

COPYRIGHT LAW IN THE REPUBLIC OF KOREA

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Copyright has been recognized as a right in the Constitution, statutes, and by custom in the United States and many other countries in the West for centuries.¹ By contrast, South Korea's experience with copyright has been limited. Professor Jeon Young-pyo, an authority on copyright in Korea, stated recently:

The copyright history of our country is very short. A copyright act was enacted in 1957, but it was like a dead law because it was almost never enforced. It was not until the copyright law was wholly revised in December 1986 and it went into force on July 1, 1987, that Koreans started to be aware of copyright.²

The wholesale revision of the Copyright Act in 1986 reflects the Korean government's efforts to "respond to social and economic changes that have taken place in the meantime, as well as to international practice relating to copyright protection."³ The impact of the Copyright Act has been significant. Chong Sang-jo, professor of law at Seoul National University, noted that since 1986 copyright has undergone more important changes in Korea than any other field while Korea has transformed faster than other countries.⁴

A case in point is the explosive increase in the number of copyright complaints that were submitted to the Copyright Liberation and Conciliation Commission (CDCC) and of copyright suits that were filed in courts in Korea during the past 10

1. For a discussion of the history of copyright in Europe and the United States, see S.M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* §§ 2.01-2.20, at 13-27 (2d ed. 1989). For the historical foundations of copyright in England and the United States, see PAUL GOLDSTEIN, 1 *COPYRIGHT* § 1.13, at 1:26-39 (2d ed. 1997).

2. JEON YOUNG-PYO, *CHULPAN MUNHWA WA CHAPII CHONOLRIJUM* [BOOK PUBLISHING AND MAGAZINE JOURNALISM] 504 (1997).

3. Paik Syeunggil, *Republic of Korea: Revised Copyright Law Comes into Effect*, 21 *COPYRIGHT BULL.* 44 (1987).

4. Chong Sang-jo, *Reflections on Copyright Decisions of 1994*, 35 *SEOUL TAEHAKYO POPHAK* [SEOUL LAW JOURNAL] 238, 238 (Dec. 1994).

years. Professor Chong argues that the growing body of copyright case law in Korea results from a new perception of copyright among Koreans and from the vigorous efforts of many copyright holders to assert their rights.⁵

The fast evolving copyright law in Korea since 1987⁶ cannot be entirely understood solely from the perspective of Koreans' changing attitudes toward copyright. As Paul Goldstein of Stanford Law School stated, "Copyright touches directly on conflicting cultural, economic, and political values—the desire for art and literature; a commitment to free markets; traditions of free speech."⁷ The "conflicting cultural, economic, and political values" of Koreans are fascinatingly illuminated in Korea's statutory and judicial framework on copyright.

The 1986 revision of the Copyright Act was induced from outside as much as from inside of Korea. "With its industries developing rapidly over the last few decades," attorney Joon K. Park in Seoul claimed, "Korea has faced a need to modernize its system of intellectual property protection. The pressures from Korea's major trading partners have also led Korea to meet international standards in protecting intellectual property."⁸

The internal and external forces that affected the revision of the Copyright Act explain in part why the Korean government is ambivalent about the ramifications of the Act for Korean society.

It is feared. . . that the implementation of the revised Copyright Law may cause a reduction in the inflow of information, knowledge and culture from abroad, and that the nation may be burdened with an additional economic liability by way of payment of royalties.

Nevertheless, the revised Copyright Law with its enhanced protection of copyright came into effect, despite domestic and external difficulties, with a view to satisfying the basic principles of the protection of copyright for the promotion of education, science, culture and arts, and to encouraging human activities for intellectual creativity so as to contribute to the common good of mankind through international exchange of protected works.⁹

5. *Id.*

6. One legal commentator characterizes 1987 as "a turning point" for Korea's copyright law, noting that the revised Copyright Act went into force, along with the newly enacted Computer Program Protection Law. He added that Korea joined the Universal Copyright Convention (effective Oct. 1, 1987) and the Geneva Phonographs Convention (effective Oct. 10, 1987). Joon K. Park, *South Korea, in* INTELLECTUAL PROPERTY LAWS OF EAST ASIA 337, 348–49 (Alan S. Gutterman & Robert Brown eds., 1997).

7. Paul Goldstein, COPYRIGHT'S HIGHWAY 38 (1994).

8. Park, *supra* note 6, at 337.

9. Paik, *supra* note 3, at 47.

This article aims to meet the growing needs of the academic and professional community in the United States and abroad for an English-language article on copyright in Korea, as Korea's economic, political and cultural transactions with other countries have expanded exponentially over the past two decades. The main focus of the article is the constitutional, statutory, and judicial framework of copyright in Korea. The article examines various statutes, court decisions, and administrative rules and regulations involving copyright in Korea.¹⁰ Its textual, historical, and doctrinal approach endeavors to make points about the underlying themes and issues of the Copyright Act in Korea. While this article is not intended to compare Korean and U.S. copyright laws, U.S. law is noted where it is appropriate to put the Korean law in context.

In order to place the discussion of the current status of copyright in Korea in proper perspective, the historical overview of copyright prior to 1986 is in order.

I. THE HISTORY OF COPYRIGHT

Given that the origins of copyright are closely interconnected with a governmental licensing of the printing press to control the wide dissemination of ideas,¹¹ copyright was a nonissue in Korea for many years when publication and distribution of print material was strictly under control of the government and when it was monopolized by a privileged group of people.¹² The government during the Yi Dynasty era from the late 14th century to the early 20th century controlled book printing and publishing as a special privilege limited to those authorized by the state. As a consequence, few Koreans had an opportunity to appreciate copyright in its practical sense. The governmental licensing of the printing press in premodern Korea is similar to the politically motivated tactic employed by the Crown in England during the 14th and 15th centuries. Professor Goldstein wrote: "The uncontrolled dissemination of literary works and political treatises could invite sedition [in England]."¹³

10. The author uses the primary (statutes, court opinions, and administrative rules and decisions) and secondary source materials (law journal articles and commentaries, law treatises, etc.) for research on his paper. The source materials for the author's paper on the Copyright Act were checked and gathered during his research trips to Seoul, South Korea, in 1991, 1994, 1996, and 1997. He was allowed access to materials at the National Assembly Library, the Supreme Court Library, the Constitution Court Library, and several major university libraries in Seoul.

11. T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE* 299 (7th ed. 1997).

12. HAN SUNG-HON, *CHOJAKKWON UI POPJE WA SILMU [COPYRIGHT LAW AND PRACTICE]* 25 (1988).

13. Goldstein, *supra* note 7, at 40.

Technology was also an impediment in the early period of copyright in Korea. While the movable type of the printing press was invented in Korea in the early 13th century, it was not used by the general public until the late 19th century. The printing press was used to publish official documents for dissemination among the select few in the government. This is one explanation for why copyright as a right, gained slow acceptance in Korea.

Until recently, because of sociocultural reasons stemming from the Confusion value system which tends to devalue the materialistic compensation of the literati, Koreans rarely accepted copyright. A Korean legal commentator argued:

Those engaged in scholarly and artistic professions avoided the monetary disputes over their published works because they traditionally valued the spirit of nobility until recent years as members of the cultural elite in our country. As a result, the right-consciousness with respect to copyright did not pervade the general public in Korean society.¹⁴

This is quite logical in that copyright was not a traditional Asian concept. Chinese copyright scholar Peter Feng stated, “[I]t is a peculiar modern Western achievement to view and give universal expression to such use as a person’s private right, and to enforce such right ‘by broad analogy to property rights in tangible movables.’”¹⁵

Copyright was introduced into Korea as a concept in 1884. Copyright was first mentioned in the “Recent Events in Various Countries” section of *Hansung Sunbo*, a newspaper published by the royal government of the Yi Dynasty. “This right is designed to authorize the government to prevent others from copying the books written and the foreign books translated by intelligent and talented people,” read the *Hansung Sunbo* news article that mentioned “chulpangwon” (literally, “printing right”) in several Western countries. “By allowing only the authors the right to print and sell their books, it enables them to profit from their books and translations and at the same time to make efforts to

14. Yong-sik Song, *Problems with the Current Copyright Law (I)*, 19 P^{YONHOSA} [LAWYER] 181, 182 (1989). See also Han, *supra* note 12, at 25 (stating that the “traditional Confucian spirit of the nobility in Korea led Koreans to hesitate in accepting payment for their published works”). Koreans’ traditional reluctance to claim damages for their copyright violations is identical to the higher value attached to the criminal rather than civil sanction for libel in Korean society. Media law scholar Paeng Won-sun observed: “First, it has been a prevailing opinion in Korean society that a man who has injured another’s reputation should be subject to penal punishment as part of retributive justice. Second, it has not been a tradition in Korea that infringement on the good name of another person ought to be compensated for in terms of monetary damages.” PAENG WON-SUN, MAESU KOMYUNIKEISHYON POPCHEI IRON [A THEORY OF MASS COMMUNICATION LAW] 151 (rev. ed. 1988).

15. Peter Feng, INTELLECTUAL PROPERTY IN CHINA § 1.02, at 3–4 (1997).

enlighten their society."¹⁶ Koreans' initial contact with copyright in the 1880s was not unique. China also first encountered copyright in the late 1800s.

Some commentators claim that Korea was one of those original signatories to the *Berne Convention for the Protection of Literary and Artistic Works of 1886*. They argue that "the intervening Japanese annexation and division of the peninsula lead most domestic commentators to the conclusion that the Republic of Korea is not a party to that treaty."¹⁷ This assertion regarding Korea's supposedly early experience with copyright is clearly implausible because there is little factual basis for it. No evidence in the history of the Berne Convention indicates that Korea signed along with 10 other countries the convention, additional article, and final protocol.¹⁸ Further, the commentators' assertion is inconsistent with the sociocultural, legal, and political context in which copyright was first introduced to Korea in the 1880s.¹⁹

The Koreans' exposure to copyright through the press in the late 19th century was followed by a legal recognition of copyright through a treaty between the United States and Japan in 1908. The U.S. and Japanese treaty on Protection of Industrial Property in Korea, which went into effect in August of 1908, provided that the Japanese statutes on copyright and other related rights be applied in Korea at the same time the treaty went into effect.²⁰ The treaty guaranteed the equal protection of copyright to Americans as to Koreans and Japanese. Article I stated:

These laws and regulations [relative to inventions, designs, trademarks and copyright similar to those which now exist in Japan] are to be applicable to American citizens in Korea equally as to Japanese and Korean subjects. In case the existing laws and regulations of Japan referred to in the preceding paragraph shall hereafter be modified, those laws and regulations enforced in Korea shall also be modified according to the principle of such new regulation.²¹

16. JEON YOUNG-PYO, CHONGBO SAHOE WA CHOJAKWON [INFORMATION SOCIETY AND COPYRIGHT] 105 (1993), citing HANSUNG SUNBO, Feb. 1, 1884, at 18.

17. Byoung Kook Min & James M. West, *The Korean Regime for Licensing and Protection of Intellectual Property*, 19 INT'L LAW. 545, 562 (Spring 1985).

18. See Berne Convention for the Protection of Literary and Artistic Works (1886), § A 1, at 1 ("Note: The Berne Convention, its Additional Article and its Final Protocol were signed by the following ten countries: Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom"). See also B. Singer, COPYRIGHT LAWS OF THE WORLD 142 (1909).

19. See *supra* text and accompanying note 16.

20. Convention on Protection of Industrial Property in Korea, May 19, 1908, U.S.-Japan, art. I, para. 1, 35 Stat. 2041.

21. *Id.* art. I, para. 2.

Imperial Ordinance No. 200 on copyright was proclaimed soon, in accordance with the U.S and Japan treaty, and the Copyright Act of Japan was “borrowed” by the royal government of the Yi Dynasty.²²

After the Japanese annexation of Korea in 1910, the “borrowed” Copyright Act of Japan was enforced under Imperial Ordinance No. 338 on the implementation of the Copyright Act in Korea. It is not clear how and to what extent the Japanese colonial government enforced its copyright law in Korea from 1910 to 1945. Nevertheless, it is most likely that copyright was not a major concern to the Japanese colonial rulers because Korea was hardly a socioculturally favorable milieu for copyright to thrive as a right. More important, copyright was not among the top policy priorities for the Japanese rulers in Korea. This is hardly a surprise in that copyright did not directly impact on the predominant “peace and order” goal of the Japanese colonial government in pushing for legal reforms in Korea.²³

Copyright was recognized as a constitutional right in 1948 when the Constitution of the First Republic of Korea was proclaimed. The Constitution of 1948 did not use the word “copyright” but provided the basis for it: “All citizens shall have freedom of science and art. Rights of authors, inventors, and artists shall be protected by it.”²⁴

Even after the end of the Japanese colonial rule of Korea in 1945, however, the Copyright Act of Japan continued to be used by the Korean government under Ordinance No. 21 of the U.S. Army Military Government (1945–1948) in Korea until 1957. This is especially noteworthy in that the 1908 U.S. copyright treaty with Japan for reciprocal protection in Korea of copyright and trademarks as well as designs and inventions became obsolete after World War II.²⁵ The first Korean copyright statute,²⁶

22. Song, *supra* note 14, at 182–83.

23. See Edward J. Baker, *The Role of Legal Reforms in the Japanese Annexation and Rules of Korea, 1905–1919*, in SANG-HYUN SONG, *KOREAN LAW IN THE GLOBAL ECONOMY* 76, 98 (1996).

24. Honbop[Constitution], art. 14 (1948), translated in 2 *CONSTITUTIONS OF NATIONS* 549, 549–59 (Amos J. Peaslee ed., 2d ed. 1956).

25. 9 CHARLES I. BEVANS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949*, at 408 (1972). See *TREATIES IN FORCE* 483 n.19 (1997), which noted:

Copyright convention with Japan for reciprocal protection in Korea of inventions, designs, trademarks, and copyrights, signed at Washington, May 19, 1908 (TS 506). This convention is considered as having been abrogated on April 8, 1951 (TIAS 2490), since it was not included in the notification which was given on behalf of the United States Government to the Japanese Government on April 22, 1953, indicating the prewar bilateral treaties or conventions which the United States wished to continue in force or revive.

modeled after the 1899 Copyright Act of Japan,²⁷ was passed by the Korean National Assembly in 1957.

The 1957 Copyright Act was formulated to promote the Korean culture by "protecting the authors of academic or artistic works."²⁸ The "works" to be protected under the Act included written and oral works, paintings, sculpture, fine art, architecture, maps, schematic drawings, photographs, musical works, drama, phonographs, cinema, and things which belong to the academic and artistic categories.²⁹ The statute did not apply to:

1. Laws, regulations, decisions, and orders of government agencies, and the texts of official documents, except for those "confidential" documents for internal use;
2. News of current events;
3. Miscellaneous information published in newspapers or magazines;
4. Public testimonies during the open court proceedings, and the open sessions of the National Assembly or the provincial legislatures.³⁰

"Copyright owner" was defined as the "author who created the copyrighted work."³¹ Copyright under the law included the personal and property rights of the author to his works.³² That is, regardless of his property right to the work, the author "shall have the right to attribution"; to indicate his identity even after the economic right to the work was transferred to others.³³ Further, Article 16 stipulated: "The author shall have the right to raise objections to those who injure his reputation by changing the contents and title of his work even after the property right to the work was transferred, irrespective of the property right to his work."³⁴ Given that the Korean law was based on the 1899 Copyright Act of Japan, Korea's recognition of the authors' personal rights in distinction from their property rights to their work was a logical consequence in the Korean law.

Copyright was qualified under the 1957 Act. The "fair use" concept was recognized to allow use of copyrighted material without violation of the law. The Act specifically allowed:

26. Chojakkwonbop [Copyright Act], Law No. 432 (1957), *translated in LAWS OF THE REPUBLIC OF KOREA* 806, 806-13 (3d ed. 1975) [hereinafter Copyright Act (1957)].

27. For a discussion of the Japanese Copyright Act of 1899, see Singer, *supra* note 18, at 88-90.

28. Copyright Act (1957), *supra* note 26, art. 1.

29. *Id.* art. 2.

30. *Id.* art. 3.

31. *Id.* art. 4.

32. *Id.* art. 7.

33. *Id.* art. 14.

34. *Id.* art. 16.

1. Copying a copyrighted work without using mechanical or chemical means and with no intention of publication;
2. Appropriately quoting from a copyrighted work;
3. Appropriately quoting illustrations in textbooks;
4. Using phrases from scholarly or artistic works as insert into a play or as supplement to a musical work;
5. Inserting scholarly or artistic works as explanatory material for other works;
6. Making drawings of sculptural work and vice versa;
7. Performing dramatic or musical works in public for educational purposes, and broadcasting of the performance;
8. Using phonorecords, taped cassettes, and films for public performance or broadcasting.³⁵

The Act provided for the self-operating recognition of the copyrighted work with no formal requirement for its registration with the government. Copyright lasted for 30 years in addition to the life of the author.³⁶ The copyright of translated material was protected for five years.³⁷ Except when it was first published in Korea, foreigners' work was not protected under the statute unless otherwise stipulated.³⁸

II. CONSTITUTIONAL AND STATUTORY STATUS

The current Constitution, amended in 1987, states: "All citizens shall enjoy freedom of learning and the arts. The right of authors, inventors, scientists, engineers, and artists shall be protected."³⁹ The Copyright Act,⁴⁰ which was amended in 1986 and most recently revised in 1997, protects the right of authors to ensure the improvement and development of culture in Korea.⁴¹

Copyright protection begins upon the work's creation and extends for 50 years past the death of the author.⁴² The copyright on a work created by two or more authors extends through the life of the last surviving author plus 50 years.⁴³ The "work made for hire" concept is recognized in Korea. The law states that if a person prepares a work within the scope of his employ-

35. *Id.* art. 64(1).

36. *Id.* art. 30(1).

37. *Id.* art. 34(1).

38. *Id.* art. 46.

39. Honbop [Constitution], art. 22 (amend. 1987), *translated in* 1 STATUTES OF THE REPUBLIC OF KOREA 1, 1-31 (1998).

40. Chojakkwonbop [Copyright Act], Law No. 3916 (1986), revised by Law No. 5453 (1997), *translated in* 7 STATUTES OF THE REPUBLIC OF KOREA 1091, 1091-1126 (1998) [hereinafter Copyright Act (1986)].

41. For a detailed discussion of the Copyright Act of 1986, as revised in 1997, see *infra* text and accompanying notes 42-80.

42. *Id.* art. 36.

43. *Id.*

ment, the copyright belongs to the employer, not the creator of the work.⁴⁴

The Korean law recognizes foreigners' copyright to works under treaties that Korea has signed with foreign countries.⁴⁵ The treaty is not essential to the copyright protection of foreigners' works. Korean law will consider the residency status of foreigners and the initial publication of the foreigners' works in Korea. Further, the principle of reciprocity on copyright between Korea and foreign countries affects the extent to which foreigners' works are protected under the Korean law. Article 3 provides:

[W]orks of a foreigner who resides at all times in the Republic of Korea (including foreign juristic persons having the principal office in the Republic of Korea. . .) and foreigners' works which are first published in the Republic of Korea (including works published in the Republic of Korea within 30 days after publication in a foreign country) shall be protected under this Act.

Even when a foreigner's work is to be protected under Paragraphs (1) and (2), if the foreign country concerned does not protect works of the nationals of the Republic of Korea, the protection under treaties and this Act may be restricted correspondingly.⁴⁶

A wide variety of items are protected by the Copyright Act. Among those listed in the statute are: (1) linguistic and literary works; (2) musical works; (3) theatrical works; (4) art works; (5) pictorial works; (6) motion pictures; and (7) computer programs.⁴⁷ Some works are not copyrightable. For example, governmental notices and decrees of the executive, legislative, and judicial branches, court opinions, and speeches delivered at the public sessions of the National Assembly and city councils are exempted from copyright protection under the law.⁴⁸

Similar to the U.S. law,⁴⁹ the Copyright Act of Korea recognizes the "fair use"⁵⁰ of copyrighted work as a limitation to the

44. *Id.* art. 9. Article 9 reads:

[T]he author of a work which is prepared on duty by a person working or a juristic person under the direction of a corporation, organization, or other employer . . . and which is published in the name of the juristic person, etc. . . , shall be the juristic person, etc., unless otherwise provided by employment or independent agreement.

45. *Id.* art. 3(1).

46. *Id.* art. 3(2), (3).

47. *Id.* art. 4.

48. *Id.* art. 7.

49. For the U.S. Supreme Court's interpretation of the "fair use" doctrine in American copyright law, see *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

50. "Fair use" in copyright law is defined as "[a] reasonable and limited use of a copyrighted work without the author's permission, such as quoting from a book in a

copyright of the owner. The statute restricts the property rights of authors:

If it is necessary for the judicial proceedings or for internal material or legislative or administrative purposes, any work may be reproduced for such purposes unless it infringes unreasonably on the interest of the author's property right owned in light of the nature of the work and the number of copies and forms of the reproduction;⁵¹

The released works may be inserted in textbooks to the degree necessary for educational purposes at schools of the level lower than high schools or the equivalent thereto;⁵²

In case of reporting current news through broadcasting, motion pictures, newspapers, or other means, any work which is viewed or listened to in the course of such reporting may be reproduced, distributed, performed publicly, or broadcast within the limits proper for such purposes.⁵³

The Copyright Act does not apply to quotations from released works "within the reasonable limit in conformity with fair practice,"⁵⁴ to nonprofit public performance and broadcasting,⁵⁵ to reproduction for private use,⁵⁶ and to reproduction in libraries,⁵⁷ among others.⁵⁸ The fair use exemptions to copyright, however, do not affect the author's personal right to reputation or privacy.⁵⁹

The current Copyright Act, as its predecessor did, protects an author's "moral rights" as part of his personal rights to his work. The moral rights, which the Berne Convention recognizes,⁶⁰ focus on the author's right to claim "paternity" and to protect the "integrity" of his work. The "paternity" element of

book review or using parts of it in a parody." BLACK'S LAW DICTIONARY 617 (7th ed. 1999).

51. Copyright Act (1986), *supra* note 40, art. 22.

52. *Id.* art. 23(1). The "released works" means works presented to the public "through performance, broadcasting, display, or by any other means. . . ." *Id.* art. 2.

53. *Id.* art. 24.

54. *Id.* art. 25.

55. *Id.* art. 26.

56. *Id.* art. 27.

57. *Id.* art. 28.

58. *See id.* art. 29 (reproduction of copyrighted works for examination purposes); art. 30 (reproduction in Braille); art. 31 (ephemeral recording or videotaping by broadcasters); art. 32 (display or reproduction of fine art works); and art. 33 (use through translation).

59. *Id.* art. 35.

60. The Berne Convention, last revised in Paris on July 24, 1971, provides for the author's "moral rights" as follows:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

the "moral rights" is "the author's right to be made known to the public as the creator of his work, to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written."⁶¹ The author's right to the "integrity" of his work entitles him "to prevent unauthorized alterations."⁶² Moral rights are not limited to the author's interest in protecting the "paternity" and "integrity" of a work. They sometimes "encompass the right to publish or not to publish a work, to withdraw a work from sale, and to prevent other injuries to the author's personality as embodied in the work."⁶³

The Korean law on an author's moral rights is illustrative. The statute provides for the author's right to decide on publication of his work⁶⁴ and for his right to identify his authorship by his real name or pseudonym on the original or reproductions of his work.⁶⁵ The integrity of the author's work is also included in the statute. Article 13 states:

- (1) The author shall have the right to maintain the identity of contents, form, and title of his work;
- (2) The author shall not make an objection to a modification falling under any of the following subparagraphs unless essential contents are changed:
 1. In the case of a work being used under Article 23 [use for purpose of school education], a modification of expression within limits as deemed inevitable for the purpose of school education;
 2. Expansion, remodelling, and other forms of transformation of a building; and
 3. Other modifications within limits as deemed inevitable in view of the nature of a work or the object or form of its use.⁶⁶

The author's moral rights belong exclusively to the author himself⁶⁷ and do not abate with the death of the author.⁶⁸

Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6bis(1). For a discussion of the "moral rights" under the Berne Convention, see Stewart, *supra* note 1, § 4.39-4.45, at 72-75.

61. RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 717 (7th ed. 1998) (quoting Strauss, *The Moral Right of the Author*, Copyright Law Revision Study No. 4, 116 (1959), in 2 STUDIES ON COPYRIGHT 963, 966 (1963)).

62. *Id.*

63. *Id.* at 708-709.

64. Copyright Act (1986), *supra* note 40, art. 11.

65. *Id.* art. 12.

66. *Id.* art. 13.

67. *Id.* art. 14(1).

68. *Id.* art. 14(2) ("Any person who uses a work after the death of its author shall not do any act that might prejudice the author's personal right had he been alive. . .").

The Copyright Act authorizes the Minister of Culture and Sports to establish the Copyright Deliberation and Conciliation Committee (CDCC). CDCC mediates copyright disputes relating to issues involving compensation, rates, and fees of copyright agents.⁶⁹

Sanctions for acts of copyright infringement are stipulated in the Copyright Act. Article 91 provides that “[a]ny person holding a copyright or any other right protected under this Act. . . may demand a person infringing on his rights to withdraw from such act or demand a person likely to infringe on his rights to take preventive measures or to deposit securities therefor.”⁷⁰

Damages are estimated by profits gained by the infringement plus the amount which the complainant could have earned in excess of the defendant’s profits.⁷¹ When it is difficult to calculate the number of illegal publications, the law presumes 5,000 unauthorized book reprints and 10,000 unauthorized phonograph records.⁷² An author whose rights were violated can sue to stop the violation and to claim monetary damages.

Korean substantive and procedural laws negatively impact the effectiveness of the Copyright Act’s imposition of damages. Dean Sang-Hyun Song of the Seoul National University College of Law and attorney Seong Ki Kim in Seoul stated:

The amount of damages tends to be decided based on the profits earned by the infringer or the reasonable royalty, rather than the actual amount of loss to the right holder due to the infringement. Due to the lack of a pretrial discovery process, it is very difficult for the plaintiff to prove the infringer’s profits. The courts, therefore, are inclined to rely on the reasonable royalty rather than the actual damages approach. The legal system of Korea is unfamiliar with the idea of treble damages or any kinds of punitive damages as a civil remedy. The lack of discovery, in combination with the lack of punitive damages, makes civil remedies an ineffective means of redressing an injury caused by infringement.⁷³

The Copyright Act provides for damage awards and penal sanctions for violation of the author’s moral right. Article 95 provides that “[a]n author may demand a person who has infringed intentionally or negligently on his author’s personal right to take measures necessary for the restoration of his reputation

69. *Id.* art. 82.

70. *Id.* art. 91.

71. *Id.* art. 93.

72. *Id.* art. 94.

73. Sang-Hyun Song & Seong Ki Kim, *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 118, 133 (Fall 1994).

instead of or in addition to the compensation for damage."⁷⁴ Further, Article 98 makes a violation of the author's moral right a crime punishable by imprisonment for up to 3 years or a fine of not more than 3 million won (US\$3,750).⁷⁵

Criminal penalties can be used by authors as a partial cure for the pitfalls of civil remedies under the Copyright Act.⁷⁶ The Act provides for criminal penalties for "criminal infringement" of copyright and "illegal publishing." Criminal infringement of copyright includes (1) infringement of economic rights or other property rights protected by the Act by means of reproduction, public performance, broadcast, or public display; (2) infringement of moral rights that defames the dignity of the author; and (3) fraudulent copyright registration.⁷⁷ Illegal publishing is defined as releasing a work under a name or alias of a person other than that of the author; prejudicing the author's moral rights or defaming the dignity of a deceased author; operating a copyright agency business without obtaining a permit; knowingly importing goods that infringe on copyright or neighboring rights.⁷⁸

Criminal infringement of copyright under the Act may bring a maximum 3-year prison term, a fine not exceeding 3 million won (US\$3,750), or both.⁷⁹ Acts of illegal publishing are punishable by up to 1-year imprisonment and/or a fine not exceeding 1 million won (US\$1,250).⁸⁰

Criminal convictions for copyright violations can be used by authors in seeking damages in their civil actions. "By filing a criminal complaint," Song and Kim noted, "right holders can push prosecutors to take actions such as a raid and seizure of the infringing products. If the raid is successful and the infringer is convicted, the right holder can bring a civil action for damages, using the criminal conviction as evidence."⁸¹

III. JUDICIAL INTERPRETATIONS

Korean courts paid little attention to copyright as an issue prior to 1987 mainly because few Koreans sued for copyright. Not until 1986 did Korean courts begin ruling on various copyright issues. These rulings directly resulted from the revised Copyright Act. Nevertheless, American attorneys are skeptical of the role of Korean courts in adjudicating copyright disputes.

74. Copyright Act (1986), *supra* note 40, art. 95.

75. *Id.* art. 98.

76. Song & Kim, *supra* note 73, at 134.

77. Copyright Act (1986), *supra* note 40, art. 98.

78. *Id.* art. 99.

79. *Id.* art. 98.

80. *Id.* art. 99.

81. Song & Kim, *supra* note 73, at 134.

They criticize the courts for “designing judgments to promote the political or economic interests of South Korea rather than to address solely the merits of a case.”⁸² They further argue that “South Korea’s civil law system lacks procedures characteristic of litigation practice in common law jurisdiction, such as discovery and the right to compel documents.”⁸³

Korean legal scholars share more of the foreign commentators’ concern about the enforcement of the Copyright Act than about its content. In their law review article on Korea’s intellectual property laws, Dean Sang-Hyun Song and attorney Seong Ki Kim stated:

Progress in enforcement [of the intellectual property laws] will take a longer time to achieve than legislative improvements. In many cases, right holders of . . . copyright in Korea find enforcement of their rights through civil actions is not easy at all. It is difficult to verify a suspected infringement due to lack of pre-trial discovery or Anto-Pillar type search orders.⁸⁴

Song and Kim added that “[t]he procedure for obtaining a preliminary injunction. . . is time consuming, usually taking a few months. Deposit of security is required before a preliminary injunction is issued.”⁸⁵

Notwithstanding the structural and procedural obstacles facing copyright complainants in what foreign observers termed “South Korea’s history of problematic litigation,”⁸⁶ Koreans and foreigners have resorted to judicial settlements of various copyright disputes since 1987. Attorney Pak Hyong-sang in Seoul called attention to Koreans’ changing attitude about the Korean press as a cause of the increasing copyright litigation. Pak argued: “Recently individual citizens have been more keenly conscious of their rights and they have been increasingly enraged with their injury from the news media’s abuse of their freedom. It seems that citizens have more interest in copyright out of their willingness to challenge the media in claiming damages for their injury.”⁸⁷

82. William Enger, *Korean Copyright Reform*, 7 UCLA PAC. BASIN L.J. 199, 207 (1990) (citation omitted).

83. *Id.*

84. Song & Kim, *supra* note 73.

85. *Id.* (citation omitted).

86. Enger, *supra* note 82, at 208.

87. Pak Hyong-sang, *News Reports and Copyright*, 18 HANKUK CHOJAKKON NONMUN SONJIP II [COLLECTION OF SELECTED PAPERS ON COPYRIGHT IN KOREA II] 189 (1994). See also PAK YONG-SANG, ONLON KWA KAEIN POPIK [THE PRESS AND PRIVATE INTERESTS] 23, 24 (1997) (stating that media litigation shows a trend to rapidly increase as citizens’ right-consciousness has grown in response to the media’s violation of the citizens’ interests).

In the course of interpreting the Copyright Act for the past 10 years, Korean courts have set the conceptual and legal framework of copyright as a right in Korea. The Seoul High Court, for example, defined the "work" under the Copyright Act. The court ruled in 1991: "A work protected under the current Copyright Act is a creative literary, scholarly, or artistic product of the author's thinking and feelings. . . . Generally speaking, the title of a work indicates no more than the symbol of the work and it cannot be considered to possess an original thinking and a creative expression of feelings."⁸⁸

The Seoul High Court's reasoning behind its refusal to uphold copyright for titles is strikingly similar to the categorical rule against copyright for titles in American law. Explaining why American courts have "universally" ruled that titles of works are not copyrightable, Professor Goldstein observed: "One rationale for denying copyright to titles may be that titles serve merely to identify and describe the work itself. Another rationale may be that titles characteristically consist of no more than short phrases and thus are either unoriginal or constitute ideas rather than expressions."⁸⁹

In connection with the Seoul High Court's opinion on the copyrightable work, the Supreme Court of Korea ruled on the "originality" of works as a requirement for protection of the works under copyright law. The Supreme Court stated:

To be eligible for protection under the Copyright Act, a work must be original with respect to literature, science, or arts (Article 2(1) of the Copyright Act) and creativity is required as an element of its copyright protection. But creativity referred to here does not mean originality in its perfect sense. Rather, it means only that the work is not a mere imitation of someone else's work and that it contains the expression of the author's individual ideas and feelings. To meet this requirement, it is sufficient that the work has the unique characteristic of the author's mental efforts and is distinguishable from the existing works of others.⁹⁰

The Korean Supreme Court's notion of "originality" as the *sine qua non* of copyright protection is similar to the U.S. Supreme Court's standard for the creativity of copyrighted works under American law. The U.S. Supreme Court in *Feist Publica-*

88. Cho Su-bi v. Yonbang Film Co., 91 Ra 79, Seoul Kodung Popwon [Seoul High Court], 3 HAGUPSIM PANGYOLJIP [LOWER COURT DECISIONS] 269-71 (Sept. 5, 1991).

89. Goldstein, *supra* note 1, § 2.8, at 2:101-2:102.

90. Chong Dae-yong v. State, 94 To 2248, Taebopwon [Supreme Court] (Nov. 14, 1995), PANRAE KONGBO [OFFICIAL GAZETTE OF COURT DECISIONS] 117-19 (Jan. 1, 1996).

tions, Inc. v. Rural Telephone Service Co.⁹¹ held: "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice."⁹²

Similar to U.S. copyright law,⁹³ the Korean law follows the principle that expressions are copyrightable, while ideas are not. The Supreme Court of Korea held:

A work under the Copyright Act must be a *creative expression* of the author's thinking and feelings acquired through an individual's efforts. Accordingly, what is protected by the Act is the author's *creative means of expressing* his thinking and feelings to the public by way of speech, language, sounds, or color. Although the contents or ideas expressed. . . may be creative and novel in their own way, they. . . cannot be copyrightable work and thus cannot be entitled to protection as part of the author's personal or property rights.⁹⁴

After all, what is protected by the Copyright Act is *not the author's ideas but their expressions* and it is limited to the individual aspect of the author's originality. Accordingly, a determination of whether a copyright was violated must be based on the rule that a substantial similarity between the two works at issue should concern their *original expressions*.⁹⁵

The idea-expression distinction explains why copyright law does not condition its protection of a work on its contents. The Supreme Court of Korea has upheld copyright even where the work's content is considered "immoral" or "illegal."⁹⁶ This parallels the statutory and judicial approach to the copyright and morality issues in the United States. An American legal scholar noted: "The 1976 Copyright Act nowhere bars protection because of the perceived illegality or immorality of a work's content. Contemporary courts have generally declined to imply any such bar into the Act, and have sustained copyright against

91. 499 U.S. 340 (1991).

92. *Id.* at 345 (citation omitted).

93. *See Baker v. Seldon*, 101 U.S. 99 (1879) (making a distinction between protected expressions and unprotected ideas under copyright law).

94. *Kim Song-gi v. Sin Sa-hun*, 93 Ta 3073, 3080, Taebopwon [Supreme Court] (June 8, 1993), 41(2) TAEBOPWON PANRAEJIP [SUPREME COURT DECISIONS] 104 (1993) (emphasis added). For a discussion of *Kim Song-gi v. Sin Sa-hun*, see *Sim Chang-sop, Copyright Owner in the Case of Producing Applicational Art Work by Order*, 19(2) TAEBOPWON PANRAE HAESOL [COMMENTARIES ON SUPREME COURT DECISIONS] 390-408 (1993).

95. *Id.* at 105 (emphasis added).

96. *See Yi Chong-suk v. Yi Chae-gil*, 90 Taka 8845, Taebopwon [Supreme Court] (Oct. 23, 1990), 38(3) TAEBOPWON PANRAEJIP [SUPREME COURT DECISIONS] 7-20 (1990).

charges that a work's obscene. . .content precluded relief for infringement."⁹⁷

In 1994, the Seoul High Court applied the "moral rights" provision of the Copyright Act in *Korean Broadcasting Corp. v. Han Sang-jin*.⁹⁸ In his suit, Han Sang-jin, professor of sociology at Seoul National University, complained that his reputation as a scholar was damaged by the unreasonably edited Korean Broadcasting System (KBS) broadcast of his lecture.⁹⁹ Han's lecture was taped for a 60-minute segment of the "KBS 21st Century Forum," but it was broadcast with one-third of the lecture deleted.¹⁰⁰

Prior to suing the Korean Broadcasting Corporation, which owns KBS, Han had asked the Press Arbitration Commission to arbitrate his claim for a reply under the Broadcast Act.¹⁰¹ He demanded the rebroadcast of his original lecture and a public apology from KBS.¹⁰² KBS, rejecting his claim, argued that editing was a proper right of broadcasters and that Han's demand for an apology would violate the network's freedom of the press.¹⁰³

97. Goldstein, *supra* note 1, § 2.5.1, at 2:40–2:41 (citations omitted).

98. 92 Na 35846, Seoul Kodung Popwon [Seoul High Court] (Sept. 29, 1994), ONLON JUNGJAE [PRESS ARBITRATION QUARTERLY] 161-71 (Winter 1994).

99. Han Sang-jin v. Korean Broadcasting Corp., 90 Kaham 1404, Seoul Chibang Popwon (Nambu Jiwon) [Seoul District Court (South Branch)] (May 14, 1992), ONLON JUNGJAE [PRESS ARBITRATION QUARTERLY] 169 (Summer 1992).

100. *Id.* at 170. Professor Han Sang-jin of Seoul National University, an authority on what he has termed the "middle class theory," gave a lecture entitled "South Korea in the 21st Century: A Sociological Perspective." According to Han's theory, the now progressive middle class, the progressive part of the working class and youth/students will be at the forefront of social changes in Korea. See Han Sang-jin, *Road to Establishing a Middle Class Society*, in *Hankuk: Che 3 ui gilul chajaso* [KOREA: SEARCHING FOR THE THIRD ROAD] 333–57 (1992). *Road to Establishing a Middle Class Society* is the "reorganized" transcript of Han's original lecture taped for the KBS program.

101. Han Sang-jin v. KBS, 89 Seoul Chungjae 73, ONLON JUNGJAE [PRESS ARBITRATION QUARTERLY] 111-12 (Summer 1990). The Broadcast Act recognizes a "right of reply" for "any person who is injured by a factual allegation published in the broadcast" to demand "a broadcast of corrected news" to the broadcasting station within 14 days after the original broadcasting of the harmful stories. Bang-songbop [Broadcast Act], Law No. 3978 (1987), revised by Law No. 5529 (1998), art. 41(1), translated in 7 STATUTES OF THE REPUBLIC OF KOREA 1181, 1181–1199 (1999).

102. *Id.* at 112.

103. *Id.* The KBS argument is analogous to the U.S. Supreme Court's reasoning behind its 1974 rejection of the right of reply relating to newspapers. The U.S. Supreme Court stated:

Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judg-

Nonetheless, Han requested that KBS broadcast that it had lost in a libel suit relating to his TV lecture, if that was the verdict.¹⁰⁴ KBS in turn responded that because Han demanded a notice of apology, his libel complaint would violate the freedom of conscience of KBS.¹⁰⁵ The Seoul District Court (South Branch) disagreed. The court held that Han's reputation was damaged and that he should be offered a "suitable" means of recovery for his injury instead of monetary damages, which Han did not claim. The suitable measure for Han, the court ruled, would be for KBS to broadcast statements on the ruling as prescribed by the court.¹⁰⁶

KBS appealed the decision to the Seoul High Court. The Seoul High Court affirmed the Seoul District Court's ruling unanimously in September 1994. Chief Judge Pak Yong-Sang stated in a carefully reasoned opinion for the court that Han had a right to his TV lecture to demand that it be identical to what he originally prepared.¹⁰⁷ Han's "exclusive" right to his lecture as an author was violated by the defendant's heavy "inconsistent" editing of the lecture, according to Judge Pak.¹⁰⁸ In responding to Han's argument that he lost his scholarly reputation as a result of the KBS program, Judge Pak concluded:

It would be reasonable to conclude that the defendant's act of deleting part of the plaintiff's work before broadcasting, rather than diminishing his social reputation generally, has affected the conceptual consistency and identity of the middle class

ment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256, 258 (1974).

104. Han Sang-jin v. Korean Broadcasting Corp., 90 Kaham 1404, Seoul Chibang Popwon (Nambu Jiwon) [Seoul District Court (South Branch)] (May 14, 1992), ONLON JUNGJAE [PRESS ARBITRATION QUARTERLY] 169 (Summer 1992).

105. *Id.* KBS apparently relied on the Constitution Court's 1991 invalidation of the libel provision of the Civil Code. The Constitution Court ruled that the Civil Code on libel was unconstitutional insofar as it required publication of a notice of apology because it violated freedom of conscience. *See* 89 Honma 160, Honbop Chaepanso [Constitution Court] (April 1, 1991), ONLON JUNGJAE [PRESS ARBITRATION QUARTERLY] 161-66 (Summer 1991).

106. *Id.* at 172. The Seoul District Court's ruling on a "suitable" means of recovery for Han, i.e., ordering the KBS to broadcast its libel decision, derives from the Constitution Court's suggestion that alternatives be used to the now invalidated public apology requirement under the Civil Code: "publication in newspapers, magazines, etc., of the court opinions on damages in civil libel cases at the expense of the defendant; publication in newspapers, magazines, etc., of the court opinions against the defendant in criminal libel cases; and a notice of retraction of defamatory stories." *See id.* at 166.

107. Korean Broadcasting Corp. v. Han Sang-jin, 92 Na 35846, Seoul Kodung Popwon [Seoul High Court] (Sept. 29, 1994), ONLON JUNGJAE [PRESS ARBITRATION QUARTERLY] 165 (Winter 1994).

108. *Id.*

theory developed by the plaintiff. Consequently, the defendant's act injured the personal right of the plaintiff as a scholar and author by discrediting his confidence in his theory. Admittedly the plaintiff's standing in the estimation of his professional community has been more or less damaged, but his reputational injury can be included in his claim for loss of his author's personal right.¹⁰⁹

Noting that the Copyright Act allows an injured party several preventive measures and restorative actions relating to a copyright violation of his work, Judge Pak ruled that Han's demand for KBS's broadcast of the court's decision on his libel was a necessary means of being recompensed for his injury under the Act.¹¹⁰

Four years earlier, the Supreme Court of Korea rejected the moral rights claim of a photographer. The plaintiff in *Yi Chong-suk v. Yi Chae-gil*¹¹¹ claimed that his reputation as a professional photographer was violated when the defendant's magazine published several pictures of nude Korean women which plaintiff had contributed to a Japanese weekly publication. The Supreme Court, reversing the Seoul High Court's ruling,¹¹² held that the defendant published the pictures to criticize the Japanese magazine for "misusing" the pictures to stimulate its readers' curiosity and to serve its commercial purpose, which could not constitute a defamation of the plaintiff.¹¹³

The "fair use" boundary was at issue in a 1995 case involving Kim U-jung, chairman of the Daewoo Group, a major business conglomerate in Seoul. In *Kim U-jung v. Kim Jin-guk*,¹¹⁴ Kim U-jung sued the author of a book, "Kim U-jung, There Is a Legend," and the book's publisher for violation of his copyright. Kim argued that his previous speeches were quoted in the book without his permission in violation of his copyright.¹¹⁵ The Seoul District Court rejected Kim's argument, reasoning that the quotation was a fair use of Kim's speeches under the law. Applying Article 25 of the Copyright Act, the court held that Kim's speeches were

109. *Id.*

110. *Id.* at 170.

111. 90 Taka 8845, Taebopwon [Supreme Court] (Oct. 23, 1990), 38(3) TAEBOPWON PANRAELJIP [SUPREME COURT DECISIONS] 7-20 (1990).

112. *Yi Chae-gil v. Yi Chong-suk*, 89 Na 32908, Seoul Kodung Popwon [Seoul High Court] (Feb. 13, 1990), 1 HAGUPSIM PANGYOLJIP [LOWER COURT DECISIONS] 262-74 (1990).

113. *Yi Chae-gil v. Yi Chong-suk*, 89 Na 32908, Taebopwon [Supreme Court], at 14.

114. 95 Kahap 3438, Seoul Chibang Popwon [Seoul District Court] (Sept. 27, 1995), 2 HAGUPSIM PANGYOLJIP [LOWER COURT DECISIONS] 184 (1996).

115. *Id.* at 186.

quoted "within the reasonable limit in conformity with fair practice."¹¹⁶

The Seoul District Court in *Kim U-jung* explicated the "reasonable limit" and "fair practice" in quotations under the Copyright Act:

The "reasonable limit" [in quoting published works] refers to the fact that the quoted work is used as supplement, complement, illustration, and reference source of the quoting material in its mode of expression and that the quoting work is primary and the quoted work is secondary. The "quotation in conformity with fair practice" means that the quoted material is used in a sensible way under the principle of trust and sincerity to make it distinguishable from the quoting work.¹¹⁷

The Seoul court pointed out that the author of the book clearly identified the sources of his quotations and the quoted material was only about 10 percent of the entire book. The court added that in writing his book about Kim as a businessman, the author had no other choice but to rely on Kim's books and speeches to discuss the major events in Kim's life and his philosophy on management and that the book's quotations followed the fair practice of quoting books.¹¹⁸

The Educational Testing Service (ETS), the American company in charge of supervising the TOEFL (Test of English as a Foreign Language) tests in about 170 countries, sued seeking damages against a Korean company for copyright infringement in 1993. *Educational Testing Service v. Seiyang Planning Inc.*¹¹⁹ originated from ETS's claim that the defendant company published a book using TOEFL test questions.

The defendants argued, relying on the "quotation from released works" clause of the Copyright Act, that their act of quoting the questions of the "released" TOEFL tests for its TOEFL review book did not infringe on the ETS copyright. They maintained that they could quote the tests for educational purposes within the reasonable limits in compliance with the fair practice of quoting under the law.¹²⁰

The Seoul Civil District Court rejected the defendants' argument based on "released works" under the Copyright Act. The court defined the "release" of a work as "presenting" the work "to the general public through public performance, broadcasting,

116. *Id.*

117. *Id.*

118. *Id.* at 187.

119. 92 Kahap 35610, Seoul Minso Chibang Popwon [Seoul Civil District Court] (Oct. 15, 1993), 3 HAGUPSIM PANGYOLJIP [LOWER COURT DECISIONS] 243 (1993).

120. *Id.* at 248-49.

display, or by any other means, and to publish [its] work.”¹²¹ The mere fact that the TOEFL tests were given to a limited number of students could not constitute the “release” of the tests under the law. The court emphasized ETS’s policy of disallowing students from keeping or circulating the tests and of retrieving the copies of the tests after the tests.¹²²

The Seoul Civil District Court ruled that ETS should recover the damages equivalent to the amount of profits that ETS would ordinarily make from its rights to the TOEFL questions, whether they were published or not.¹²³ The court awarded ETS US\$39,400 in damages against the Korean defendants for their violation of the ETS copyright to the TOEFL questions. Noting that each published TOEFL question would be worth US\$10 in profits to ETS, the court calculated the damages based on the possible profits that ETS might have earned from the total of 3,940 TOEFL questions that the Korean defendants published illegally.¹²⁴

Nevertheless, the Seoul court rejected the US\$47,891 damages claim of ETS for its alleged expenditure in creating new questions for a make-up test which was required for those who took the previous tests with the same questions that the defendants had published. The court argued that the defendants did not expect ETS to use the questions they had copied for publication in its actual TOEFL, let alone the “special damage” that ETS would suffer in arranging for the retaking of the tests with new questions.¹²⁵ ETS did not include in its damages claim the possible profits of the Korean defendants that were attributable to their infringement of its TOEFL copyright.

Are letters copyrighted in Korean law? The Seoul District Court addressed this question in *Marianne Sim Lee v. Kong Sok-ha*.¹²⁶ This 1995 copyright case began when the widow of Dr. Benjamin Whiso Lee, a noted Korean-American nuclear physicist, sued for an injunctive relief against publication of Dr. Lee’s letters. The letters were written by Dr. Lee to his mother in Korea from the United States.

Judge Kwon Kwang-jung of the Seoul District Court, writing for the court, distinguished copyrightable from uncopyrightable letters. Noting that copyrightable works are limited to literary,

121. *Id.* at 249.

122. *Id.*

123. *Id.* at 251.

124. *Id.*

125. *Id.* at 251–52.

126. 94 Kaha 9230, Seoul Chibang Popwon [Seoul District Court] (June 23, 1993), 1 HAGUPSIM PANGYOLJIP [LOWER COURT DECISIONS] 323–45 (1996).

scientific, or artistic works under the Copyright Act, Judge Kwon stated:

Mere letters of personal greetings and of notifications on facts are not entitled to copyright protection. Nevertheless, copyright is recognized for letters of scholars and artists about their scholarly opinions and artistic thoughts and also for letters in which they express their ideas and feelings in the course of writing about their living.¹²⁷

In examining the issue of who holds the copyright to letters, Judge Kwon held that while the receiver has a right to possess the letter, the sender usually retains the copyright to the letter.¹²⁸

The Seoul District Court's ruling on the property rights to letters is similar to Anglo-American law. As Sir James Stephens summarized the English law: "A person who writes and sends a letter to another retains his copyright in such letter, except in so far as the particular circumstances of the case may give a right to publish such letter to the person addressed, or to his representatives, but the property in the material on which the letter is written passes to the person to whom it is sent, so as to entitle them to destroy or transfer it."¹²⁹ Likewise, American courts were universal in holding that letters are copyrightable and that the author of a letter has exclusive copyright in it.¹³⁰

On the other hand, in Korea copyrightability depends considerably on the content of the letters and the author of the letters, while in Anglo-American law it does not. That is, a U.S. court held: "[T]he author of any letter or letters (and his representatives') whether they are literary compositions, or familial letters, or letters of business, possess the sole and exclusive copyright therein. . . no person, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit."¹³¹

IV. DISCUSSION AND ANALYSIS

Copyright is no longer an empty phrase in South Korea. Indeed, it has now emerged as a fertile ground for litigation. The metamorphosis of copyright from a largely ignored legal notion to a hotly debated concept in and out of court over a 10-year period since 1987 epitomizes how Korea is on the move to a vibrant sociocultural and economic body politic.

127. *Id.* at 327.

128. *Id.*

129. Brown & Denicola, *supra* note 61, at 14 (quoting Sir James Stephens).

130. Goldstein, *supra* note 1, § 4.2.1, at 4:16 (citations omitted).

131. *Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841).

In many ways, the sweeping political and legal reforms, which started in Korea in 1987, are still under way. The December 18, 1997, election of opposition leader Kim Dae-jung as President of Korea—the first time that an opposition candidate has become president in Korean political history—is a good illustration of those reforms.

The accelerated social and cultural transformation of Korea in recent years has contributed enormously to the now heightened status of copyright in Korea. Koreans are more willing to assert their rights through the judicial process. This is in sharp contrast with the unwillingness of Koreans previously to turn to courts to vindicate their injured interests. One plausible explanation is that in the past Koreans rarely expected their court to be institutionally competent to exercise their rule-of-law authority in ruling on their claims. The Korean judiciary, which has been traditionally controlled by the executive branch, was viewed as being unduly influenced by the ruling class, including media organizations.

Now it is widely accepted, however, that Korean courts have improved their status as a more independent branch in the midst of Korea's increasingly functional democracy since 1987. Koreans have become more fully aware of the likelihood that Korean courts are no longer dominated by the "established leadership" in Korea in their judicial proceedings. One telling example of the change is the increasingly frequent invocation by the courts of the right of judicial review.¹³²

The more active judiciary in Korea does not provide a full picture of the rejuvenated Copyright Act. The 1986 revision of the virtually "dead" Copyright Act of 1957 was a crucial impetus behind making copyright more than a theoretical concept in Korea. There is no doubt, however, that the revision of the Copyright Act was a legislative action taken by the Korean government under pressure. In the 1980s, the U.S. government often threatened to impose stiff trade sanctions on Korea if the Korean government refused to take action against the then widespread violation of American copyrights. Korean legal commentators aptly noted: "During the last several years, the Korean government conducted large scale criminal raids and seized infringing goods. . . . [T]hose criminal prosecutions were made

132. See generally Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1 (1994); James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73 (1992).

mainly to avoid being listed in the "Watch List" of the USTR [US Trade Representative]. . . ."¹³³

Thus, the current Copyright Act is the byproduct of the U.S. government's hardball negotiation with Korea over trade issues. At the same time, however, the statute provided Koreans and foreigners with a more realistic legal mechanism for their copyright protection.

The amended Copyright Act has increased protection by expanding the coverage of copyrighted work and the duration of protection. Also, it has recognized the copyright of foreign authors to a greater extent than ever. The Act follows the continental model of emphasizing authors' personal rights over their property rights. It retains the "moral rights" from its predecessor. The moral rights aspect of the Copyright Act is directly influenced by the civil law system of continental Europe which Korea adopted through Japan.

Koreans might have created their own version of moral rights as part of copyright regardless of whether their law was transplanted from Europe. This is culturally and legally in tune with Korean society. As noted previously, Korean authors consider protection of their personality on their works more important than the economic profit attached to the works. This is identical to what Koreans pursue in suing for defamation. Many Koreans prefer criminal sanctions over monetary awards as a more effective way to punish their defamers.

The Copyright Act recognizes the "fair use" doctrine in balancing the exclusive rights of a copyright holder and the public's interest in using copyrighted material in a reasonable manner without the consent of the copyright owner. As in many areas of law, a definitional problem exists. There is no simple definition of "fair use" and the Act does not contain one in its definitions section. Korean courts are in the process of determining what factors to consider in applying the fair use doctrine to both published and unpublished work.

Korean courts have tried to formulate theories and tests on copyright in adjudicating cases since 1987. But it has not been an easy task because little case law and scholarly discussion had been accumulated prior to 1987. Nevertheless, "[t]he dearth of a coherent, consistent policy and theory. . . is not without merit. It enables [Korea] to have relatively easy access to international norms and principles."¹³⁴ The recognition of the "fair use" doctrine, "moral rights," "neighboring rights," the exemption of government documents from copyright, and the extended duration

133. Song & Kim, *supra* note 73, at 134.

134. Feng, *supra* note 15, § 1.04, at 5.

of copyright ownership are among those major copyright principles derived from international norms.

Further, the influence of American and other copyright theories on Korean courts is unmistakable.¹³⁵ This is particularly apparent with the Korean courts' interpretations of the idea-expression distinction. Also, the judicial definitions of the "fair use" quotations for book writing and of the "release" of the copyrighted work are other examples of the Korean courts' adoption of U.S. copyright law.

On the other hand, the Korean courts' interpretation of the Copyright Act under the tradition of its civil law system is detectable in some judges' rigid adherence to the statute in their rulings. The Seoul District Court's decision relating to the copyrightability of letters is a good example. The decision seems to be correct in interpreting the statutory language of copyright subjects, but it raises questions about the unintended consequences of the court's rather narrow reading of the statute. The court's ruling clearly contradicts a more sensible rule against resting copyrightability on judicial notions of artistic or scientific merits.

In conclusion, the copyright law in South Korea will continue to evolve in the years ahead. Considering the legal and political environment in which the Copyright Act was revised in 1986 along with a more active Korean judiciary in tackling various new issues, copyright will provide Koreans with an opportunity to develop the kind of legal theories and concepts which will meet the needs of their fast changing society. In many ways, the United States will serve as a useful frame of reference because of its extensive experience with copyright law over the years.

135. Noting "the serviceability of American legal ideas and institutions in the Korean settings," Dean Sang-Hyun Song stated: "Korea took law and theory mainly from Germany through Japan. Yet in the past few decades American law has been influencing or providing the reference point to certain fields of law such as . . . intellectual property law, etc." Sang-Hyun Song, *Special Problems in Studying Korean Law*, in Song, *supra* note 23, at 180.