



ICLG

The International Comparative Legal Guide to:

Copyright 2019

5th Edition

A practical cross-border insight into copyright law

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Korea



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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

Copyright subsists in creative work expressing human thoughts and emotions. Unlike the United States, it is not necessary for the work to be fixed in a tangible medium. In Korea, copyright automatically attaches once the work exists without formal registration. Only expressive work is protected under copyright, and ideas are not protected under the doctrine of separation of idea and expression. In order to be copyrightable, the work must express the author's original thoughts and emotions and not copy another's work.

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

Under the Copyright Act of Korea, copyright subsists in any creative work expressing human thought and emotion. The Copyright Act lists the following nine types as indicative examples: literary work; musical work; performance work; artistic work; architectural work; photographic work; cinematographic work; graphic work; and computer programs.

Article 7 of the Copyright Act lists the following items as works excluded from copyright protection:

- (i) constitution, acts, treaties, decrees, and municipal ordinances and rules;
- (ii) bulletins, public notifications, directives and others similar thereto which are issued by the central or local government;
- (iii) judgments, decisions, orders, or adjudications of courts, as well as rulings and decisions made by the administrative appeals procedures, or other similar procedures;
- (iv) compilations or translations of works as referred to in subparagraphs (i) through (iii) which are produced by the central or local government; and
- (v) current news reporting which delivers simple facts.

Recently, a court decision was rendered on whether pornography is afforded copyright protection. The court held that "Copyright protects work in the domain of literature, academia and the arts regardless of whether the work is ethical or not. Therefore, any such work is subject to copyright protection even if the content thereof is unethical or illegal".

1.3 Is there a system for registration of copyright and if so what is the effect of registration?

Although registration is not required for copyright to subsist or become effective in Korea, there is a system for registration.

In order to register a copyright, an application to the Korea Copyright Commission can be made by submitting the requisite form, online or offline. The registration fee is KRW33,600 (for offline registration) and KRW23,600 (for online registration).

The effect of registration is that it gives rise to the legal presumption that the author identified in the registration is the copyright owner of the work. Further, if the date of creation or date of initial publication is registered, such date is legally presumed as the actual date of creation or initial publication. Once copyright is registered, the person who infringes such copyright is deemed liable for the infringement. In order to claim the statutory compensation for damages, copyright must have been registered prior to the date of infringement.

On a separate note, assignment of, or limitations on disposal of, copyright and the establishment, transfer, termination, or limitation of disposal of, a pledge over copyright cannot be perfected without registration.

1.4 What is the duration of copyright protection? Does this vary depending on the type of work?

In principle, copyright lasts for the life of the author plus 70 years. Copyright in cinematographic work or in work originating from employment lasts for 70 years from the date of publication.

1.5 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

Design:

Under the Design Protection Act of Korea, "design" refers to aesthetic value derived from visual effects of form, shape, colour or the combination thereof. It is possible for a work to be subject to protection as both copyright and design.

Other:

Under the Copyright Act of Korea, the creator of a database is granted protection by a right similar to copyright (right of copy, distribution, broadcasting or transmission of the database).

1.6 Are there any restrictions on the protection for copyright works which are made by an industrial process?

Whether a work created by an industrial process can be subject to copyright protection will be determined based on whether such work is a creative work expressing human thought and emotion. In general, it will be difficult for a work created by an industrial process to be deemed copyrightable.

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

In principle, the author of the work is the first owner of the copyright. “Author” means a person who has contributed to the creative expression of the work. Merely providing ideas, hints or topics does not qualify as an author of a copyrightable work.

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

One cannot become the owner of copyright because one ordered or commissioned the work. The criterion is whether a person has actually contributed to the creative expression of the work. With the exception of “work for hire” set forth in question 2.3 below, the commissioner of work is not entitled to become the copyright owner.

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

Under the Copyright Act, any “work for hire” conducted during a person’s employment and published in the name of the employer shall be deemed to have been authored by the employer, unless otherwise stipulated in the employee’s employment contract or the internal regulations of the employer.

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

Joint ownership of copyright is formed when two or more persons have jointly created the copyright work and it is not possible to separately use the portion of such work attributable to each person. Copyright of jointly created work can only be exercised upon unanimous consent of all joint copyright owners. Assignment or pledge of the respective right of one joint copyright owner cannot be made without the consent of the other copyright owners.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

There are no formalities required when transferring or assigning copyright. However, if the transfer or assignment is not registered,

perfection of such transfer/assignment is not achieved. For example, if A were to assign his copyright to B and A later assigns the same copyright to C, B cannot claim against C that B is the valid assignee of such copyright unless B had previously registered such assignment of copyright.

3.2 Are there any formalities required for a copyright licence?

There are no formalities required for a copyright licence.

3.3 Are there any laws which limit the licence terms parties may agree (other than as addressed in questions 3.4 to 3.6)?

There are no laws specifically limiting copyright licence terms. Nonetheless, with respect to commercial recordings, once three years from the initial sale of a recording has passed, a third party may produce a different commercial recording based on the original recording upon consultation with the copyright owner of the recording. If the parties fail to reach an agreement upon consultation, the third party may produce such commercial recording by obtaining the approval of the Minister of Culture, Sports and Tourism and paying a certain compensation amount to the copyright owner or depositing such amount in escrow.

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

The following organisations are the licensing bodies for the main areas of copyright:

Musical work:

Korea Music Copyright Association	Rights of musical authors.
The Korean Society of Composers, Authors and Publishers	Rights of musical authors.
Federation of Korean Music Performers	Rights of music performers such as singers and musicians.
Recording Industry Association of Korea	Rights of recording producers.

Literary work:

Korea TV & Radio Writers Association	Rights of writers for television and radio.
Korean Society of Authors	Rights of copyright owners of literary work, plays, art and photographs.
Korea Scenario Writers Association	Rights of film scenario writers.
Korea Reproduction and Transmission Rights Association	Reproduction and transmission rights of literary work.

Cinematic work:

Korean Film Producers Association	Rights of film producers.
The Movie Distributors Association of Korea	Rights of film producers.

Broadcast work:

Korea Broadcasting Performers’ Rights Association	Rights of broadcasting performers such as actors or voice artists.
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News:

Korea Press Foundation	Rights of news authors.
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Public:

Korea Information Cultural Centre	Rights of public copyrights.
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3.5 Where there are collective licensing bodies, how are they regulated?

In order to conduct collective copyright licensing business, approval from the Minister of Culture, Sports and Tourism is required. The percentage and amount of fees paid to collective licensing bodies by copyright owners or licensees are also subject to the approval of the Minister of Culture, Sports and Tourism.

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

The licence terms of collective licensing bodies are subject to the supervision and approval of the Minister of Culture, Sports and Tourism. Accordingly, there are hardly any challenges to the licence terms.

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

The copyright owner holds the following rights: the right to reproduce his/her work; the right to perform his/her work publicly; the right to transmit his/her work in public; the right to exhibit the original or copy of his/her work of art, etc.; the right to distribute the original or copy of his/her work; the right to authorise the commercial rental of phonograms made public; and the right to produce and use a derivative work based on his/her original work.

4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

The author of a copyrightable work has moral rights in addition to copyright. Moral rights include the right to decide whether or not to make his/her work public, the right to indicate his/her real name or pseudonym on the original or copy of his/her work, or on the medium of publication by which his/her work is made public, and the right to maintain the integrity of the content, form and title of his/her work. The author's moral rights shall belong exclusively to the author. Accordingly, moral rights cannot be assigned or inherited. Whether or not moral rights can be waived is controversial.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

Once the original or copies of the copyright work become subject to a transaction (such as sale or otherwise), the copyright owner does not have distribution rights as to subsequent transactions regarding the work in accordance with the doctrine of exhaustion of rights. The reference to "originals or copies" above is limited to tangible

products and does not include online copies. Accordingly, the doctrine of exhaustion of rights does not apply to online copies (for example, music files).

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

The copyright owner may benefit from the following enforcement regimes:

The Ministry of Culture, Sports and Tourism has a special police force dedicated to law enforcement of copyright infringement.

Also, the Ministry of Culture, Sports and Tourism can take the following measures against online service providers for distribution of illegal copies, after review by the Copyright Protection Deliberation Board:

- (i) warning against the copier/distributor of illegal copies; and/or
- (ii) order deletion or suspension of distribution of illegal copies.

The Korea Copyright Protection Agency can take the following corrective advisory measures against an online service provider upon discovery of distribution of illegal copies on the network of the online service provider, after review by the Deliberation Board:

- (i) warning against the copier/distributor of the illegal copies;
- (ii) deletion of illegal copies or suspension of distribution of illegal copies; and/or
- (iii) suspend the account of the copier/distributor who has repeatedly distributed the illegal copies.

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

An exclusive licensee may also bring civil or criminal suits against infringers of copyright. The collective licensing body may also bring an independent suit against copyright infringement.

5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

Anyone who is indirectly involved in copyright infringement ("secondary infringers") is deemed to have aided and abetted copyright infringement. For example, an online service provider who overlooked the circulation of illegal copies will be deemed to have aided and abetted copyright infringement.

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

The general doctrine of "fair use" is a defence often used in copyright infringement claims. To determine whether "fair use" applies, the following will be considered:

- (i) purpose and character of use (such as whether the use is or is not for non-profit);
- (ii) type and nature of the copyright work;
- (iii) amount and substantiality of portion used in relation to the entirety of the work; and

- (iv) effect of the use of work on the current or potential market for, or value of, the work.

There are also limits on the scope of copyright protection. For example, copyrighted public work can be used without the consent of the copyright owner.

5.5 Are interim or permanent injunctions available?

Preliminary injunctions ordering temporary cessation of copyright infringement are available. Permanent injunctions are also available.

5.6 On what basis are damages or an account of profits calculated?

If the copyright infringer gains profit from such infringement, damages shall be based on the amount of such profit. It is also possible for the copyright owner to claim damages based on the value typically realised upon exercise of the copyright. Instead of claiming damages in the above manner, it is possible to claim damages in a fixed amount – in general, a maximum of KRW10,000,000 per copyright being infringed and in the case of intentional infringement for financial gain, a maximum of KRW50,000,000.

5.7 What are the typical costs of infringement proceedings and how long do they take?

At the initial trial level, a copyright infringement case will take approximately six to eight months. A preliminary injunction will take approximately one to two months. The typical costs mainly consist of attorney costs, and such costs differ based on the complexity and the nature of the case and the attorneys involved.

5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

The trial court judgment can be appealed in the appellate court. At the appellate level, the trial court judgment may be reversed based on error in factual or legal determinations. The appellate court judgment can be appealed in the Supreme Court.

5.9 What is the period in which an action must be commenced?

A claim for damages must be brought within three years from learning of the infringement. A claim for suspension or elimination of infringement can be made at any time as long as the infringement exists.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Copyright infringement is a criminal offence. A copyright infringer who has copied, performed, transmitted, exhibited, distributed, leased or authored a derivative work shall be subject to imprisonment of not more than five years and/or a penalty of not more than KRW50,000,000. An infringer of the author's moral rights or the performer's moral rights who prejudices the honour or reputation of the author or the performer shall be subject to imprisonment of not more than three years and/or penalty of not more than KRW30,000,000.

6.2 What is the threshold for criminal liability and what are the potential sanctions?

The criminal prosecution of copyright infringers is commenced when the copyright owner files charges. However, if the copyright infringer is a repeat offender or intends financial gain, criminal prosecution can commence even without any charges filed by the copyright owner.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

There have been discussions that the existing copyright legislation should be reformed to keep up with the fast pace of changes in digital technology. There have been reports that the government is expected to prepare legislative reform.

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

A recent issue is whether online service providers who overlooked hyperlinks should be deemed to be indirect copyright infringers. In 2014, the Supreme Court held that an online service provider which overlooked hyperlinks of websites containing illegal copies of copyrighted work on its online bulletin boards shall not be deemed a copyright infringer. The rationale was that hyperlinks are merely the address of a website. This Supreme Court decision, however, has been criticised profusely by academics and contradictory lower court decisions have been rendered.



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