

# 著作權法第六十五條第二項四款

## 衡量標準之研究

### 研究計劃摘要

制定著作權法之目的，係為鼓勵著作之創作、傳播與流通，藉此豐厚人類文明與社會文化。現代化社會，亦無不致力於建立周全的著作權法制，使著作人因為可以就其創作成果，依法享有各種著作權利之故，因而樂於創作。

基於文化發展之特性，文明社會固能因為各種創作源源不斷的出現，而使文化內涵更加豐盈；然而於著作人從事各種創作時，實際上亦需要利用他人之著作，方能繼起創作。因此，著作權法的一方面既應鼓勵創作、保護創作人，另一方面更應提供創作人合理利他人著作的空間，以避免在保護創作之同時，壓抑獨立創作的空間。此項平衡保護兩種利益的設計機制，亦為各國構建其著作權法制時之重要指導準則。

我國著作權法體受此種思潮，基於「為兼顧調和社會公共利益，促進國家文化之整體發展，於必要時亦須予以限制」之理由，於制定民國八十一年著作權法時，除明定各種保護著作權之措施外，亦同時在著作權法第四十四條至第六十六條之間，植入名為「著作權之限制」之規定，而在這

些限制著作權之規定中，尤以通稱為「著作權合理使用條款」之著作權法第六十五條規定，乃係著作權法上一項歷史悠久、頗具特色的著作權平衡機制，值得加以探討。按所謂「著作權之合理使用」，其意義係指：「著作權人以外之人，對於著作權人依法享有之專有權利，未經著作權人同意或授權，即得於一定範圍內、以一定方式，自由、無償加以利用」。若自訴訟法角度以觀，「合理使用，並非權利，乃是訴訟上的一種抗辯主張」（fair use argument is not a right, but a privilege），此項主張係著作權人對於他人之利用行為，提出侵害著作權之訴訟後，該他人乃據此提出「其利用行為，係對於著作權之合理使用，而不構成侵害著作權」之訴訟上防禦方法（affirmative defense）。

我國著作權法上的「合理使用」，既以「合理之使用」為免責之條件，然所謂之「合理」，其標準何在？如何範圍、如何程度、乃至如何方式之使用，方始構成合理之使用？這些問題，在我國著作權法的條文中，並未明示任何答案，而僅在著作權法第六十五條第二項規定中，指示法院應在個案判斷時，審酌一切情狀，以為判斷之標準，特別是法院尤應審酌該條第二項所指明的「四項事實」，以為判斷該利用行為是否構成合理使用之參佐。這條規定內容如下：

#### 著作權法第六十五條

著作之合理使用，不構成著作財產權之侵害。

著作之利用是否合於第四十四條至第六十三條規定或其他合理使用之情形，應審酌一切情狀，尤應注意下列事項，以為判斷之標準：

- 一、利用之目的及性質，包括係為商業目的或非營利教育目的。
- 二、著作之性質。

三、所利用之質量及其在整個著作所占之比例。

四、利用結果對著作潛在市場與現在價值之影響。

由於著作權法僅於第六十五條第二項文中，抽象地指示法院應依個案審酌方式，審酌一切情狀，特別是該條第二項所列出的四個事項，藉以判斷利用行為是否得以構成合理使用，而法條中卻未明文規定何者始屬合理之使用，由於國內尚少有直接之討論，僅有之線索，只有著作權法第四十四條至第六十四條等條款所規「著作權之限制」之條文，以及第六十五條第二項所列舉之「四項事實」可以作為參考準據。因之，除藉由檢視立法者制定合理使用條款之原意，進而推測其審酌標準所在之外，另項可行之探索方向，則是藉由探討與整理由司法機關，包括法院與檢察署在內，在個案中判斷具體之利用行為是否構成合理使用時所表示之見解，作為研求合理使用審酌標準之對象。

此外，由於我國著作權法第六十五條規定，係直接參考美國一九七六年的著作權法第一〇七條的立法例而來，二者雷同度極高，因之，彼邦美國學術界以及實務界對於著作權合理使用主題所發表之學術文獻以及實務案例，亦當然可以成為研求我國著作權法合理使用之審酌準則時，重要的參考對象。

本研究即擬自上述三大資料來源，研究我國著作權法第六十五條第二項四款之審酌準則，嚐試建立「審酌利用行為是否構成合理使用之審酌模式」，並參考中美兩國相關學術見解及司法實務案例，提出「著作權合理使用之審酌準則」，以供主管機關以及各界在適用著作權法第六十五條第二項規定時參佐之用。

惟囿於作者學植有限，在從事本研究時，當難免發生謬誤，關於本研

究案所提出之著作權合理使用「審酌模式」，以及「著作權合理使用之審酌準則」是否具體可行？由於乃係出於作者個人從事著作權合理使用研究後所獲得之粗見，未必盡然妥善、為此，謹祈請各界給予批評與指教。

## The Research on the Possible Guidelines of the Second Paragraph in Article 65 of Copyright Act of Taiwan

### Abstract

The primary purpose to establish Copyright Law is to encourage the creation, communication and dissemination of all sorts of works, in order to harvest human culture and civilization. A modern society would always try to establish her copyright protection mechanism to protect all of the authors' economic and moral rights which subsists on the creation of their works.

With the continuous creation of all kinds of works, the society is benefited and the culture is also enriched, but for the reason that a world goes ahead because each of us builds on the works of our predecessors, so the protections granted by copyright law should be limited in a way that does not allow to stifle independent creation by others. And it is believed that most of the Countries in the world are just build their fair use mechanism base on the principle.

In enacting Copyright Act of 1992, Legislative Yuan expressed its intension to build up the fair use mechanism is to balance the mutual benefits between the private and the public, and to promote the progress and development of the national culture as a whole; Therefore, a serial of articles called: "The limitations on copyrights" have been established and planted into the Act, among which, the fair use doctrine clause, Article 65, is historically the most important one. A fair use Fair use is a free, non-infringed use, it also may be defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent or authorization, notwithstanding the monopoly granted to owner by the copyright", *cited from* HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1924). And from the perspective of procedure law, "fair use argument is an affirmative defense, as such it is a privilege, not a right, and is relevant only after a prima facie evidence showing of infringement has been established." *cited from* 1 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 725-26 (1994).

How to determine that a use is fair? What is the standard and criteria to decide that use is "fair" in copyright law? To what extend and degree, and in what way a use is fair, obvious

there is no exactly direct answer to these questions in Taiwan Copyright Act, except the text of article 65. The article 65 of the Copyright Act directs the courts, in a case-by-case base, should take into account every element in which it is related to the use itself, especially the second paragraph, of which, it provides that the court should emphasize to examine the "four facts" in order to determine whether the use in issue is a fair use or not. The full text of Article 65 says:

The fair use of copyright would never constitute an infringement of the economic right of copyright.

Where a use is fair or not, should be judged based on every facts related to the use, especially on the following facts:

- 1.The purpose and nature of the use, including the commercial purpose or non profit educational purpose;
- 2.The character of the use itself;
- 3.The quality and quantity of the portion of the use in relation with the work used;
- 4.The effect of result of the use toward the potential market and the present value of the work used.

The possible guidelines for the judgment whether a use is fair therefore lies on those Limitations on Copyright Articles, which are between Article 44 to 64, and the four facts mined in the second paragraph of Article 65, And the others guidelines may be figured out or be measured from the judicial verdicts or judgments handed down from Courts and the decisions rendered from the District Attorneys' offices.

Besides, the cases or studies regarding the Article 107 of the United States Copyright Act of 1976, from which, the Article 65 of Taiwan Copyright Act of 1992 are literally originated from, also play an important role to help us to define and learn more about the interpretation and the application of fair use doctrine to every case we are facing.

This research is primarily tried to shape out the outer guidelines for the decisive criteria about a fair use, or tried to find out any categorizative fair use standard which might be possibly exist.

研究計劃摘要..... **I**