

# **COMPARATIVE ANALYSIS OF FAIR USE DOCTRINE FROM CHINESE AND AMERICAN PERSPECTIVES: LESSONS FROM JIMMY LIN'S PS CASE**

Written by *Zhaoxia Deng*

*3rd Year PhD Student, The University of Hong Kong*

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## **ABSTRACT**

*There are two legislative modes of fair use doctrine in the global scale: one is closed mode representative by China and the other is open mode representative by US. In Jimmy Lin's case, the defendant was held for copyright infringement due to his replacement of one of the characters in the picture without the authorization of the original author. Whilst in a similar case, the Prince case, the defendant's act was held justification for transformative use in US. The fundamental reason for the different legal provisions of the two countries lies in their different attitudes towards the personal rights of copyright, where Chinese copyright law takes moral rights more seriously, while US law focuses more on the property rights.*

*In September 8, 2017, the Beijing Haidian Court made a judgement of the copyright dispute between plaintiff Zhu Qingfu and defendants Jimmy Lin & Beijing Micro Dream Chuang Ke Network Co. Ltd., where star Jimmy Lin was sentenced to a fine of more than 300000 RMB due to the poster of a picture with obvious PS traces in his Weibo. This case has triggered the debate on the differences between the fair use doctrine between China and US.*

## **JIMMY LIN'S PS CASE REVIEW**

Dating back to August 25, 2013, Jimmy Lin released a Weibo to celebrate the number of his fans reaching 21 million, with a picture and texts "21 million fans' gift come ahead of time! I still look good with bald head!" In February 2017, Zhu Qingfu, the original photographer, sued Jimmy Lin at court. He argued that in 1992, the work *Chinese Men* was completed by him to show the true face of Chinese investigators and reflect the national integrity and spirit. It won several awards such as the Gold Prize of the 18<sup>th</sup> National Photographic Art Exhibition due to its high popularity and widespread good social influence. Plaintiff also claimed that, "The picture involved in the case is a tampered work, in which the face of the third soldier from the left was clipped and replaced by Jimmy Lin's own avatar accompanied by misleading texts. This Weibo was heavily forwarded, commented and praised. Jimmy Lin's behavior leads to the serious entertainment of the work and the creative ideas expressed in the work are seriously misinterpreted. This runs counter to the author's serious idea of national integrity and national spirit expressed in the original work, which infringes the plaintiff's right of authorship, the right of revision, and the right of integrity."

After hearing the case, the Beijing Haidian court held that, "Zhu Qingfu is the copyright owner and enjoys the copyright of the work involved. Except as otherwise stipulated by laws and regulations, others may not use the work involved without Zhu's authorization. Jimmy Lin posted the picture in his Weibo. After comparison, we can see that the picture was clipped on the four sides and the face of the main character in the middle of the work involved was replaced by Jimmy Lin's own image. The work was disseminated to the unspecific Weibo users and further spread to other third party medias through the public open Weibo platform. Since Jimmy Lin did not sign for Zhu when he posted the temperate picture, he should be aware of the copyright infringement of the work without permission. The foresaid act of Lin have infringed upon Zhu's right of authorship, the right of revision, the right of integrity and the right of communication through information network." At the end, Lin made a statement in his home page entitled "Dreamer" to apologize for seventy-two hours, and compensate the plaintiff for the economic loss of 300000RMB and other reasonable costs.<sup>1</sup>

## **SIMILAR CASE WITH DIFFERENT JUDGEMENT IN US**

A similar case has been staged on other country with a different ending. American photographer Patrick Cariou lived and worked in the Rastafarianism community of Jamaica for six years in 1990s. He gained the trust of local believers and created and published the *Yes Rasta* in 2000, a collection of photographic works on the theme of Rastafarianism. As of January 2010, the photo collection had been sold for 5791 copies, and its publishing house, the Power House, paid a royalty of \$8000 to Cariou. Richard Prince, a famous appropriation artist, is a leading figure in the field of art. His works of embezzlement are exhibited in many famous art galleries and are widely sought after by the art community. He held two exhibitions entitled *Canal Zone* from 2007 to 2008, and sold the exhibited works in the exhibition. All of his works are based on Cariou's *Yes Rasta*, and his creative techniques include drawing figures on the faces of the original Cariou's photographs, cutting and stitching the original photographs and so on. The exhibition has had a tremendous impact on the American art world and brought huge economic benefits to Prince. Cariou brought Prince to the court in the end of 2008 after learning about the Prince's *Canal Zone* exhibition. The case was adjudicated by the Court of Appeal of the Second Circuit in April 2013. Different from Jimmy Lin's case, the US judges decided that the "misappropriation works" created by Prince based on the original photography works are transformative use, which conforms to the requirements of fair use, and therefore does not constitute copyright infringement.<sup>ii</sup>

According to Article 107 of the U.S. Copyright Law, 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.<sup>iii</sup> The Court of Appeal of the Second Circuit explained that, "For the purpose of use, the law does not require reasonable use only for the purpose of 'comment or criticism'. The key lies in whether the new work contains new expressions and convey new information and meanings compared with the original works. For the market of work, the criterion of judgement is not whether the new work retrain or destroy the market of the original work, but whether the new work seize the market share of the original work. For the amount of use, the law does not explicitly require that the amount of use should not be more than 'necessary', and for transformative use, a certain

amount of original work must be used to achieve the purpose of transformation based on the original work. But for the nature of the work being used, it is not essential in the context of ‘transformative use’.” For the above reasons, the Court of Appeal of the Second Circuit held that Prince’s use of *Yes Rasta* “contains new expressions, conveys new information and meanings” totally different from the original work, and does not capture the market share of the original work. It can be regarded as “transformative use” and does not infringe the rights of Cariou.

## **DIFFERENT LEGISLATIVE LOGICS BEHIND THE FAIR USE DOCTRINE IN CHINA AND US**

The nature of the Prince case is almost the same with that of the Jimmy Lin’s case, and the former even displays stronger commercial use and heavier distortion. However, these two cases have totally different judgements in US and China due to different regulations of the fair use in these two countries.

Unlike the US Copyright Law, the Chinese Copyright Law does not give a criterion for judging whether a use is fair use or not, but it enumerates twelve cases that constitute fair use in Article 22. Accordingly, a work may be exploited without the permission from, and without payment of remuneration to, the copyright owner under the following conditions, provided that the name of the author and the title of the work are mentioned and the other rights enjoyed by the copyright owner by virtue of this Law are not infringed upon : “1) use of a published work for the purposes of the user’s own private study, research or self-entertainment; 2) appropriate quotation from a published work in one’s own work for the purposes of introduction of, or comment on, a work, or demonstration of a point; 3) inevitable reappearance or citation of a published work in newspapers, periodicals, radio stations, television stations or other media for the purpose of reporting current events; 4) reprinting by newspapers or periodicals or other media, or rebroadcasting by radio stations or television stations or other media, of the current event articles on the issues of politics, economy and religion, which have been published by other newspapers, periodicals, radio stations or television stations or other media, except where the author has declared that publication or broadcasting is not permitted; 5) publication in newspapers or periodicals or other media, or broadcasting by radio stations or television

stations or other media, of a speech delivered at a public assembly, except where the author has declared that publication or broadcasting is not permitted; 6) translation or reproduction, in a small quantity of copies, of a published work for use by teachers or scientific researchers in classroom teaching or scientific research, provided that the translation or reproduction is not published or distributed; 7) use of a published work by a State organ within the reasonable scope for the purpose of fulfilling its official duties; 8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or similar institution, for the purpose of the display or preservation of a copy of the work; 9) free of charge performance of a published work, that is, with respect to the performance, neither fees are charged from the public nor the remuneration is paid to the performers; 10) copying, drawing, photographing, or video recording of an artistic work located or on display in an outdoor public place; 11) translation of a work published by a Chinese citizen, legal entity or organization, which is created in the Han language (Chinese), into a minority nationality language for publication and distribution within the country; 12) translation of a published work into Braille and publication of the work so translated.”<sup>iv</sup> Because the legislative mode of fair use in Chinese Copyright Law is exhaustive, it excludes other types of use such as that in the Jimmy Lin’s case from fair use.

By comparing the different regulations of fair use doctrine in China and US, we can learn that in the Chinese Copyright Law, fair use can be applied on the premise that such use is noncommercial and does not infringe the right of revision of the original author. Nonetheless, in the US Copyright Law, it is irrelevant whether the use is commercial, as long as it contains new expressions and information different from the original work and does not seize the market share of the original work, it can be considered as fair use. The fundamental reason for the different legal provisions of the two countries lies in their different attitudes towards the personal rights of copyright. In accordance with the Berne Convention, moral rights include the right to attribution of authorship and the right to respect for integrity of one’s work, or the right to protect a work from modification contrary to the author’s desire. This is embodied in the Article 10 section 1 of the Chinese Copyright Law. For example, in the Jimmy Lin’ case, the Haidian Court clearly stated in his judgement that Jimmy infringed Zhu’s “right of authorship, the right of revision and the right of integrity”.

However, copyright protection in American Copyright Law is more limited to property rights. Because “transformative use” contains new expressions and information fundamentally

different from the original work, and the subsequent work is aimed at different markets and audiences, it does not constitute the seizure or improper use of the economic interests of the original work. Hence the property rights of the original work would not be infringed. Besides, as the American Copyright Law diluted the personal rights of copyright, the original author who puts forward litigation claims merely based on moral rights can hardly convince the court. For instance, in Prince case, the original author Cariou, as like Zhu Qingfu, provided similar argument that “his photo collection *Yes Rasta* belongs to ‘extremely traditional photographic portraits’” and claimed that he “did not want any connection between his photo collection and popular culture”. But the court ultimately did not accept his claims.

From the above analysis, we can learn that the different judgements of the two similar “PS” case in China and US are resulting from the different attitudes towards the personal rights of copyright in these two countries. Which one is better or worse is a question worthy of further exploration in academia. As far as the current law is concerned, we can learn from the Jimmy’s case that Chinese Copyright Law still adopts a strong protective attitude towards the copyright’s personal right—the right of authorship, the right of revision and the right of integrity. It is a copyright infringement to revise or banter the work without the original author’s authorization, irrespective of noncommercial purpose.

## **REFERENCES**

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<sup>i</sup> See Zhu Qingfu v. Jimmy Lin, (2017) Beijing 0108 Civil Verdict 1334.

<sup>ii</sup> See Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

<sup>iii</sup> See Article 107 of the U.S. Copyright Law.

<sup>iv</sup> See Article 22 of the Chinese Copyright Law.