SPC Guiding Case No. 81: Zhang Xiaoyan v. Lei Xianhe, Zhao Qi, and Shandong Aishuren Audio-Video Books 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 / film and television works / historical subject matter / substantial similarity

Holding

1. The main subject line and overall plot thread of a work created on the basis of the same historical subject matter are the common wealth of society, belong to the category of ideas, and cannot be monopolized by any individual; anyone has the right to use such subject matter to create works.

2. In determining whether a work constitutes infringement, a determination shall be made from such aspects as whether the author of the alleged infringing work had access to the right holder's work and whether the alleged infringing work and the right holder's work constitute substantial similarity. In determining whether substantial similarity is constituted, a comparison shall be made of whether the author's choices, selections, arrangements, and designs in the expression of the works are the same or similar, rather than comparing aspects such as ideas, emotions, creativity, and subject matter.

3. Under the provisions of the Copyright Law on the protection of works, the people's court shall protect the author's original expression, that is, the form of expression of ideas or emotions. Ideas, materials, information in the public domain, creative forms, necessary scenes, and expression forms that are unique or limited shall not be protected.

Basic Facts

The plaintiff Zhang Xiaoyan alleged: In December 1999, she began adapting and creating the script of "Plateau Cavalry Company"; in August 2000, based on the script, she prepared to shoot the 20-episode television series "Plateau Cavalry Company" (the script and the television series are hereinafter referred to as "Zhang's Play"); in December 2000, the series was completed, and Zhang Xiaoyan was the copyright owner of the series. The defendant Lei Xianhe participated in the production of the series as the honorary producer of "Plateau Cavalry Company." The defendant Lei Xianhe, as the first screenwriter and producer, and the defendant Zhao Qi, as the second screenwriter, produced the television series "The Last Cavalry" (the television series and its script are hereinafter referred to as "Lei's Play"). On July 1, 2009, Zhang Xiaoyan purchased a DVD of "The Last Cavalry" from the defendant Shandong Aishuren Audio-Video Books Co., Ltd., and found many similarities with "Zhang's Play," with the main character relationships, story plot, and other aspects being identical or similar, and "Lei's Play" infringing upon the script and television series of "Zhang's Play." She therefore requested the court to order: the three defendants to cease the infringement; Lei Xianhe to publicly publish an apology statement in Qilu Evening News; and Lei Xianhe to compensate Zhang Xiaoyan for losses of script remuneration and script publication, distribution, and adaptation fees totaling 800,000 yuan.

The defendant Lei Xianhe argued: The script of "Zhang's Play" was adapted from Zhang Guanlin's novel "The Source of the Snowy River," while "Lei's Play" was initially adapted by Lei Xianhe from Shi Yonggang's novel "Boundless Sky," and was later rewritten and finalized by Zhao Qi with reference to his novel "Riding a Horse and Carrying a Gun to the Ends of the Earth." In the first half of 2000, Zhang Xiaoyan approached Lei

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Xianhe and proposed to co-produce a television series reflecting the life of cavalry. Lei Xianhe introduced to Zhang Xiaoyan the situation of adapting “Boundless Sky” and suggested co-production, which Zhang Xiaoyan did not agree to. In August 2000, Lei Xianhe and Zhang Xiaoyan signed a cooperation agreement, agreeing that the filming and production would be handled by Zhang Xiaoyan and that Lei Xianhe would be responsible for military support and would not participate in artistic creation; Lei Xianhe did not see Zhang Xiaoyan’s script. “Lei’s Play” and “Zhang’s Play” were created and broadcast at different times, and “Lei’s Play” could not have affected the distribution and broadcast of “Zhang’s Play.”

The court found upon trial: “Zhang’s Play,” “Lei’s Play,” “Riding a Horse and Carrying a Gun to the Ends of the Earth,” and “Boundless Sky” were all military and historical subject matter works developed with the withdrawal (reduction) of cavalry units during the streamlining and reorganization of the military in the mid-1980s as the main line. The short story “Riding a Horse and Carrying a Gun to the Ends of the Earth” was published in Issue No. 12 of 1996 (total issue No. 512) of PLA Literature and Art; the novel “Boundless Sky” was published and distributed by the PLA Literature and Art Publishing House in April 2001; “Zhang’s Play” was broadcast on Channel 8 of China Central Television in the morning time slot from May 17 to May 21, 2004, at a rate of four episodes per day; “Lei’s Play” was broadcast on Channel 1 of China Central Television in the prime evening time slot from May 19 to May 29, 2004, at a rate of two episodes per day.

“Riding a Horse and Carrying a Gun to the Ends of the Earth,” through the description of the company commander, the political instructor, and a divine warhorse before and after the cavalry company was disbanded, recounts the glory of cavalry in history, the disbandment of the cavalry company, and the obsession of the officers and soldiers of the cavalry company, especially the cavalry company commander, with cavalry and warhorses. The work contains the following descriptions: the mystery in the origin of the divine horse (No. 15 military horse), the rapport between the company commander and the military horse, the character image of the political instructor Kong Yuehua, the company commander writing poems, the father having been a cavalry regiment commander, the important role played by cavalry in future wars, the efforts made by the company commander to retain the cavalry company, the final disbandment of the cavalry company, and the solemn tragedy of the company commander and the divine horse at the end. In “Lei’s Play,” the origin of the heavenly horse also contains mystery, and except for the fact that the father of the company commander Chang Wentian had been a cavalry division commander, the above plot content is basically similar to “Riding a Horse and Carrying a Gun to the Ends of the Earth.”

“Boundless Sky” is a book about the legendary and mysterious history of the last cavalry company of the Chinese army, showing life on the grasslands and of cavalry, such as the emotions between horses and humans, the genetic value of the last wild horse, the old man who studies horse language, the mysterious prophet, and the legendary story of the last wild horse winning at the Hong Kong racecourse. In “Boundless Sky,” the father of the company commander Cheng Tian was the division commander of the original cavalry division; the commander was the first company commander of the Shannan cavalry company and a former subordinate of Cheng Tian’s father; Cheng Tian secretly loved the commander’s daughter Lan Jing since childhood; the political instructor Wang Qingyi was in love with Lan Jing and promoted the love between Cheng Tian and the geneticist Liu Keke. In the end, the company commander sacrificed himself to rescue researchers trapped in a swamp. In “Lei’s Play,” Gao Bo brought the “Great Lama,” which ran fast, steadily, and had a good temperament and had belonged to the former political instructor, to Chang Wentian as a temporary mount. At the end, the company commander sacrificed himself to complete an arrest mission. The description in “Lei’s Play” of the relationship between the political instructor Kong Yuehua and the company commander Chang Wentian has similarities with the plot content of the relationship between the political instructor Wang Qingyi and the company commander Cheng Tian in “Boundless Sky.”

The court entrusted the Copyright Appraisal Committee of the China Copyright Protection Center to appraise Zhang’s Play and Lei’s Play, with the following conclusions: (1) the main character settings and relationships are partially similar; (2) the main plot line, namely the reduction (disbandment) of the cavalry unit, has

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similarities; (3) there are some identical or similar plots, but except for one place where the language expression is basically the same, the specific expression of these plots is basically different. The plot with basically the same language expression refers to the plot in which the male protagonists of the two works express “willing to be a horse herder.” In Episode 4 of “Zhang’s Play,” Qin Dongji said: “With the grassland as home and horses as companions, be a horse herder”; in Episode 18 of “Lei’s Play,” Chang Wentian said: “With the grassland as home and horses as companions, have you seen the film ‘The Horse Herder’? Be a free horse herder.”

Judgment

On July 13, 2011, the Intermediate People’s Court of Jinan City, Shandong Province, rendered Civil Judgment (2010) Ji Min San Chu Zi No. 84: all of Zhang Xiaoyan’s claims were dismissed. Zhang Xiaoyan was dissatisfied and appealed. On June 14, 2012, the Higher People’s Court of Shandong Province rendered Civil Judgment (2011) Lu Min San Zhong Zi No. 194: the appeal was dismissed and the original judgment was affirmed. Zhang Xiaoyan was dissatisfied and applied to the Supreme People’s Court for retrial. Upon examination, on November 28, 2014, the Supreme People’s Court rendered Civil Ruling (2013) Min Shen Zi No. 1049: Zhang Xiaoyan’s retrial application was dismissed.

Reasoning

The court’s effective judgment held that the focal point of dispute in this case was whether the script and television series of “Lei’s Play” infringed the copyright in the script and television series of “Zhang’s Play.”

In determining whether a work constitutes infringement, a determination shall be made from two aspects: whether the author of the alleged infringing work had “access” to the right holder’s work requiring protection, and whether the alleged infringing work and the right holder’s work constitute “substantial similarity.” In this case, the parties had no dispute that Lei Xianhe had access to the script and television series of “Zhang’s Play,” and the core issue in this case lay in whether the two works constituted substantial similarity.

What the Copyright Law of our country protects is the author’s original expression in a work, that is, the form of expression of ideas or emotions, and does not include the ideas or emotions themselves reflected in the work. The ideas referred to here include the understanding of material existence, objective facts, human emotions, and ways of thinking, and are the objects described and expressed, belonging to the subjective category. The process by which a thinker, with the aid of a material medium, puts conception into form, transforms imagery into images, transforms the abstract into the concrete, transforms the subjective into the objective, and transforms the intangible into the tangible, for others to perceive, is creation; the original expression formed through creation is a work protected by the Copyright Law. The expression protected by the Copyright Law refers not only to the final form of symbols such as words, colors, and lines; when the content of a work is used to embody the author’s ideas and emotions, the content also belongs to the expression protected by the Copyright Law. However, ideas, materials or information in the public domain, creative forms, necessary scenes, and expressions that are unique or limited are excluded from the scope of protection of the Copyright Law. Necessary scenes refer to certain events, characters, layouts, and scenes that must inevitably be adopted when choosing a certain type of subject matter for creation; such indispensable modes of expression for a specific subject matter are not protected by the Copyright Law. Unique or limited expressions refer to a situation in which an idea has only one or a limited number of forms of expression, and such expressions are regarded as ideas and are not given copyright protection. In determining whether “Lei’s Play” and “Zhang’s Play” constitute substantial similarity, a comparison shall be made of the expression of ideas and emotions in the two works, that is, whether the authors’ choices, selections, arrangements, and designs in the expression of the two works are the same or similar, rather than looking at other aspects such as ideas, emotions, creativity, and subject matter apart from expression. Combining Zhang Xiaoyan’s claims, an analysis and determination shall be made from the following aspects:

On Zhang Xiaoyan's claim that the subject lines of "Lei's Play" and "Zhang's Play" are the same, because both "Lei's Play" and "Riding a Horse and Carrying a Gun to the Ends of the Earth" describe the stories of the "last cavalry" before and after the disbandment through the theme and situation of "the hero's last stand and the cavalry's swan song," it can be determined that the subject line and overall plot thread of "Lei's Play" came from "Riding a Horse and Carrying a Gun to the Ends of the Earth." The four works, "Zhang's Play," "Lei's Play," "Riding a Horse and Carrying a Gun to the Ends of the Earth," and "Boundless Sky," are all military and historical subject matter works developed with the withdrawal (reduction) of cavalry units during the streamlining and reorganization of the military in the mid-1980s as the main line. This is the common wealth of society and cannot be monopolized by any individual; therefore, the authors of the four works all have the right to use such subject matter in their own way to create works. Therefore, even if there is a certain degree of similarity between the subject lines of "Lei's Play" and "Zhang's Play," because the subject line is not protected by the Copyright Law and the subject line of "Lei's Play" came from "Riding a Horse and Carrying a Gun to the Ends of the Earth," which was published earliest, it cannot be determined that "Lei's Play" plagiarized "Zhang's Play."

On Zhang Xiaoyan's claim that the character settings and character relationships of "Lei's Play" and "Zhang's Play" are the same or similar, in view of the fact that the four works are all military subject matter works developed with the withdrawal (reduction) of cavalry units in a specific historical period as the main line, except that "Riding a Horse and Carrying a Gun to the Ends of the Earth," limited by the length of a short story, does not have a love triangle or military-civilian relationship, the other three works all contain character settings and character relationships such as love triangles, officer-soldier superior-subordinate relationships, and military-civilian relationships. Such modes of expression are necessary scenes inevitably adopted in military subject matter works and, because the modes of expression are limited, are not protected by the Copyright Law.

On Zhang Xiaoyan's claim that the language expression and story plot of "Lei's Play" and "Zhang's Play" are the same or similar, in terms of language expression, for example, the language expression "be a free 'horse herder'" in "Lei's Play" and "be a horse herder" in "Zhang's Play" is basically the same, but such language expression is a conventional expression in a specific context and is not original expression. In terms of story plot, the story plot used to embody the author's ideas and emotions belongs to the category of expression, and an original story plot shall be protected by the Copyright Law; however, the fact that only some elements of the story plot are the same or similar does not necessarily lead to the conclusion that the story plot is the same or similar. Most of the identical or similar parts of the four works belong to public domain materials or materials lacking originality, and some are merely the same in some elements of the story plot, but the specific content and expressed meaning developed by the plot are different. The second-instance court determined that "Lei's Play" and "Zhang's Play" had six identical or similar story plots, of which the relationship of a former subordinate and the temporary designation of horses also had similar plot content in "Boundless Sky," while the other parts, although identical or similar in plot design, were in some cases merely the same or similar in some elements of the plot expression, and the identical or similar plot content was few and insignificant.

On the whole, the specific plot development, the focus of the description, the personalities of the protagonists, and the ending of "Lei's Play" and "Zhang's Play" are different; the identical or similar story plots of the two works account for an extremely low proportion of "Lei's Play" and occupy a secondary position in the overall story plot, do not constitute the main part of "Lei's Play," and will not cause readers and viewers to have the same or similar appreciation experience of the two works, so no conclusion can be drawn that the two works constitute substantial similarity. Under Article 15 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, which provides that "where works on the same subject matter are created by different authors, and the expression of the works is independently completed and creative, it shall be determined that the authors each enjoy independent copyright," "Lei's Play" and "Zhang's Play" are works on the same

subject matter created by different authors, and both are original and each enjoy independent copyright.

Relevant Legal Provisions

Article 2 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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