Can Hair Style be Protected by China’s Copyright Law
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Abstract. It is a problem that how to protect the Culture and Creativity enterprise such as hair style under the framework of intellectual property right, which has been discussed by legal theory and judicial practice in recent years. This article would like to do case study on three relevant cases to make clear whether or not the image composed by hair style and head wear etc. was protected by the range of Copyright Law.

Introduction
With the trend of China’s globalization and the world’s Chinization, the Culture and Creativity enterprise in China have boomed. The Culture and Creativity enterprise are playing a more and more important role in the development of social economy. The creative industries are “those industries have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property”, its core value lies in the creation and innovation, which is an intellectual output based on the originality of creator, the intellectual property is a monopoly rights enjoyed by the rights holders to their creative work according to law. It is a problem that how to protect the creative industry such as hair style under the framework of intellectual property right, which has been discussed by legal theory and judicial practice in recent years. This article would like to do case study on three relevant cases to make clear whether or not the image composed by hairstyle and headwear etc. was protected by the range of Copyright Law.

Three Relevant Case Studies
Case1. Shi Hui v. Xuzhou City Bureau of Labor and Social Security et al Copyright Infringement Dispute Case (2004)[1]

● Fact
Plaintiff Shi Hui entered the forth Jiangsu Province hair and makeup contest named Jin Sha Cup in 2002, which was organized by Jiangsu Provincial Department of Labor and Social Security, Jiangsu Provincial Trade Union Council, Jiangsu Provincial Hair and Beauty Association, his women-evening hairdo won the silver award for this project.

On July 25-27, 2003, the Xuzhou Labor Bureau, Xuzhou City, Jiangsu Province Federation of Trade Unions organized by the Hairdressing Association, Xuzhou Jin Sha School held Huai Hai Hair and Beauty Fashion Festival, Plaintiff found the photo of his evening hairdo which won the silver award for the forth Jiangsu Province Hair and Makeup Contest was used in the Fashion Festival’s print ads and guest card without Plaintiff’s permission, and did not pay remuneration to Plaintiff.

Plaintiff claimed that the hairdo designed by him won the silver award for the “Jin Sha cup” the forth Jiangsu Province Hair and Makeup Contest’s Women-Evening Hairdo Program Contest in 2002, his creative hairstyle belonged to the arts work under the Copyright Law, Plaintiff enjoyed the copyright according to law. The captioned Defendant’s accused act violated the right of authorship of the work enjoyed by Plaintiff according to law and the right of remuneration. Therefore, Plaintiff...
asked the court to order those five defendants be jointly liable to stop tort, apologize, compensate economic loss RMB 30,000 yuan, and bear the litigation fee.

● Judgment
On December 17, 2004, Plaintiff filed an application to withdraw the suit to Xuzhou City Intermediate People's Court, the court considered that the application complied with related provisions of law and ruled to approve the withdrawal of the suit according to Civil Procedure Law of the People's Republic of China.

● Comment
The legal problem involved in this case is whether or not hair style can be protected by Copyright Law. Because China’s Copyright Law does not explicitly stipulate such kind of work, thus whether or not hairstyle can can be protected by Copyright Law is quite controversial. This case ultimately had no conclusion because Plaintiff withdrew the suit, but the thinking about composition of works and the protection related to China’s Copyright Law didn’t come to an end.

Case2. Liu Jinmi v. Beijing Feirui Jia Trading Company, City Liyuan Beauty Salon Et Al Copyright Infringement Dispute Case (2005)[2]

● Judgment
This case also involved that whether or not hair style belonged to the protected object of Copyright Law. Beijing Haidian District People’s Court made the following statement: “The hair style claimed by Liu Jinmi is composed by a series technique and steps. Copyright Law has no right to prohibit imitating and using the technique and steps, thus it is not the protected object of Copyright Law. But regarding the specific results of the skills and procedures, i.e. the hair itself, can be described as a sculpture, yet the shape of the fixing is obviously different from the sculpture; adding that the body's own hair due to using on the human body, in shape, length, straight or curly hair etc. choice, must be in accordance with the requirements of the human body's natural law, style has not exceeded the public domain; and the combination of hair style and the human body itself and the characteristics of manual labor, all the communication is limited to imitate and cannot achieve complete replication, therefore the line and the shape of the human hair cut by hand technique itself does not belong to the works of the copyright law.”

● Comment
This judgment explicitly negated that hair style was protected object of copyright.

Case3. He Ji and Hangzhou Tiancan Culture Communication Co. Ltd. Copyright Ownership, Copyright Infringement Dispute Case (2011)[3]

● Fact
Plaintiff and his friend had a tour to visit Sun Moon Lake in Taiwan in early 2009, abruptly generated creative inspiration, made the conception of the woman's hairstyle to the interpretation of Hangzhou "Ten Scenes of West Lake” (indicating the famous tourist attractions in West Lake of the ten characteristics in Hangzhou City, Zhejiang Province, the most common speaking are Suti Chunxiao, Quyuan Fenghe, Pinghu Qiuyue, Duanqiao Canxue, Liulang Wenying, Huagang Guanyu, Leifeng Xizhao, Shuangfeng Chayun, Nanping Wanzhong and Santan Yinyue). After going back to Hangzhou, Plaintiff placed himself into the library, museum, multi searched information; went to West Lake Ten Scenes doing sketch on spot many times, considered the style; afterwards he continuously practiced on women’s hair, modified and improved. During this process Plaintiff also specially painted the shape figure sketch, attached a plan, briefly explained the model form requirements, selection and collocation of clothing, headwear and so on. Several months later, the "Ten Scenes of West Lake" image show was finally completed. On April 22, 2009 it was formally showed to the public at Hangzhou Canal Culture Square. On April 23, 2009 the “Youth Times” did publicity and presentation in a special edition for it.

Later on, on May 1, 2009 the "Ten Scenes of West Lake” image show was formally exhibited in the “Fifth China International Animation festival”, afterwards also was publicly performed in the opening ceremony of “Guqin Music Festival” of “China West Lake Hangzhou International Fair”, obtained leaders and audiences’ unanimous praise. The "Ten Scenes of West Lake” image show
through broad report by province, city and CCTV, has become a “golden name card” of Hangzhou recognized by all Chinese people.

Defendant was a professional model company, provided part of the assistance during the time of Plaintiff and his friend’s creation. The president of Defendant Co. watched most part of the process of Plaintiff’s creation and deduction, and made shooting and record. On October 12, 2010, in the “Second Hangzhou Beautiful Festival Night Awards” broadcasted by Hangzhou TV channel, Defendant launched the “Ten Scenes of West Lake” style show under his name, and published on his website. After Plaintiff discovered, claimed that Defendant plagiarized, and simulated and adapted to use his own original works, and made vilification and distortion.

On December 7, 2010, Plaintiff sued Defendant to Xihu District People's Court of Hangzhou City, Zhejiang Province, claimed that the "Ten Scenes of West Lake" image show created by him, including the overall shape of hair style (containing headdress), clothing and props, was three-dimensional art work, Defendant’s act of plagiarism, alteration and distortion of Plaintiff's work infringed his right of authorship, modification, integrity of work protection and reproduction, constituted tort, asked the court to order Defendant immediately stop infringing act on Plaintiff’s copyrighted work of art the "Ten Scenes of West Lake" image show, i.e. stop infringing Plaintiff’s copyright act by distributing and publicly deducting, and compensate economic losses, publicly apologize, eliminate bad influence and bear the litigation fee of this case and other reasonable fee.

● Judgment

The judgment of Xihu District People's Court of Hangzhou City, Zhejiang Province rebutted Plaintiff's litigation claim of stopping tort and compensating loss. [4] Plaintiff dissatisfied with such judgment, appealed to Hangzhou City Intermediate People's Court, Zhejiang Province.

The fact examined by the second instance court was consistent with the original instance court’s, decided that the "Ten Scenes of West Lake" image style belonged to the intellectual achievement in art field and had creativeness and replicability, constituted the work in the sense of Copyright Law, its work category was three-dimensional work of art, and further decided as follows:

First, the work of the right claimed by Plaintiff which could be one to one correspondence with the accused work, were only 4 photos. Compared to the two sides of the four photos can be seen, the expression forms of both works were not identical.

Second, concerning the problem that in both styles i.e. the expression of the work, had some certain factors, the specific scene corresponding to the "Ten Scenes of West Lake", had a long history. Therefore, using it to be the topic of performance, using hair style etc. as the way for expression, the expression of the work, would be restricted by the "Ten Scenes of West Lake" corresponding specific scenery. Thus, we could not say that there were some specific elements in the form of expression and decided that tort was established.

Finally, regarding whether or not Defendant Co. referred to Plaintiff’s creation, the second instance court determined that current evidence showed that Defendant Co. contacted Plaintiff’s style, both parties once closely cooperated, and both parties’ style used the "Ten Scenes of West Lake” as the subject of performance, hence, might decide that Defendant Company’s style referred Plaintiff’s creation. Although the form of Defendant Co. was different from Plaintiff's work in the form of expression, such as style, layout, and other specific expression of different ways, Defendant Co. had in its own form of reference to Plaintiff's idea, used Plaintiff's creativity, yet this kind of reference was not adaptation in the sense of Copyright Law.

Simultaneously, owing that Copyright Law protects the expression way of works does not protect idea and expression. Therefore, Defendant Company’s reference conduct did not constitute infringement of Plaintiff’s copyright. The court made the final instance judgment and maintained the original verdict. [3]

● Comment

Although Plaintiff’s cause of action of this case was not supported by the court, yet no matter first or second instance court both made clear that the "Ten Scenes of West Lake” image show belongs to the “three dimensional work of art”, should be protected by Copyright Law. Previously,
In this case, it affirmed for the first time that the image of hair style with originality and replicability constituted the work in the sense of Copyright Law, was protected by Copyright Law. Its work category was the three dimensional work of art, thus, this case has very important meaning, has very huge encouraging function toward encouraging innovation and developing and promoting culture and creation enterprise. Naturally, this case not only involved much more complicate problem of law application, that is the understanding and definition of whether or not hair style belonged to the three dimensional work of art under Copyright Law, but also involved much more difficult fact finding and judgment problem, that is how to decide whether or not Plaintiff and Defendant’s both image styles constituted similarity, and whether or not the "Ten Scenes of West Lake" used by Defendant on models was adapted from Plaintiff’s work constituted tort and so on.

In this case, the second instance judgment’s holding of similarity was the same as the first instance court, decided that both image styles did not constitute similarity. Besides, regarding whether or not Defendant Company’s work referred Plaintiff’s creation, the second instance court presented unique viewpoint, finally also determined that Defendant Company’s style referred Plaintiff’s creation. But owing that such kind of reference was adaptation in the sense of Copyright Law; and the law protects the expression way of works, does not protect idea and creation, thus, the referring conduct did not constitute infringement of Plaintiff’s copyright. Accordingly, it raises the thinking of how to effectively protect the creativity of culture and creativity enterprise.

Just as stating by the second instance court, the dichotomy of idea and expression is the basic principle of Copyright Law, and creativity is only one kind of idea, must be demonstrated through a certain form and the carrier to be protected. If it was not performed or other people performed inconsistently, then the court could not decide that the work was to be protected and constituted tort. Contacting the case, Plaintiff based on the "Ten Scenes of West Lake" which is a well-known attractions element, had a brainwave on such basis, for interpretation of women's hair and clothing style and made practice and fixation. To Plaintiff, the most and critical content was “in women's hair and clothing and other comprehensive way to interpret the ‘Ten Scenes of West Lake’”, this is the creativity of Plaintiff himself, and Defendant knew this creativity’s core and benefit during the process cooperating with Plaintiff, further interpreted in other form. The second instance judgment restated that to use the “Ten Scenes of West Lake” as performing topic, to use hair style etc. as the expressing way, his work’s expression definitely was restricted by the corresponding scenery of the “Ten Scenes of West Lake”. Defendant Co. made creation based on referring creativity, if adding his understanding and intellectual achievement, had shaped new work, finally can only lead to the court’s making the judgment that both image styles were inconsistent and refuted Plaintiff’s appeal.

Conclusively speaking, to IPR protection for culture and creativity enterprise, we should do something as follows:

First, as the creator of the work, he/she should clarify his/her work, as detailed as possible, completely fixes the form of the work of the performance, esp. the creation factors among them, in addition to exclude public known information, should deal with its elements in a specific way;

Second, when the court decides whether or not it belongs to protected works by law, standards should be relaxed appropriately, because culture and creativity enterprises’ results are based on the public known information, creativity focuses on “ideas”, in the process of the "ideas" transferred into the form of expression, they are constantly adjusted and interpreted by creators. Therefore, when according to the performance of the works to determine the composition of the elements of the work, the court should suitably relax the standard. The first and second instance judgments of this case also indicated such kind of attitude;

Finally, to judge whether or not constituting tort, the court should link the type of work, the creative process, whether or not Plaintiff and Defendant contact each other and the density of contact together to make comprehensive judgment. It may say that Defendant of this case had already maken close contact with Plaintiff, Defendant made recreation on the basis of referring
Plaintiff’s creativity. If the degree of the recreation was not high, then it could completely fall into the protected range of Plaintiff’s work. [5]

Conclusion
In case 2, the judgment explicitly negated that hair style was protected object of copyright. In case 3, although such case has been settled, yet the first and second instance judgment regarding the determination of works of Copyright Law and the evaluation standard of the three dimensional works of art, have stepped further to deepen and enriched the understanding of Copyright Law. The first and second instance court reasonably applied rules of proof in the process of hearing the case, found out the truth and solved the problem, have much stronger referring meaning toward the hearing of the like cases. We may say the judgments of this case have important navigation function toward the copyright of image style category. [5]

References