) or took the copyrighted material without modifications, UCC producers today actively make use of the existing works to make UMCs and URCs, which may give rise to copyright issues that cannot be resolved by simple application of the relevant laws. Third, while the first UCCs were mostly I-UCCs or E-UCCs, many of them created today are B-UCCs, or at least have some commercial aspect. There are several ways in which UCCs may become of commercial nature, with the purpose of generating profit.<sup>13)</sup> Example of an indirect way would be to gain advertisement revenues. UCCs may give increase in UV,<sup>14)</sup> PV<sup>15)</sup> traffic for the online service providers or sites, which allows for higher earnings from advertisements. This happens in mainly two ways. One would be to lease platforms of UCCs (blogs,

<sup>12)</sup> "Naver Video" and "Naver Blog" are such services provided by Naver. Other major portals including Daum and Yahoo provide similar services.

<sup>13)</sup> Seung-Hee Chun, Business Models Making Use of UCCs, Daum Display Ad Official Blog (Dec. 19, 2006), <http://blog.daum.net/newdaf/10763479>.

<sup>14)</sup> Unique Visitor; the number of individual page visitors regardless of each visitor's page view.

<sup>15)</sup> Page View; the number of page views regardless of the number of visitors.

cafes, minihompis) to the advertising party for money. Another would be to insert advertisements into the individual UCCs. For example, video clips that have GomTV and PandoraTV<sup>16)</sup> as their platform have built-in advertisements before and after playing the contents of the UCCs. More direct way would be to receive commissions for the sale of UCCs. Most famous of this may be report-purchasing sites. These sites provide an arena where people can upload (sell) and download (buy) college papers, reports, and reviews, and take a fraction of the sales as commission. Recently, sites that serve as market for video clips are gaining popularity as well.

The problem is, Korean legal system, as well as most other legal systems around the world, is not fully prepared for the imminent copyright disputes regarding UCCs. Specifically, the Copyright Act which, for nearly 290 years in the U.S. and 40 years in Korea, has protected rights of authors against “professionals”, now has the burden to protect copyright against individual consumers and end-users of the internet. Although the law has not changed, its target and purpose seemingly have. If a limited number of professionals (e.g. authors, artists, programmers, courts, government officials) were the sole entities to make use of existing copyrighted works, the current form of Copyright Act could provide an environment for contractual licensing or authorization to use the existing works. However, when it comes to amateur use of the copyrighted works by anonymous users of the internet, contractual use of the works would be difficult and unreasonable: the copyright holders would not expect to have all casual use of their work be under their supervision, and people making UCCs would not be willing to ask permission for all trivial use of existing works. Fundamentally, requiring all use of the work to receive permission would seriously hinder internet users’ motivation to make creative works of one’s own, and consequently undermine the purpose of the Copyright Act, which includes “promot[ing] fair use of works to the improvement and development of the culture and related industries”.<sup>17)</sup>

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<sup>16)</sup> GomTV ([www.gomtv.com](http://www.gomtv.com)) and PandoraTV ([www.pandora.tv](http://www.pandora.tv)) are two of the largest video platform providers in Korea.

<sup>17)</sup> Copyright Act, art. 1.

Furthermore, the Korean Copyright Act does not have an explicit article on general fair use of copyrighted works. Rather, it has enumerated articles regarding limitations of copyright, which are targeted for specific professional use (e.g. use in judicial proceedings, use for school education, news reports). As a result, the Act does not provide answers to the question of how and how far amateur producers of UCCs can make use of existing copyrighted works for their creation. This is why there have been discussions and efforts to incorporate a general clause on fair use into the copyright system.

## IV. Fair Use

### 1. What is Fair Use?

In the Son Dam-bi decision, the Seoul High Court found that the UCC by the Plaintiff falls in the scope of “reproduction” and “public transmission” of the song <I am Crazy>. Someone who is not a copyright holder must have consent from the author to reproduce or publicly transmit the work. However, certain use of copyrighted works can be considered justifiable even without the consent: the doctrine in copyright law that allows limited use of copyrighted material without acquiring permission from the rights holders is called the “fair use doctrine”.

The historical origins of the current fair use doctrine began in England. The doctrine that we now label as “fair use”, appeared in English cases as the doctrine of “fair abridgment”.<sup>18)</sup> In the United States, Justice Joseph Story introduced the principle in *Folsom v. Marsh*, a case involving rival biographies of George Washington. Over the years, the court fine-tuned the idea suggested by Justice Story. In 1976, the United States Congress codified the fair use doctrine. Rather than specifically defining fair use or articulating a clear test of fairness, it provided a non-exhaustive list of illustrative uses - such as comment, criticism, scholarship, research, news reporting, and teaching - that may qualify as fair.<sup>19)</sup> Congress also set forth four

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<sup>18)</sup> *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.) 490.

nonexclusive factors for courts to consider when deciding whether a particular use is fair. These factors are (1) the purpose and character of the use, including its commercial or nonprofit nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the reproduced parts in relation to the copyrighted work as a whole; and (4) the impact of the use on “the potential market for or value of the copyrighted work.”<sup>20)</sup>

The idea of fair use is not unaware in Korean law as well. While the U.S. has a general provision on fair use (17 U.S.C. §107), most of the civil law countries including Korea have adopted enumerated clauses regarding limitations or exceptions to copyright. Korean Copyright Act Article 23 through 36 lists various occasions where the author’s copyright shall yield to justified use of the works. They include reproduction for judicial proceedings,<sup>21)</sup> use of political speeches,<sup>22)</sup> use for the purpose of school education,<sup>23)</sup> use for news report,<sup>24)</sup> reproduction of news articles and editorials,<sup>25)</sup> quotations from works made public,<sup>26)</sup> public performance and

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<sup>19)</sup> Gideon Parchomovsky, Fair Use, Efficiency, and Corrective Justice, *Legal Theory* 3, 347, 352-353 (1997).

<sup>20)</sup> 17 U.S.C. §107 Limitation on Exclusive rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

<sup>21)</sup> Copyright Act, art. 23.

<sup>22)</sup> Copyright Act, art. 24.

<sup>23)</sup> Copyright Act, art. 25.

<sup>24)</sup> Copyright Act, art. 26.

<sup>25)</sup> Copyright Act, art. 27.

broadcasting for non-profit purposes,<sup>27)</sup> reproduction for private use,<sup>28)</sup> reproduction in libraries,<sup>29)</sup> reproduction for examination questions,<sup>30)</sup> reproduction for visually impaired persons,<sup>31)</sup> ephemeral sound or visual recordings by broadcast organizations,<sup>32)</sup> exhibition or reproduction of works of art<sup>33)</sup>, and use by means of translation.<sup>34)</sup>

Despite the enumerated clauses, courts seem to turn to Article 28 (previously Article 25 before the revision in December, 2006) as a general clause regulating fair use. There was a lower court decision in which the court expressly saw “fair quotation” of Article 28 as an implementation of the “fair use” doctrine.<sup>35)</sup> However, it is still questionable whether the term “fair use” mentioned in the decision is equivalent to the general meaning of fair use. The Supreme Court of Korea, through its decisions, has developed a way of interpreting Article 28 in a way that fair use is applied in the decisions of the U.S.<sup>36)</sup> This is more apparent in a case regarding thumbnail images used for the purpose of aiding searches in search engines.<sup>37)</sup> In the Court’s decision, Article 25 (equivalent to the current Article 28) analysis, whether providing thumbnail images of the copyrighted works infringes the copyright, did not take into consideration the purpose of the use (news reporting, criticism, education, research, etc.) as listed expressly in Article 25.<sup>38)</sup> In other

<sup>26)</sup> Copyright Act, art. 28.

<sup>27)</sup> Copyright Act, art. 29.

<sup>28)</sup> Copyright Act, art. 30.

<sup>29)</sup> Copyright Act, art. 31.

<sup>30)</sup> Copyright Act, art. 32.

<sup>31)</sup> Copyright Act, art. 33.

<sup>32)</sup> Copyright Act, art. 34.

<sup>33)</sup> Copyright Act, art. 35.

<sup>34)</sup> Copyright Act, art. 36.

<sup>35)</sup> Judgment of June 5, 2008, 2007GaHap18479 (Seoul South District Ct.).

<sup>36)</sup> Judgment of July 10, 1998, 97Da34839; May 13, 2004, 2004Do1075, etc. (Supreme Court of Korea)

“In deciding whether the quotation was made within a reasonable limit and is compatible with fair practices, the court must consider comprehensively the purpose of the quotation, character of the original work, content and amount of the quotation, the manner and form of the quotation, general perception of the audience, whether it replaces the demand for the original work, etc.” The same statement was quoted in the Son Dam-bi decision.

<sup>37)</sup> Judgment of Feb. 9, 2006, 2005Do7793 (Supreme Court of Korea).

words, the Supreme Court, instead of applying the facial description of Article 25, seems to have taken up the fair use test developed in the U.S. This may be interpreted to mean that the courts consider the current Article 28 as a general provision on fair use and adopt the fair use doctrine contemplated by the U.S. Court.

## 2. Necessity of Fair Use Clause, and Specific Guidelines

People have discussed whether it is necessary to include an article on fair use in Korean Copyright Act. The dissenters worry that such inclusion could limit the copyright of authors in an arbitrary way, weakening the system of copyright and harm the stability it brings. They worry it could encourage people to make use of the copyrighted material without efforts to gain authorized license or consent from the right holders, and dismantle the hard-earned public awareness of copyright protection on the internet. Also, some say that differences in the legal system and fair use development between the U.S. and Korea must be taken into account. Fair use clause was incorporated in the U.S. Copyright Act through extensive accumulation of decisions on the issue, and the ways of interpreting the clause had somewhat been articulated (although fair use in the U.S. still is criticized for its uncertainty and unexpectedness). However, rarely do such broad clauses have place in the laws of Korea, which is a civil law country. They argue that introduction of such clause could cause problems due to the lack of precedents to give the minimum guidance and consistency. As an alternative, Article 2<sup>38)</sup> of the Korean Civil Act may be applied to frustrate the author's frivolous claims against minor, non-infringing use.

On the other side of the argument, scholars mainly stress the flexibility that the

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<sup>38)</sup> Copyright Act Article 28 (Quotations from Works Made Public) It shall be permissible to make quotations from a work already made public: provided that they are within a reasonable limit for news reporting, criticism, education, and research, etc. and compatible with fair practices.

<sup>39)</sup> Minbeop[Civil Act] Article 2 (Trust and Good Faith) (1) The exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith. (2) No abuse of rights shall be permitted.

fair use clause can bring about. Different ways of using copyrighted material rise and fall, and enumerated clauses of the current Copyright Act cannot adequately regulate the variety of uses emerging under the IT environment. Whether a use constitutes a fair limitation of the copyright evidently requires some interpretation with or without the general clause: in such circumstances it would be better to have a applicable clause rather than applying a foreign doctrine without statutory grounds, or making inference to Article 28 on fair quotations, for which the legislators did not intend such general use.

Considering the pros and cons, and especially taking note of the expanding use on the internet and imminent copyright issues, adopting a general clause on fair use is likely to be a better option. It would be idle to believe that decisions by the judiciary will provide the necessary guidelines for fair use: courts will need firm statutory grounds in order to decide with confidence on fair use cases, which are inherently subjective and requires extensive interpretation of facts and the law. Another factor to consider is the US-Korea Free Trade Agreement, agreed on June 30, 2007 and facing ratification by the National Assembly. As a result of the agreement, some of the American aspects of copyright law will be incorporated to the Copyright Act, which are expected to expand the protection of copyrights.<sup>40)</sup> Providing more protection for copyright does not always help to reach the goal of the copyright law and benefit the society as a whole: incorporating fair use into the Act will add balance to the recent “copyright-oriented” revisions.

In addition, resorting to Article 2 Paragraph (2) of Korean Civil Act would not be a practical substitute for the fair use provision. The Supreme Court of Korea states that an exercise of a right is a violation of Article 2 Paragraph (2) when “exercise of the right, with the subjective purpose of giving only pain and suffering to the counterpart, gives no profit to him or her, and goes against the objective social order”.<sup>41)</sup> Meeting such strict standards is extremely difficult, as

<sup>40)</sup> Articles 39 through 42 of the Korean Copyright Act were revised to protect copyright for 70 more years after the death of the author, instead of the previous 50 years. Articles regarding neighboring rights were also revised in favor of copyright protection (revised June 30, 2011, effective July 1, 2013).

<sup>41)</sup> Judgment of Nov. 27, 2003, 2003Da40422 (Supreme Court of Korea).

the Court requires both the objective and subjective elements. It is unlikely that Article 2 of the Civil Act will adequately and consistently protect minor UCC use of copyrighted material from the abuse of the right.

### 3. Efforts to Legislate Fair Use in Korea

#### A. Proposed Revisions

From the heated debate on whether to adopt a general fair use clause, many scholars and lawmakers have somewhat come to agree that the enumerated articles on copyright limitation is not sufficient to manage emerging copyright issues of today's digital atmosphere.<sup>42)</sup> Indeed, there have been legislative efforts to insert a general provision on fair use. Over the last few years, members of the National Assembly have submitted bills to include a fair use provision.<sup>43)</sup> The most recent effort is the 2010 bill which includes general clause on fair use. The proposed clause is as follows:

#### | Article 35-2 (Fair Use of a Work)

- (1) In occasions where Articles 23 through 35 and 101-3 through 101-5 are not applicable, a copyrighted work may be used in exceptional cases where it does not collide with the ordinary use of the work and does not unjustly harm the profit of the copyright holder.
- (2) The factors in the following sub-paragraphs shall be considered in determining whether the use of a copyrighted work fall in Paragraph (1):
  1. the purpose and character of the use, including whether such use is of a commercial nature or not;
  2. the type and use of the copyrighted work;
  3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
  4. the effect of the use upon the current and potential market or value of

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<sup>42)</sup> Tae-Eun Kim, *A Study on Adoption of Fair Use to Copyright Law in Korea* (thesis for Masters degree), Kyungpook National University, 69 (2011).

<sup>43)</sup> For example, Bill No. 1802888, proposed Dec. 5, 2008.

the copyrighted work.

The proposed revision for fair use greatly resemble 17 U.S.C. § 107. However, the proposed bills are yet to be passed by the National Assembly. Therefore, how the fair use is to be incorporated into the Copyright Act is still up for debate.

There could be three ways of incorporating fair use into the current Copyright Act of Korea. First option is to eliminate the existing enumerated clauses and insert a general one to oversee all cases regarding limitations on copyright. Second is to list and enumerate all possible cases of fair use, and the third would be to insert a new general provision while keeping the existing enumerated clauses.<sup>44)</sup> Most scholars agree that the third option would most likely suit the current circumstances. The first method would bring about immense changes to the Act, and is likely to face the assertion that such legislation is not in conformity with the civil law system. The second carries the same problems posed by the current system, which is, the Act cannot keep up with the ever-changing IT environment, not to mention the variety of forms UCCs can take.

The suggested revisions for fair use, to date, have taken the third approach: they have the fair use clause subsequent to the individual limitation clauses (Article 23 through 35). There may also be other ways to position the general clause in relation to the enumerated clauses, such as putting it “before” the enumerated clauses. Positioning it in such manner may imply that the fair use argument may act as a “limitation” on copyright, not “exceptions” to copyright.<sup>45)<sup>46)</sup></sup>

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<sup>44)</sup> Kye-Won Suh, An Empirical Study on Adoption of Fair Use to Copyright Law in Korea, *51:4 Busan National University Law Review*, 159, 175 (2010).

<sup>45)</sup> Kim, *supra* note 42, at 84.

<sup>46)</sup> The fair use doctrine is generally regarded as “limitations” to copyright in Anglo-American system, while it is perceived as “exceptions” in civil law countries. Fair use as “exceptions” implies that the original copyright is the subject of main protection and its fair use as an exception to the rule, whereas fair use as “limitations” allows room for setting boundaries between copyright and fair use. The proposed clauses for fair use in Korea refer to fair usage as “exceptional cases”. Fair use is referred to as “limitations or exceptions” in TRIPs Agreement, and “limitations and exceptions” in WIPO Copyright Treaty. Also, note that TRIPs Article 13 refers to fair use as certain “special” cases, as opposed to “exceptional” cases (TRIPs Article 13 Limitations and

In other words, it would suggest that fair users of the copyrighted materials have their own “rights”, rather than being just the beneficiary of the exceptions posed by the law. Whether the general clause has place before or after the enumerated clauses shall undergo closer speculation which would involve the value judgment of copyright and fair use.

#### B. Guidelines for Fair Use of Copyrighted Works

Although revision of Copyright Act for general fair use clause is yet to take place, Council on Copyright Co-existence, supported by Ministry of Culture, Sports, and Tourism has put forth “Guidelines for Fair Use of Copyrighted Works” in December 2010, and has been providing them on-line since May 31, 2011.<sup>47)</sup> The Guideline consists of 12 sections to provide guidance as to how usage of certain copyrighted materials may be permitted for fair use in light of the articles in the Copyright Act.<sup>48)</sup> The sections to note are Section 11 and 12. Section 11 with the title “Other Fair Use” states:

Notwithstanding the enumerated grounds in the above sections, a copyrighted work may be freely used in exceptional cases where it does not collide with the ordinary use of the work and does not unjustly harm the profit of the copyright holder, when the proposed bill to include a fair use clause of Article 35-2 is approved and put into effect. The following is to be considered in such usage:

- ① the purpose and character of the use, including whether such use is of a

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Exceptions: Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder).

<sup>47)</sup> Guidelines for Fair Use of Copyrighted Works (May 31, 2011), <http://freeuse.copyright.or.kr/htm/guideline/guidehome.htm>.

<sup>48)</sup> The twelve sections areas follows: Section 1 Fair use related to Government Agencies, Section 2 Fair use for Educational Purposes, Section 3 Fair use regarding Press and Broadcasting, Section 4 Fair use regarding Quotation of Works Made Public, Section 5 Performance and Broadcasting for Non-profit Purposes, Section 6 Reproduction for Private Use, Section 7 Use of Copyrighted Work in Libraries, Section 8 Use of Copyrighted Material for the Visually Impaired, Section 9 Exhibition and Reproduction of Art, Photography, Architecture Works, Section 10 Fair use of Copyrighted Computer Programs, Section 11 Other Fair Use, Section 12 Examples of Fair Use Cases.

- commercial nature or not;
- ② the type and use of the copyrighted work;
  - ③ the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - ④ the effect of the use upon the current and potential market or value of the copyrighted work.

Section 11 was constructed on the premise that a general fair use article will be inserted to the Copyright Act. Section 12 “Examples of Fair Use”, in the form of question and answers, deals with instances of utilizing copyrighted works and suggests possible legal effect it could bring.<sup>49)</sup>

The Guideline has significance in that efforts have been made to provide some instructions and manual for the casual users of copyright material on the web. Many examples on the Guideline deal with usage of existing works on the internet, especially regarding the production of UCCs. The diverse interest groups that make up Council on Copyright Co-existence and participated in making the Guideline balanced the Guideline and reflected different perspectives surrounding the issue. It is also evident, however, that the Guideline could only make reference to the standardized use of copyright, especially taking into account the technological complexities that the UCCs and other IT creations can pose. The Guideline is only a guideline: unless decisions of the court are accumulated to reflect the view of the judiciary, the Guideline alone cannot be a decisive standard in determining fair use.

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<sup>49)</sup> Some of the questions in Section 12 regarding fair use in the form of “UCCs” are: Is it fair use to take pictures of purchased products and to post them online for product review?(Q. 10), is it fair use to scan pictures of catalogues, movie posters, or jacket pictures of music albums and post them on blogs for review?(Q. 11, 13), is putting steel cuts of movies online a fair use?(Q. 12), is it fair use to put lyrics of entire songs in a blog?(Q. 21), is putting parts of a published books or poems a fair use?(Q. 25), is posting an audio file of a me singing in a karaoke to a popular song a fair use?(Q. 30), is posting a video clip of a child with a copyrighted music playing in the background a fair use?(Q. 34), is a posted clip of me dancing to a music a fair use?(Q. 40), is it fair use to put together several image files into a single file?(Q. 42).

## V. Application of Fair Use: in Light of UCCs

Copyright Act revision to include a general fair use provision and efforts to establish a guideline are important for the rising fair use disputes. Ultimately, however, the finding of facts for each case, and the judicial interpretations made by the court will prove to be decisive. Even when there is a general provision, the fair use doctrine requires courts and users to engage in a complex multi-variable analysis whose result is difficult to predict. Compounding to this problem is the fact that courts generally keep the doctrine as vague as possible and decline to provide a formula for what constitutes fair use.<sup>50)</sup> Therefore, it may be worthwhile to look into each of the variables suggested to be included in the general clause of fair use, especially taking into consideration of fair use in the form of UCCs.

### 1. The Purpose and Character of the Use: Commercial Nature?

Many professionals of copyright consider “commerciality” of the new work as an important factor when deciding fair use. For many, copyright means “money”, and the justification for unwarranted use of copyrighted work would be that it is an amateur use not intended to generate profit. The proposed bill of Korea and 17 U.S.C. § 107 both require consideration for the commerciality of the use. The Court of Son Dam-bi decision also considers whether the use was of commercial nature or not: in deciding that the Plaintiff’s use was within a reasonable limit and is compatible with fair practices the Court took note that “the clip was not made and transmitted for commercial use”(②). However, decisions by the U.S. Courts show that commercial nature of the work is not a decisive factor in determining whether the use is of commercial or not. There are numerous decisions that acknowledged fair use when it came to production of commercial films, TV programs, music albums, etc.<sup>51)</sup>

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<sup>50)</sup> Gideon Parchomovsky, Beyond Fair Use, *Cornell Law Review*, 91, 93 (2010).

<sup>51)</sup> Some of the most famous cases are: *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78, 114 S.Ct. 1164, *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2nd Cir. 1998).

What led to the discrepancy between the decisions and the articles in the U.S.? Is commerciality only minor factor for the test? It is worth noting that the Copyright Acts have purpose and character of the “use” as the variable, not the purpose and character of the “newly created work” itself. Commentaries on variables for fair use, as well as the reasonable limit and compatibility test in the Son Dam-bi case seem to focus on whether the newly created work has commercial character or have purpose of generating profit. The commercial character of the “new work” cannot be a decisive factor in deciding fair use. When people produce a work of one’s own, they usually have some form of audience in mind. Even if they do not intend to generate profit from the work, they usually want it to be enjoyed by as many people as possible.<sup>52)</sup> Especially, one of the most significant features of the IT environment and the production of UCCs is in their power to reach out to enormous audience around the world connected by the world-wide web. Even if the producer intended to collect the minimum production costs from the distribution, it may result in generating a large profit depending on how popular his or her work becomes, and how much audience it draws. Whether a use of a copyrighted work falls into the category of fair use cannot be decided upon “ex post facto” analysis of the commerciality of the new work.

Another perspective shall be incorporated in analyzing the purpose and character of the use. When the new work created by making use of another original work creates the same effect and inspiration on the audience as the original work, the new one could be seen as free-riding on the preference and recognition of the original work. If the effect and inspiration it creates rests largely on the commercial effect and inspiration of the original work, the “use” itself may be labeled “commercial”. So, the factor at issue must consider whether the use results in creating the “same” or “different” effect to the audience: in other words, a “transformative” use is a standard in interpreting the purpose and character of the

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<sup>52)</sup> Of course, people would make works (by making use of other copyrighted works) for self-fulfillment, not intended to be shared by others, but such use would not induce issues of infringement as they it will fall under Article 30 (Reproduction for Private Use).

use. In reality, transformative use has been an important factor in fair use decisions of the U.S. For example, the Supreme Court found that 2 Live Crew's rap parody of Roy Orbison's song "Pretty Woman" had transformative value that outweighed its commercial aspect. It also found that the more transformative the new work, the less will be the significance of the other three factors.<sup>53)</sup><sup>54)</sup>

Transformative use seems to have been acknowledged and taken into account in the reasonable limit and compatibility test of the Son Dam-bi case. The Court expressed that the video contained a crude imitation of Son Dam-bi's song and dance by a little girl whose tone, beat, and words considerably differed from the original work, and does not arouse the same feeling as created by the original song (parts ③, ⑤, ⑦). Indeed the young girl's performance comes to the audience as sweet and cute, generating feelings very disparate from the original song <I am Crazy> which normally induces excitement and musical inspiration. Whether the use is transformative will be decisive in determining fair use of other UCCs as well. A newspaper article copied and pasted into a blog, though the article itself lacks any commercial value, could turn out to infringe the copyright of the newspaper due to little transformation. On the other hand, works of parody, although they may adopt content and format of the existing works, will at times be considered to be fair: they usually intend to create humor, satire, or irony not included in the original piece. Surely, UCCs categorized as URCs will more likely be considered transformative compared to UMCs, thus have better chance of passing the fair use test.

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<sup>53)</sup> Campbell v. Acuff-Rose Music, Inc, 510 U.S. 569 (1994).

<sup>54)</sup> In Elvis Presley Enterprises v. Passport Video, 349 F.3d 622 (9th Cir. 2003), the court finds little transformative character saying: "nature as a biography transforms the purpose of showing these clips from pure entertainment to telling part of the story of Elvis life. But many of the film clips seem to be used in excess of this benign purpose, and instead are simply rebroadcast for entertainment purposes that Plaintiffs rightfully own". In Hofheinz v. AMC Productions, Inc 147 F. Supp. 2d (E.D.N.Y. 2001), the court found transformativeness in the use of films to show the advancements of special effects in movies.

## 2. The Type and Use of the Copyrighted Work

The characteristics of the original work may also be taken into account in judging fair use. According to the commentary in the Guidelines for Fair Use of Copyrighted Works Section 11, some of the notable factors to consider are ① whether the original work was of a factual character, and ② whether the work has been made public.

Decisions in the U.S. suggest that the use of “factual, informational” work is more likely to be considered fair, while use of more creative, original works is harder to justify with the fair use doctrine.<sup>55)</sup> Here, factual work would refer to a work which contains material based on factual matters, yet is expressed or arranged in more creative and original way.<sup>56)</sup> Such notion is on the premises that factual matters could be expressed and transmitted in similar ways by different individuals, and that there is relatively higher needs for these informational works to be widely distributed for the public to share.

Regarding the second factor, whether the used work has already been made public, the 17 U.S.C. §107 explicitly states that this is not the foremost concern.<sup>57)</sup> However, the U.S. Supreme Court seems to take the factor into account, saying “the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use”.<sup>58)</sup> On the other hand, enumerated articles on copyright limitations in the Korean Copyright Act, for the most part, require the original work to be made public.<sup>59)</sup> From these, we can see that

<sup>55)</sup> National Business Lists, Inc. v. Dun & Bradstreet, Inc., N.D.Ill.1982, 552 F.Supp. 89, Bridge Publications, Inc. v. Vien, S.D.Cal.1993, 827 F.Supp. 629.

<sup>56)</sup> A mere factual material provided in a usual, common way would not be protected by copyright to begin with. Copyright Act Article 7 (Works Not Protected) No work which falls under any of the following Subparagraphs shall be protected under this Act: ... 5.Current news reports which transmit simple facts

<sup>57)</sup> 17 U.S.C. §107: “...The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors”.

<sup>58)</sup> Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

<sup>59)</sup> Enumerated articles that does not require the works to be made public are Article 23 (Reproduction for Judicial Proceedings), Article 26 (Use for News Report), Article 35 (Exhibition or Reproduction of Works of Art, Etc) Sub-paragraphs 1 and 3.

whether the work had been made public or not could be a factor in judging the “type and use of the copyrighted work”.

In all, however, Sub-paragraph 2 “the type and use of the copyrighted work” seems to act as secondary standard in the fair use test. Park (2010) views this as a “casting vote” to the test, meaning that this variable could be taken seriously only when the analysis of other factors do not indicate a clear determination on fair use.<sup>60)</sup> Reasonable limit and compatibility test of the Son Dam-bi case does not seem to have taken much thought on this factor as well.

### 3. The Amount and Substantiality of the Use

Regarding this variable, the general phrasing by the Korean Supreme Court was to consider the “content and amount of the quotation”. This ambiguous wording raised a following question to be considered: whether it is ① amount and substantiality of the used original work, or ② substantiality of the quotation from the original work within the newly created work.<sup>61)</sup>

Unlike the Supreme Court phrasing, the fair use clause of the 17 U.S.C. § 107, and the proposed bills in Korea seem to clarify this point. It is stated, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”, which corresponds to ① of the two interpretations. Despite the express provision, however, analysis of the cases show that N/copy is taken into account just as much as N/original, sometimes having even larger role in the analysis.<sup>62)</sup> This may well be applied to cases of UCCs. Take for example, a UCC of a shortened highlight of a soccer match that had been broadcasted on a TV network. N/original could be very small (3~5 minutes of a 90 minute match) whereas N/copy would converge nearly to 1. On the other hand, a blog posting of a poem review with the poem itself would have a large N/original and small

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<sup>60)</sup> Kyung-Shin Park, A New Definition of Fair Use, *Copyright Quarterly*, 42, 57 (2010).

<sup>61)</sup> Park, *supra* note 60, at 47. Park terms ① as “N/original”, and ② as “N/copy”.

<sup>62)</sup> Park, *supra* note 60, at 47. Park conducts numeric analysis on several U.S. cases regarding fair use, quantifying and comparing N/copy and N/original of the works at dispute. He concludes that decisions of fair use is not in proportion to N/original.

N/copy. The former will (and should) constitute an infringement of copyright, and the latter a fair use.<sup>63)</sup> N/original is not the sole factor in the decision of fair use.

In the Son Dam-bi decision, the Court seems to have taken into account both N/original and N/copy for the reasonable limit and compatibility test. N/original would correspond to the mention that “the quoted amount is only 7, 8 verses out of 74 total verses, seemingly the least possible quotation for the purpose” (④) and consideration for N/copy is illustrated by the mention that “due to background noise, only about 15 seconds out of 53 can be recognized as singing the copyrighted song” (⑥).

As was the case for Son Dam-bi decision and other decisions, both N/original and N/copy should be noted into the fair use test. However, this does not necessarily indicate a deficiency in the Copyright Act provision: N/copy may as well be considered in line with the “transformative use” test for the first element, the purpose and character of the use. Larger N/copy would mean less transformative use, while a smaller N/copy would mean more transformative use. However, since N/copy factor is as important as N/original in considering fair use, expressly codifying N/copy factor into the article as well as N/original would be meaningful in maintaining balance.

#### 4. Effect of the Use on the Market of the Copyrighted Work

A big reason why copyrighted work could be used without the consent of the authors in certain situations is because it does not harm the copyright holder. When a use considerably deprives the author of any benefits enjoyed from the copyright, passing it off as fair use could shake the copyright system, which is primarily designed to protect the rights of original authors. The importance of this fourth variable is reflected in the commentary of the Guidelines for Fair Use, which comments that this is the most crucial and final factor of the four. In a way, the above three factors exist to supplement this last factor: since the impact of the use on the value and market of the original work is not always visible, the

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<sup>63)</sup> Such outcome is also expected in light of examples suggested in the Guidelines for Fair Use of Copyrighted Works.

preceding factors could aid in determining whether the newly created work comes with its own market and audience, or conflict with the existing market and value of the original work.

One point worth noting of this factor is that it considers the “potential” market, as well as the current value of the copyrighted work. A potential market, in a broad sense, could encompass all future use of the copyrighted material. Thus, there is a need to determine a way to interpret and assess the potential market of the existing work. If the original author had express plans on how it intends to form a separate, secondary market by making use of the original work, it may as well be regarded as a potential market for which the profit should be secured against infringement. Even when there is no express implication, “ordinarily expected use” of a work and the new market it is likely to create shall be included in the area of “potential market”. Take again the example of creating a UCC by modifying a broadcasted soccer match. It can be fairly expected that the TV network could put together main parts of the game to create a highlight for later broadcast, possibly for sports news. This would be the “ordinarily expected use”. On the other hand, putting together a favorite player’s performance in the game to create a UCC would not be an ordinarily expected use of the original author, and not conflict with the potential market. Again, whether the use falls into an “expected” use of a copyright would depend on how transformative the use is in comparison with the original work. In essence, transformative use is likely to evade the possibility of encroaching upon the existing and potential market value of the original work.

## VI. Conclusion

The fair use doctrine, despite the lack of firm statutory ground, has been well incorporated in Korean courts’ decisions on limitations of copyright. The current decisions unfold the fair use analysis by means of Article 28 on fair “quotation”, but the upcoming increase of fair use disputes call for a general provision on fair

use. The general fair use clause of the proposed bills takes the form of a supplementary clause placed subsequent to the existing enumerated articles on copyright limitations. They greatly resemble 17 U.S.C. § 107, not to mention adopting the four-factor test in considering fair use. Even if the revision is made to incorporate the general clause, specific ways in which facts are interpreted and the article is applied would come from the courts. All four factors will play a role, but whether the use of the work was “transformative” is the most critical in assessing all of the variables.

The Son Dam-bi decision is significant for several reasons. It re-ignited discussions of fair use, which was the focus of the preceding discussion. It also provided, though not discussed for this purpose, a look into the liabilities of gigantic Online Service Providers (in the case, Naver) that serve as major platforms formulating today’s web environment. Lastly, it also dealt with the assessment of damages for compensation regarding unjustified takedown notices. The Son Dam-bi case is rare for the kind: often ordinary users of the web neither have the resources nor the will to take action against large corporations who own and exercise copyright. For people to express their creative minds free from worries of copyright infringement, it will be the job of the government to refurbish the laws, and the job of the judiciary to put forth clearer standards.

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