Korea

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Body of Law

Software, including computer programs, is protected as copyrightable work under the Copyright Act ("the Act") of Korea. Special provisions in Articles 101-2 through 101-7 of the Act address the protection of such programs. Previously, the Protection Act of Computer Programs addressed the safeguarding of computer programs until it was abolished and absorbed into the Act in 2009.[1]

Under Korean law, international treaties, to which Korea is a party, are self-executing, meaning that no additional legislation is necessary to give effect to the treaty under domestic law. This means that international treaties addressing copyrights or intellectual property rights, such as the Berne Convention (effective in Korea as of 21 August 1996), the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") (effective in Korea as of 1 July 1996) and the World Intellectual Property Organization Copyright Treaty ("WCT") (effective in Korea as of 24 June 2004), are given the same weight and effect as domestic law. As recently as 2012, Korea entered into Free Trade Agreements ("FTA") with the U.S. and the E.U., which have been in effect since 15 March, 2012 and 1 July, 2011 respectively. The Act has been revised to provide a wider range of protection for the software in range, remedies, technical protection measures, etc.

Object of Protection

According to the Act, 'computer program' means a work reduced to writing, composed of orders and directions, used in a device with information processing capability with the purpose of obtaining a specific result.[2] In other words, the program should 1) be functioning on a device capable of processing, controlling, and storing, 2) be able to perform meaningful work, 3) have at least two sets of instructions and orders, and 4) be expressed in code (and not just exist as an idea).[3] Under the laws of Korea, the term 'software' has a broader meaning than just a computer program; it includes flow charts, system architecture and user manuals, which are afforded legal protection through the general provisions of the Act. Databases, while not included in the definition of 'computer program,' are protected separately under specific provisions contained in Articles 91 through Article 98 of the Act. The Supreme Court of Korea has stated that to be an author of a computer program, some level of creativity is required, just

[1] Korean Ministry of Culture, Sports and Tourism and Korea Copyright Commission. Guide on Amendments to the Korean Copyright Act. Seoul: Korean Ministry of Culture, Sports and Tourism and Korea Copyright Commission, 2009. 17. Print.

[2] Copyright Act Article 2 (16).

[3] Song, Young Sik, et al. Copyright Acts . 2 vols. Seoul: Yook Bub Sa, 2013. 659-660. Print.

as it is required for other literary works under the Act. It declared that while the work does not need to be completely original or novel, the author must have expressed his/her own thoughts or emotions to the extent that his/her work is distinguishable from the work of another.[4] The Act, however, excludes programming languages (characters, symbols and their systems as means of expressing programs), syntax (special agreement on the usage of the programming language in a specific program) and algorithms (combination methods of instructions and commands in program) from protection.[5]

Authors

Definition of Author

The general provisions of the Act applicable to authors of other type of literary works extends to the authors of computer programs: an author is a person who has created a work,[6] and becomes the holder of exclusive and moral rights to such work.[7] Under the Berne Convention, copyrights are composed of moral and exclusive rights. Moral rights are the author's right to have the work published, the right to indicate his/her name on the work, and the right to preserve the integrity of the content, format, and title of the work.An author automatically becomes the copyright holder upon the creation of a work since the Act does not require any registration procedures or other types of formalities for an author to be recognized as a copyright holder.[8]

Authors of Work Made for Hire

In contrast, under the laws of Korea, an employer who engages an employee for a work made for hire (sometimes referred to as work for hire or WFH) will be treated as the author of the work, and not just the holder of moral and exclusive rights.[9] Here, an employer may refer to a juristic person, legal entity, an organization, etc. [10]

For a work to be recognized as a work made for hire, the following conditions must be satisfied: a work has to be made (i) under the supervision of an employer (ii) by an employee working for the employer (iii) during performance of his or her duties, and (iv) the work must be published under the name of the employer.[11] In instances where computer programs are work made for hire, employers do not need to meet the fourth prong of the test as publication would

[4]Supreme Court 94Do2238 dated November14, 1995.
[5]Copyright Act, Article 101-2.
[6]Copyright Act, Article 2 (2).
[7]Copyright Act, Article 10(1).
[8]Copyright Act, Article 10(2).
[9]Korea Copyright Commission. 100 Consultation Cases in Relation to the Revised Copyright Acts. Seoul: Korea Copyright Commission, 2012. 60. Print.
[10]Copyright Act, Article 2(31).
[11]Korea Copyright Commission. 100 Consultation Cases in Relation to the Revised Copyright Acts. Seoul: Korea Copyright Commission, 2012. 60. Print.

be counter to the purpose of keeping confidential trade secrets.[12] However, even in the case where all of the above conditions are satisfied, if an employment contract or the employer's internal regulation states otherwise,[13] the person who created the work may become the author of the work.

In Korea, many programs used by companies are developed on a contract basis[14] meaning that a commissioning party can agree to pay remuneration in exchange for work produced by a commissioned party (also known as the developing party) to create certain programs. When the conditions for work made for hire are not met in the course of performance of the contract, the developing party, as the author, may transfer exclusive rights to the party who ordered the work by an agreement of assignment; however, the moral rights still belong to the developing party as these rights are alienable from the author. Therefore, it is important to analyze whether a commissioned work may be recognized as a work made for hire as this determines the rightful holder of moral rights. With regard to this issue, the courts have held that the doctrine of work made for hire is usually not applicable to most commissioned work. Generally, the commissioning party will not be considered the author in a customary computer program development contract. However, when the commission party is the sole investor, planner, and publisher of the ordered work, and the commissioning party borrows only the commissioned party's human resources, the work will be recognized as a work made for hire of the party who ordered the work.[15] In other words, in cases where the contribution of the entity who ordered the work is dominant (while the developer has little discretion), the ordering entity is the sole financer of the program, and the work is developed to benefit only the commissioning party, the program will be recognized as a work made for hire, as described in the above.

Joint Authors

In case of a joint authorship, an author may not exercise the exclusive or moral rights without the unanimous agreement of all the copyright holders. However, a copyright holder may not discourage the other copyright holders from reaching an agreement on exercise of the copyright or unreasonably withhold his/her consent in bad faith.[16] Authors of a joint work may designate a representative amongst them to exercise their copyrights, with the caveat that any limitations imposed on the authority of such representative should not take precedence over a bona fide third party.[17] With respect to the exclusive rights of a joint authorship, an author cannot transfer, assign or pledge his/her share of the exclusive

[12]Korean Ministry of Culture, Sports and Tourism, and Korea Copyright Commission. Guide on Amendments to the Korean Copyright Act. Seoul: Korean Ministry of Culture, Sports and Tourism and Korea Copyright Commission, 2009. 22. Print.

[13]Copyright Act, Article 9.

[14]The Korean Civil Act, Article 664.

[15]Supreme Court 98Da60590 dated November 10, 2000.

[16]Copyright Act, Article 48(1).

[17]Copyright Act, article 15(2)(3), 48(4).

rights without the consent of the remaining authors. Any profit accruing from the exploitation of a joint work will be apportioned among the authors according to the respective shares of each author, unless otherwise stipulated. In such cases, the share of each author shall be deemed equal unless otherwise clearly specified.[18]

Exclusive rights

According to the Act, the author of a program has exclusive rights to reproduce,[19] transmit or broadcast the work in public,[20] and to distribute,[21] lease, rent,[22] or produce derivative works[23]. Characteristics worth noting are as follows. Based on the revision of the Act in 2011, which reflected the Korea-United States FTA, temporary reproduction was included in concept of a reproduction. The right of public transmission, which includes the pre-existing notion of rights of broadcasting and transferring, was introduced by the amendment of the Act in 2006. It was through this amendment that the Act was extended to include the right of transmission of a work or database or right of making such work or database available to the public via wire or wireless communication. As a result, uploading digital information of a work on the internet is now prohibited as a violation of right of public transmission. The right of distribution is only applicable to distribution in tangible media. The Court has declared that 'a user's connecting to a certain server to save a specific digital file in a shared folder to enable other users to download shall not be considered a distribution and that transferring a work or a copy only in a tangible media shall be construed as distribution.[24] The author's leasing rights only applies when a computer program is leased for profit; the right to create derivative works means a right to create a new work based on the work by means of translation, modification, alteration, etc. of original work; and the right to make compilations falls under the right of reproduction.[25]

Exceptions to the Exclusive Rights

In relation to use of computer programs, there are several special exceptions to exclusive rights under the Act. For example, a user of a computer program may temporarily reproduce such program in a computer without consent of the exclusive right holder to the extent deemed necessary for the purpose of

[18]Copyright Act, Article 48(2).
[19]Copyright Act, Article 16.
[20]Copyright Act, Article 18.
[21]Copyright Act, Article 20.
[22]Copyright Act, Article 21.
[23]Copyright Act, Article 22.
[24]Seoul High Court 2003Na21140 dated January 12, 2005.
[25]Korean Ministry of Culture, Sports and Tourism and Korea Copyright Commission. Guide on Amendments to the Korean Copyright Act. Seoul: Korean Ministry of Culture, Sports and Tourism and Korea Copyright Commission, 2009. 34. Print.

efficient information processing.[26] Additionally, a user may reproduce a program to check the ideas or principles underlying such program for the purpose of research, study, or testing without the consent of the copyright holder and may temporarily reproduce a program for the purpose of maintenance and repair of such program. [27] Reverse engineering is the copying or modifying of a computer program copyright code in order to obtain information necessary for interoperability of independently created computer programs with other computer programs.[28] The Act allows limited reverse engineering in cases where it is necessary to obtain information for the compatibility of such program with other program, provided that a user cannot obtain said information through an alternative source or method. A user may not transmit information obtained by reverse engineering to a third party other than for the purpose of establishing or testing compatibility. Furthermore, the user should not use the information obtained during reverse engineering for developing, producing, or selling substantially similar programs in infringement of the copyright of the program.[29] In regard to the principle of exhaustion, once the original work or its copy has been sold with the copyright holder's express intention to do so, (excluding the holder of moral right, since the moral right is inalienable while exclusive right is not), the right of distribution by the copyright holder is exhausted.[30] Therefore, a buyer may distribute the original work or its copy without any permission from the holder of exclusive right. However, it is not clear under the laws of Korea whether the principle of exhaustion applies to intangible digital works purchased through on-line networks as there are no current statutes or court precedents that address this issue.

Moral Rights

An author's moral rights belong exclusively to the author,[31] and these rights cannot be assigned or transferred. Moral rights are the author's right to publish the work, the right of attribution, and the right to preserve the integrity of the content, format, and title of the work. Exercising such rights through a proxy or an agent is possible, but only to the extent that it does not substantially infringe upon the author's moral rights.[32] A person who violates an author's moral rights will be subject to imprisonment for no more than three years or be charged with a fine not exceeding 30 million won, or both.[33] Expression of an author's intention on his or her right to the integrity of the work may be delivered by implied consent.[34] A user may modify a computer program without consent of the copyright holder, only to the extent such modification

[26]Copyright Act, Article 35-2.
[27]Copyright Act, Article 101-3(1)6.
[28]Copyright Act, Article 2(34).
[29]Copyright Act, Article 101-4.
[30]Copyright Act, Article 20.
[31]Copyright Act, Article 14(1).
[32]Supreme Court 94Ma2217 dated October 2, 1995.
[33]Copyright Act, Article 136(2)1.
[34]Supreme Court 92Da31309 dated December 24, 1992.

is necessary to make the program which is designed for a specific computer available for other computers or to the extent such modification is necessary for efficiency of the specific computer.[35] The right of attribution and the right of publication is governed by the general provisions of the Act. In cases where authors and copyright holders of unpublished work are not one in the same, and these authors, rather than the copyright holders, assign their exclusive rights to another person or grant the person the right to use or exclusively issue it, the authors will be deemed to have consented to its publication.[36] If derivative or compilation work made with the consent of the original author has been published, the original work will be deemed to have been published.[37]

Terms of Protection

The 2011 amended version of the Act, effective as of 1 July 2013, provides that the author's exclusive rights to a program will be effective for the author's life time plus seventy years after the death of the author.[38] The exclusive rights for work made for hire continues to exist for a period of 70 years after it has been published.[39] The exclusive rights for a work with no author's name or second name continues to exist for a period of 70 years after it has been published.[40] The exclusive rights to a joint work continues to exist for a period of seventy years after the death of the last surviving author,[41] and the exclusive right for derivative works is protected independently from the original work, under the Act, for the lifetime of the author of derivative works plus seventy years after the death of such author. The protection period of the exclusive rights starts from the year after the author's death or its publication,[42] since it may be difficult ascertain the exact dates of the author's death, creation or publication.

Copyright Assignment

Assignment of Exclusive Rights

Exclusive rights may be assigned in whole or in part.[43] Each of the exclusive rights, such as right of reproduction, right of public transmission, etc., may be assigned as a whole or in piecemeal. Additional constraints such as geographic limitations may be added. For example, the right of reproduction may only be available in the U.S. When the exclusive rights of a program are assigned as a whole, the right to make a derivative work will be presumed to have been included, unless otherwise stipulated.[44] The exclusive right holder may grant

[35] Copyright Act, Article 13(2) 4, 5.
[36] Copyright Act, Article 11(2).
[37] Copyright Act, Article 11(4).
[38] Copyright Act, Article 39(1).
[39] Copyright Act, Article 41.
[40] Copyright Act, Article 40.
[41] Copyright Act, Article 39(2).
[42] Copyright Act, Article 44.
[43] Copyright Act, Article 45(1).
[44] Copyright Act, Article 45(2).

permission to use the work instead of transferring the exclusive right by assignment.[45] When it is uncertain whether the author assigned the exclusive rights or granted mere permission to use, the exclusive rights will remain with the author, according to the Supreme Court's decision.[46] According to Article 105 (1) of the Act, copyrights can be held in trust. Under the Trust Act, if the trustor creates a valid express trust, the trustee should manage and dispose of the trust corpus in the interest of the beneficiary or in the stated interests of the trust. Under the trust agreement, ownership of the trust property is completely transferred from the trustor to the trustee; and the trustee has all of the rights to the trust property, including the right to file a lawsuit. Therefore, the trustor is prohibited from instituting any claims for compensatory damages based on the copyrights in the trust property.[47] Under Article 105(2) of the Act only those organizations satisfying the following criteria are permitted to carry out copyright trust services: (i) the organization must be comprised of holders of copyrights (or other rights protected under the Copyright Act) to the trust property; (ii) the organization must be not for profit; and (iii) the organization must possess the capability to conduct the collection and distribution of royalties.

Assignment of Moral Rights

Since the author's moral rights are inalienable and not transferable,[48] moral rights exhaust at the author's death. No special provisions under the Act limit the moral rights of computer programs, as such, moral rights for computer programs are recognized like other copyrighted works. Due to its inalienability, an author's moral rights cannot be held in trust.[49]

Special Measures

Civil Remedies

If a copyright holder's work is infringed, the copyright holder may file an application for a cease-and-desist order against the infringer. The copyright holder or holder of other rights under the Act may request an injunction for such infringement provided that such infringement continues, regardless of the infringer's intention or negligent conduct.[50] The copyright holder may file a petition to a court to take preventive measures or to provide a security for compensation for damages against a potential infringer of his or her exclusive rights. The court may issue a preliminary injunction to temporarily suspend the infringement, to seize the objects made by the act of infringement, or to take other necessary measures on behalf of the plaintiff whose copyright is being infringed.[51] The

[45] Copyright Act, article 46(1).
[46] Supreme Court 95Da29130 dated July 30, 1996.
[47] Seoul High Court 98GaHap83680 dated July 23, 1999.
[48] Copyright Act, Article 14(1).
[49] Seoul High Court 95Na41279 dated July 12, 1996.
[50] Oh, Seung Jong. Copyright Act. Seoul: Park Young Sa, 2013. 1414. Print.
[51] Copyright Act, Article 123.

copyright holder' may also seek injunctive relief, which may be granted upon showing the existence of the claims to be preserved and the need to preserve such claims. The copyright holder's right to apply for a cease-and-desist order and right to request preventive measures constitute the existence of such claims. A pledge of security may not be required to grant injunctive relief.[52]. Moreover, the copyright holder has the right to request actual damages for monetary loss or non-economic damages, such as mental or emotional damage, against the infringer.[53] The copyright holder may claim, taking into account the difficulty of proving the amount of damages, either (1) the amount of profit the infringer gained through infringement, or (2) the amount corresponding to the revenues that would have been acquired by the copyright holder by exercising his or her copyright in normal course of business.[54] Moreover, due to revision of the Act to reflect the Korea-US FTA, the copyright holder may claim statutory damages, instead of actual damages, if the copyright holder had registered his/her copyright prior to exercise of the claim of statutory damages.[55] In case the copyright holder fails to prove the infringer's intentional conduct or negligence or the three year period for statute of limitations has expired, the copyright holder may claim restitution for unjust enrichment pursuant to the Civil Act of Korea. When an author's moral rights (such as the right to decide when and how to publish a work—which may be done anonymously or pseudonymously—the right of attribution, or right to the integrity of the work) are infringed, the author may claim damages arising from such infringements under Article 751 of the Civil Act of Korea. The court has declared that "although no express law exists, it is natural that copyright holder can claim damages for the infringement of his or her moral right which is inalienable in its nature.[56]" In these situations, there is a rebuttable presumption that the copyright holder suffered damages, mentally or emotionally, as well as damages to reputation.[57] The copyright holder may request to take measures to restore his/her reputation in cases of defamation. In the event the moral rights are infringed or the dignity of the author has been damaged, the damaged party may request restoration of his or her reputation as well as monetary damages.[58] The Act also has separate provisions that apply to the infringement of moral rights after an author's death. This provision allows the author's bereaved family or executor of his or her will to demand preventive measures, provision of security for damages, or restoration of the author's reputation.[59]

[52]Article 123 of the Act
[53]Copyright Act, Article 125.
[54]Seoul High Court 83Na4449 dated November 28, 1984.
[55]Copyright Act, Article 125-2.
[56]Supreme Court 98Da41216 dated May 25, 1999.
[57]Supreme Court 89Daka12824 dated October 24, 1989.
[58]Copyright Act, Article 127.
[59]Copyright Act, Article 128.

Joint Works

In the event there are concerns that the copyright of a joint work might be infringed, each joint author is entitled to seek preventive measures or a cease-and-desist order under Article 123 of the Act. If the exclusive rights are infringed, each of the holders of exclusive rights may claim monetary damages in proportion to his or her share of copyright under Article 125 of the Act. When the infringement of moral rights concerns all the joint authors, the copyright holders must act in unison to seek reparation. However, the amount of damages sought by each author is in his/her discretion.[60] In cases where moral rights of just one of the joint authors are infringed, each author may act independently of the others when filing suit.

Collective Works

When there are concerns as to whether copyrights of collective works will be infringed or when copyrights of collective works are actually infringed, each copyright holder may respectively claim damages or seek prohibitive and preventive measures, or cease-and-desist orders for the works created by him or herself.

Derivative Works

The courts[61] have held that the copyright of derivative computer program belongs to the author of the derivative computer program regardless of whether the copyright holder of the original work gave his/her consent for use of the original in the derivative work. The author of the derivative work may claim damages when the derivative work's copyright is infringed. However, a copyright holder of a derivative work may not use the derivative work without consent of the copyright holder of the original work.

Criminal Sanctions

Article 136 of the Act stipulates that copyright infringers are subject to criminal punishment. Before the inclusion of the Korea-USA FTA into the Act, Article 140 provided that a copyright infringer may not be criminally punished without a complaint by the copyright holder except in circumstances where infringements were committed habitually *and* with profit-making motives (*emphasis added*). With the passage of the Korea-USA FTA, the Act's exception clause was broadened to allow criminal prosecution of those who were habitual infringers *or* infringers who were profit-motivated ('emphasis added").[62] It is possible that this broadened exception clause subjects more infringers to criminal sanctions as compared to the previous version of the Act.

[60]Supreme Court 98Da41216 decided May 25, 1999.
[61]Supreme Court 2002Da45895 dated September 24, 2004.
[62]Copyright Act, Article 140.

Unprotected Software and Public Domain Software

Works with expired copyright protection terms, works without a copyright holder, or works with express waivers from copyright holder are not be protected under the Act. In contrast, though Free and Open Source Software ("FOSS") makes available its source code for public use, it is not unprotected software or public domain software as defined under the Act.

Analysis of FOSS under Korean Law

Copyright

The process of concluding FOSS licenses differs from that of other copyrighted works. Under Korean law, a FOSS license agreement is treated much like a contract because of the similarities between the two. First, the all-important intent to form a contract exists between the two parties. The offeror intends the offeree to use the copyrighted work by granting the offeree the permission to use the work; the offeree often manifests his/her intent to accept through some action that signifies his/her acceptance. Second, a FOSS license explicitly states the material conditions for using the copyrighted work. For the reasons mentioned above, the FOSS license agreement is binding and enforceable under Korean law as a contract. Although people might have the mistaken belief that authors of FOSS have waived their rights because of the free public availability of FOSS, from the legal perspective, the authors continue to hold their valid copyrights in FOSS, which are protected under the relevant laws while simultaneously allowing users the right to use the FOSS under certain conditions. The development environment of FOSS is radically different than the environment in which commercial proprietary software is developed. While several program developers may collaborate at the same time to create the first version of FOSS, FOSS is usually developed by successive combinations of derivative works taken from preceding derivative works based on its original work. Important legal issues concerning FOSS are: who holds the copyrights, what is the object of copyright protection, and how copyright holders can enforce their rights emanating from the copyrights. All of which are reviewed in detail as follows:

Qualification of FOSS

Many users are expected to use, copy, modify, and redistribute FOSS after the creation of the first version. The works made during the process are classified into one of three categories: joint works, collective works, or derivative works. Joint work is created when two or more program developers collaborate, with the intention that their individual contributions be merged into one. Program developers need not work on the program contemporaneously in order to be considered joint work. Collective work is when each developer's contribution can be used separately and independently. Derivative work is when a developer modifies the pre-existing FOSS with significant variations while maintaining

substantial similarities.[63]

Rights of Joint Authors

Since the exclusive rights to a joint work must be exercised with the unanimous agreement of all the exclusive rights holders, it becomes more significantly harder to reach absolute consensus when many developers are involved. To solve this conundrum, copyleft FOSS licenses contain clauses that make it mandatory for each contributor (developer) to allow his or her contribution to be freely available to the public for copy, modification and redistribution. Moreover, in accordance with the principle of private autonomy, each contributor may agree in advance to make freely available his/her contribution even before he/she creates the code in accordance with the license agreement, which shall be effective under the laws of Korea.

Rights of Authors of Collective Works

The defining characteristic of a collective work is that each author's contribution can be separated into discrete parts. As such, each author of a collective work may, without the other authors' permission, assign his or her exclusive rights to another or permit others to use his/her own creation.

Rights of Copyright Holders of Derivative Works

The Korean Supreme Court held that creator of the derivative work of a computer program holds the copyrights to the derivative work, whether or not the copyright holder of the original work gave his/her consent to use the original work in the derivative one.[64] Therefore, copyrights for the derived programs based on General Public Licensed ("GPL'd") software belong to the developer of the derivative work, to the extent that it is his/her own creation under the laws of Korea.[65] When an original work and its derivative are inseparable, a question arises of whether the consent of all authors is needed in order to modify or change the inseparable work. To deal with this issue, Article 6 of General Public License ("GPL") 2.0 states that recipients of each derivative work automatically receive a license from the original licensor to use, copy, distribute or modify such derivative work. Also, Article 2 of Apache 2.0 and Article 2.1 of the Mozilla Public License ("MPL") 2.0 state that each contributor gives users permission to use the work. All of the previously cited license clauses are valid under Korean law. Copyleft clauses in FOSS licenses may be a point of controversy when it comes to protecting derivative works or authors of derivative works under Korean law. Copyleft clauses obligate the source code of derivative works to be distributed under the same license as the original work, which results in limiting the exercise of the copyright by the copyright holder of the

[63]Supreme Court 2003Da47782 dated 9 September, 2005.
[64]Supreme Court 2002Da45895 dated September 24, 2004.
[65]Supreme Court 2006Do8369 February 12, 2009.

derivative works. However, under Apache and Berkeley Software Distribution ("BSD") licenses, which do not require the authors of the derivative works to disclose the source code of the modified programs, the copyrights of the authors of the derivative works are protected as provided in the Act. Since Korean law acknowledges the principle of private autonomy, except for certain rights that cannot be transferred or waived under the compulsory provisions, exercise of copyrights can be limited in accordance with a license agreement under the doctrine. For example, copyleft clauses may limit the moral right of a copyright holder of a derivative work by stipulating the method and time of publication of the work or by allowing free modification of the work by the public. However, an author is entitled to determine how to exercise his/her moral rights under the principle of private autonomy as long as he/she does not transfer his/her moral rights. Therefore, copyleft clauses are valid under Korean law if it falls within the previously described bounds of conduct. If an author of the derivative work does not fulfill his or her obligations under the license and argues that the copyleft clause is unfair and thus void under the Korean law, GPL auto-termination clauses may intervene by prohibiting the author of the derivative work from using the original work. While it's undecided if this would be a winning argument in court, the author of a derivative work most likely will not benefit from arguing that copyleft clauses are void.

The Assignment of Copyrights

The same principle on the assignment of copyrights applies to computer programs. Copyrights of software can also be held in trust; however, it is not frequently practiced in Korea. When FOSS is made as a work for hire, the employer becomes the author of the FOSS by operation of the Act and thus becomes the holder of exclusive and moral rights.[66] In such instances, the employer may exercise its copyrights under the terms and conditions of a FOSS license.

Moral Rights

Because most FOSS licenses allow liberal modifications to FOSS, a major legal issue is whether these modifications will severely infringe upon the author's right to the integrity of the work. Creating a derivative work inevitably causes limitations on the exercise of the original author's right to the integrity of the work since the derivative work is a new one that substantially modifies the original work. However, the author's right to the integrity of the work can also be waived under the doctrine of private autonomy. When a copyright holder allows its downstream users to create derivative works, the copyright holder may dictate the parameters within which the integrity of the content should be maintained. Therefore, by executing a license agreement, the original author may limit his or her moral right to maintain the integrity of the work by

[66]Korea Copyright Commission, 100 Consultation Cases in Relation to the Revised Copyright Acts, Seoul: Korea Copyright Commission, 2012, 60. Print.

allowing free and substantial modifications of the original work without running afoul Korean law. There is a caveat to the original author's waiver of the right: when a user of FOSS modifies the original work in a manner against the original author's purpose of creation, which renders the author's intention suspicious, and is detrimental to the honor or reputation of the original author, infringement of the author's moral rights shall still be recognized, regardless of the effectiveness of the original author's waiver of the right to the integrity of the work under the terms of a license.

Enforcing FOSS Licenses

Various bodies of law such as Korean contract law, the Copyright Act, criminal law, etc. should be considered simultaneously in order to determine whether FOSS license agreements are binding and enforceable.

Contracting Parties

Unlike general license agreements, FOSS license agreements may involve several authors of the original work or derivative works. Assuming that an agreement is concluded, once FOSS is downloaded and used, identifying the contracting parties is an issue. In order to legitimately use FOSS as an end user at the end of development chain, the end user must receive permission from all legitimate copyright holders throughout the entire development and modification process of FOSS. When FOSS is distributed directly from the copyright holder of the original FOSS (the "Original Copyright Holder"), the contracting parties of the FOSS license agreement are the Original Copyright Holder and the recipient of the software. However, if the recipient of FOSS redistributes the software to a third party (the "Redistributor") without making any modifications, different opinions may arise on whether the Redistributor becomes either a contracting party or an agent of the Original Copyright Holder who is the contracting party. It is reasonable to recognize that the intent of the distributor is to distribute the software in his or her own capacity within the scope of his or her permitted use, instead of distributing as the copyright holder's agent, unless it was explicitly otherwise expressed. For example, when a distributor of non-copyleft licensed original software distributes that software under a different license, the effect of the distribution is not binding on the author of FOSS because he/she never agreed to the different license. Therefore, the contracting parties of such distribution should be the distributor and the downstream recipient.[67] Naturally, when a person who modified a program distributes the modified software, he/she would be the contracting party.[68]

[67]Choi, Young Ro. "Issues on Applying Open Source Software on Korean Contract Law" (for Working Group of Revitalization of Open Source Software organized by Communication of Korea(abolished) and Korea IT Industry Promotion Agency and Ministry of Information). GNU Korea, 2002. 4-6. Web. 1 July 2013 http://korea.gnu.org/people/chsong/copyleft/osl.pdf.

[68]Choi, Young Ro. "Issues on Applying Open Source Software on Korean Contract Law" (for Working Group of Revitalization of Open Source Software organized by Communication

The Validity of FOSS Licenses

Contractual Relationship

Providing FOSS for free gives it the simultaneous status as a gift under the Korean Civil Act as well as a copyrightable work license agreement under the Act.[69] An offer and acceptance are required to form a legally binding contract. Under the current legal framework, the distribution of FOSS constitutes an offer.[70] Though the licensees may be numerous and unspecified, FOSS license agreements may be considered contracts as long as they contain material terms that are specific and definitive. The Court has held that 'offer should be specific and definitive to such an extent as to establish an agreement by its corresponding acceptance; the offer should include information which could determine the contents of the agreement.'[71] Most FOSS licenses present specific and definitive terms and conditions which could determine the contents of the agreement in order to use the corresponding FOSS program. In order for a contract to come into existence, an offer and its corresponding acceptance should be present, and, in principle, the offeree should notify the offerror of his/her acceptance. Practically speaking, no means exist for a licensee of FOSS to notify anyone of his/her acceptance. Where no notice of acceptance is required for a contract to be validly executed, whether through the offeror's explicit permission or because of trade custom practice, the contract will come into existence upon the occurrence of an event, which may be construed as a declaration of the intention to accept.[72] Under a FOSS license agreement, the licensee does not need to give a notice of acceptance to the licensor. Instead, the licensee's download of FOSS[73] or the modification or distribution of the program constitutes acceptance[74]. Experts are divided as to which of these events actually qualify as the formal acceptance. Further, FOSS licenses are regarded as standardized contract terms as defined under the Act on the Regulation of Terms and Conditions. Standardized contract terms means the contents of a contract that a party prepares in a specific form in advance in order to enter into a contract with unspecified multiple parties regardless of their name, type, or scope.[75]

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of Korea(abolished) and Korea IT Industry Promotion Agency and Ministry of Information). GNU Korea, 2002. 5. Web. 1 July 2013 http://korea.gnu.org/people/chsong/copyleft/osl.pdf.

[69]National IT Industry Promotion Agency, Study on Open Software License: On its Legal Issues and Foreign Policies. Seoul: Software Engineering Center, 2002. 48.

[70]National IT Industry Promotion Agency, Study on Open Software License: Standard License Agreement for Government developed Open Source Software, Seoul: Software Engineering Center, 2003, 74. Print.

[71]Supreme Court 2003Da41463 dated December 8, 2005.

[72]The Korean Civil Act, Article 532.

[73]National IT Industry Promotion Agency(Software Engineering Center). Study on Open Software License: Standard License Agreement for Government developed Open Source Software, National IT Industry Promotion Agency(Software Engineering Center), 2003. 74. Print.

[74]Kim, Byung Il. "GPL and Conflict of Laws", Study on Conflict Laws 14 (2008): 93. Print.

[75]The Act on the Regulation of Terms and Conditions, Article 2.

No Warranty

Limitation on 'no warranty clause' under the Civil Act

License agreements such as GPL, etc. provide that any copyright holder, or any other party who may modify or redistribute the program ("Contributors") may disclaim warranties against any defects of the FOSS program. In other words, Contributors are not liable for any damages arising out of defects of the program, even if the holder or other party was aware that the defects may have existed. According to Article 559 of the Korean Civil Act, 'a donor shall not be liable for any defect or deficiency in the thing or right which forms the subject of his or her gift; provided, that this shall not apply to cases where he/she was aware of such defect or deficiency and has nevertheless failed to inform the donee thereof.' The aforementioned article on the Korean Civil Act seems to conflict with the FOSS license no-warranties clauses. However, the terms of no-warranty clauses of FOSS license agreement such as GPL, which includes 'possibility of such defects,' does not extend to cases where copyright holder are fully aware of the defects. In other words, when the copyright does not disclose a known defect or deficiency to a recipient, the copyright holder will be liable for damages under the Korean Civil Act. No-warranty clauses will be ineffective in these situations. However, when the copyright holders only recognize the possibility of defects, without actual knowledge of such defect or deficiency, which is threshold conditions under the Korean Civil Act, the copyright holders can effectively disclaim its warranties.[76]

Under the Act on the Regulation of Standardized Contracts

According to Article 7 of the Act on the Regulation of Standardized Contracts,[77] the standardized contract terms that concern the liability of contracting parties that fall under any of the following subparagraphs will be null and void: 1) a clause that exempts a business operator (a party to a contract who offers standard business terms to the opposing parties as the content of the contract), its agents, or its employees from liability arising from intentional conduct or gross negligence; 2) a clause which limits the extent of damages payable by the business operator, in circumstances without objective justifiable cause; 3) a clause which excludes or limits the warranty liability of a company in situations without objective justifiable cause.[78] The no-warranty clauses of the FOSS license agreements as in GPL, constitute standard business terms since a contracting party prepares such clauses in a specific form in advance in order to enter into a contract with unspecified multiple contracting parties. Since FOSS is provided for free, which could be seen as an "objective justifiable cause" under subparagraphs 2) and 3), a no- warranty clause would apply and thus would not be null

[76] National IT Industry Promotion Agency(Software Engineering Center). Study on Open Software License: On its Legal Issues and Foreign Policies. Seoul: National IT Industry Promotion Agency (Software Engineering Center), 2002. 58-59. Print.

[77] Under German law, it is called 'Standard Business Terms.'

[78] The Act on the Regulation of Terms and Conditions, Article 7.

and void. However, in the event that disclaimer clauses are applied to software providers who acted with intention or gross negligence, the clause would be null and void under the above referenced paragraph 1). In other words, if the licensor was aware of the defect of the software or should have been aware of the defect but for the gross negligence of the licensor, the licensor is liable for damages pursuant to Article 559 of the Korean Civil Act. If the licensor's gross negligence or intentional conduct is proven, the licensee is entitled to seek liabilities from the licensor pursuant to Article 7 of the Act on the Regulation of Terms and Conditions.[79] However, if the licensee under the GPL 2.0 seeks liabilities from the licensor claiming that the no-warranty clause is null and void, then the licensor may claim that the license agreement was automatically terminated because the licensee copied or distributed FOSS program except as expressly provided under GPL 2.0 and was in breach of a no-warranty clause. When a commercial distributor provides warranties for a FOSS in exchange for a fee, no warranties in the original FOSS license agreement will be deemed to have been modified between the commercial distributor and the end user, especially when these warranties did not exist in the original license agreement. Therefore, the distributor should be liable under the additional contractual obligations as a contracting party. Moreover, to the extent the scope of warranty under such agreement is narrower than the scope specified in the compulsory provisions of relevant laws, the warranties scope specified in the applicable law will apply.

Limitation under the Product Liability Act

Under the Korea Product Liability Act, 'product' means all movable goods, industrially manufactured or processed, including movable goods that is a part of another immovable or movable good. Because of the perceived intangible nature of a computer program, whether a 'computer program' is a product is a hotly contested issue.[80] According to Article 3 of the Korea Product Liability Act, a manufacturer who distributes software contained or embedded in tangible storage means or devices will be liable for damages, death, personal injuries, or property damage (this category excludes the damage to the defective product) that a person suffers as a result of a product defect, arising from defects in manufacturing, defects of design, or inadequate warnings on the product.[81] Any special agreement intended to exclude or limit the liabilities for damage in violation of the Product Liability Act will be null and void, provided that this will not apply to cases where a person who purchased a defective product to be used solely for his/her own business and entered into a special agreement to limit or exclude liabilities for damages incurred to his business property.[82] In order to apply the Product Liability Act to a FOSS distributor, the distributor

[79]National IT Industry Promotion Agency(Software Engineering Center). Study on Open Software License: On its Legal Issues and Foreign Policies. Seoul: National IT Industry Promotion Agency (Software Engineering Center), 2002. 59-60. Print.

[80]Association of Comparative Private Law, Study on Amendments to the Product Liability Act, Seoul: Ministry of Justice of Korea, 2012. 59. Print.

[81]The Product Liability Act, Article 2(2).

[82]The Product Liability Act, Article 6.

should be a manufacturer, which the Product Liability Act defines as a person who is engaged in the business of manufacturing, processing, or importing any product.[83] If a company creates a FOSS program embedded in a device or devices meant for its own consumption, the liability exemption clause of the FOSS license may be valid under Article 6 of the Act. Therefore, in practice, product liability on FOSS would not often recognized.[84]

The Copyleft Principle

Principle

Strong copyleft clauses included in GPL 2.0 or 3.0, which obligate downstream users to distribute the source code of work based on the original program of the same copyleft license, may conflict with the Copyright Act and the Trade Secret Protection Act. The former acknowledges the independent copyrights of authors of derivative works while the latter protects trade secrets.

The Validity of Copyleft Clause

As mentioned above, copyleft clauses are valid under Korean law since the principle of private autonomy is applied to the exercise of copyright. However, copyleft clauses may conflict with the Trade Secret Protection Act. The Trade Secret Protection Act defines 'trade secret' as information (including production and sales methods, useful technical or business information for business activity), that is not publicly known and of which is the subject of considerable effort to maintain the secrecy and independent economic value. Though trade secrets are protected under the Trade Secret Protection Act, many licenses, including GPL, require disclosure of the original source code for derivative programs and thus may be in conflict with the Trade Secret Protection Act.. The Korean Supreme Court has held that when the person who modifies FOSS becomes the author of the derivative work by meeting the legal standard set forth by the courts, the original source code of the derivative work is still considered a trade secret provided that it remains unpublished, retains its independent economic value, and is kept confidential through the considerable effort of the trade secret holder. Although the author of derivative work may be liable for damages to the original author because the author of the derivative work failed to meet his/her duty to disclose the source code, more likely, the author of the derivative work will not have to disclose the source code since it i) is not known publicly, and ii) is the subject of considerable effort to maintain its secrecy, and iii) has independent economic value, and therefore is qualified as a trade secret.[85] This holding is to

[83]The Product Liability Act, Article 2(3)a.

[84]Choi, Young Ro. "Issues on Applying Open Source Software on Korean Contract Law" (for Working Group of Revitalization of Open Source Software organized by Communication of Korea(abolished) and Korea IT Industry Promotion Agency and Ministry of Information). GNU Korea, 2002. 10. Web. 1 July 2013 http://korea.gnu.org/people/chsong/copyleft/osl.pdf.

[85]Supreme Court 2006Do8369 dated February, 12 2009.

be criticized as described in the section entitled "FOSS Cases in Korea."

Remedies for Infringement

Under the Copyright Act

The principles that apply to other copyrightable works apply to FOSS when authors claim remedies and criminal sanctions under the Act. Standing to sue differs depending on whether the work is a joint work, a collective work, or a derivative work as described in the section entitled "Analysis of FOSS under Korean Law."[86]

Breach of License Agreement or Copyright Infringement, Compensation for Damages

When there is a breach of a FOSS agreement, a determination must be made of if the breach constitutes a breach of contract and further a copyright infringement. If the breach corresponds to exclusive rights, which are guaranteed under the Act, the breach may be treated as a copyright infringement. Because there are no court precedents that deal with this issue head-on, the herculean task of making such determinations is set before the Korean judiciary. While it is by no means a complete guide to the subject, there is a case that may shed some light on this particular issue. In the case where an author of a derivative work based on GPL'd FOSS failed his duty to disclose its source code, the Supreme Court did not clarify whether such was a breach of a contract or constituted an infringement of copyrights. The lack of clarity came from the Supreme Court's usage of the phrases "violation of the GPL agreement" and "the copyright holder" in its decision. The Court pointed out that such decisions are held separately from the issue of whether the author of derivative work who violates the GPL agreement may be liable for damages to the copyright holder of the original work. However, the lower court made it clear that the author of a derivative work who used a GPL'd FOSS, without disclosing the source code, is in violation of the GPL and is liable for damages to the copyright holder of the original work for copyright infringement.[87] The details of the case are to be discussed in the following section. To determine the proper cause of action under which compensation for breach of a license agreement is sought, the form of the infringement and the nature of the infringed rights should be analyzed. If the object of the infringement is a component of the copyrights as defined under the Act, the Act is applicable and the special measures as stated in Part I will apply. On the other hand, when the object of infringement is a contractual license obligation, which is not fulfilled, contract law under the Korean Civil Act would apply. If a licensee breaches a FOSS license agreement, the licensor may apply for specific performance[88] or terminate the license agreement[89] upon

[86]Supreme Court 2006Do8369 dated February, 12 2009.
[87]Seoul Central District Court 2005No3002 dated November, 1 2006.
[88]The Korean Civil Act, Article 389.
[89]The Korean Civil Act, Article 543.

occurrence of a termination event or upon expiry of period of notification for performance as provided under FOSS license[90] or claim damages.[91] The licensor may file under the Civil Execution Act, with a provisional disposition to keep the licensee from using the FOSS program or to disclose its source code until the relevant judgment is held.

FOSS Cases in Korea

Elimnet v. Haionnet

An employee of Elimnet (the Developer) created a derivative work using GPL'd FOSS during his employment and assigned the copyright to the company. Elimnet used the derivative work for its business. After a while, the Developer resigned from Elimnet without disclosing the source code of the derivative work to company. He later founded Haionnet and used the modified version of the derivative work for its Haionnet's business. Elimnet filed a complaint arguing that the Developer used Elimnet's trade secrets without permission. The Developer was charged with the violation of the Trade Secret Protection Act. The Supreme Court held that in view of the assignment contract of the copyright between Elimnet and the Developer, Elimnet was the copyright holder of the derivative work based on the GPL'd software; the same court did not address whether Elimnet should be liable for damages to the copyright holder of the original GPL'd software. The court further held that the source code of the derivative work was Elimnet's trade secret since the source code of the derivative work i) was not known publicly, ii) had independent economic value and iii) was maintained as a secret through considerable effort. However, a strict application of the court's decision in this case can be criticized as below. The purpose of protecting trade secret is to prevent infringers from gaining unjust profit through unfair competition, rather than to protect trade secret itself.[92] The copyright holder of the original work allowed users to modify the work under the condition that users disclose the source code of the modified program to the public, along wide public access to the modified program. A refusal by either a user or developer to fulfill his/her obligations would lead to the automatic termination of the license. The lower court held that refusing to disclose the source code of the modified program would be an infringement of the original copyright holder's right of modification: the act of using the modified program without disclosing its source code would be an infringement of the copyrights of the original author because it exploited the creativity of the original author without his/her permission.[93] It is in doubt whether the derivative author of a GPL'd software who has violated the terms of the license agreement can be regarded as a fair competitor who should be protected under the Trade Secret Protection Act. Moreover, the information must be maintained in confidence

[90]The Korean Civil Act, Article 543, 544.
[91]The Korean Civil Act, Article 551.
[92]Supreme Court 95Da24528 dated February, 13 1998.
[93]Seoul Central District Court 2005No3002 dated November, 1 2006.

to be recognized as a trade secret. Secrecy is maintained only when it is kept in confidence by the legitimate holder, who holds the lawful right to use the trade secret.[94] The modifier holds the copyright of the derivative work, but does not hold the copyright for the original work. Because the derivative work is in generally inseparable from the original software, the modifier inevitably infringes the copyright of the original program whenever he/she uses the derivative work without permission of the original author. Therefore, in such circumstances, the derivative author may not necessarily be regarded as a holder of a lawful right to use the derivative work or a derivative author who should be protected under the Criminal Act. Protecting a company's derivative work as a trade secret when it was created by infringing the copyright holder‘s original work does not conform to the purpose of the Trade Secret Act. Moreover, as previously discussed, since the source code of the derivative work may not satisfy the conditions of a trade secret, the court's holding that acknowledged the derivative work, an undisclosed source code of FOSS, as a trade secret may be criticized. Such a court holding does not conform to the original copyright holder's intent to make the software as free and open as possible, which might hinder the active use and development of FOSS in Korea.

[94]Pack, Kwang Min and Hae Sung Yoon. "Examination of Trade Secret concept in Unfair Competition Prevention and Trade Secret Protection Act" Sungkyunkwan Legal Study 18.1 (2006): 4. Print.