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Q246

Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

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I. Current law and practice

1) Does your law provide for exceptions or limitations to copyright protection for libraries and archives?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) reproduction and/or distribution for the purpose of preservation or replacement;

yes

Please comment:

Korea Copyright Act provides specific exceptions and limitations to copyright protection for libraries and archives set forth in Subsection 2(Limitation on Author's Property Rights) under Articles 31, 35-2; Article 94 (Restrictions on Rights of Database Producers). Neighbouring Rights also provides specific limitations for libraries and archives in Article 87. Under the law, performance, phonogram and broadcast fall under the subject matter protected by neighbouring rights. Limitations and exceptions on copyright protection also apply to neighbouring rights *mutatis mutandis*.

Reproduction and distribution for the purpose of preservation or replacement are exceptions to copyright protection. Article 31-1 provides that a library under the Library Act and the facilities (which provides books, records, and other materials, "books") prescribed by Presidential Decree designed for public access may reproduce works included in the library's collection for the purpose of preservation in a physical or a digital form. However, in the event that such books are sold in digital form, the library shall be prohibited from reproducing them in digital form.

A library may reproduce also for another library at their request for the purpose of their preservation or replacement in the event that the other library has difficulty obtaining such book due to out of print or other equivalent causes. Note that reproduction is not authorized in digital form in this case.

b) reproduction and/or distribution for the purpose of interlibrary lending;

yes
Please comment:

Article 31 provides that libraries may reproduce or transmit the books held in its collection to allow users inside other library to peruse them by computer provided that the same shall not apply where the whole or a portion of books have been published for commercial purposes, and a period of five (5) years has not elapsed since their publication date. In making such reproduction of the books, in the event that such books are available for sale in digital format, the library shall be prohibited from reproducing them in digital format.

c) reproduction and/or distribution for the purpose of providing copies (either in a physical or a digital form) to users of libraries or archives; or

yes
Please comment:

Library may reproduce, at the request of a user and for the purpose of research and study, one per person, a single copy of a portion of books in its collection. Note that reproduction is limited to works that are already made public and such reproduction may not be in digital format.

Libraries may reproduce or interactively transmit their books in its collection to allow users of libraries to peruse them within such library by using computers. In such case, the number of users who may use them simultaneously shall not exceed the number of copies of such books held by the library or authorized to be used by the persons with copyrights or other rights protected under this Act. In making such reproduction of the books, if such books are available for sale in digital format, the library shall be prohibited from reproducing them in digital form.

In the event that the libraries reproduce or transmit the books in digital form for other library, they shall take necessary measures to prevent any further reproduction to prevent any copyright infringement.

d) any other activities, and if so, what activities?

2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?

The exceptions and limitations may extend to libraries under the Library Act and archives for public use. Reproduction and distribution for the purpose of preservation extends to non-profit educational institutions or public libraries. In general, these exceptions or limitations are not applicable to museums under the current exceptions and limitation provisions.

3) Are there any conditions as to the type or scope of any permitted activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether certain forms of reproduction (e.g. digital reproduction) are excluded)? If so, please explain the conditions.

The Copyright Act is silent as to the number of copies that are permitted for the purpose of preservation exceptions. As already indicated in Question 1) a, however; the works may not be reproduced in digital form in the event that when such books are available for sale in digital format.

In addition, where the libraries reproduce or transmit the books in digital form, they shall take necessary measure prescribed by Presidential Decrees to prevent any reproduction in order to prevent any infringements on copyright and other rights protected under this Act.

4) Are there any conditions as to the type of copyrighted work that may be used (e.g. lawfully created copies, copies existing in the library's or archive's collection, published works)? If so, please explain the conditions.

Reproduction at the request of a user and for the purpose of research and study not only apply to the published works existing in the library's collection but also include books reproduced by and interactively transmitted from another other library

5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) performance and/or display for educational purposes;

yes

Please comment:

Korea Copyright Act provides specific exceptions and limitations to copyright protection for education institutions in Subsection 2(Limitation on Author's Property Rights) under Article 25through Article 38; Article 94 (Restrictions on Rights of Database Producers) and in Article 87 (Limitation on exercise of Neighbouring Rights);Articles 101-3 to 101-5(Restrictions on Author's Property Right of Program).Under the law, performance, phonogram and broadcast fall under the subject matter protected by neighbouring rights. Limitations and exceptions on copyright protection for education also apply to neighbouring rights *mutatis mutandis*.

In addition to the enumerated limitations, the newly introduced statutory fair use provision states that the copyright work may be used "among other things for reporting, criticism, education and research."

Pursuant to Article 25(2), part of work that has already been available to the public may be reproduced and distributed, performed publicly, broadcast and transmitted for face-to-face education in educational institutions or other supporting bodies which are established or associated with the state or local governments to the extend deemed necessary for the purpose of classroom education or its support.

Performance or display of a work in the course of class session is an exception for educational purposes but such exceptions and limitations are narrowly applicable for educational purposes only and that the scope is rather limited.

b) reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);

yes

Please comment:

Reproduction and distribution of a work is permissible to the extent where it is recognized as necessary and material for the purpose of education. A person who uses a work for reproduction and distribution for educational purposes such as preparing for course packs or compilations or entrance exams shall indicate its sources. Such sources shall be clearly indicated in the manner and to the extent deemed reasonable by the situation in which the work is used, and in cases of a work which bears the author's real name or second name, such real name or second name shall be indicated.

c) making translations;

yes

Please comment:

Under Article 36 (Use by Means of Translation, Etc.) if a work is used in accordance with Articles 25 for the purpose of school education, the work may be used by means of translation, arrangement, or adaptation. A person who uses a work shall indicate its sources. The indication of the sources shall be made clearly in a manner and to the extent deemed reasonable in the situation in which the work is used

d) making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);

yes

Please comment:

There are no explicit statutory exceptions under the current law making available in digital networks for education purposes. However reasonable inferences may be made that statutory exceptions such as "reproduction", "distribution", "performance in public", "public transmission", "broadcasting" and "forwarding" for educational purposes may extend to "digital networks" for education purposes exceptions such as uploading course packs onto on-line platform, providing distance education as long as they are integral part of class sessions and that they are for non-profit purposes. In addition, some other factors to consider is to determine whether there is any conflict with the normal exploitation of copyright work and whether there are any prejudices against the legitimate interest of the copyright holder.

e) reproduction and/or distribution for research purposes; or

yes

Please comment:

Fair use exception may be applicable to reproduction or distribution for research and study purposes under Article 28 for published work; Article 31 for research and study purposes ; and also under Article 35-3 for general fair use exceptions where it provides four statutory factors to determining whether a particular use is fall into this exception.

Article 35-3(Fair Use of Copyrighted Material):

1. Except for situations enumerated in Art. 23 to Art. 35-2 and in Art 101-3 to 101-5, provided it does not conflict with a normal exploitation of copyright work and does not unreasonably prejudice the legitimate interest of the copyright holder, the copyright work may be used, among other things for reporting, criticism, education and research.

2. In determining whether Art 35-3(1) applies to a use of copyrighted work, considerations must be given to the four factors: the purpose and character of the use including whether such use is of a

commercial nature or is of a non-profit nature, the type or purpose of the copyrighted work; the amount and importance of the portion used in relation to the copyrighted work as a whole; the effect of the use of the copyrighted work upon the current market or the current value of the copyrighted work on the potential market or the potential value of the copyrighted work

Note this is almost the same assertion of the US copyright act.

f) any other activities, and if so, what activities?

yes

if so, what activities?:

Works that have already been made available to the public may be used in the textbooks recognized by the Government to the extent deemed necessary for the purpose of education at high schools, their equivalents or lower level schools

6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

These exceptions and limitations apply to non-profit educational institutions

7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.

There are conditions as to the type or scope of activities and the persons who may engage in such activities. Under the provisions of Article 25(3), not only teachers and educational institutions, but also a student who attends the educational institutions described in Article 25 (2) may reproduce or interactively transmit a work already made public within the limit prescribed in Article 25(2) to the extent deemed necessary for the purpose of classroom education.

Schools defined question (5) may reproduce, distribute, perform in public display or publicly transit a portion of the works which are published for educational purposes. Only when it is inevitable to use all of the work in view of the character of the work, the purpose, form of the work, i.e., fair use factor analysis, they may utilize the whole not a portion of the work.

Reproduction and distribution of a work must be directly related to and materially relevant to the class-session teaching contents and such reproduction must be compatible with fair practices using fair use analysis factors under Article 35-3(2). Such factors include purposes and characters of the use, such as for-profit or non-profit; types and uses of works; proportions of used parts in the entire works and their importance; and influence of the use of works over the current market or value or potential market or value of such works...etc..

8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

Works already made public may be a factor to consider within fair use practices. Only lawfully created copies may be used in this instance.

A person may reproduce, distribute, broadcast or transmit the whole or considerable parts of database

provided that the same does not apply where it is in conflict with the ordinary exploitation of relevant database: where being used for education, science or research and for the case of non-profit making purpose.

For the questions below, please provide an answer for each exception or limitation mentioned above.

9) Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is interpreted as covering such specific exception or limitation?

As discussed above, the Korean Copyright Act specifically provides for such exceptions and limitations.

There are two case laws which could have an impact on fair use analysis. The recent Supreme Court case held that the use of images were within the meaning of fair practices under Article 28. The Court found that to determine whether a particular use is compatible with fair practices, courts should consider various factors including the purpose of the use, the type of the copyrighted work, the content and the amount of the portion used, and whether the copyrighted work could replace the demand of the original work. It is expected that the Korean court is likely follow this case law for the interpretation of Article 35-3, a newly implemented fair use doctrine back in 2012 to the Korean Copyright Act which provide more flexibility in the field of copyright limitations. Therefore, it is anticipated that the provision will allow the court to more flexible interpretations and which, in turn, will enable the court to deal more effectively with the fast development of technologies.

Another statutory provision that provides for exception is set forth in Article 35-2. When a person uses work on a computer, he/she may temporarily reproduce such works in that computer to the extent deemed necessary for the purpose of smooth and efficient information processing provided that this shall not apply where the use of such works infringes on copyright

10) Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?

The Korea Copyright law does not explicitly use the term "three-step-test" nor implemented the "three step-test" in the legal system per se. Note, however, the fair use provision has clearly provided an enumerated list of permissible uses with the specific language from the three-step test and then provided flexibility by an open-ended list of permissible uses based on statutory facts when such uses are not found in the enumerated categories. The exceptions and limitations set forth in copyright law should meet the conditions of the three steps and hence deemed to embrace the Three -Step Test set forth in Article 9(2) of the Bern Convention.

11) Is use under the exception or limitation permitted automatically (without any further action), or must certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter, please explain the criteria/procedure(s).

Regarding limitations on the author's copyright, there is no mandatory or compulsory license which provides some legal which obligate the parties to negotiate the contract. As already explained, the Minister of Culture already sets the payable fees. Therefore such use under the exceptions or limitations is permitted automatically (provided that the entity falls within the scope of such libraries/archives is entitled to reproduce and distribute)

Note that the Korean Copyright Act provides for compulsory license for so called orphan works under

Article 50.

12) Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made?

The Korean Copyright law does not include a levy regime yet. However, there is remuneration payable for use under the exceptions for education purposes and also for libraries or archives such as textbook exceptions and utilization of works at higher education institutes; and also some types of library limitations and exceptions.

Use under the exceptions for education purposes, a person who intends to utilize a work pursuant to Articles 25(1) and (2) as indicated above, shall pay remuneration to the owner of author's property rights according to the criteria for remuneration standard determined by the Minister of Culture, Sports and Tourism("The Minster"). Those who engage in reproduction, distribution, public performance, broadcasting, or interactive transmission of a work done at high schools, their equivalents, or lower level schools are not obliged to pay remuneration. The right to receive such remuneration is exercised through an organization which has been designated by the Minster.

Use under the exceptions for libraries and archives, libraries shall pay the owners of authors' property rights remuneration in accordance with the standards determined by the Minister of culture, Sports and Tourism: provided that such provision is not applicable to books for which the holder of author's property rights are the State, local government or schools under Article 2 of the Higher Education Act (excluding the whole or part of books which have been published for commercial purposes)

13) Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.

There is no special treatment for orphan works for use within such exception or limitation.

14) Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?

The law is silent on specific statutory languages that allow the exception and limitation be overridden by contract.

15) Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions?

no
If not please comment. :

There are currently no efforts by private organizations to address use by libraries and archives.

II. Policy considerations and proposals for improvements of the current law

16) Should there be any exceptions or limitations to copyright protection for libraries and archives?

yes
If yes, in relation to what activities?:

Yes, the current Copyright Act provides for a number of exceptions and limitations to copyright protections for libraries and archives.

17) Should there be any exceptions or limitations to copyright protection for education and research institutions?

yes

If yes, in relation to what activities? :

Yes, the current Copyright Act provides a number of exceptions and limitations to copyright protection for education and research institutions.

18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?

yes

Why?:

Yes, the Three-Step Test is a useful test for determining any exceptions or limitations to copyright protection. The newly amended Korean Copyright Act offers both a closed list of permissible use as with the European model and an open-ended consideration based on statutory factors which in turn allows flexibility in applying the Three Step Test

19) Should the exception or limitation be capable of being overridden by contract? Why? Why not?

20) Should remuneration be payable for any of the activities described in 16) and 17) above? Why? Why not?

21) How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved?

There might be always a need for improvement as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions. Given the newly amended "Fair Use" introduction to the Korean Copyright Act in 2012, we will wait to see how the court will interpret the statutory languages.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

b) to what activities should these exceptions or limitations apply;

c) under what conditions should the activities be undertaken or the copyrighted work used?

25) If yes to question 17):

a) to what educational and research institutions should these exceptions or limitations apply;

b) to what activities should these exceptions or limitations apply;

c) under what conditions should the activities be undertaken or the copyrighted work be used?

For the questions below, please provide an answer for each exception or limitation mentioned above (as applicable).

26) Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?

27) How should any remuneration for use that falls under such exception or limitation be determined or calculated? Who should be liable for making such payment, and to whom should such payment be made?

28) What special treatment, if any, should there be for use of orphan works within such exception or limitation?

29) In what circumstances should the exception or limitation be capable of being overridden by contract?

30) How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?

Summary

The Korean Copyright Act("the KCA") provides the specific statutory provisions for exceptions and limitations to copyright protection for libraries, archives and educational and research institutions. The approach to such exceptions and limitations in the KCA are found in a combination of the US "fair use" model and the European model of "a three-step test" (as set forth in the Article 9(2) of the Bern Convention). The Korean Copyright Act offers both an open-ended consideration based on statutory factors as with the US "fair use" model and a closed list of permissible use as with the fair dealing model.

Please comment on any additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question.