SPC Guiding Case No. 80: Hong Fuyuan and Deng Chunxiang v. Guizhou Wufufang Food Co., Ltd. and Guizhou Jincai Ethnic Culture R&D Co., Ltd. (Copyright Infringement Dispute)

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil / copyright infringement / derivative works of folk literature and art

Holding

Where the expression of a derivative work of folk literature and art is an independently completed and creative part and conforms to the characteristics of a work protected under the Copyright Law, it shall be determined that the author enjoys copyright in the original part.

Basic Facts

The plaintiffs Hong Fuyuan and Deng Chunxiang alleged: The work "Harmonious Coexistence Twelve" created by the plaintiff Hong Fuyuan was published in the book "Fuyuan Batik Art" published by Guizhou People's Publishing House in August 2009. Hong Fuyuan had transferred the right to use the work in issue (except for use in batik) to the plaintiff Deng Chunxiang, who maintains the copyright property rights. The defendant Guizhou Wufufang Food Co., Ltd. ("Wufufang Company"), for promotional purposes, used Hong Fuyuan's painting in a cropped manner on the goods it sold without authorization. The plaintiffs believed that the defendant infringed Hong Fuyuan's right of authorship and Deng Chunxiang's copyright property rights, and requested the court to order: the defendant to compensate Deng Chunxiang 200,000 yuan for economic losses for infringing the copyright property rights; the defendant to cease using the pattern in issue and destroy the packaging boxes and product brochures in issue; and the defendant to publish a statement apologizing for infringing Hong Fuyuan's personal rights.

The defendant Wufufang Company argued: First, the work over which the plaintiffs sued, and the partial patterns on the product outer packaging designed by Guizhou Jincai Ethnic Culture R&D Co., Ltd. ("Jincai Company") for Wufufang Company, both drew on the traditional batik patterns of the Gejia people of Huangping, Guizhou, and the defendant's use of the product outer packaging designed by Jincai Company did not constitute infringement; second, the product outer packaging of Wufufang Company was commissioned from the third party Jincai Company in this case, and Wufufang Company had fulfilled its duty of reasonable care in using the product outer packaging; third, the work in issue was located in the lower right corner of the product packaging, and the area of the entire work accounted for only about one-twentieth of the area of the product outer packaging, so its promotional effect on product sales was relatively small, and the compensation amount of 200,000 yuan claimed by the plaintiffs was clearly excessive. The plaintiffs' claims had no factual or legal basis, so it requested that the plaintiffs' claims be dismissed.

The third party Jincai Company stated: It carried out advertising design and planning for Wufufang Company. In December 2006, it created the hand-painted original draft of "Four Seasons as You Wish," and only in October 2011, when Wufufang Company developed gifts for the tourism market, did it re-crop a part of the pattern for use. The bird pattern, the "as you wish" pattern, and the bronze drum pattern in the picture all originated from the "original form" of the Gejia batik of Huangping, Guizhou; the bird pattern in the plaintiffs' work also originated from traditional Guizhou batik. The work claimed by the plaintiffs was not original, and there was no factual basis for infringement in this case, so the plaintiffs' claims should not be supported.

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The court found upon trial: The plaintiff Hong Fuyuan had engaged in batik art design and creation for many years and had been successively awarded by the Ministry of Culture the honorary titles of “One of China’s Top Ten Folk Artists” and “Advanced Individual in the Protection of Intangible Cultural Heritage.” In August 2009, the work “Harmonious Coexistence Twelve” that he created was published in the book “Fuyuan Batik Art” published by Guizhou People’s Publishing House. The work drew on the characteristics of natural patterns and geometric patterns of traditional batik art, with indigo blue as the main color, depicting a harmonious picture of the coexistence of flowers and birds. However, the work supplemented the shape of the bird, enriched the lines of the bird’s eyes and mouth, making the bird figure more expressive; it incorporated the author’s personal originality into the bird’s neck and feathers, making the bird figure more vivid; and it also incorporated the author’s own conception into the central bronze drum pattern flower, making it different from traditional batik art patterns. On August 1, 2010, the plaintiff Hong Fuyuan and the plaintiff Deng Chunxiang signed a “Contract for the Transfer of the Right to Use the Work,” agreeing that Hong Fuyuan would transfer the right to use the work in issue (except for use in batik) to Deng Chunxiang, who would maintain the copyright property rights within the scope of the transferred rights.

The defendant Wufufang Company commissioned the third party Jincai Company to carry out brand market image planning and design services, including product packaging and supporting design, product manuals, and promotional materials design. Based on the design services of the third party Jincai Company, Wufufang Company used batik flower-and-bird patterns and “as you wish” pattern borders in the upper left corner and lower right corner of the outer packaging gift boxes of its products Guizhou Spicy Chicken, Guizhou Xiaomizha, and Guizhou Dried Pork. Hong Fuyuan believed that Wufufang Company had used the work “Harmonious Coexistence Twelve” that he created, which on the one hand infringed Hong Fuyuan’s right of authorship and severed the connection between the author and the work, and on the other hand infringed Deng Chunxiang’s copyright property rights. Upon comparison, it was found that the batik flower-and-bird patterns used on the outer packaging gift boxes and product manuals of the three products produced and sold by Wufufang Company and the work “Harmonious Coexistence Twelve” created by Hong Fuyuan were consistent in the structural modeling of the bird and flower figures and the choices and arrangement of lines, with only differences in the background color and line color of the patterns.

Judgment

On September 18, 2015, the Intermediate People’s Court of Guiyang City, Guizhou Province, rendered Civil Judgment (2015) Zhu Zhi Min Chu Zi No. 17: (1) the defendant Guizhou Wufufang Food Co., Ltd. shall, within ten days after this judgment takes effect, compensate the plaintiff Deng Chunxiang for economic losses of 100,000 yuan; (2) the defendant Guizhou Wufufang Food Co., Ltd. shall, after this judgment takes effect, immediately cease using the work “Harmonious Coexistence Twelve” in issue; (3) the defendant Guizhou Wufufang Food Co., Ltd. shall, within five days after this judgment takes effect, destroy the packaging boxes and product promotional brochures of the products in issue, Guizhou Spicy Chicken, Guizhou Xiaomizha, and Guizhou Dried Pork; and (4) the remaining claims of the plaintiffs Hong Fuyuan and Deng Chunxiang were dismissed. After the first-instance judgment was pronounced, none of the parties appealed, and the judgment took legal effect.

Reasoning

The court’s effective judgment held that the focal points of dispute in this case were: first, whether the work “Harmonious Coexistence Twelve” in issue was protected by the Copyright Law; second, whether the packaging patterns of the products in issue infringed the plaintiffs’ copyright; third, how to determine the subject of liability in this case; fourth, how to determine the modes of liability for infringement in this case; and fifth, how to determine the amount of compensation in this case.

On the first focal point of dispute, in the painting “Harmonious Coexistence Twelve” of the plaintiff Hong Fuyuan in issue, the tails of the two birds overlap, and the middle is connected by a bronze drum pattern flower to display a sense of symmetry, and these are precisely the thematic characteristics of the natural

patterns and geometric patterns of traditional batik art. According to the existing evidence in this case, it can be determined that the work in issue clearly drew on the mode of expression of traditional batik art, and its creative inspiration directly came from the back-wrapping pattern of the Gejia batik of Huangping. However, the work in issue supplemented the shape of the bird, enriched the lines of the bird's eyes and mouth, incorporated the author's personal originality into the bird's neck and feathers, making the bird figure more expressive and vivid, and also incorporated the author's conception into the central bronze drum pattern flower, making it different from traditional batik art patterns. Under Article 2 of the Regulations for the Implementation of the Copyright Law, which provides that "a work as referred to in the Copyright Law means an intellectual achievement that is original in the literary, artistic, and scientific fields and can be reproduced in some tangible form," the painting "Harmonious Coexistence Twelve" created by the plaintiff Hong Fuyuan in issue is a derivative work of traditional batik art works, is an inheritance and innovation of traditional batik art works, conforms to the characteristics of a work protected by the Copyright Law, and is protected by the Copyright Law within the scope of Hong Fuyuan's originality.

On the second focal point of dispute, under Item (9) of Article 4 of the Regulations for the Implementation of the Copyright Law, which provides that "a work of fine art means a two-dimensional or three-dimensional plastic art work with aesthetic significance constituted by lines, colors, or other means, such as paintings, calligraphy, and sculptures," a painting is mainly a two-dimensional plastic art work with aesthetic significance constituted by lines, colors, and other means. After comparison at trial, the flower-and-bird patterns used in the packaging gift boxes and product manuals of the products in issue, such as Guizhou Spicy Chicken, and the painting "Harmonious Coexistence Twelve" in issue were consistent in the structural modeling of the bird and flower figures and the choices and arrangement of lines, with only differences in the background color and line color of the patterns. From the effect of the comparison, the differences in the background color and line color of the patterns had already become merely a means of concealing the infringement, rather than original intellectual labor. The third party Jincai Company claimed that the works it designed and used in the product packaging gift boxes and product manuals of Wufufang Company were created in 2006, but it did not submit any evidence to support this, while Hong Fuyuan's work in issue was published in the book "Fuyuan Batik Art" in 2009, and the book directly noted that the creation date of the painting was 2003, from which it can be determined that Hong Fuyuan's work in issue was created and published first. Before Wufufang Company produced and sold the products in issue, Hong Fuyuan had already published the work "Harmonious Coexistence Twelve" in issue, and Wufufang Company had the opportunity to access the plaintiff's work. Accordingly, it can be determined that the third party Jincai Company had the intent to plagiarize Hong Fuyuan's work in issue, and Wufufang Company's partial use of the plaintiff's work in producing and selling the product packaging gift boxes and product manuals in issue infringed the plaintiff's right of reproduction in the painting of fine art in issue.

On the third focal point of dispute, during pre-trial preparation, after the court explained to Hong Fuyuan whether to add Jincai Company as a defendant to participate in the litigation and whether it was necessary to change the claims, the plaintiff stated in writing that he did not agree to add Jincai Company as a defendant and believed that the relationship between Wufufang Company and Jincai Company was a separate legal relationship not suitable for consolidated trial with this case. In fact, Wufufang Company and Jincai Company signed a contract, agreeing that the outer packaging, advertising copy, and promotional materials of all products produced by the defendant would be designed by Jincai Company, and the contract also agreed that if the design content submitted by Jincai Company had infringing acts, the consequences would be entirely borne by Jincai Company. However, Wufufang Company, as the commissioning party of the product packaging, did not adduce evidence proving that it had fulfilled its duty of reasonable care, and was also the final user and actual beneficiary of the infringing work. Under Item (1) of Paragraph 2 of Article 48 of the Copyright Law, which provides that "whoever commits any of the following infringing acts shall, according to the circumstances, bear civil liability such as ceasing the infringement, eliminating the effects, making an apology, and compensating for losses … (1) reproducing, distributing, performing, screening, broadcasting,

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compiling, or disseminating to the public through information networks the work of another without the permission of the copyright owner, except as otherwise provided by this Law," and Articles 19 and 20(2) of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Copyright Dispute Cases (the "Interpretation on Copyright Dispute Cases"), Wufufang Company should bear the civil liability for the infringement in this case in accordance with the law. The relationship between Wufufang Company and the third party Jincai Company is a separate legal relationship, not within the scope of trial of this case, and the parties may separately assert and resolve it.

On the fourth focal point of dispute, under Articles 47 and 48 of the Copyright Law, whoever infringes the copyright or the rights related to copyright shall, according to the actual circumstances of the case, bear civil liability such as ceasing the infringement, eliminating the effects, making an apology, and compensating for losses. In this case, first, part of the plaintiffs' personal rights and property rights in the work were infringed, objectively producing corresponding economic losses, and the plaintiffs' first claim for compensation for losses should receive corresponding support in accordance with the law; second, regardless of whether the infringer was at fault, in order to prevent the expansion of losses, ordering the infringer to immediately cease the ongoing acts of infringing another person's copyright so as to protect the lawful rights and interests of the right holder is also the purpose of the implementation of the law, and the plaintiffs' second claim requesting the defendant to cease using the pattern in issue and destroy the packaging boxes and product brochures in issue should be supported in accordance with the law; third, Wufufang Company in fact had no subjective intent and no gross negligence, but merely failed to fulfill its duty of reasonable examination and bore infringement liability based on the provisions of the law, and Hong Fuyuan also did not adduce evidence proving that the defendant's infringing act caused damage to his reputation; therefore, Hong Fuyuan's third claim requesting that Wufufang Company publish a statement of apology in the comprehensive section of Guizhou Metropolis Daily was not supported.

On the fifth focal point of dispute, in this case, the plaintiffs did not claim reasonable expenses incurred to stop the infringing act, nor did they adduce evidence proving any expenses incurred to stop the infringing act. At trial, the plaintiffs did not submit any evidence to prove the amount of their actual losses, nor did they submit any evidence to prove Wufufang Company's illegal gains from the infringing act. In fact, the plaintiffs' actual losses were themselves difficult to determine, and the defendant's illegal gains from the infringing act were also difficult to ascertain. Under Paragraphs 1 and 2 of Article 25 of the Interpretation on Copyright Dispute Cases, which provide that "where the actual losses of the right holder or the illegal gains of the infringer cannot be determined, the people's court shall determine the amount of compensation in accordance with Article 48(2) (now Article 49(2)) of the Copyright Law upon the request of the parties or ex officio. In determining the amount of compensation, the people's court shall comprehensively consider such circumstances as the type of work, the reasonable use fee, and the nature and consequences of the infringing act," and in light of the objective reality of this case, the following five aspects affecting the amount of compensation for copyright infringement were mainly considered: first, the work "Harmonious Coexistence Twelve" of Hong Fuyuan in issue is a derivative work of traditional Guizhou batik art works, and the creation of the copyrighted work is an inheritance and innovation on the basis of traditional batik art works; the outline of the bird figure and the sense of symmetry in the work in issue originate from traditional art works, and the innovation of the author's conception has a certain limit and a relatively limited space; second, Guizhou batik has certain regional characteristics and geographical indication significance, and batik art works created with flowers, birds, insects, and fish as the creative origin are, in a certain sense, Guizhou elements or Guizhou symbols; as a local enterprise of Guizhou, Wufufang Company's use of Guizhou batik art works conforms to the inherent requirements of the basic characteristics of nationality and regionality of folk literature and art works as intangible cultural heritage; third, under the "Contract for the Transfer of the Right to Use the Work" signed by Hong Fuyuan and Deng Chunxiang, Hong Fuyuan had already transferred the right to use the work "Harmonious Coexistence Twelve" in issue (except for use in batik) to Deng Chunxiang, that is, most of the copyright property rights in the work in issue were transferred to Deng Chunxiang, who is outside the

region of inheritance of traditional folk art, and Deng Chunxiang maintains the copyright property rights in the work in issue; based on the objectively separate status of the subjects of the personal rights and property rights in the work in this case within and outside the region of inheritance of traditional folk art, the consequences and impact produced by the infringing acts of enterprises within the region of inheritance were not significant; fourth, Hong Fuyuan had for decades persisted in the exploration and pursuit of ethnic batik art, organically integrating traditional ethnic batik with classical Chinese culture in his creation, thereby elevating batik art to a certain height and playing a certain role in promoting the development of regional culture; although most of the copyright property rights in the work in issue had been transferred to Deng Chunxiang outside the region of inheritance of traditional folk art, Hong Fuyuan's creative value and his reputation in the batik art industry should be respected; fifth, the production and operation scale and sales channels of Wufufang Company's products in issue, Guizhou Spicy Chicken, Guizhou Xiaomizha, and Guizhou Dried Pork, should be taken as reference; according to the procurement contract between Wufufang Company and Guangzhou Zhuofan Color Printing Co., Ltd. submitted by Wufufang Company, although the above evidence may not necessarily fully and objectively reflect the production and operation status of Wufufang Company's products in issue, in the absence of any contrary evidence from the plaintiffs, the defendant's evidentiary assertion should be permitted by law within a reasonable scope. Comprehensively considering the above factors, and with reference to the current level of economic development and people's living standards in Guizhou Province, the court exercised discretion to determine that Wufufang Company should compensate Deng Chunxiang for economic losses of 100,000 yuan.

Relevant Legal Provisions

Article 3 of the Copyright Law of the People's Republic of China.

Article 2 of the Regulations for the Implementation of the Copyright Law of the People's Republic of China.

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