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## THE EVOLVING LINKING LAW IN SOUTH KOREA: *CHUING IT OVER*

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*South Korean hyperlink copyright law is vague and inconsistent. Given that South Korea has the fastest internet speeds in the world, and that it has the highest internet usage penetration in Asia, sophisticated development of its hyperlink copyright law must occur—with specific attention to criminal aiding and abetting and civil tortfeasor laws. This article seeks to remedy a patchwork quilt of legal precedents as well as Korean statutory norms, and provides a comparative analysis of U.S. and EU law.*

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## **INTRODUCTION**

Copyright law responds to the invention and proliferation of new technologies. Korean copyright law in particular seeks to protect authors and their works, even in the domain of online internet communications. At the same time, it is keenly aware of the need to limit too much protection for individuals as measured against the benefits of the work to society. Article 22(2) of the Korean Constitution states that “[t]he rights of authors, inventors, scientists, engineers and artists shall be protected” at law.<sup>1</sup>

Korea is considered by many as the nation with the fastest internet access speeds in the world and, with the highest internet usage penetration in Asia,<sup>2</sup> it boasts a plethora of connectivity options to access, contribute, and receive cultural media in cyberspace.<sup>3</sup> Ideas surrounding the use of internet in society, however, have only recently begun to find favor with courts as the subject of legal jurisprudence.<sup>4</sup> A leader in terms of the integration of internet usage and online media into everyday life and society, Korea continues to grapple with copyright law in cyberspace.<sup>5</sup> This derives partly from its often inconsistent jurisprudence on intellectual property issues.<sup>6</sup> Although domestic technology inventions enjoy a forceful patent protection scheme, copyright law has remained more varied in its

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<sup>1</sup> Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 22(2) (S. Kor.), [https://elaw.klri.re.kr/eng\\_service/lawView.do?lang=ENG&hseq=1](https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=1)

<sup>2</sup> Jacob Poushter et al., *Social Media Use Continues to Rise in Developing Countries but Plateaus Across Developed Ones*, PEW RESEARCH CENTER (June 19, 2018), <https://www.pewresearch.org/global/2018/06/19/social-media-use-continues-to-rise-in-developing-countries-but-plateaus-across-developed-ones/>; see also Tim Hornyak, *Getting Online in Super-Wired South Korea*, CNET (July 16, 2012), <https://www.cnet.com/news/getting-online-in-super-wired-south-korea/>.

<sup>3</sup> *Southeast Asia's internet economy to cross \$100 billion this year: industry report*, REUTERS (Nov. 9, 2020), <https://www.reuters.com/article/us-southeast-asia-technology/southeast-asias-internet-economy-to-cross-100-billion-this-year-industry-report-idUSKBN27Q0CB>.

<sup>4</sup> See e.g., Jongpil Chung, *Comparing Online Activities in China and South Korea: The Internet and the Political Regime*, 48 U. CAL. PRESS 5 (2008).

<sup>5</sup> *Id.*; see also SangJo Jung, YoungJoon Kwon, & JoonSuk Park, Comparative study on criminal liabilities of copyright infringement, a report commissioned by Korea Copyright Commission, (November 2011), <http://www.copyright.or.kr/information-materials/publication/researchreport/view.do?brdctsn=9970&list.do?pageIndex=4&brdctstatecode=&brdclasscode=02&servicecode=06&nationcode=&searchText=&searchTarget=ALL#>.

<sup>6</sup> Hyun-Sil Lee & Minju Ryan Kim, *South Korea strengthens IP protection through legislative measures*, MANAGING IP (Aug. 20, 2020), <https://www.managingip.com/article/b1n06yxsm5451g/south-korea-strengthens-ip-protection-through-legislative-measures>.

interpretation and vigor to date.<sup>7</sup> This article seeks to remedy a patchwork quilt of legal precedents, both persuasive and non-binding, as well as Korean statutory norms.

The potential liability of online service providers (OSP) based on copyright infringement committed by users of their linking services has been one of the most complicated and contentious copyright issues in the U.S. and Europe, and perhaps as well as in South Korea.<sup>8</sup> With an eye to free trade agreements with the United States and Europe, Western notions of intellectual property (IP) laws including copyright law and its role in society have begun to “creep” into Korean jurisprudence.<sup>9</sup> The validity of these free trade agreement (FTA) IP concepts, however, should not be assumed in blind faith; rather, a careful assessment of these IP provisions, with reference to Korean legal traditions, cautions against wholesale importation, in favor of a more selective, measured approach. Rights holders, as well as third parties and end users, are harmed by the failure of domestic copyright law to adequately settle an area of the law that comparative jurisdictions have found alternative but more conclusive means of resolving.<sup>10</sup>

The South Korean Supreme Court decision on “linking” in the “*Chuing*” case from 2015 was most hotly debated.<sup>11</sup> Chuing.net (“Chuing”) is a website for exchanging information about popular Japanese cartoons, comics, and animation. Like many online bulletin boards or forums, any user<sup>12</sup> who accessed Chuing was able to view the contents and postings therein, but only those users who registered

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<sup>7</sup> Jay A. Erstling & Ryan E. Strom, *Korea’s Patent Policy and Its Impact on Economic Development: A Model for Emerging Countries?*, 11 *SAN DIEGO INT’L L.J.* 441, 441-446 (2010).

<sup>8</sup> *See, e.g.*, Christina Angelopolous, *Hyperlinks and Copyright Infringement*, 76 *CAMBRIDGE L.J.* 32, 32-35 (2017) (“a more complex analysis” by the CJEU on the topic was “controversial”); *see also* John F. Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 *CARDOZO L. REV.* 1821, 1821 (2013). Here, we use term online service provider (OSP) to broadly refer to those online platform operators and owners, such as collaborative fan community websites, that facilitate interaction among internet users through a web page. Although legal scholarship has used the similar phrase internet service provider (ISP) to denote those infrastructure or utility providers that allow for the physical means of connectivity, such topics, though popular in international scholarship, has not yet found case or controversy of a similarly recognized nature in Korean law.

<sup>9</sup> Lee & Kim, *supra* note 6.

<sup>10</sup> Joshua Gans & David Hsu, *The Impact of Uncertain Intellectual Property Rights on the Market for Ideas: Evidence from Patent Grant Delays*, 54 *MANAGEMENT SCIENCE* 982 (2008).

<sup>11</sup> *See* Daebeobwon [S. Ct.], Mar. 12, 2015, 2012Do13748 (S. Kor.) [hereinafter *Chuing*]. Because of the way that South Korean Supreme Court decisions are rendered, without an official legal name, here the authors use the name of the defendant, Chuing net, as a proxy for the official case name.

<sup>12</sup> By “users,” we refer to those who were capable of clicking on links, and potential infringers.

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for an account with the Chuing website were permitted to add comments and post new topics. The online members<sup>13</sup> of Chuing posted information about these animated drawings, frequently with character analyses, reviews of cartoons, and 44 hyperlinks to overseas blogs on which particular cartoons or their translated versions had been uploaded, without permission from copyright or other rights holders in the cartoons. Chuing had also exercised some online community management functions. A criminal action was brought against Park, who was the domain owner, website manager, and online administrator, for alleged copyright infringement by the provision of direct links to overseas blogs where users could copy and transmit those cartoons or their translated versions.<sup>14</sup>

The Court held that Park did not infringe the copyright, either as a principal or as an accessory under Art. 136(1)(1) of the current Korean Copyright Act.<sup>15</sup> The Court reasoned that the mere provision of links, which had not been found to be reproducing or transmitting the linked-to work under the Korean Copyright Act in precedent rulings,<sup>16</sup> could not be considered a principal offense for copyright infringement because the act of making a deep/direct link to the copyrighted work does not make a copy or transmission.<sup>17</sup> In other words, Park's provision of the hyperlink by neglecting the link posts was simply informing a user about the location of (translated) versions of Japanese animations on the internet.

In addition to linking, these animated media files were frequently unlawfully uploaded to the Chuing site by Chuing members so that other internet

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<sup>13</sup> Members also being those who had capability to post links, in contrast to users.

<sup>14</sup> Park created, maintained, and managed the sites comprising the affiliate network: <http://chuing.co.kr/>, <http://good.chuing.net/>, and <http://maria.chuing.net/>. Given that, internationally, most copyright actions are civil and not criminal, a criminal action tends to be preferred by plaintiffs in South Korea as the plaintiffs of this case. According to a commentator (Professor HyungDoo Nam, Yonsei Law, S. Korea), this is partly because civil liabilities lacking punitive damages are seen as weak and because Korean citizens traditionally tend to seek to resolve disputes through police enforcement actions or prosecutions.

<sup>15</sup> Korean Copyright Act, art. 136 (S. Kor.) (stating specifically, “[a]ny person who falls under either of the following subparagraphs shall be punished by imprisonment for not more than five years or by a fine not exceeding 50 million won, or may be punished by both: 1. A person who infringes on copyright or other property rights protected pursuant to this Act (excluding the rights under Article 93) by means of reproduction, performance, public transmission, exhibition, distribution, lease, or preparation of derivative works.”).

<sup>16</sup> See Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da80637 (S. Kor.); see also Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da4343 (S. Kor.); Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da5643 (S. Kor.); Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da76256 (S. Kor.); Daebeobwon [S. Ct.], Mar. 11, 2010, 2007Da76733 (S. Kor.).

<sup>17</sup> See Daebeobwon [S. Ct.], Nov. 26, 2010, 2008Da77405 (S. Kor.).

users could view or download those files.<sup>18</sup> Whereas Park exercised oversight duties over Chuing, additional management functions were delegated to members of the website who had assumed supervisory roles of an informal nature.<sup>19</sup> Given the expressive and opinionated nature of online bulletin board websites, owners such as Park commonly utilize select members as moderators to police and monitor the pages for especially offensive or illegal content.<sup>20</sup> Park had allowed the management team of these such moderating members to upload or link to cartoons and other relevant digital materials originally posted on blogs the moderating members operated themselves and hosted abroad.<sup>21</sup> Chuing served as the *de facto* central hub for these moderating members to share their individually hosted web pages as spokes amongst themselves and with others.<sup>22</sup> This meant that the website fostered both the discussion and dissemination of the works of interest to the Chuing members.

The Court also reasoned that Chuing could have been found to have made the reproduction or transmission of the works easier, by providing the links, and thereby to have aided and abetted the commission of copyright infringement.<sup>23</sup> Chuing contended that with no evidence of the commission of an underlying crime by a principal, punishing an aider and abettor would indefinitely expand the scope of prosecution, in violation of the principle of legality.<sup>24</sup> In response, the prosecution argued that an aider and abettor to the commission of a crime need not be aware of who exactly the principal is under precedents.<sup>25</sup> For reasons specific to Korean jurisprudence and explored below, the criminal nature of the action was grounded in the current copyright regime.

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<sup>18</sup> See e.g., Chuing, *supra* note 11.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (at times Korean judicial opinions have simply referred to “copyright” as a right in and of itself, rather than being comprised of multiple related rights); see also Korean Constitution [heonbeop], Law No. 10, arts. 10 (last revised on October 29, 1987); Korean Penal Code [hyeongbeop], Law No. 7077, art. 1(1) (last revised on January 20, 2004) (providing that no punishment or protective security measure shall be imposed without law; i.e., *nulla poena sine lege* means no penalty without law).

<sup>25</sup> See Daebeobwon [S. Ct.], Sept. 28, 1977, 76Do4133 (S. Kor.); Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.).

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Notably, the Court did not analyze a potential infringement of *distribution rights*, because the distribution right may only involve tangible works—not any work transmitted electronically under the Korean Copyright Act.<sup>26</sup>

The *Chuing* decision was not warmly received. First, it was argued that the decision conflicted with precedent.<sup>27</sup> For instance, in 2003 the Korean Supreme Court found that the defendants who made a simple link to the homepage of a website where plaintiffs created an online bulletin board of lewd pictures were criminally liable as principal for openly displaying such pictures.<sup>28</sup>

Second, it was argued that the Court should have analyzed each and every exclusive right protected by copyright individually.<sup>29</sup> Here, the reproduction right and public transmission right were relevant, and thus the Court should have determined whether Park, by his operation of *Chuing*, aided and abetted the unauthorized reproduction and public transmission of the linked-on work.<sup>30</sup> One interesting argument that was made was that an infringement of the reproduction right and an infringement of transmission right are different offenses under the criminal law, i.e., the former would be an instant or completely committed offense, while the latter, a continuing or incompletely committed one.<sup>31</sup> As these were comprised of different elements under the statutory view, violation of one would not necessarily preclude an analysis of culpability of the other.

Additionally, it was argued that operating a website on which hyperlinks are posted, and thereby allowing users to know the location of a work, one of OSPs activities covered by Art. 102 of Korean Copyright Act, should be an act of aiding and abetting.<sup>32</sup> Holding otherwise would defeat the purpose of Art. 102(1)(4) of Korean Copyright Act, which grant to OSPs a limitation of liabilities associated with their particular activities that would permit users to “know the location of works, etc. on information and communications networks.”<sup>33</sup>

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<sup>26</sup> See *Daebeobwon* [S. Ct.], Dec. 14, 2007, 2005Do872, (S. Kor.).

<sup>27</sup> Jun-Seok Park, *Is an Internet Link Creator Not a Principal or even Not an Accessory? - The problem in the Korean Supreme Court decision 2012do13748 and an appropriate logic for punishment in a criminal case of copyright infringement*, 48 *INDUSTRIAL PROPERTY RIGHTS* 73 (2015).

<sup>28</sup> Some may note the website subject matter content may have influenced the judicial decision, but there is no evidence for either contention.

<sup>29</sup> See *Chuing*, *supra* note 11.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Korean Copyright Act, art. 102(1)(4) (S. Kor.).



This article will provide general explanations and an overview of Korean copyright law as necessary context for readers to adequately understand the issues in the linking cases. Specifically, this provides (1) the exclusive rights and defenses on the internet under Korean copyright law, (2) the differences between civil and criminal copyright law, including the importance of the criminal law in Korea, and (3) the law relating to secondary liability in more detail. Second, the article deals with the Korean linking cases, with the comparative analysis of U.S. and EU law, with particular attention to the complexity of the jurisprudence relating to the communication right under EU law.

### **THE CURRENT KOREAN HYPERLINK COPYRIGHT REGIME**

The fundamental structure for Korean copyright regime comes from the Korean Copyright Act, which defines all the rights protected under the Act, the direct violations or infringements of the Act, and the civil and criminal sanctions against such violations.<sup>34</sup>

#### **A. COPYRIGHT HOLDER RIGHTS ON THE INTERNET: INTERPRETATION OF THE STATUTORY DEFINITIONS IN THE DIGITAL AGE**

Seven exclusive rights are protected under Korean Copyright Act. Each of those rights has a corresponding right protected under the U.S. Copyright Act: (1) reproduction,<sup>35</sup> (2) public performance,<sup>36</sup> (3) public transmission,<sup>37</sup> (4) public display,<sup>38</sup> (5) distribution,<sup>39</sup> (6) lease,<sup>40</sup> and (7) preparation of derivative works.<sup>41</sup> Rights of public display, public performance, distribution, and lease under the Korean Copyright Act may protect tangible works, but not digital or electronic works.<sup>42</sup> As a result, reproduction and public/interactive transmission rights can be

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<sup>34</sup> *Id.* at 136(1)(1) (at one point in time distribution was not explicitly included in criminally punishable infringing acts, but is now explicitly included).

<sup>35</sup> Korean Copyright Act, art. 16.

<sup>36</sup> *Id.* at art. 17 (stating the right of authors to perform their work publicly, however this right is irrelevant to the internet).

<sup>37</sup> *Id.* at art. 18. Since 2000, this has been held to cover someone who (1) transmits or sends copyrighted works by signals to the public, or (2) makes the work available to public.

<sup>38</sup> *Id.* at art. 19 (irrelevant to the internet).

<sup>39</sup> *Id.* at art. 20 (irrelevant to the internet); *see* Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.).

<sup>40</sup> Korean Copyright Act, art. 21 (S. Kor.) (irrelevant on the internet).

<sup>41</sup> *Id.* at art. 22.

<sup>42</sup> *Id.* at art. 22.2.

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most likely implicated in potential copyright infringement on the Internet.<sup>43</sup> Korean courts often analyze these rights when considering an infringement action.<sup>44</sup>

The definition of the “reproduction” under the Korean Copyright Act had been changed from covering “remaking”<sup>45</sup> to “fixing or remaking”<sup>46</sup> and finally, to “temporarily or permanently fixing or remaking”<sup>47</sup> a work on a tangible object by various means.<sup>48</sup> Under the Korea-U.S. Free Trade Agreement (FTA),<sup>49</sup> “temporary storage” has been explicitly included in the scope of reproduction for the balanced protection of copyright holders’ rights in a digital environment, unless the temporary storage is necessary for the smooth and efficient data/information process.<sup>50</sup> As a result, the works, performances, and phonograms in temporary form, including temporary storage in electronic form, can be protected under Korean Copyright Act and Korea-U.S. FTA.<sup>51</sup>

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<sup>43</sup> See Sang Jo Jung, ET AL. *Comparative Study on Criminal Liabilities of Copyright Infringement*, KOREAN COPYRIGHT COMMISSION (Nov. 2011), <http://www.copyright.or.kr/information-materials/publication/research-report/view.do?brdctsnno=9970&list.do?pageIndex=4&brdctsstcode=&brdclasscode=02&servicecode=06&nationcode=&searchText=&searchTarget=ALL>.

<sup>44</sup> *Id.*

<sup>45</sup> Korean Copyright Act, art. 2.14 (S. Kor.).

<sup>46</sup> *Id.*; see also Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.) (explaining that the act of electronically saving the MP3 file in a computer hard disc can be found as reproduction not under the old copyright law but under the amended one, which provides reproduction includes the fixing of digital work on tangible object).

<sup>47</sup> Korean Copyright Act, art. 2.22 (S. Kor.).

<sup>48</sup> *Id.* at 2.14. “Various means” includes, but is not limited to printing, photograph copying, sound or visual recording, and other means.

<sup>49</sup> Free Trade Agreement Between the United States of America and the Republic of Korea, Kor.-U.S., art. 18.4.1., June 30, 2007, [https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file273\\_12717.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf) [hereinafter “Kor.-U.S. FTA”].

<sup>50</sup> See Korean Copyright Commission, *Introduction to the Korean Copyright System*, KOREAN COPYRIGHT COMMISSION (Dec., 2015), [https://www.copyright.or.kr/eng/doc/copyrightlaw\\_pdf/Introduction+to+the+Korean+Copyright+system.pdf](https://www.copyright.or.kr/eng/doc/copyrightlaw_pdf/Introduction+to+the+Korean+Copyright+system.pdf) (the 20th amendment to the Korean Copyright Act was made to reflect Free Trade Agreement Between the United States of America and the Republic of Korea, as a result, the temporary fixation in a tangible medium was recognized as reproduction).

<sup>51</sup> Kor.-U.S. FTA, *supra* note 49, at art. 18.4.1.

Under the Korean Copyright Act, authors' public transmission rights<sup>52</sup> and music record producers' interactive transmission (forwarding) rights<sup>53</sup> have been recognized since July 1, 2000<sup>54</sup>, and since Dec. 28, 2006,<sup>55</sup> respectively. New interpretations of those exclusive rights relevant to the online age have clarified the ease with which infringement occurs.<sup>56</sup> In order to reproduce a digital work, a potential infringer need only fix a work on a tangible object,<sup>57</sup> not necessarily remake that work.

Transmission has been elementally defined as making available, which includes transmitting.<sup>58</sup> Public transmission, meanwhile, includes transmitting or making available to the public.<sup>59</sup> Together, these definitions of reproduction and transmission in the Korean copyright regime have been the foundation for online linking infringement of moral rights under Article 11 of the Korean Copyright Act, because of the broad applicability to online or digital works.<sup>60</sup>

### ***I. POTENTIAL DEFENSES UNDER ARTICLE 30***

In addition to the more general OSP limited liability and safe harbor provisions under Art. 102, Art. 30 provides a potential defense for OSP and online use infringement of the reproduction right. Specifically, Art. 30 allows for private use of a work when it has already been made public and is used for non-commercial personal, familial, or other equivalent uses.<sup>61</sup> Note that this defense would again only apply to the reproduction right, but not the transmission right.

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<sup>52</sup> Korean Copyright Act, art. 2.7 (S. Kor.) (defining public transmission as “transmission of a work, a performance, a phonogram, a broadcast, or a database”; or “making such available to the public by wire or wireless means intended for reception or access by the public.”).

<sup>53</sup> *Id.* at art. 2.10 (defining transmission or forwarding as provision of works, etc. for use so that the members of the public may have access at the time and place of their own choice among the public transmission, including transmission to be done accordingly).

<sup>54</sup> *Id.* at 18.2 (providing that “[t]he author shall have the right to transmit his work”).

<sup>55</sup> *Id.* at art. 81 (“Music record producers shall have the right to forward their music records.”); *cf. with Id.* at art. 18 (“The author shall have the right to transmit his or her work to the public.”).

<sup>56</sup> *See e.g., Jung ET AL., supra* note 43, at 13-14.

<sup>57</sup> Korean Copyright Act, art. 2.22, 136(1)(1) (S. Kor.).

<sup>58</sup> Korean Copyright Act, art. 2.10 (S. Kor.) (defining public transmission as “transmitting works, stage performances, phonograms, broadcasts or database . . . by making such available to the public by wire or wireless means so that the public may receive them or have access to them.”).

<sup>59</sup> Korean Copyright Act, art. 2,7 (S. Kor.).

<sup>60</sup> *Id.* at art. 11 (the author has the “right to decide whether or not to make his work public”).

<sup>61</sup> *Id.* at art. 30.

## **B. COPYRIGHT ENFORCEMENT**

Infringement can be subject to both civil actions and criminal prosecution in Korea. But criminal sanctions have been perceived as the more important and common measure against copyright infringements over civil remedies in Korea.<sup>62</sup>

### **I. CRIMINAL SANCTIONS AGAINST COPYRIGHT INFRINGEMENT IN KOREA**

Criminal sanctions have been an important remedy for copyright infringement in Korea. Criminal sanctions apply to nearly all provisions encompassing copyright law in Korea, oftentimes alongside the more traditional civil remedies.<sup>63</sup> The Korean Copyright Act in particular notes that the infringement of copyright or other property rights protected under the act, including moral rights, and obstruction of OSP business are within the scope of Art. 137(1)6.<sup>64</sup> The Copyright Act criminalizes almost every act violating the *ordre public* that the statute intends to realize.<sup>65</sup>

There are three fundamental requirements to bring a criminal action under the Copyright Act for copyright infringement: (1) the use of the work for commercial purposes, (2) willfully or intentionally, and (3) a complaint is filed, once those are met, criminal actions may be brought.<sup>66</sup> Each element has been broadly construed by Korean courts.

The term “commercial purposes” has traditionally meant taking a commercial advantage or performing an act for private financial gain.<sup>67</sup> This

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<sup>62</sup> See Jung ET AL., *supra* note 43.

<sup>63</sup> *Id.*, at 70; Korean Copyright Act, art. 123, 136 (S. Kor.).

<sup>64</sup> Korean Copyright Act, art. 136(2)(1) (S. Kor.) (“A person who defames the honor of author or performer by infringing on author's or performer's moral rights”); *see also id.* at art. 136(1)(6) (“A person who obstructs the business of an online service provider by making a demand by intention for the suspension or resumption of a reproduction or interactive transmission . . . upon knowing that he or she had no legitimate authority.”).

<sup>65</sup> Penal provisions regarding any infringement under the Copyright Act, include: false issue, false attribution of rights, confiscation, complaint, concurrent punishment, etc. Korean Copyright Act, *supra* art. 136-41 (S. Kor.). In contrast, criminal remedies in Germany fill a more supplementary role. Jung, ET AL., *supra* note 61, at 4. Compared to Korea, the scope of criminal punishments is small in the context of the overall body of copyright law. *Id.* At the same time, however, a wider range of punishments are available in Germany than in Korea for infringement. *Id.*

<sup>66</sup> See Korean Copyright Act (S. Kor.).

<sup>67</sup> See *e.g.*, 18 U.S.C. § 31 (1988).

parallels the definition under U.S. law, with or without commercial purpose (i.e., commercial advantage or private financial gain).<sup>68</sup> Copyright infringement may be criminally liable in Korea, commercial purposes notwithstanding.<sup>69</sup> Also, criminal sanctions are available to punish a general public's infringing acts that have no commercial purpose.<sup>70</sup> Similarly, the Korea-U.S. FTA imposes criminal punishment for infringement "in commercial scale" to imbue actions that, in aggregate, substantially affect the private sector, with criminal liability.<sup>71</sup> At one time, distribution was not explicitly included in criminally punishable infringing acts under Art. 136(1)1, but now, it is explicitly included.<sup>72</sup>

Pursuant to the Korean Copyright Act, willful or intentional infringement notes that criminal procedures and penalties were applied to significant willful infringements and willful infringements for commercial advantage or private financial gain.<sup>73</sup> Again, this has been supplemented to include the receipt or expectation of anything of value, under the Korea-U.S. FTA.<sup>74</sup> In contrast, looking to Art. 104-2(1), infringement that is done "[i]ntentionally or by negligence" may suffice to be criminally punished. This tends to clash with those American definitions of infringement imported through the KORUS FTA, which note the willful requirement and make no mention of negligence as qualified.<sup>75</sup>

Under the "complaint requirement," which is a default requirement for criminal liability, a formal complaint from a victim is required for criminal prosecution in the absence of an exception under Art. 140, with an indictment subject to the receipt such complaint. Moreover, under Art. 140.1, a crime will not be prosecuted against an objection of the victim. Despite this requirement, an increasing number of criminal actions have been brought without a complaint, as the exceptions under Art. 140 are expanding and instituting public action for the policy goals of such a change. For instance, among other exceptions, if the

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<sup>68</sup> Pursuant to the No Electronic Theft Act, section 506 (a)(1)(B) was added, specifically including "the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000 . . ." 17 U.S.C. § 506 (1976).

<sup>69</sup> Jung ET AL., *supra* note 43, at 39.

<sup>70</sup> *Id.*

<sup>71</sup> Kor.-U.S. FTA, *supra* note 49, at art. 26.

<sup>72</sup> Korean Copyright Act, art. 136.1(1) (S. Kor.).

<sup>73</sup> *Id.* at art. 136.2(3)-(4), 104.2(1).

<sup>74</sup> *See generally* Kor.-U.S. FTA, *supra* note 49.

<sup>75</sup> *Cf.* 17 U.S.C. § 1204(a) ("willfully and for purposes of commercial advantage or private financial gain"); 17 U.S.C. § 506(a) (1976) ("willfully infringes a copyright").

infringement was for profit and habitual, for business, or a false-issue a complaint is not required.<sup>76</sup>

A historical snapshot of the copyright infringement cases from 2003-2012 illustrates prevailing trends pre-*Chuing* and immediately before the Korea-U.S. FTA. As the number of complaints increased, the clear-up rate decreased.<sup>77</sup> An increasing number of infringing acts, scope of copyright, scope of infringing acts, and prosecution without a complaint occurred. The majority of these cases did not deal with serious infringements, but rather with indiscriminate complaints, indiscriminate prosecutions, resulting in pecuniary punishment or non-indictments. Prosecutions tend to be indiscriminate against the general public, which parallels the increase in minor infringers. In sum, the number of complaints and the number of infringing acts has increased from 2003 to 2012.<sup>78</sup> At a basic level, the scope of digital copyright law has expanded due to increasingly content-enabled forms of online dissemination; as rapid internet speeds and mobile networking has become pervasive, internet culture has emphasized user sharing. The increasing number of infringing acts and the expanding scope of infringing acts—the criminal prosecution of which does not require a formal complaint from the victim—are also considered to contribute to this trend. The proportion of dismissals, innocence, and suspended sentences approximated 15%, while prison sentences were extremely rare.<sup>79</sup> The majority of offenders received pecuniary punishment.<sup>80</sup> The proportion of minor offenders has been increasing, and the proportion succumbing to greed and temptation to try for a quick and easy monetary gain was very small among the

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<sup>76</sup> Specifically, infringement of the right of a database producer, presenting or publicly transmitting a performance, or distributing reproductions of performance under the real or second name of a person other than the performer will not require a complaint by the victim. Also, the infringement of copyright or other property right protected under the Copyright Act *for profit*, done so “for profit-making” or “habitually” under Art. 140.1 need not require a complaint. Thus, under the for-profit and habitually paragraph of Art. 140.1, infringement of copyrights or other property rights, such as moral rights, in a *for profit* manner and committed habitually can trigger liability without a victim complaint. Compare 17 U.S.C. § 1204 (1976), with Korean Copyright Act, at art. 140.1, 136.2(3), 137.1(2), 136.1 S. Kor.).

<sup>77</sup> Jung ET AL., *supra* note 43, at 28; see also Byung Il Moon & Yong Hee Suh, *The Types of Crimes Related to Violation of Copyright: in Comparison with Violations of Other Intellectual Properties*, KOREAN COPYRIGHT COMMISSION (June. 2014), <http://www.copyright.or.kr/information-materials/statistics/analysis/view.do?brdctsn=11429&list.do?pageIndex=1&brdctsstatecode=&brdclasscode=&servicecode=06&nationcode=&searchText=&searchTarget=ALL>.

<sup>78</sup> Jung ET AL., *supra* note 43, at 28; Moon & Suh, *supra* note 74, at 5, 12.

<sup>79</sup> Moon & Suh, *supra* note, 74, at 13.

<sup>80</sup> *Id.* at 12.

various motivations described.<sup>81</sup> It was reported that some law firms had brought suits for settlement money.<sup>82</sup> In response, the Prosecutors' Office and courts have adopted and enforced the suspension of an indictment on the condition that the defendant receive education and court-annexed arbitration, respectively. The Korea Copyright Commission also executes mediation and arbitration of disputes.<sup>83</sup>

Korean law recognizes the distinction between defendants according to the principles of direct and indirect liability. Infringement can carry nuanced distinctions between defendants engaged in similar conduct. For principals and accessories, this can mean various forms of tests. A co-principal had functional control over the infringement, and a mere accessory as alleged infringement did not have functional control.<sup>84</sup> Aiders and abettors are those who aid and abet the commission of a crime, such as infringement, by another person, and thus may be punished as accessories of said crime.<sup>85</sup> The Korean conception of aiding and abetting includes all acts facilitating the commission of a crime by the principal.<sup>86</sup> This means both indirect and direct acts, regardless of the means, a broadly construed meaning that also applies to tangible physical, and intangible mental acts.<sup>87</sup> Aiding and abetting also occurs where an act is omitted if it facilitates the commission of a crime.<sup>88</sup> Again, aiding and abetting for copyright infringement may even occur before the commission of a crime by facilitating acts, in anticipation of future commission of a crime.<sup>89</sup>

Criminal sanctions are not necessarily an effective means for building a new behavioral norm.<sup>90</sup> Rather, they could be a measure for affirming and maintaining already existing behavioral norms.<sup>91</sup> Little evidence exists in Korean jurisprudence of a deterrent effect of criminal sanctions for copyright infringement. Moreover, although they include a wide range of infringements, including trivial, *de minimis* effects, the current system is set up to impose mechanical and uniformly indiscriminate punishments. This fails to sufficiently accommodate the rapid changes in the digital era, while offering no practical guidance. Lawsuits against a

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<sup>81</sup> *Id.* at 13.

<sup>82</sup> *Id.*

<sup>83</sup> Korean Copyright Act, art. 113 (S. Kor.).

<sup>84</sup> Hyeongbeop [Criminal Act], Act No. 293, Sep. 18, 1953, amended by Act No. 11731, Apr. 5, 2013, art. 34 (S. Kor.).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Jung ET AL., *supra* note 43.

<sup>91</sup> *Id.*

large number of unspecified members of the general public, including minors, produces inaction on the part of online participants in the increasingly vital internet.

The ambiguity and contradictions of the current legal regime on copyright imposes on internet users a duty to investigate *sua sponte* whether copyright may be infringed under the circumstances, even when no standards for fair use on the internet have been established.<sup>92</sup> Strict prohibitions on interpreting criminal laws by analogy may cause some problems with application of vague sections of the copyright laws and regulations. In order to avoid the chilling effects of excessive filings of criminal lawsuits, as well as to safeguard individual rights from an abuse of criminal proceedings, copyright infringement cases should limit criminal sanctions. Criminal sanctions are currently available to punish the general public's infringing acts *with no commercial purpose*. Only "for-profit"<sup>93</sup> and "habitually"<sup>94</sup> infringing acts have been clarified, but more is needed. Establishing concrete standards for duration, and amounts of infringement, adding key phrases from the Korea-U.S. FTA, such as "significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain"<sup>95</sup> or "significant prejudicial impact:" particularly infringement on reproduction, distribution, and transmission right; or charging the reproduction fees against rampant illegal downloads on the internet may all serve these policy goals.

## **2. CIVIL REMEDIES FOR COPYRIGHT INFRINGEMENT**

Aside from criminal sanctions, other remedies for infringement are available, including injunctive relief. Under the Korean Copyright Act, injunctive relief may be granted against various parties, including OSPs, who aid and abet copyright infringement under a policy that tries to achieve the real effect of copyright enforcement to prevent infringement.<sup>96</sup> Civil remedies for infringement<sup>97</sup> include injunctions, as well as compensation for damages and statutory damages.<sup>98</sup> These are available against a wide range of people, including direct infringers who reproduce, distribute, etc. a copyrighted work; persons who circumvent technical protective measures; persons who eliminate right management information; and OSPs which aid and abet copyright infringement.

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<sup>92</sup> Kenneth D. Crews, *Copyright: Distance Education and the TEACH Act*, AM. LIB. ASS'N, <http://www.ala.org/advocacy/copyright/teachact/distanceeducation> (last visited Feb. 23, 2021).

<sup>93</sup> Korean Copyright Act, art. 136.3-3, 136.3-4, 140.1 (S. Kor.).

<sup>94</sup> *Id.* at art. 140.1.

<sup>95</sup> Kor.-U.S. FTA, *supra* note 49, at art. 18.10, 26(a).

<sup>96</sup> *See* Korean Copyright Act (S. Kor.).

<sup>97</sup> *Id.* at art. 123-129.5.

<sup>98</sup> *Id.*



### **C. POTENTIAL HYPERLINKING LIABILITY UNDER KOREAN COPYRIGHT LAW**

The Korean copyright law regarding linking is not entirely settled. Potential liabilities of hyperlink service by OSPs could depend on (1) the type of link technology, (2) the lawfulness of the linked-to work, (3) principal offender (main actor) vs. accessory (aider and abettor), and (4) limitations on liabilities.

#### ***1. THE TYPE OF LINK TECHNOLOGIES***

Linking liability is contextual based on the exact methodology of the link provided to the infringing material. Linking itself begets policy and normative issues with regard to online copyright, as the theory of an implied license with sharing links to transmitted or reproduced material online can conflict with the economic incentives to create and distribute content by a copyright holder and content creator.<sup>99</sup> In some cases, as long as a website visitor makes no copy of material, economic incentives are unaffected.

But where a paywall is bypassed through deep links or link harvesting technology, the context matters more. Deep or direct links provide a user with a direct hyperlink address for a specific website content item, typically a web page, rather than the website's home page.<sup>100</sup> This type of link eliminates the need for a user to take additional actions by clicking items on the home page, by directing them directly to the subpage. Bypassing the paywall and viewing an uploaded copy on the linked-to webpage would be equivalent to acquiring a copyrighted book from a bookstore without paying and then reading it—i.e., theft. In a paywall context, however, this is not copyright infringement. While there are seemingly similarities between the real world, offline crime of larceny, and bypassing a paywall, they are not closely analogous.

Hyperlinking liability implicates more nuanced imperatives and its own understanding. In many cases, detailed evidence about how a new hyperlink works would lead to a different court decision. Detailed technical evidence about how exactly various kinds of hyperlinks work mattered at least to Google and Facebook.<sup>101</sup> In *Flava Works Inc. v. Gunter*, these companies contended that evidence on how the myVidster social bookmarking site works is critical when

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<sup>99</sup> Orit Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA HIGH TECH. L. J. 275, 323 (2008).

<sup>100</sup> See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

<sup>101</sup> Brief of Amici Curiae, Google Inc. and Facebook, Inc. in Support of Neither Party at \*3, *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012) (No. 11–3190).

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courts attempt to draw the line between direct and indirect/secondary infringement in a joint amicus curiae brief.<sup>102</sup> In review, it is actually somewhat remarkable how this brief has seemingly come to foreshadow the potential road not taken in American copyright law that Korean copyright law has chosen to follow. The companies, highly self-interested in that they accrue and exercise influence at the socio-cultural level on the internet, in addition to economic dominance, derive their revenue from scalable products based on network effects from interconnected users. Fundamentally, distinguishing between infringing or non-infringing works causes ripple effects for these scaled revenue streams. Google and Facebook analyzed the distance of the website myVidster from the infringement under various nomenclature to describe different ways of infringing: “direct” infringement as uploaders, “contributory” infringers and others, who would not be liable under American copyright law.<sup>103</sup> Even though in myVidster’s situation the *Flava* court did not find “tertiary” copyright infringement—the state of the current posture of Korean copyright law in online cases suggests not only that such an outcome is desirable, but also the “secondary” infringers described in the brief in *Flava* as not being liable who actually would be liable if the case was brought under Korean law.<sup>104</sup> It is also important to note that the brief in *Flava* only considers civil remedies, and does not discuss criminal liability, which would be an important consideration when infringement is brought under Korea’s liability regime.

Moreover, each type of link technology can have a different impact on the potential advertising revenue that can be raised from visits to the linked-to webpage. Simple links that take users to a homepage would have no impact on the revenue, while direct or deep links that take users to the linked-to work webpage directly would bypass the paywall.<sup>105</sup>

Inline links or embedded links could even confuse the online viewers about which website is hosting the linked-to work.<sup>106</sup> Google and Facebook have suggested that, in such cases, courts should employ the “server test”<sup>107</sup> to determine

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*18-19.

<sup>104</sup> See *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 760 (7th Cir. 2012) (noting that “Google and Facebook in a joint amicus curiae brief friendly to myVidster manage to muddy the waters by analyzing remoteness of injury from an alleged infringement not as a matter of general tort principles but as a species of layer cake.”).

<sup>105</sup> Dawn Leung, *What’s all the Hype About Hyperlinking?: Connections in Copyright*, 7 INTELL. PROP. BRIEF 59, 62 (2020).

<sup>106</sup> *Id.* at 63.

<sup>107</sup> Brief of Amici Curiae Google Inc. and Facebook, Inc. in Support of Neither Party, *supra* note 101, at \*4.

potential liabilities.<sup>108</sup> In fact, Korean courts have employed that test in some cases.<sup>109</sup> At the same time, these digital corporations possess the ability to send users to other pages in order to receive advertising or search placement revenues. It is possible that new technologies for links can raise different legal issues in the future. It would be debatable whether the server test should matter if the work can be incorporated into a website through specialized links, where the work is wholly unrelated to the server, and it appears to be hosted by that website. In such a view, inline or embedded link services may be highly likely liable for infringement.

## 2. *THE LAWFULNESS OF THE LINKED-ON MATERIAL*

Emerging differences between the ways linked-on material distinguishes cases can be best explained through the European perspective in a 2018 case, *Renckhoff*.<sup>110</sup> Like past Korean instances of determining the nature of the linked-on material as being highly relevant to whether or not case facts influence the decision—obscenity<sup>111</sup> or implied cultural value as an unlawful characteristic of material<sup>112</sup> appears prominently. In contrast, lawfulness of the copyright for the content has been de-emphasized in comparison to other locations such as Germany. Specifically, under EU law, there are two exclusive rights that protect copyrighted works: (1) the Right of Reproduction (i.e., copying), and (2) the Right of Communication to the Public (i.e. disseminating online to a general public).<sup>113</sup> The court in *Renckhoff* justifies its decision on the basis of the former exclusive right, that of the Right of Reproduction, and not the Right of Communication to the Public. In *Renckhoff*, the defendant argued that posting a hyperlink on their website to a public site where a photographer freely uploaded his own photograph<sup>114</sup> is functionally equivalent to posting an exact copy of the photograph on their own website in lieu of linking, the latter action being the dispositive feature of the case.<sup>115</sup>

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<sup>108</sup> See *Kelly*, 336 F.3d 811. *But see* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159-1160 (9th Cir. 2007).

<sup>109</sup> See *Daebeobwon* [S. Ct.], Nov. 26, 2009, 2008da77405 (S. Kor.).

<sup>110</sup> Case C-161/17, *Land Nordrhein-Westfalen v. Dirk Renckhoff*, 2018 E.C.R. 634.

<sup>111</sup> Seoul High Court [Seoul High Ct.], Mar. 30, 2017 2016Na2087313 (S. Kor.) (detailing obscene, lewd, pornographic images contrary to conservative Confucian ideals underpinning prohibitions on such material).

<sup>112</sup> Seoul High Court [Seoul High Ct.], Jan. 12, 2017, 2015Na2063761 (S. Kor.).

<sup>113</sup> Land Nordrhein-Westfalen, *supra* note 111, at ¶¶ 13-14.

<sup>114</sup> *Id.* at ¶ 34.

<sup>115</sup> *Id.* at ¶ 27 (“there is no need to draw a distinction between the communication of a work by posting it on a website and the communication of such a work by including a hyperlink on a website which leads to another website on which that work was originally communicated without

The plaintiff, the photographer, countered that defendant's analogy was irrelevant to the facts at hand.<sup>116</sup> Since hyperlinking to a work versus posting an exact copy on a different website are not the same action, when defendant copied the photograph, the photographer had no way of exercising his own rights over the work.<sup>117</sup> Therefore, it would not have mattered if hyperlinking law permitted the photograph's display, because hyperlinking law is not applicable to the posted photograph.<sup>118</sup>

Finally, the *Renckhoff* court held that posting a photograph that was freely available on one website (where it was authorized by the author) onto another website (where it was not authorized by the author) required additional consent from the author.<sup>119</sup>

The OSPs' linking services to unlawful material would make the infringement analysis more complicated, because of the additional party ("uploader"), who uploaded the unlawful material on the linked-to webpage. While it is clear that potential direct infringers are users of the linking service as well as the uploader, it is unclear what the potential role of the OSP with respect to each directly infringing act would be, if any. Lawfully uploaded materials and unlawful materials would surely change the analysis, as would published versus unpublished materials.

**a. *Linking to lawful material***

Because of the understanding of the importance of hyperlinking to learning, collaboration, and online communication, European courts have generally recognized the potentially harmful effects of hyperlinking legal regimes that fail to accommodate the connective nature of hyperlinks and copyright infringement.<sup>120</sup>

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any restriction and with the consent of the copyright holder. Thus . . . the work has not been communicated to a new public.”).

<sup>116</sup> *Id.* at ¶ 10.

<sup>117</sup> *Id.* at ¶ 28.

<sup>118</sup> *Id.*

<sup>119</sup> See Land Nordrhein-Westfalen, *supra* note 111. The court in this case relied on the *Soulier* case, the EU analogue of the US case *Authors Guild, Inc. v. Google, Inc.* Although beyond the scope of this manuscript, if there were a future case in Korean jurisprudence that dealt with posting freely available works on one portal, copied onto another portal, as in Land Nordrhein-Westfalen, it would be highly interesting to note whether such a court would look to a rights-based approach in allowing rights of reproduction, or even performance by receiving.

<sup>120</sup> See, e.g., Magyar Jeti Zrt v. Hungary, no. 11257/16, Eur. Ct. H.R. (2018), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-187930"\]}](https://hudoc.echr.coe.int/eng#{).

As noted previously, the EU case of *Renckhoff* deals with the exclusive right of the Right of Reproduction, but it is worth discussing EU cases that cover the Right of Communication to the Public and its implications on hyperlinks and copyright. This bears similarity to Art. 11(1) (the right to make public) of the Korean Copyright Act.

In the EU, communication to a new public is also weighed against whether the work has in fact been previously published without the consent of the copyright holder.<sup>121</sup> The two conditions are (1) whether there was “an act of communication,” (2) to the “public.”<sup>122</sup> The development of the act of communication through CJEU rulings has led to broad interpretation of the right.<sup>123</sup> More pressing for hyperlinking liability is the second condition—defining the public who receives the communication.<sup>124</sup> The definition of public online would also encompass communication to new users or users reached through a different technical process. For instance, a 2014 case, *Svensson*, journalists who were writing press articles from the *Göteborgs-Posten* newspaper and website published those press articles without access restrictions online such as a paywall.<sup>125</sup> The defendant, *Retriever Sverige*, operated a website where they provided a provision of lists of clickable links to articles published by other websites.<sup>126</sup> In *Svensson*, the key determination was whether a new public had been targeted by the links.<sup>127</sup> Because the work was not restricted in its online accessibility, it was available to all users online.<sup>128</sup> Therefore, there was no communication to a new public specifically.<sup>129</sup> It is worth noting how this approach is technology neutral in nature, and how it renders the type of hyperlink used as irrelevant to the core issues surrounding use of the material at stake and interaction with online users.<sup>130</sup> But, *Svensson* only applies

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<sup>121</sup> See generally P. Bernt Hugenholtz & Sam C. van Velze, *Communication to a New Public?*, 47 INT’L REV. OF INTELLECTUAL PROP. COMPETITION L. (2016), [https://www.ivir.nl/publicaties/download/IIC\\_2016.pdf](https://www.ivir.nl/publicaties/download/IIC_2016.pdf) (examining the development of the “new public” test in EU copyright law).

<sup>122</sup> Council Directive 2001/29, art. 3, 2001 O.J. (L 167) 1 (EC).

<sup>123</sup> Hugenholtz & Velze, *supra* note 122, at 4.

<sup>124</sup> See Case C-466/12, *Nils Svensson and Others v. Retriever Sverige AB.*, <http://curia.europa.eu/juris/document/document.jsf?docid=147847&doclang=EN> (Feb. 13, 2014); Council Directive, *supra* note 123.

<sup>125</sup> *Svensson*, Case C-466/12.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> João Pedro Quintais, *Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public*, 21 J. WORLD INTELLECTUAL PROP. 385, 408-09 (2018).

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when the linked works were made freely available with consent of the rights holder, like through a free newspaper portal.<sup>131</sup>

In the case of restricted content made available by hyperlinking, the CJEU in *GS Media*, applied the communication to the new public standard as well.<sup>132</sup> In *GS Media*, the website operator allowed for the provision of hyperlinks to the files containing photographs at issue for profit.<sup>133</sup> *GS Media* had full knowledge of the illegally infringing nature of the publication.<sup>134</sup> As in the Korean case of *AllaTV*, where there is a similar intent requirement present to that in *GS Media*, awareness became an issue for determining copyright infringement liability.<sup>135</sup> But, for *AllaTV*, the issue was not so much as to differentiate between commercial or individual infringers, but more of the knowledge and intent factors.<sup>136</sup> The CJEU has also sometimes mentioned commercial or for-profit communication as a separate or integrated part of this assessment.<sup>137</sup> In Korea there is no recognition that embedding can be done from outside a paywall.<sup>138</sup> This presumption of knowledge on the part of commercial hyperlinking infringers in *GS Media* would likely have a potentially useful application for Korean hyperlinking liability, in lieu of pure intent outside of its commercial implications, and the reasonable assertion that non-commercial users online likely would have little motivation or incentive to conduct due diligence in ascertaining the legality of hyperlinks, as balanced against the unique nature of the internet to facilitate communication.

Hyperlinks are considered the addresses of the location of the works, and thus, the provision of them would not make OSPs liable for infringement.<sup>139</sup> But, there was an outlier decision in 2003. The Korean Supreme Court held that the provision of a simple link to a homepage of a website, where obscene materials had

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<sup>131</sup> See Svensson, C-466/12; Quintais, *supra* note 13,1 at 392-93.

<sup>132</sup> Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV and Others*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&doclang=EN> (Sept. 8, 2016).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Seoul High Court [Seoul High Ct.], Jan. 12, 2017, 2015Na2063761 (S. Kor.); *GS Media*, C-160/15.

<sup>136</sup> Seoul High Court [Seoul High Ct.], Jan. 12, 2017, 2015Na2063761 (S. Kor.).

<sup>137</sup> See Quintais, *supra* note 131, at 403.

<sup>138</sup> See e.g. Seoul High Court [Seoul High Ct.], Jan. 12, 2017, 2015Na2063761 (S. Kor.). This may partially derive from the “closed” structure of many Korean websites, which feature “robots.txt” crawling exclusion standards to prevent pages from being included in search results.

<sup>139</sup> An OSPs’ provision of hyperlinks to lawful works has generally been found not liable for copyright infringement. See Jonathan A. Friedman & Francis M. Buono, *Using the Digital Millennium Copyright Act to Limit Potential Copyright Liability Online*, 6 RICH. J.L. & TECH 18 (2000) (explaining the qualifications for OSP safe harbor protection).

been uploaded, was directly liable for violation of a provision in force at the time.<sup>140</sup> Although there has been no subsequent supporting court decision, the provision of inline links would also make OSPs potentially liable in minority opinions. Inline links, which direct not to homepage but to the exact material on a particular website, would enable those who click on and follow hyperlinks to skip the paywall on a homepage, and thereby deprive the copyright holders or original transmitters of the material from raising advertising revenue.<sup>141</sup> An inline link, which may even determine which specific portion of a work to be viewed is transmitted, seems to do more than just provide the location information of a work. In such sense, an inline link should be held to be directly or indirectly liable for infringement in the minority opinion.

When linking to lawful material, simple and direct links do not create direct liability for transmission. Aside from the 2003 outlier case, Korean law does not view the inline link as creating direct liability for transmission. But, given the vacillating nature of varying levels of courts, a minority viewpoint could point to direct liability for transmission. Moreover, no aiding and abetting liability for linking to lawful material is contemplated as likely or a natural result of the Copyright Act provisions.

***b. Linking to an unlawful, copyright-infringing work***

Thus far, providing hyperlinks to pirated audio-visual works would not make OSPs directly liable for infringement in the majority of cases. Korean courts are split on the indirect liabilities of OSPs with respect to the provision of hyperlinks to unlawful material. In 2015, the Korean Supreme Court held that OSPs providing direct/deep links to overseas websites where visitors of websites could view or upload Japanese cartoons, which had been themselves translated or uploaded on those overseas websites without authorization, were not liable for the infringement of the reproduction and transmission rights.<sup>142</sup> In contrast, in 2017, the Seoul High Court, which is not bound by the Korean Supreme Court decision, found that the OSP providing an embedded link to unlawfully uploaded Korean TV programs was indirectly liable.<sup>143</sup>

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<sup>140</sup> Daebeobwon [S. Ct.], Apr. 26, 2006 2003Do4128 (S. Kor.).

<sup>141</sup> See *Hyperlink*, NEW WORLD ENCYCLOPEDIA, [https://www.newworldencyclopedia.org/entry/Hyperlink#Inline\\_link](https://www.newworldencyclopedia.org/entry/Hyperlink#Inline_link) (last visited Apr. 29, 2021).

<sup>142</sup> Chung, *supra* note 11.

<sup>143</sup> See Seoul High Court [Seoul High Ct.], Jan. 12, 2017, 2015Na2063761 (S. Kor.). Korea does not recognize the principle that decisions at higher court bind lower court. Higher court decisions bind lower courts only for the same case (i.e. narrow rulings). If it does not fall into the narrow rulings, it is only considered persuasive.

Linking to an unlawful, copyright-infringing work results in similar liabilities as lawful works. It should be noted that the actor who initially uploaded the copyrighted work is directly liable for that same infringement.<sup>144</sup> Simple, direct links, meanwhile, beget no direct liability for transmission for the linking party.<sup>145</sup> Similarly, inline links also create no liability for direct transmission, unless of course a minority viewpoint follows from the 2017 Seoul High Court's decision. Much like the 2003 Korean Supreme Court's contrarian ruling for lawful copyright-infringing work links, the 2017 Seoul High Court's ruling also stands in contrast to the mainline series of cases, but with regard to unlawful, copyright-infringing work. Moreover, for aiding and abetting liability, linking remains a controversial aspect for producing aiding and abetting liability.

### **3. MAIN ACTOR AND THE AIDER AND ABETTOR**

Confounding this process, Korean courts have not yet conclusively determined that inline linking constitutes indirect copyright infringement liability but have implied that it is aiding and abetting. This presents a difficult reconciliation between the types of liabilities under statutory purview. As mentioned above, the fundamental structure for Korean copyright regime comes from the Korean Copyright Act, which defines all the rights protected under the Act, and all the civil and criminal sanctions against violations of those rights.<sup>146</sup> But the Korean Copyright Act has no explicit provisions regarding indirect infringement. Therefore, the jurisprudence for co-tortfeasor and accessory liabilities under Korean Copyright Act has been supplemented by: (1) the legal theories and case law for co-tortfeasor liabilities under Korean civil laws, (2) those for the aider and abettor liabilities under Korean criminal laws, and (3) if warranted, those for the relevant laws adjacent to civil and criminal laws.

OSPs' liabilities are grounded in co-tortfeasor's liabilities, arising from OSFs' aiding or abetting users' copyright infringement.<sup>147</sup> Korean legal provisions from a number of these areas form a patchwork quilt of OSP liabilities for aiding

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<sup>144</sup> See Angela Kim et. al, *Copyright Litigation in South Korea: Overview*, THOMSON REUTERS, [https://uk.practicallaw.thomsonreuters.com/w-010-6175?comp=pluk&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&OWSessionId=0fe6af0e4a5e4655ad7079c47047c4ce&skipAnonymous=true#co\\_anchor\\_a552189](https://uk.practicallaw.thomsonreuters.com/w-010-6175?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=0fe6af0e4a5e4655ad7079c47047c4ce&skipAnonymous=true#co_anchor_a552189) (last visited Apr. 29, 2021).

<sup>145</sup> See Chuing, *supra* note 11.

<sup>146</sup> Once distribution was not explicitly included in criminally punishable infringing acts under Korean Copyright Act, art 136.1.1. Now it is explicitly included.

<sup>147</sup> Minbeob [Civil Act], Act. No. 471, Feb. 22, 1958, *amended by* Act. No. 11728, Apr. 5, 2013, art. 760 (S. Kor.); Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.).



and abetting. Relevant sections from the Copyright Act (Arts. 91(1) (injunction), 102 (restriction on liability of online service providers), 125 (claims for damages), 136 (penal provisions) of Copyright Act, the Civil Act (Arts. 750, 760(1), and 760(3)), and the Criminal Act (Art. 32 (accessories)) form the backbone of the legal regime.

To complicate matters further, in Korea, aiding and abetting may have different meanings in civil and criminal liability contexts. Article 760 of the Civil Act on joint torts treats both aider and abettor the same.<sup>148</sup> In contrast, the punishment for aiding a crime versus punishment for abetting a crime are different. The latter is punished on equal terms as the principal (Article 31(1) of the Criminal Act), while the former has its punishment reduced (Article 32 of the Criminal Act). Korean courts have frequently applied to OSPs the co-tortfeasor liability,<sup>149</sup> and the aiding and abetting criminal liability, sometimes without differentiating civil liability and criminal liability.<sup>150</sup>

#### **4. CO-TORTEASOR TREATMENT UNDER ART. 760(3) OF THE KOREAN CIVIL ACT IN COURTS**

The scope of aiding and abetting acts under Korean civil and criminal laws are much broader than the scope of indirectly infringing acts under U.S. doctrines.<sup>151</sup> In fact, Korean courts have considered any act that facilitates direct infringement by any means, including willful negligence or the omission or failure to act against a directly infringing act, as an aiding and abetting act.<sup>152</sup> The aiding and abetting act may be tangible, intangible, physical, or mental.<sup>153</sup> The act may be committed either during, or even before direct infringement merely in anticipation of such commission.<sup>154</sup> An aider or abettor does not have to be consciously aware of who is the main actor or principal offender; constructive notice or indirect knowledge of the identity is not required.<sup>155</sup>

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<sup>148</sup> Civil Act, *supra* note 149, at art. 760.

<sup>149</sup> Some sources use the term “joint tortfeasor” instead of “co-tortfeasor” without distinction. For the sake of simplicity, we apply only the latter term.

<sup>150</sup> See, e.g., Daebeobwon [S. Ct.], Jan. 25, 2007, 2005Da11626 (S. Kor.); Daebeobwon [S. Ct.], Apr. 26, 2006, 2003Do4128 (S. Kor.).

<sup>151</sup> Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.).

<sup>152</sup> *Id.*

<sup>153</sup> See Daebeobwon [S. Ct.], May. 12, 2016, 2015Da234985 (S. Kor.).

<sup>154</sup> See Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.); Daebeobwon [S. Ct.], May. 12, 2016, Da234985 (S. Kor.).

<sup>155</sup> See Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.); Daebeobwon [S. Ct.], May. 12, 2016 2015Da234985 (S. Kor.).

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In addition to the aiding and abetting liability, courts have even found direct liability for OSPs in exceptional cases. For example, an OSP was directly liable where the OSP itself began to transmit a copyrighted work, and where OSP chose a particular copyrighted work to transmit, and thereby proactively performed or participated in an infringing act.<sup>156</sup>

Moreover, Korean courts have applied to both the civil and the criminal cases the “secondary” theories of copyright infringement. In other words, the doctrine of indirect infringement from the U.S. copyright regime.<sup>157</sup> Korean courts’ reliance on the U.S. doctrines seems rational, considering that the Korean intellectual property regime itself was not a native system, but one transplanted or imported from the U.S.<sup>158</sup> As a result, courts have, in some cases, recognized the co-tortfeasor and aiding and abetting liabilities for digital copyright infringement by referring to the U.S. doctrines of contributory and vicarious liability.<sup>159</sup> There is an issue with co-tortfeasors who are Civil Act liable, and this means that in Korea, they are equivalently liability. Here, indirect copyright infringement is premised on direct copyright infringement. Indirect liabilities are imposed on a defendant who is not the direct infringer. But such liabilities are far from settled in cases involving hyperlinks, as described above.

### *a. The Sori-Bada Case*<sup>160</sup>

OSP’s aiding and abetting liabilities were first established in non-hyperlink cases. In a series of decisions involving the same OSP of a P2P file-sharing software service, “Sori-Bada,” the Supreme Court found that copyright holders’ reproduction rights were directly infringed by users, and indirectly by the OSP that aided its users’ crime.<sup>161</sup> This seminal case dealt with Korea’s first peer-to-peer file sharing service, and utilized a line of reasoning that emphasized the site’s role in

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<sup>156</sup> Seoul High Court [Seoul High Ct.], Apr. 30, 2009, 2008Na86722 (S. Kor.) (appeal dismissed).

<sup>157</sup> Chein-Chung KAO, *A Comparative Study on Patent Infringement Types and Court Judgments in United States, Japan, and Taiwan*, Taiwan Intellectual Property Office (2017). As comparatively recent arrivals to the application of intellectual property to domestic law, Korean courts cannot entirely ignore the U.S. case law and the U.S. intellectual property regime. Korean copyright regime needs to be supplemented in part by the U.S. copyright regime. Moreover, in the era of the global economy and trade, bilateral and multilateral agreements and e-commerce have been pressuring the harmonization of Korean legal regime with the regimes of trade partners and consumers. In the global era, Korea’s economy and trade cannot be confined within its national borders.

<sup>158</sup> See, e.g., Kor.-U.S. FTA, *supra* note 49, at art. 18.10.26(a).

<sup>159</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da80637 (S.Kor.).

<sup>160</sup> See Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.).

<sup>161</sup> Daebeobwon [S. Ct.], Dec. 14, 2007, 2005Do872, (S. Kor.); Seoul High Court [Seoul High Ct.], Jan. 12, 2005, 2003Na21140, (S.Kor.).

sponsoring copyright infringement committed by users.<sup>162</sup> A series of cases related to *Sori-Bada* have shown that OSPs may be found liable for aiding and abetting direct infringers. But, *Sori-Bada* was the first time that the Supreme Court held an intermediary like Sori-Bada liable for aiding and abetting copyright infringement.

The Korean Supreme Court did not differentiate between civil liability and criminal liability in this case. The Korean Supreme Court held that all direct and indirect acts that facilitate copyright infringement were considered aiding.<sup>163</sup> Moreover, it was sufficient that the aider was reckless, and it was not required that the aider was specifically conscious of the date or place of infringement, the object copied, or the identity of the principal.<sup>164</sup> The Korean Supreme Court also stated that the distribution right, which is only related to works in tangible form, was not infringed.<sup>165</sup>

**b. Ental Case<sup>166</sup>**

*Ental* was the case where the Seoul High Court found that the OSP was directly liable because of its indirect engagement. The Court held that Ental, an OSP providing a remote storage digital video recorder (RS-DVR) service that enabled data sharing on different platforms such as tablets, smart phones, and laptops, directly infringed on reproduction and public transmission rights.<sup>167</sup> Based on the particular set of facts in this case, the Seoul High Court differentiated it from the American decision, *Cartoon Network v. Cablevision Systems*, which also involved a RS-VDR.<sup>168</sup>

Additionally, the Seoul High Court held that Ental was secondarily liable for the infringement by the viewers, because the downloading of a file by the viewer could not be considered as a private use.<sup>169</sup> More importantly, the *Ental* court described what kinds of conduct can implicate accessory liability for infringement of reproduction right in detail.<sup>170</sup>

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<sup>162</sup> See Supreme Court [S. Ct.], Dec. 14, 2007, 2005Do872 (S. Kor.).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Seoul High Court [Seoul High Ct.], 2 Apr. 30, 2009, 008Na86722 (S. Kor.) (appeal dismissed).

<sup>167</sup> *Id.*

<sup>168</sup> *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139-40 (2d Cir. Aug. 4, 2008) (holding that Cablevision's proposed RS-VDR had no potential direct infringement on either reproduction or public performance rights of copyright holders).

<sup>169</sup> Seoul High Court [Seoul High Ct.], Apr. 30, 2009, 2008Na86722 (S. Kor.) (appeal dismissed).

<sup>170</sup> *Id.*

First, *Ental* noted that all of the conduct that make the infringement of the reproduction right easier, either directly or indirectly, can implicate accessory liability.<sup>171</sup> All acts and omissions of acts facilitating copyright infringement, either direct or indirect, regardless of the means, not only tangible and physical acts, but also intangible and mental acts, committed not only during but also before the infringement (in anticipation of future infringement) could be liable.<sup>172</sup> Second, such conduct can be committed while the principal is still committing the infringement; or, in anticipation of a future infringing act, even before the principal will commit the infringement.<sup>173</sup>

Third, willful negligence of the infringement committed by a principal would suffice to implicate accessory liability.<sup>174</sup> An accessory does not have to be aware of the time, place, object, etc. of the infringing act specifically, or, of who the principal definitively is.<sup>175</sup> The final appeal for *Ental* was ultimately dismissed, and the decision stands.<sup>176</sup>

***c. Remaining issues to be resolved***

There are many issues that need be settled in near future to ensure the justification or legitimacy of the existing Korean copyright regime, both internally to ensure interpretability and consistency, as well as to prevent ambiguity for future technologies and when dealing with online copyright issues on the global scale.

***i. Interaction and harmonization with pre-existing jurisprudence of relevant Korean laws and U.S. copyright laws***

To establish a more coherent liability regime, the Korean copyright regime should continue to interact and harmonize with pre-existing, relevant Korean legal systems, and with U.S. copyright law systems. But interpreting the provisions for civil and criminal sanctions in the Korean Copyright Act in concert with the civil and criminal regimes, would expand the scope of the aiding and abetting liabilities for copyright infringement in Korea too far. Some mechanism should be instituted to set the boundaries of civil and criminal liability for aiding and abetting copyright

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See id.*

<sup>176</sup> *Id.*

infringement in Korea. There is a need for more consistency and predictability—rather than favoring one regime because it is the most efficient at the time.<sup>177</sup>

ii. *Legal consequence(s) of clicking an Internet hyperlink by viewer*

In addition to the general understanding of the aiding and abetting liabilities for copyright infringement in Korea, the legal consequence(s) of various activities on internet websites must be determined in order to define the elements of direct and indirect infringement (see Table 6). Particularly: (1) whether clicking an internet hyperlink by a user can be construed as “transmitting or using” the linked-to copyrighted work under Art. 18; (2) whether clicking a particular hyperlink is in fact “displaying” the linked-to work under Art. 19; or more specifically, (3) whether clicking an inline link causes the reproduction, public display, or public transmission of the linked-to work should be determined.

The crux of the issue centers on this third question, specifically whether a website posting a hyperlink is contributing to the public transmission of the work. The Seventh Circuit Appellate Court of the United States has developed two tests to apply to this issue, whether infringers sell the unlawful works online (and thereby create a potential unlawful market), and whether the works were actually accessed via a defendant’s website.<sup>178</sup> Because the public performance right implicates the moment that a performance occurs, when a work such as a video is uploaded or bookmarked is an important factor to assessing liability.<sup>179</sup>

In *Flava*, the performance for uploading and for receiving meant that the defendant video service could be held liable for infringement due to their facilitation of public performance by assisting in the transmission via providing links. It is telling that the United States Copyright Act mentions a similar concept, stating that transmission is defined as “to transmit or otherwise communicate a performance . . . of the work . . . to the public.”<sup>180</sup> The essential elements for protection of the right include (1) the public nature of the audience, and (2) that the audience is “capable of receiving” the performance at issue.<sup>181</sup>

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<sup>177</sup> Though beyond the scope of this topic, judicial paternalism in Korea also may play a part.

<sup>178</sup> *Seventh Circuit Holds that “Social Bookmarking” of Infringing Content Alone Is Insufficient to Support Grant of Preliminary Injunction*, 126 HARV. L. REV. 2479, 2482 (June 20, 2013).

<sup>179</sup> *Id.* at 2483, 2485.

<sup>180</sup> 17 U.S.C. § 101 (2020).

<sup>181</sup> *Id.*

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Furthermore, the means by which users accessed information militates against the motives of the same users in accessing the information.<sup>182</sup> Essentially, to transmit the performance is to communicate the essence of the work to another place or person.<sup>183</sup> For U.S. copyright, this entails public performance meeting a minimum threshold where a signal is received by the public at a place beyond the place from which it is sent.<sup>184</sup> For the purposes of this analysis, and remaining within the ambit of the American copyright regime, the public performance right maintains exclusive rights to perform several types of creative works in public or to delegate the performance to the authorized party doing so. Performing a work under the same section means to “recite, render, play, dance, or act it, either directly or by means of any device or process.”<sup>185</sup> Note here that “to perform” is defined broadly with regard to process or equipment. There is little doubt that a user working on a computer to portray a digital work on a computer screen performs that aspect of the work within the original meaning of the statute. But more relevant is the question of whether the performance has occurred “publicly” within the meaning of Section 101. The “public” performance can be formed through the “public place” analysis, but also through the “transmit” clause.<sup>186</sup> The latter is more often applied to copyright disputes in the digital age. The extent of the revelation and audience composition are key factors for this inquiry. The means and methodology by which the public audience can receive the performance implicate the definition of the public element.<sup>187</sup> That is, how the public received or had transmission access to the performance, the nature of the audience element, and the access to the public “place.”

With regard to the facts in myVidster, performance by uploading and receiving were distinguished.<sup>188</sup> Performance by receiving referred to the means that users functioning as an audience used to or could have used to receive copyrighted works from Flava via myVidster. In contrast, uploading and bookmarking as a visitor to the myVidster website could mean viewing at the same time or watching in at a separate time and place from other viewers. The Seventh Circuit’s motive-based exploration of the issues focused on contributory infringers from an incentives and personal circumstantial relation.<sup>189</sup> This would not allow for long-term guidelines to address these issues for later online copyright cases. Changing technological advances, which would necessitate online cultural changes,

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<sup>182</sup> *Seventh Circuit Holds that “Social Bookmarking,” supra* note 180, at 2483.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 2483.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 2484.

<sup>188</sup> *Id.* at 2485-56.

<sup>189</sup> *See id.*

can drastically affect motivations. Given that the state-of-the-art technology for sharing and broadcasting online works may be presumed to change in the future as it has over the course of the development of the web, it would be merely a stopgap for jurisprudence to turn to motives as a definitive test for resolving contributory infringement issues.<sup>190</sup> The rise of “freemium” services, which require no subscriptions or paywalls, also supports expanded legal approaches.

Of interest to Korean copyright scholars is the approach favored by the Second Circuit in *Cablevision*.<sup>191</sup> In grounding the approach to the U.S. Copyright Act, the court focused on the statutory interpretation of the law.<sup>192</sup> The Second Circuit noted the means and methods, rather than the subjective motives, was at stake.<sup>193</sup> In particular, discerning “who is capable of receiving the performance being transmitted” was crucial to informing whether the public had been transmitted to.<sup>194</sup>

As myVidster charges, that infringing content would almost certainly be “public” using the Second Circuit analysis. One Korean legal commentator has suggested using the bright line distinction between consummate versus non-consummate offenses in the criminal law in characterizing copying and public transmission.<sup>195</sup> The shortcomings of existing copyright law as applied to the online environment, with significant implications for future applications of contributory-liability doctrine in copyright law, require reinvigorated solutions to resolve ambiguity and indiscrete precedents.

##### **5. OSP’S OBLIGATIONS AND LIMITATIONS ON LIABILITY**

Ultimately, courts decide the extent to which liabilities should be limited. Unlike in the United States or China, immunity may not be the result of copyright infringement limitations in Korea. Rather than a starting point, blanket protection could be a possibility, with only some reduction or no reduction of liabilities at all. This parallels the recent development in Korean copyright regimes in ensuring a suitable environment for rights holders, while also crafting domestic legal frameworks that reflect Korean needs and sensibilities. Indeed, observers could expect a lesser limitation on liabilities in Korea than in the U.S. With the historical

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<sup>190</sup> *See id.*

<sup>191</sup> *See* Kim Chang-hwa, *Network-based storage devices and copyright infringement-Cartoon Network LP, LLLP v. CSC Holdings, Inc. Focusing on the case*, 38 L. J. 609-51 (2014).

<sup>192</sup> *Cartoon Network LP, LLLP*, 536 F.3d 121.

<sup>193</sup> *Id.* at 127-29.

<sup>194</sup> *Id.* at 134.

<sup>195</sup> Park, *supra* note 27, at 129-131, 145-152, n. 110, 111.

lack of emphasis that has been afforded to copyright in Korea, such a limitation on liabilities may unduly influence enforcement of the first principles of copyright. Ultimately, in Korea, the courts will decide how much the liabilities should be limited. The limitation of liabilities does not necessarily mean complete immunity—it is sometimes only some reduction of liability, if any. The current limitations under Article 102 of the KCA are a “graduated system of waivers of responsibility.”<sup>196</sup>

*a. Defining the scope of OSP obligations*

The structure of KCA Article 102, which provides safe harbor for intermediaries from third party copyright infringement, is very similar to that of EU Directive 2000/31/EC<sup>197</sup> and of the U.S. DMCA.<sup>198</sup> As noted above, paragraph (1) sets out specific conditions for each of the four classes of OSPs (i.e., mere conduits, caching, hosting, and information location tools) eligible for safe harbor provisions. Paragraph (2) provides another safe harbor to an OSP when it would have been technologically impossible for the OSP to take measures under paragraph (1).<sup>199</sup> Korean courts rarely, if ever, have accepted a defense based on Article 102.<sup>200</sup> Paragraph (3) announces that OSPs do not have any general obligation to monitor or investigate.

KCA Article 103 sets out a notice and takedown procedure, reminiscent of the DMCA. If a person in Korea claims copyright infringement and demands that an OSP suspend the reproduction or transmission of the works, Article 103 requires the OSP to immediately comply with, and inform the claimant and the alleged infringer of such suspension.<sup>201</sup> By complying with such a procedure, an OSP will be exempt from liabilities arising from the copyright infringement. Here, “reproductions and transmission” means making material available online for

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<sup>196</sup> CTR. FOR LAW AND DEMOCRACY, REPUBLIC OF KOREA: ANALYSIS OF THE KOREAN COPYRIGHT ACT 4 (2013), <http://www.law-democracy.org/live/wp-content/uploads/2013/06/Korea.Copyright.pdf>.

<sup>197</sup> See Land Nordrhein-Westfalen, *supra* note 111.

<sup>198</sup> WORLD INTERMEDIARY LIAB. MAP, CTR. FOR INTERNET AND SOC’Y, Copyright Act, last amended by Act. No. 12137 (Dec. 30, 2013), <http://wilmap.law.stanford.edu/entries/copyright-act-last-amended-act-no-12137> (noting that “[t]he provision was amended twice in 2011 to reflect the Korea-EU FTA and the Korea-US FTA. As a result, the Intellectual Property chapter of the Korea-EU FTA reproduced EU Directive 2000/31/EC Section 4 ‘Liability of intermediary service providers’ almost exactly in verbatim; that of the Korea-US FTA adopted the structure of DMCA safe harbor provisions.”).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*



downloading.<sup>202</sup> Unlike the DMCA, Korean copyright law requires on-demand takedown not as a mere requirement for qualifying for the safe harbor, but as an unconditional prerequisite.<sup>203</sup> The OSP cannot choose to deviate from this notice and takedown procedure. Under Article 103-3, a rights holder may even request from an OSP the information necessary to take civil or criminal legal action against an alleged infringer, including the infringer's name and address.

Article 104 implicates a specific subset of OSPs, those whose main purpose is to transmit works via P2P networks and web-hard (cyber-lockers) service providers. This article demands a duty to accommodate technological measures to interrupt the illegal transmission of copyrighted material. Particularly, it imposes a direct obligation on the part of OSPs to implement the necessary measures for filtering out unlawful material. Upon a request from a right holder, those special types of OSPs must implement those necessary measures defined by the Enforcement Decree of the Copyright Act.<sup>204</sup> Any OSP failing to implement such measures will face a civil fine and may be subject to cancellation or suspension of its business registration under the Telecommunications Business Act.<sup>205</sup> The court has been very strict in allowing the safe harbor under Article 102 to these special types of OSPs.<sup>206</sup> A constitutional complaint was raised, but the Korean Constitutional Court found the provision constitutional.<sup>207</sup>

Other articles in the KCA note additional measures to prevent infringement, against individual users. KCA Article 133-2 provides administrative power for OSPs to shut down an account of a continuous infringer, and even the whole bulletin board website providing a platform for the infringer. Under KCA Articles 133-2 and 133-3, the Minister of Culture, Sports, and Tourism may obligate OSPs to suspend the account of a subscriber or an online bulletin board that has received

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (“The Enforcement Decree of the Copyright Act defines those necessary measures as: 1) Technical measures capable of identifying the work, etc. by comparing the title, characteristics of work, etc. (basically, a filtering measure mainly based on the titles and hash values of the works); 2) Measures of limiting search or transmission to cut off illegal forwarding of work, etc. that came to be recognized pursuant to subparagraph 1 (basically, a keyword based measure that prevents searching of the keywords and uploading of files including the keywords); 3) Where the illegal forwarder of the work, etc. requesting for the prohibition of infringement on the copyright.”).

<sup>205</sup> *Id.*; Telecommunications Business Act, 10656 (S. Kor.), translated in Korea Legislation Research Institute online database,

[https://elaw.klri.re.kr/kor\\_service/jomunPrint.do?hseq=42181&cseq=1013111](https://elaw.klri.re.kr/kor_service/jomunPrint.do?hseq=42181&cseq=1013111).

<sup>206</sup> WORLD INTERMEDIARY, *supra* note 200.

<sup>207</sup> *Id.*

more than three warnings. KCA Article 22-3 of the Telecommunications Business Act also mandates similar mandatory technical measures for OSPs to filter out obscenity. Such is the expansive scope of monitoring duties of Korean OSPs, with KCA Art. 133(2) providing administrative power to shut down the account of a continuous infringer and even the entire bulletin board that OSPs provided. The revised Korean Copyright Act prescribes these drastic measures against online copyright infringement, expanded to cover all kinds of infringement with knowledge, incentive, and intent.

These principles are broadly applicable, and not confined to instances where the infringing material was clearly or obviously posted on the internet space provided by the OSP. Clear cases of infringement would usually result in take-down and the shut-down of the specific individual posting demanded of the OSP by the victim. The same actions would also happen in cases where the OSP was specifically aware of the circumstances surrounding the posting of the material, even without a direct take-down demand, if it was externally obvious that the OSP must have been aware of the posting, if management control of the posting was technologically or economically feasible, or if OSP had a duty to take adequate measures and not to tailor or deny injunctions. An OSP is not liable as co-tortfeasor only because copyright infringing material was uploaded on the website the OSP operates, even if users can find the material easily through the website's search function, due to Article 102.

***b. OSP's liabilities and their limitations under safe harbor provisions***

The safe harbors available to OSPs under Art. 102(1)(4) deserve further assessment in light of these details. Paragraph 4 notes that the OSP may not be responsible where four requirements for immunity are met: (1) not transmitting, (2) no direct financial gain, (3) stopping the reproduction and transmission, and (4) notice to the designated person for receiving a request for stopping infringement.<sup>208</sup> Such limitations are applied to both civil and criminal liabilities of OSPs.<sup>209</sup> But, some knowledge of infringing activities disqualifies the OSP from this safe

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<sup>208</sup> Korean Copyright Act, art. 102.1(4) (S. Kor.).

<sup>209</sup> Daebeobwon [S. Ct.], Sep. 26, 2013, 2011Do1435 (S. Kor.) (finding that Arts. 102 (1), 102 (2), and 103 (5) of the Korean Copyright Act should be applicable to criminal liabilities, based on both the legislative purposes of each provision and the lack of any restrictions in the corresponding phrases of each provision. Here Arts. 102(1) and 102(2) were revised on June 30, 2011 (Law No. 10807), in order to categorize online service providers into four types, e.g., simple conduit, caching, hosting, and information retrieval; and in order to clarify the immunity requirements for each type, as part of an effort to "implement a free trade agreement between South Korea and the European Union and its Member States.").

harbor.<sup>210</sup> Moreover, some intent and control on the part of the linking service providers would also disqualify them from these limitations.<sup>211</sup>

***c. Automatic indirect liability for linking and limitations of such liability under safe harbor provisions?***

The notice and take-down scheme under the provisions for the limitation of online service providers' liabilities in Korea, which was heavily influenced by the U.S. DMCA, only awards discretionary mitigation or exemption to online service providers qualified to receive immunity.<sup>212</sup> Interestingly, the safe harbor provisions of the U.S. DMCA suggest only potential liabilities, which include direct as well as indirect liabilities.<sup>213</sup> These provisions do not necessarily presume the automatic indirect liability of linking. Under the Korean Copyright Act, an OSP may be immunized under safe harbor provisions only if the OSP is not disqualified for safe harbor in the first place.<sup>214</sup> Not all indirect liabilities may be immunized. Disqualification may be based on knowledge, financial gain, the denial of immediate suspension of reproduction or transmission, and other related actions.<sup>215</sup> The relevant statutory language notes that "[w]here an online service provider has not initiated the transmission of works . . ." Art. 102(1)(a) will apply. Therefore, the extent of the OSP actions that will qualify for the safe harbor may face different interpretations. Willful aiding and abetting would probably not be eligible for the limitation of liabilities provision. Aiding and abetting by willful negligence would also not likely be eligible for this provision, especially considering Korean courts' deference to the high threshold for OSP safe harbor and a general reluctance to grant limited liability under Art. 102 as a whole. The corresponding U.S. safe harbor provisions do not state that the liabilities limited under the DMCA are confined to indirect liabilities.<sup>216</sup> As such, it is reasonable to conclude that not only indirect, but also direct liabilities, can be limited under Art. 102. The plain language meaning of the statute does not clearly state that linking by OSPs should be captured under accessory liability.

In 2017, the Seoul High Court interpreted, and the Supreme Court affirmed, Art. 102(1)4 as meaning that linking is a kind of aiding and abetting to direct copyright infringement by service users, and thus is naturally assumed as aiding

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<sup>210</sup> See Korean Copyright Act, art. 102 (S. Kor.).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

<sup>214</sup> See Korean Copyright Act, art. 102 (S. Kor.).

<sup>215</sup> *Id.*

<sup>216</sup> See Digital Millennium Copyright Act, *supra* note 213.

and abetting infringement under copyright law.<sup>217</sup> This conclusion was seemingly at odds with the natural inclination of Korean jurisprudence towards the safe harbor provisions. As noted above, safe harbor provisions that presume OSPs' linking service to be automatically liable as an accessory to the infringement may be overly ambitious.

***d. The theory and elements for the OSP's liabilities based on copyright infringement by users***

Moving beyond OSP limited liability, a co-tortfeasor's liabilities as an accessory under Korean Civil Act can also have severe consequences for online media.<sup>218</sup> A wide variety of OSP liabilities are grounded in co-tortfeasor liability. The indirect liabilities for copyright infringement of OSP are statutorily based on Art. 760, Cl. 3 of the Korean Civil Act, providing that the abettor or aider shall be considered as a co-tortfeasor. This theory of the "aider" liabilities has been employed as a general principle in analyzing the indirect liabilities of Internet service providers for a wide variety of claims. To be clear, the Korean Copyright Act does not provide any legal theory for those OSP's liabilities, which derive from other statutory bases. Such OSP's liabilities do not come from the instigation or direct copyright infringement by the OPS.<sup>219</sup>

This differs again from the U.S. legal regime. In 2007, the U.S. Ninth Circuit Court of Appeals ruled that framing, without storing or serving, constituted no direct infringement of display and distribution rights, and that thumbnail copying for image search engines was fair use.<sup>220</sup> The Ninth Circuit Court also stated that contributory infringement requires (1) OSP's actual knowledge that specific infringing works are available, but (2) not taking simple measures to disable availability; and that vicarious infringement requires OSP's power to stop the infringement.<sup>221</sup>

It is ambiguous whether Korean copyright law would accommodate Sony's "substantial noninfringing use" defense and the negation of such defense by "intentional inducement" in another U.S. case from the Ninth Circuit, *MGM v.*

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<sup>217</sup> Seoul High Court [Seoul High Ct.], Mar. 30, 2017, 2016Na2087313 (S. Kor.).

<sup>218</sup> See Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, art. 760, amended by Act No. 14965, Oct. 31, 2017 (S. Kor), translated in Korea Legislation Research Institute database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=45912&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=45912&lang=ENG).

<sup>219</sup> See Youngjoon Kwon, *Tortious Liability of Internet Service Providers for Defamation: A Korean Perspective*, 5 J. KOREAN L. 121, 127-28 (2006).

<sup>220</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176 (9th Cir. 2007).

<sup>221</sup> *Id.* at 1172.

*Grokster*.<sup>222</sup> In *Grokster*, the defendant provided P2P sharing with code developed to avoid contributory and vicarious liability.<sup>223</sup> The Ninth Circuit found that their willful blindness would prove bad intent and held the defendant liable for the resulting infringement by users.<sup>224</sup> In noting that “[o]ne who distributes a device with a clear object of promoting its use to infringe . . .” is liable, the court reasoned that *inter alia* pirate audience demand, a lack of filtering tools or mechanisms, and a business model dependent on infringement all evidenced inducement to infringe.<sup>225</sup>

In Korea, inducement actions for copyright infringement appear less tolerant of such conduct by OSPs. As mentioned, the safe harbor provisions presume that OSPs’ linking is liable as accessory to the infringement under Art. 102 provisions on indirect liability, although there have been multiple, conflicting interpretations.<sup>226</sup> Under the American system, indirect infringement refers to when a third-party “actively induce[s], encourage[s] or materially contribute[s] to” infringing acts carried out by another party.<sup>227</sup> For indirect infringement, linking would lead to secondary infringement that would satisfy the safe harbor under the DMCA.<sup>228</sup> For American OSPs, they would therefore not be held liable.<sup>229</sup> In essence, under the intentional inducement test, linking that leads to inducement in bad faith, with no safe harbor, would be liable as in *Grokster*.<sup>230</sup> Where linking led to inducement that was not in bad faith, a safe harbor would be available to shield from liability.

Under Korean copyright law, injunctive relief may be brought against a wide range of people, including direct infringers who reproduce, distribute, etc. a copyrighted work; persons who circumvent technical protective measures; persons

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<sup>222</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 440 (1984) (explaining that a manufacturer of a product is not liable for contributory infringement as long as the product is capable of substantial noninfringing uses); MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 937 (2005).

<sup>223</sup> See *Grokster, Ltd.*, 545 U.S. at 925.

<sup>224</sup> *Id.* at 939.

<sup>225</sup> *Id.* at 936-37.

<sup>226</sup> Seoul High Court [Seoul High Ct.], Mar. 30, 2017, 2016Na2087313 (S. Kor.); Daebeobwon [S. Ct.], Sept. 7, 2017, 2017Da222757 (S. Kor.).

<sup>227</sup> Cornell University Law School, *Indirect Infringement*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/indirect\\_infringement](https://www.law.cornell.edu/wex/indirect_infringement) (last visited Apr. 29, 2021).

<sup>228</sup> Berkman Klein Center, *Copyright Claims Based on User Content*, DIG. MEDIA L. PROJECT (Jan 22, 2021), <https://www.dmlp.org/legal-guide/copyright-claims-based-user-content>.

<sup>229</sup> David M. Perry, *You May Be an OSP: Know These Changes to the Digital Millennium Copyright Act*, BLANK ROME LLP (June 2017), <https://www.blankrome.com/publications/you-may-be-osp-know-these-changes-digital-millennium-copyright-act>.

<sup>230</sup> Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936-37 (2005).

who eliminate digital rights management (DRM) information; and OSPs that aid and abet copyright infringement.<sup>231</sup> Such a broad construction of the provision would reflect a policy that tries to achieve the practical effect of Copyright holders seeking injunctive relief against OSP's copyright infringement to prevent irreversible harm to their rights.<sup>232</sup> Injunctive relief is an extraordinary remedy, because OSP liability is based on torts under the civil laws, which allow compensation claims but not injunctive relief.<sup>233</sup> Relief against such a tortfeasor has been previously granted for policy reasons without a solid legal basis grounded in the Korean statutory conception of copyright infringement liability.<sup>234</sup>

### ANALYSIS OF CHUING DECISION

#### **A. INFRINGEMENT OF REPRODUCTION AND TRANSMISSION RIGHTS**

Unless members are liable for infringing the Korean public transmission right (the communications right in other jurisdictions), the members who post links but do not copy the linked-to work itself could not be held directly liable for copyright infringement as a principal.<sup>235</sup> Referring back to the aforementioned *Chuing* case, those members of the website could neither have aided nor abetted the infringement of the reproduction right, because the copying done by the blog operator was completed at the moment when the operator uploaded the work on the overseas blog site, which occurred prior to the *Chuing* member adding a link to the overseas blog operator.<sup>236</sup> But, those members who posted links could be liable for indirect infringement of the reproduction right, both as a co-tortfeasor and an

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<sup>231</sup> Angela Kim et al., *supra* note 144.

<sup>232</sup> Jay (Young-June) Yang, et al., *Overview of Korean IP laws*, BUILDING IP VALUE, [http://www.buildingipvalue.com/n\\_ap/397\\_399.htm](http://www.buildingipvalue.com/n_ap/397_399.htm) (last visited Apr. 24, 2021).

<sup>233</sup> Jun-Seok Park, *The Prospect for ISP's Liability in UGC-Related Cases in Korea*, 7 J. KOREAN L. 145, 147 (2007).

<sup>234</sup> Maricel Estavillo, *South Korea Bolsters Copyright Strategy In K-Pop Crazy States*, INTELLECTUAL PROP. WATCH (Dec. 14, 2012), <https://www.ip-watch.org/2012/12/14/south-korea-bolsters-copyright-strategy-in-k-pop-crazy-states/>. With the Korean economic landscape in flux, industry considerations can also persuade when dealing with linking laws. Copyright protections for media and content creators are increasingly in vogue given the recent success of Korean comics. Whereas *Chuing* dealt with overseas rights holders and content, Korean "manhwa," or comics, have themselves faced piracy concerns from copyright infringing sharing websites of the same type. Domestic regulators have demonstrated a renewed appetite for copyright protection enforcement given the stakes, and the government cultural funding that provides the authors of these comics with the means to produce.

<sup>235</sup> *See Chuing*, *supra* note 11. In contrast to those decisions involving embedding links; here, there is no framing, only direct/deep linking.

<sup>236</sup> *See id.*

accessory.<sup>237</sup> Specifically, they can be prosecuted as an aider and abettor because transmission of the work alone by the blog operator is a continuing wrong, so long as the uploaded work has not been taken down from the overseas blog site.<sup>238</sup>

Under Korean law, the operator of the overseas blog, who originally uploaded copyrighted work on the blog without authorization, would be liable for direct infringement of both reproduction and public transmission rights, provided that a Korean court had territorial jurisdiction over infringements occurring offshore.<sup>239</sup> Under the *PantyNews* decision, the operator could also be liable as a co-tortfeasor of the infringement of public transmission rights alongside the overseas blog site members who had posted the links.<sup>240</sup> To the extent that many of the overseas blog site operators in *Chuing* were the same individuals who had originally uploaded copyrighted works onto their own blog sites, it is unclear how many blog operators in *Chuing* would have been implicated by such an analysis. Nevertheless, the point remains that co-defendant's liability of public transmission rights infringement would extend to an operator of a site that allowed the direct uploading and hosting of copyrighted works under Korean copyright law.<sup>241</sup>

To be clear, as the manager and administrator of *Chuing*, Park did not himself, by his operation of *Chuing*, transmit or send copyrighted works to the general public.<sup>242</sup> Whether Park, by his operation of *Chuing*, aided or abetted public transmission of copyrighted works was and is unsettled under Korean law and deserves further scrutiny.

A comparison of *Chuing* with precedent in Korean as well as foreign cases suggests that the Korean Court draws from the prior experiences of similar copyright law issues in other nations.<sup>243</sup> In particular, American copyright law that

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<sup>237</sup> Here, we use the term “co-tortfeasor” rather than “co-defendant” due to the potential for civil fines alongside criminal punishment, pursuant to Chapter XI of the Korean Copyright Act. Korean Copyright Act, art. 136-38.

<sup>238</sup> *Id.*

<sup>239</sup> See *Daebeobown* [S. Ct.], Mar. 25, 2002, 2001Da66946 (S. Kor.). The so-called, “JesusChristSuperstar” case.

<sup>240</sup> *Daebeobown* [S. Ct.], July 8, 2003, 2001Do1335 (S. Kor.) (finding that the party who created a website and posted obscene materials to the website was liable for public display as a co-plaintiff).

<sup>241</sup> This occurs regardless of whether uploading was performed by the operator alone, or by a mere user of the site.

<sup>242</sup> *Chuing*, *supra* note 11.

<sup>243</sup> *ChungJoo* District Court [Dist. Ct.], Oct.19, 2012, 2012No626 (S. Kor.) (mentioning “indirect aiding-and-abetting”). The internal reference is reminiscent of the amici brief by Google and Facebook. See Brief of Amici Curiae Google Inc. & Facebook, Inc. in Support of Neither Party, *supra* note 101 (citing the phrases “facilitation of infringement through some other indirect

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addresses framing and hyperlinking issues—which are now approaching Korea’s highest court for the first time—serve as barometers of the Korean courts’ ability to apply legal considerations previously grappled with to the specifics of Korean law.<sup>244</sup> Although not a direct importation of these legal concepts into Korean law, American cases provide a means to measure Korea’s Supreme Court rulings on current cases without submersion in the historical evolution of linking and framing that predates the *Chuing* decision.

*Perfect 10, Inc. v. Amazon.com, Inc.* was a 2007 ruling from the U.S. Ninth Circuit Court of Appeals that addressed hyperlinking specifically.<sup>245</sup> The court held that framing links unaccompanied by storing or serving was not direct infringement of display and distribution rights.<sup>246</sup> Hosting a link to specific material was not equivalent to storing the linked-to material itself.<sup>247</sup> Drawing from the lower court’s reasoning in *Perfect 10 v. Google, Inc.*, the case noted that inline linking here did not result in the display of content that would give rise to claims of direct infringement.<sup>248</sup> The use of the “server test” was instead selected, where hosting and transmitting material was the dispositive act for framing links that infringe upon distribution and display rights.<sup>249</sup> A similar test has also been adopted in certain Korean cases.

That is, framing or inline linking, unlike the type of link described in *Chuing*, would not constitute this type of display infringement.<sup>250</sup> Of interest to

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infringer” and the phrase “contributing to contributory infringement”). *See also* Jun-seok Park, *The Change of Interpretation on the Quotation Provision in the Korean Copyright Act (Article 28) and the Review of It*, 57 SEOUL L.J. 171, 174-75 (2016) (noting that like other IP regimes, the Korean copyright regime has been most heavily influenced by the Japanese regime. However, the influence of the U.S. copyright regime on the Korean regime has also been significant. The application of fair use is a good example. Korean courts have interpreted a fair use provision (Art. 28 of the Korean Copyright Act) in a comprehensive and expanded manner, unlike Japanese courts interpreting the same provision to be restricted by the principle of master-servant relationship).

<sup>244</sup> In cases involving search engines’ thumbnail services, Korean courts interpreted the quotation provision of the Korean Copyright Act, which is similar to its Japanese counterpart, just as U.S. courts would interpret the provision for limitation of exclusive rights (17 U.S.C. §107). *See* Park, *supra* note 246, at 192.

<sup>245</sup> *See generally* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>246</sup> *Id.* at 1161.

<sup>247</sup> *Id.* at 1160-1161.

<sup>248</sup> *Id.* at 1159-1160 (referencing lower court decision in *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 843-44 (C.D. Cal. 2006)).

<sup>249</sup> *Id.* at 1159.

<sup>250</sup> *See* *Ticketmaster L.L.C. v. Prestige Entm’t W., Inc.*, 315 F. Supp. 3d 1147, 1163-64 (C.D. Cal. 2018) (noting that while Ticketmaster’s HTML code is “viewable and otherwise discoverable,” this fact does not give the user license to download and store Ticketmaster’s pages and code).



Korean copyright law was the similar situation in *Chuing*, where the copyright holder was unable to go after direct infringers. Although *Chuing* did not adopt the same reasoning to determine direct display infringement, it is possible that the *Perfect 10* court's "server test" would have caused the Korean Court to arrive at a parallel conclusion.<sup>251</sup>

In contrast to *Chuing*, the court in *Perfect 10* did take the additional step of analyzing the infringement of distribution rights. The infringement in *Perfect 10* required actually giving a copy of the protected work to another.<sup>252</sup> But, Google's links were simply pointing a user to the location where the copy could be found, which was not considered infringement.<sup>253</sup> While not adopting similar methodology, the *Chuing* court echoed the result by not finding distribution rights infringement.<sup>254</sup>

*Perfect 10* also noted the unlikely possibility of success on the merits of a direct or vicarious liability claim (remanding on contributory), an indirect liability decision that could be seen as at odds with Korean precedent.<sup>255</sup> Specifically, contributory infringement would have required OSP's actual knowledge and failure

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<sup>251</sup> See *Perfect 10*, 508 F.3d at 1159-60 (applying the server test, under which storing and serving the electronic information of an image as 0s and 1s was a prima facie case of display right violation, however inline linking or framing electronic information with no storage was not); compare with *Chuing*, *supra* note 11 (applying a different analysis than the server test, but holding "the act of posting an Internet link by itself does not constitute aiding and abetting copyright infringement.").

<sup>252</sup> *Perfect 10*, 508 F.3d at 1162.

<sup>253</sup> *Id.*

<sup>254</sup> *Chuing*, *supra* note 11 (holding "the act of posting an Internet link by itself does not constitute aiding and abetting copyright infringement").

<sup>255</sup> *Perfect 10*, *supra* note 247, at 1175 (noting Google's liability was not vicarious, as it was difficult for Google to monitor and control their processes, and vicarious liability is founded upon a failure to act or failure to cause a third party to stop directly infringing actions.). Contributory liability would be based on Google's failure to stop its own actions, but here the issue was framing links and thumbnails rather than simple inline links. The court remanded this question of contribution. *Id.* at 1173; see also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (finding that search engine's reproduction of party's images as thumbnails was fair use and did not constitute infringement, however the factor considering the creative nature of the copyrighted work did weigh slightly towards copyright infringement). But see *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (finding plaintiffs demonstrated likelihood of success on merits of contributory and vicarious infringement claim); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (vacating and remanding lower court's summary judgement that defendant was not liable for contributory and vicarious infringement).

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to take simple measures to prevent infringing works availability.<sup>256</sup> Vicarious liability, meanwhile, would have entailed OSP's power to stop the infringement. Had these standards been applied to *Chuing*, again a similar result may have occurred, as the links to infringing sites were simple links with no stored or framed images. The terms indirect and secondary, for the purposes of copyright infringement, are not interchangeable.<sup>257</sup> In fact, secondary liability is not mentioned in Korean copyright statutes, and there is little recognition of its synonymous usage with the former terms in American legal literature.

In 2010, three years after *Perfect 10*, similar lines of reasoning were used in the U.S. Seventh Circuit case *Flava Works, Inc. v. Gunter*.<sup>258</sup> The Seventh Circuit reversed and vacated a ruling by the lower court that disagreed with *Perfect 10* on the question of inline linking.<sup>259</sup> In *Flava Works*, defendant myVidster was an online social bookmarking website that enabled users to share videos posted elsewhere online through embedded frames.<sup>260</sup> The *Chuing* decision in Korea is reasonably supported by the logic adopted by the *Flava* Court and what was presented in Google and Facebook's *amicus curiae* brief.<sup>261</sup> The Court in *Flava* wrote in regard to indirect infringement liability, "it is insufficient that there has been infringement by someone, somewhere, that was facilitated by the operation of the myVidster website." According to the *Flava* Court, "[e]very claim of secondary copyright infringement must derive from a claim of direct copyright infringement." It also stated that a claim of secondary infringement cannot derive from another claim of secondary infringement. The actions of myVidster's activity was seen as too unrelated and distant from the actual infringement to qualify as contributory.

Regarding indirect infringement liability, the *Flava* Court stated that, "as the record stands . . . , myVidster is not an infringer, at least in the form of copying or distributing copies of copyrighted work. There is no evidence that myVidster is encouraging them, which would make it a contributory infringer."<sup>262</sup> According to

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<sup>256</sup> *Perfect 10*, 508 F.3d at 1172 ("Applying our test, Google could be held contributorily liable if it had knowledge that infringing *Perfect 10* images were available using its search engine, could take simple measures to prevent further damage to *Perfect 10*'s copyrighted works, and failed to take such steps.").

<sup>257</sup> *Id.* at 1169 (quoting *Napster*, 239 F.3d at 1013 n. 2 ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.")).

<sup>258</sup> *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

<sup>259</sup> *Id.* at 757-59, 61.

<sup>260</sup> *Id.* at 756.

<sup>261</sup> *Id.* at 760 ("The direct infringers in this case are the uploaders; myVidster is neither a direct nor a contributory infringer—at least of *Flava*'s exclusive right to copy and distribute copies of its copyrighted videos."); see Brief of Amici Curiae Google Inc. & Facebook, Inc. in Support of Neither Party, *supra* note 101, at \*4, (arguing myVidster was not a direct infringer).

<sup>262</sup> *Id.* at 758 ("myVidster isn't increasing the amount of infringement.").

the Flava court, the distinctions lie between direct infringement and contributory infringement in many respects,<sup>263</sup> and further, between contributory infringement and noninfringement.<sup>264</sup>

Applying these concepts from the *amicus curiae*, and *arguendo*, the prosecution in *Chuing* would have had to show that at least one Chuing user was a direct infringer, not merely a contributory or vicarious infringer. If that first step of establishing a direct infringer was satisfied, the prosecution would have then needed to prove the other elements of contributory or vicarious infringement before indirect liability could attach. In such a view, Chuing cannot be held liable as a “tertiary” copyright infringer, because there is no explicit legal basis for such a thing as tertiary copyright infringement. But, this fallacy of logic related to a constructive tertiary copyright infringement was not necessarily rejected by Korean courts. Although *Chuing* was a decision by the Korean Supreme Court, it is persuasive, but non-binding precedent, under the Korean civil law system.

## **B. FLUCTUATING PRECEDENTS AND POST-*CHUING* DECISION**

Korean Supreme Court decisions have fluctuated in digital copyright cases where the Court applied the same criminal law theories regarding principal and secondary liability. In fact, *Chuing* reveals that Korean courts are still in flux regarding hyperlinking cases, despite the number of and length of time that such cases have seen judicial scrutiny, even as far back as in 2003.<sup>265</sup> Korea has both civil and criminal liability.<sup>266</sup> While secondary liability is well defined under the US regime, in Korea, the parallel concept of indirect liability for copyright infringement is rather broad.

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<sup>263</sup> *See id.* at 760.

<sup>264</sup> *See id.*

<sup>265</sup> *See e.g.*, Daebeobwon [S. Ct.], Jul. 8, 2003, 2001Do1335 (S. Kor.) (referencing the court’s finding that a party who creates a website and posts obscene materials to the website can be found liable for public display as a co-plaintiff).

<sup>266</sup> Similarly, Section 506 of the United States Copyright Act provides for criminal penalties for any person who commits an infringement “by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.” 17 U.S.C. § 506.

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### **I. RELATIVELY SPARSE SUPREME COURT COPYRIGHT INFRINGEMENT DECISIONS IN GENERAL**

Korean copyright practice had been nominal over three decades (1957-1986).<sup>267</sup> Since 1986, this practice area has been developed under trade-related pressures, e.g., the negotiations with USTR, the TRIPs Agreement, and free trade agreements with other developed countries.<sup>268</sup> The expansion of the internet industry in the late 1990s has also contributed to copyright law's rapid development.<sup>269</sup> Yet the practice of copyright law in Korea is arguably not considered lucrative.

While a large number of trivial copyright prosecutions have been brought in Korea, only a relatively small number of copyright infringement cases have been decided by the Korean Supreme Court. The number of copyright cases decided by the Supreme Court has been less than both the number of patent cases and the number of trademark cases. The Supreme Court decided 39 copyright, 255 patent, and 965 trademark cases between August 15, 1945 and March 1, 1998, when the Patent Court of Korea was established under Article 3(1) of the Court Organization Act, followed by 99 copyright, 389 patent, and 574 trademark cases between March 2, 1998 and September 30, 2015.<sup>270</sup> Such a low number of copyright cases at the Supreme Court has been attributed to the weak enforcement of copyright law in Korea, which cannot provide stable rewards to copyright holders.<sup>271</sup> These numbers suggest that the trend of increasing Korean copyright jurisprudence will continue, as Korea continues to make progress in safeguarding the rights of creators and inventors in the wake of the 1986 Korean Copyright act and subsequent amendments, under which authors have rights to their work.<sup>272</sup>

Moreover, the Supreme Court has never decided copyright cases *en banc*. The Supreme Court had decided a total of 15 intellectual property cases *en banc* from the time imperial Japanese rule over Korea ended in 1945 until May 21, 2015

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<sup>267</sup> Jun-seok Park, *The Past, Present, and Future of the Korean Intellectual Property Law*, 136 THE JUSTICE 121, 147-49 (2013).

<sup>268</sup> *Id.* at 128-132.

<sup>269</sup> *Id.* at 149-50.

<sup>270</sup> Park, *supra* note 27, at note 3. Here, the numbers of copyright, patent, and trademark cases decided at Supreme Court in Korea are the search results of Supreme Court holdings using key words of "copyright," "trademark," and "patent," respectively.

<sup>271</sup> *See id.* at 78.

<sup>272</sup> *See* Edward Choi, *With Great Power Comes Great Responsibility: Korea's Role in the War Against Online Piracy*, 10 SAN DIEGO INT'L L.J. 555, 563-64, 572-73. (2009); *see* Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 UCLA PAC. BASIN L.J. 276 (2000).

and none of them was a copyright case.<sup>273</sup> In the wake of the 1986 Copyright Act, courts have struggled to develop sufficient familiarity and experience with how to build up copyright laws.

## 2. ***PRECEDENTS INVOLVING SIMPLE, AND DEEP OR DIRECT HYPERLINKS***

The *PantyNews/Newspaper Panty* Korean Supreme Court decision involved a simple hyperlink to obscene material on an initial webpage or homepage.<sup>274</sup> In 2003, the Korean Supreme Court found that the defendants who had made a simple link to the homepage of a website where plaintiffs had created an online bulletin board featuring lewd pictures were criminally liable for the infringement of the public display right.<sup>275</sup> The Court also held that the website providing the link was liable as a co-principal, according to the doctrine of control via functional domination over the infringement, for displaying obscene content openly under the Act on Promotion of Information and Communications Network Utilization and Information Protection.<sup>276</sup> *PantyNews* used direct infringement, not copyright law, but this different law was used as a rough guide before the online linking regime had developed.

It is worth repeating that a direct or deep link could harm advertising revenue, since the link would enable visitors to bypass a paywall for content, and thereby disincentivize the creation of works. But, the Seoul Central District Court did not consider such harm as a factor in determining infringement. In the 2004

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<sup>273</sup> The Supreme Court decided the first *en banc* case in 1964, another case in the 1980s, 3 cases in the 1990s, one case in the 2000s, and as of 2017, 9 cases in the 2010s.

<sup>274</sup> Daebeobown [S. Ct.], Jul. 8, 2003, 2001Do1335 (S. Kor.).

<sup>275</sup> *Id.*

<sup>276</sup> “[T]he ‘control of the crime’ paradigm represents a plausible normative theory to hold responsible as perpetrators those participants who may have been remote from the scene of the crime, but still masterminded its commission, i.e., decided whether and how the offence would be committed.” Maja Munivrana Vajda, *Distinguishing between Principals and Accessories at the ICC – Another Assessment of Control Theory*, 64 ZBORNIK PFZ 1039, 1053-4 (2014). “This control can take different forms: direct domination over the act in the case of direct perpetration (*Handlungsherrschaft*); control over the will of the direct perpetrator or domination arising out of the superior knowledge of the indirect perpetrator in the case of indirect perpetration (*Willensherrschaft*); or functional domination of the participating joint actor in the case of co-perpetration (*funktionale Tatherrschaft*).” Naha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12 CHI. J. OF INT’L L. 159, 165 (2011). “Co-perpetration is the joint commission of a criminal act by individual participants who are knowingly and willingly working together. Co-perpetration is based on the functional act-domination of each co-perpetrator, which arises from the principle of the division of labor and of the allocation of functional roles.” *Id.* at 167.

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*Sayclub*<sup>277</sup> decision, the Seoul Central District Court held that providing a deep link to an individual online news article would not be considered as reproducing, transmitting, or displaying of the article; and furthermore, may be defended as fair use.<sup>278</sup> As a result, the defendant was not found liable for copyright infringement, either as a principal or as an accessory.<sup>279</sup>

In 2009's *TwistKim* decision, the Seoul High Court held that providing a direct link to defamatory material was not aiding and abetting the commission of defamation.<sup>280</sup> The Supreme Court did not grant appellate review certiorari.<sup>281</sup>

Again in 2009, the issue in *Cell Phone Bell Sound* was whether someone who makes a link to a work is actually saving the work in RAM memory, and thereby reproducing the work under the Korean Copyright Act.<sup>282</sup> The Korean Supreme Court said no.<sup>283</sup> According to the Court, making a direct hyperlink to a work cannot constitute either of the elements of public transmission of the work under the Act, which are (1) the provision of the work for public use, and (2) the transmission of the work, whereas saving a copy of the work onto its own server can fulfil both of these prongs of the test for public transmission.<sup>284</sup> The Court also held that neither an individual who provides a link to specific website on his or her blog, nor a website operator who provides users a tag,<sup>285</sup> which facilitates linking, could be found directly infringing the reproduction and transmission rights of others. The Court also stated that providing users an address<sup>286</sup> or a tag for a link<sup>287</sup> to illegally saved music on its own server<sup>288</sup> would not result in more liability than liability based on provision of the streaming service.<sup>289</sup>

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<sup>277</sup> Seoul Central District Court, July 21, 2006, 2004Ga-Hap76058 (S. Kor.).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Seoul High Court [Seoul High Ct.], April 15, 2009, 2008Na26416 (S. Kor.).

<sup>281</sup> Seung Ki Hong, The final report to Korea Copyright Commission: A study on the current situation in Korea regarding the right to publicity, Section 3.1(45) at pp101-103 (analyzing Seoul Central District Court 2005KaHap112203, decided on Dec. 26, 2007) and Section 3.1(48) at p107 (analyzing Seoul High Court 2008Na26416, decided on Apr. 15, 2009), Dec. 2012.

<sup>282</sup> Daebeobwon [S. Ct.], Nov. 26, 2009, 2008da77405 (S. Kor.). In Korean copyright law, saving a file in RAM memory was not copying it, until the 2012 Kor.-U.S. FTA came into effect. *See* Kor.-U.S. FTA, art. 18.4.1.

<sup>283</sup> Daebeobwon [S. Ct.], Nov. 26, 2009, 2008da77405 (S. Kor.).

<sup>284</sup> *Id.*

<sup>285</sup> Tags are an internet technology that automatically link to a website and are a preliminary step in streaming content.

<sup>286</sup> An address is a URL with a hypertext tag.

<sup>287</sup> For example, providing instructions or information about the delivered location of pathways to be transmitted on the web.

<sup>288</sup> For example, so users can listen to the music without connecting to the site's homepage.

<sup>289</sup> Daebeobwon [S. Ct.], Nov. 26, 2009, 2008da77405 (S. Kor.).

As described earlier, in *Chuing*, the Supreme Court found no principal or accessory offense for infringement of reproduction or public transmission right in providing a deep or direct link.<sup>290</sup>

### 3. PRECEDENTS INVOLVING INLINE OR FRAMING LINKS

Just as these cases can point to differing viewpoints on the context of the type of link, so to can the nature of the linked materials and framing implicate whether or not infringement occurred. The most noteworthy case is the Korean Supreme Court Decision 2009Da4343 (“Yahoo Korea”), decided on March 11, 2010. Here, the Korean Supreme Court adjudicated the merits of a claim against the Korean Yahoo subsidiary by a plaintiff alleging copyright infringement.<sup>291</sup> On that date, a series of five cases involving image search engine providers Freechal,<sup>292</sup> Empas,<sup>293</sup> Naver,<sup>294</sup> and Yahoo (the latter having two cases<sup>295,296</sup>) were brought by a photographer and were all decided together.<sup>297</sup> In those five decisions, the Court held that framing or inline linking, including “slide show[s],” was not copying a work, or even transmitting or making a work available to public, and thus there was no principal offense of copyright infringement, because the linker did not transmit or make the work available to the public.<sup>298,299</sup> The Court found that the OSP’s reproduction of the photographer’s original images for use as thumbnails in the OSP’s search engine was non-infringing fair use under Art. 28 of Korean Copyright Act.<sup>300</sup> Eschewing consideration of the display right, in all five cases the provision of a thumbnail in list viewing was seen as fair use and irrelevant with regard to the display right.<sup>301</sup>

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<sup>290</sup> Daebeobwon [S. Ct.], Mar. 12, 2015, 2012Do13748 (S. Kor.).

<sup>291</sup> Daebeobwon [S. Ct.], March 11, 2010, 2009Da4343 (S. Kor.).

<sup>292</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da76256 (S. Kor.).

<sup>293</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2007Da76733 (S. Kor.).

<sup>294</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da5643 (S. Kor.).

<sup>295</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da4343 (S. Kor.).

<sup>296</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da80637 (S. Kor.).

<sup>297</sup> Jun-Seok Park, *The Copyright Infringement Liability for Reproduction, Display, and Transmission through an Inline Link and etc. by an Image Search Engine*, Civil Litigation Study XXXIII- part I, 627-702, Summarizing Table 2, 638-9 [hereinafter “Copyright Infringement Summarizing Table 2”].

<sup>298</sup> See Svensson, C-466/12, 2013; Council Directive 2001/29, art. 3 (on EU broadcast to a new public for parallel analysis of new audience infringement standard).

<sup>299</sup> “Slide show” format online links are those in which multiple hyperlinks are offered to users who can then navigate forward or backwards through the links at their discretion.

<sup>300</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2009Da4343 (S. Kor.).

<sup>301</sup> *Id.*

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With respect to the viewing of detailed large versions of external and internal images,<sup>302</sup> the Court held that OSPs did not directly infringe the reproduction or transmission rights in two cases, and had no other form of liability in three of the cases because using an electronic bulletin board system, so long as neither the original full-sized images nor their detailed, the large versions of the images were not saved in a tangible object such as the OSP's server (see Table 5).<sup>303</sup>

In the same vein, the Court held that an OSP had committed copyright infringement because they had saved the detailed large versions of original images on its server and had posted them by clicking on corresponding thumbnail images, which was not considered fair use.<sup>304</sup> This determination was because the detailed large image can substantially substitute the aesthetic appreciation of a work, and thus affect the demand of a work.<sup>305</sup> Moreover, the Court stated that such infringement was not eligible for the limitation of liabilities safeharbor under Art. 102(1)(1) of the Korean Copyright Act, since the OSP, rather than other parties as members, had executed the reproduction and transmission of a work.<sup>306</sup>

Finally, the Court stated that an internet hyperlink that did not cause the reproduction, display, or transmission of a copyrighted work was not "using copyrighted material," and thus was not infringing the right of attribution in three cases.<sup>307</sup> The Court also wrote that the display right protected under the Korean Copyright Act was irrelevant here.<sup>308</sup> Interestingly, in a different Korean Supreme

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<sup>302</sup> Here, external images are the images that have been fetched from other websites; internal ones are the images that have been uploaded by members and provided for other members to use.

<sup>303</sup> The Court did not decide on potential indirect liability of Internet portal service providers' linking under Art 760(3) of the Korean Civil Act. This treatment of bulletin board systems resembles that in the landmark American online copyright infringement case under *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (M.D. FL. 1993). In *Frena*, the defendant also owned a Bulletin Board Service, a subscription-payment website where users could upload and download photos. *Id.* At one point in time, over 170 of these images were copyrighted photos, all of which were uploaded by subscribing customers, rather than the website owner. *Id.* Despite cooperation by the website owner following a summons and continuing monitoring, *Frena* held the defendant liable for direct liability. Because the issue of direct infringement liability was based on strict liability, no intent to infringe was required. *Id.* Unlike *Frena*, here the lack of storage was dispositive.

<sup>304</sup> Daebeobwon [S. Ct.] Mar. 11, 2010, 2007Da76733, (S. Kor.).

<sup>305</sup> Daebeobwon [S. Ct.], Mar. 11, 2010, 2007Da76733, (S. Kor.). Interestingly, the Korean Court did not favor the same economic policy rationale as *Frena* in noting rights holders' ability to sell or give away the copyright when dealing with online bulletin board linking.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> A series of cases related with Sori-Bada have established that distribution right is only related to works in tangible form.



Court case, the Court stated that a plaintiff was at fault if they did not take any technical measures against the reproduction of works when they could have anticipated, and taken said measures against unauthorized reproduction and transmission.<sup>309</sup> This affirmative duty to use digital rights management technology or other measures on the part of a rights holder has been seldom encountered elsewhere.<sup>310</sup>

The cases involving image search engines, discussed below, have shown that Internet links are just pointers to the addresses where the content can be found. Linking, which is not creating or fixing a linked-to work in tangible form, has not been considered as reproduction of the work.<sup>311</sup> Courts have consistently stated that an internet link, which is only information about the web location of or a path to an individual work that is saved in a server of particular webpage or website, can only be considered an instruction or a preparatory act for a transmission request.<sup>312</sup> Internet links are irrelevant to the display of works under Korean copyright law.<sup>313</sup>

Prior to the Yahoo image search cases above, nine criminal and civil cases involving image search engines were decided between May 13, 2004 to April 26, 2007 at the Korean Supreme Court.<sup>314</sup> The Court held that the provision of thumbnail images viewed in lists was fair use in all five cases adjudicated on that issue, while the provision of saved, large image viewing was not considered fair use, again decided in all eight of the eight cases adjudicated for the latter type of potential infringements.<sup>315</sup> Moreover, the Court rejected the application of the limitation or reduction of liabilities, or immunity in all six of six cases adjudicated on that issue.<sup>316</sup>

These series of decisions illustrate the historical context in which Korean jurisprudence has advanced from simply a technical standpoint. In more than a

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<sup>309</sup> Daebeobown [S. Ct.], Mar. 11, 2010, 2007Da76733 (S. Kor.); *see, e.g.*, Daebeobown [S. Ct.], Jan. 25, 2007, 2005Da11626 (S. Kor.).

<sup>310</sup> *See, e.g.*, Seoul High Court [Seoul High Ct.], Jul. 26, 2005, 2004Na76598 (S. Kor.).

<sup>311</sup> The definition of reproduction has been changed from the reproduction of a work in tangible object to the fixation of a work in tangible object. Korean Copyright Act, art. 2.14: re-making a work in tangible object as before Jan 12, 2000; fixing a work in tangible object included before Dec 28, 2006.

<sup>312</sup> *See e.g.*, previous discussions of cases, *supra*.

<sup>313</sup> *See* Korean Copyright Act, (S. Kor.).

<sup>314</sup> Jun-Seok Park, *The Copyright Infringement Liability for Reproduction, Display, and Transmission through an Inline Link and etc. by an Image Search Engine*, Civil Litigation Study XXXIII- part I, 627-702, Summarizing Table 1, 637 [hereinafter “Copyright Infringement Summarizing Table 1”].

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

dozen image search engine cases, the Supreme Court found that the thumbnail viewing, framing, inline linking—including slide show viewing—and internal image viewing were not instances of copyright infringement. In fact, the only viewing form that the Court found liable was the viewing of the large image stored on the defendant’s own server.<sup>317</sup> In this case of providing the saved large images for viewing, the Court found not only that the fair use defense under Art. 28 was unavailable, but that the limitation of the OSPs’ liabilities under Art. 102(1) was unavailable as well.<sup>318</sup>

In summary, the Korean legal perspective addresses thumbnail images in list view as not reproducing or transmitting and does not consider display rights relevant. These thumbnail images qualify under Art. 28 provision for fair use.<sup>319</sup> Similarly, framing does not constitute the reproduction or transmission of the work, and that display rights are irrelevant. Inline linking, including slide show links, does not infringe the reproduction, display, or transmission rights. There was also no infringement of the right to attribution. Internal image viewing, where images were uploaded by website members and allowed for the use of other members, have no aiding and abetting liabilities. They are also eligible for immunity under the safe harbor provisions.<sup>320</sup>

#### **4. POST-CHUING CASE INVOLVING EMBEDDED LINKS**

Post-*Chuing*, a single case, *AllaTV*, has been adjudicated regarding embedded links. The Court found that infringement of public transmission rights as an aider and abettor resulted from the provision of embedded links.<sup>321</sup> Additionally, in September 2017, the Korean Supreme Court affirmed an appellate court decision and ruled that the defendants who had provided the embedded links to an overseas video-sharing website for broadcasting video programs, were criminally liable as accessories for the infringement of transmission rights.<sup>322</sup> Whereas the *Chuing*

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> Korean Copyright Act, art. 28 (S. Kor.).

<sup>320</sup> See *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009), for information on early attempts at American legal approaches to thumbnail linking as direct infringement liability, where evidence of “Secret Handshake” smash and grab emulated copyrighted works for duplication and distribution, and mere cached thumbnails would likely not meet direct infringement. See also *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y.), judgment entered, 111 F. Supp. 2d 346 (S.D.N.Y. 2000) (where issue of linking was subordinated to DMCA circumvention liability).

<sup>321</sup> Seoul High Court [Seoul Hight Ct.], Mar. 30, 2017, 2016Na2087313 (S. Kor.); Daebeobwon [S. Ct.], Sept. 7, 2017, 2017Da222757 (S. Kor.).

<sup>322</sup> Daebeobwon [S. Ct.], Sept. 7, 2017, 2017Da222757 (S. Kor.).

website used direct/deep links, the AllaTV website utilized embedded/inline/framing links.<sup>323</sup> The Appellate Court in Korea held that *AllaTV*, as an OSP collected embedded links to broadcast programs from overseas websites and posted them in lists on its website, aided and abetted the infringement of the public transmission right.<sup>324</sup> Subsequently, the Supreme Court affirmed.<sup>325</sup> According to Supreme Court, the aider and abettor needed not to be aware of who is the principal exactly, and thus the defendants could be liable under the interpretation of the aiding and abetting liabilities.<sup>326</sup>

The High Court reasoned as follows: first, Art. 102(1)(4) of Korean Copyright Act presumes that linking may implicate the aiding and abetting liability for copyright infringement.<sup>327</sup> Second, the transmission of a work, which means making the work available, continues as long as the uploaded work is retained, and thus available on the internet.<sup>328</sup> Providing links would enhance the practical accessibility to that work, and thus the availability of the work.<sup>329</sup> Third, if the linking service was not held liable for indirect infringement, then the linking services will most likely increase, because it would promote the information accessibility for users and the convenience in delivering unlawful works for uploaders, without being implicated in direct infringement.<sup>330</sup> The High Court found no direct infringement in the defendant's embedded linking.<sup>331</sup> Fourth, potential liability for indirect infringement would not severely limit the freedom to undertake linking activities by considering whether the linker was aware of unlawfulness of the linked-to work, whether: (1) there was negligence in not being aware of such unlawfulness, (2) linking was a fair use performing public function, or (3) the provisions for the limitation of liabilities under Art. 102 were applicable, and other closely related questions.<sup>332</sup> The High Court additionally decided there was no private use defense under Article 30, and failed to consider the partially consistent lines of reasoning in the string of cases utilized beginning with *Sayclub*.<sup>333</sup> In essence, in *AllaTV*, the court did not necessarily reverse *Chuing*, as there were distinguishable facts based on link type and the specific situation.

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<sup>323</sup> *Id.*

<sup>324</sup> Seoul High Court [Seoul High Ct.], Mar. 30, 2017, 2016Na2087313 (S. Kor.).

<sup>325</sup> Daebeobwon [S. Ct.], Sept. 7, 2017, 2017Da222757 (S. Kor.).

<sup>326</sup> *Id.*

<sup>327</sup> Seoul High Court [Seoul High Ct.], 2 Mar. 30, 2017, 016Na2087313 (S. Kor.).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

The central legacy of *Chuing* shows that Korean courts remain in flux on hyperlink cases. Whereas in *PantyNews* the Supreme Court found direct liability for a simple hyperlink to the homepage of a website where obscene material was uploaded. 12 years later the Court in *Chuing* and other cases found no liability at all for deep or direct links. Two more years later in *AllaTV* the same court found, again, an embedded link to unlawful material constituted aiding and abetting copyright infringement by the OSP. Although cases have been conflicting, the most recent 2017 decision suggests that the linking service could be indirectly liable for copyright infringement in specific circumstances.<sup>334</sup> Still, different linking technologies for links might raise different legal issues.

##### **5. SUMMARY OF KOREAN COURTS' INTERPRETATION OF HYPERLINKING LAWS**

Direct copyright infringement under Korean law for hyperlinking has been rare and almost never found. Indirect infringement is expansive for hyperlinking cases in Korea. Moreover, the Korean Supreme Court has held an OSP criminally liable for aiding and abetting copyright infringement based on both direct and indirect acts and without having actual knowledge of the identity of the principal responsible for the direct infringement, or the location and date of the offense.<sup>335</sup> Given the range of decisions that domestic cases touching on the copyright aspects of hyperlinking and infringement have produced, a number of diverse issues need to be settled soon in order to mitigate potential confusion among legal scholars, practitioners, and in particular, consumers of online media. These issues include: (1) the elements of direct and indirect copyright infringement exposed by posting a hyperlink, in particular, copyright infringement as principal and as accessory, respectively; (2) how to weigh defendant's knowledge, incentives, and intent in posting a link; (3) which evidence can show that the linking party "knew or ought to have known;" (4) why infringing material on a copyright owner's server should be differentiated from that on a third party's server; and (5) whether the four types of activities by OSPs, that are covered under Korean safe harbor non-infringement provisions are actually forms of indirect infringement themselves. The outcome of these issues may depend upon the nature and types of linking and infringing works, as well as our changing conceptions of the web. More court decisions on this subject matter would establish further guidance, standards, or clarification of Korean law on linking and infringement, including its practical effects.

So far, courts have generally concurred that providing simple, deep or direct, or perhaps inline link to another website does not directly infringe the

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<sup>334</sup> *Id.*

<sup>335</sup> Kim et. al, *supra* note 144.

copyrights of a linked-to work. Linking itself was not considered as reproducing or transmitting the linked-to work. EU courts have grappled with the substance of this viewpoint in addition to other different jurisdictions. In 2016, the Court of Justice of the European Union (CJEU) held that a person providing a link “knew or ought to have known” that it provides access to a work illegally placed on the internet.<sup>336</sup> The court imposed a duty on whoever provides links to check the legitimacy of the linked material.<sup>337</sup> The court appears to presume ill intent if the party providing links does so for “pursuit of financial gain,” and, to rebut this presumption, the person linking to the document must demonstrate her lack of knowledge that the linked material is infringing.<sup>338</sup> This decision increases the risk of copyright infringement from linking to third party material on a website or server that may not necessarily be operated by the copyright owner, especially if the website yields a financial gain.

Although court decisions have been conflicting, a linking service could be indirectly liable for copyright infringement in particular circumstances.<sup>339</sup> Even though cases have only *de facto* binding power in Korea, many commentators are looking forward to an *en banc* decision on copyright infringement in near future to resolve conflicting decisions.<sup>340</sup> The *PantyNews* decision was the singular case that contradicted the concurrent American perspective on copyright law. But, it is important to note that obscene material may have been the dispositive factor, when viewed alongside contemporaneous decisions.

This status quo begets the rule that streaming is more harmful for embedding purposes than mere linking to a non-streaming work. Essentially, streaming is more harmful for embedding in a hyperlinking infringement sense because of the additional rights implicated in the performance and transmission sense. Streaming involves an additional technological step that other types of works would not elicit. Moreover, greater file size and bandwidth from streaming could implicate subjective knowledge tests with regard to the OSP and increased demands on capacity limits for their operations.

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<sup>336</sup> Case C-160/15, *GS Media v. Sanoma Media Netherlands BV*, 2016 E.C.R.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> Linking could be liable for trafficking in circumvention technology in violation of the Digital Millennium Copyright Act (DMCA). *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001) (holding that hosting and linking to the DeCSS code violated the DMCA’s anti-trafficking provisions).

<sup>340</sup> Park, *supra* note 27, at 74-9.

Korean courts do not explicitly consider any potential harm to advertising revenue as an important factor in determining infringement.<sup>341</sup> In those cases where it is considered, it usually relates to indirect infringement and OSP liability.<sup>342</sup> Unlike a simple link, a direct or deep link could cause a harm to the advertising revenue because the link would enable for visitors to bypass the paywall, and thereby disincentivize the creation of works.<sup>343</sup> An inline or embedded link that fetches a specific webpage or a specific portion of a webpage could cause advertising revenue to nearly vanish.<sup>344</sup> But, courts have not paid attention to the economic effects of a particular hyperlink.

Instead, courts have focused on whether the linked-to work was saved or stored in the defendant's server.<sup>345</sup> As a result, an inline or embedded link that fetches an image from a distant website onto the web page being viewed was not treated differently from other links. Where there was no financial gain and the defendant had no knowledge of the work, vicarious infringement would be less likely.<sup>346</sup> Korean courts do not normally balance factors such as contributory liability, vicarious liability, and indirect (e.g., file-sharing) liability especially in view of advertising.<sup>347</sup> Rather, the focus and reliance on aiding and abetting criminal or tortious law weighs against the very civil copyright law that are within the purview of these statutes.<sup>348</sup> This crutch, this overreliance on what might be less in flux or more stable reflect a judicial tendency to avoid wading into the waters of copyright at all. By doing so, cases become even more convoluted and copyright law becomes less and less robust.

**C. PRESUMPTION OR NO PRESUMPTION OF ACCESSORY LIABILITY FOR HYPERLINKING UNDER SAFE-HARBOR PROVISIONS**

Therefore, it is valuable to respectfully challenge this notion of cascading indirect liability under Art. 102, and pointing to Art. 102(2) and Art. 102(3) to support this assertion. A reading of the statute that aiding and abetting liability is implicated by Art. 102 would necessarily render Art. 102(2) and Art. 102(3) obsolete and superfluous. Hence, to invoke the canon of construction dealing with the rule against surplusage in order to avoid the interpretation that would create

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<sup>341</sup> See discussion, Section C, *supra*.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

such an irrelevant meaning for the latter paragraphs of Art. 102.<sup>349</sup> Specifically, Art. 102(2) makes it clear that “[n]otwithstanding the provisions of paragraph (1)” the OSP will not be held liable for copyright infringement or other rights infringement “due to the reproduction or interactive transmission of works, etc. by other persons.”<sup>350</sup> The key phrases here indicate that again, paragraph (2) of the Act should be read alongside paragraph (1)—not as an optional failsafe. These facts imbue the key terms “reproduction” and “transmission” as directly referring to those specific rights granted to rights holders.

Additionally, paragraph (3) of the Article suggests that a similar approach is appropriate. Again, meant to be read alongside paragraph (1), Art. 102(3) notes that an OSP “shall not be obligated to monitor any infringement . . . or actively investigat[e]” infringement on the OSP’s services.<sup>351</sup> It is very interesting that such a broad rendering of the limitation of liability for an OSP would note so explicitly the need not to maintain an active monitoring presence, bolstering the requirement that merely a “reasonably implemented” policy or program for compliance in accordance with Art. 102(1)(3) be adopted. It stands to reason that implication of OSP liability for aiding and abetting under Art. 102 would contradict Art. 102(3), a paragraph whose wording clarifies Art. 102(1)(3) and is a necessary complement to understand the statutory scope of copyright infringement monitoring duties for OSPs. Thus, there is evidence of Art. 102(1)(3) as an indispensable section of the Article limiting OSP liability, whose meaning is as equally important as 102(3). Again, the suggestion that a cascading liability of aiding and abetting for OSPs could result here is unlikely, as it would render Art. 102(3) irrelevant or unnecessary.

It seems fitting to emphasize the remedial nature of Art. 102(3) here, which was newly inserted by Act. No. 10807 on June 30, 2011, pre-*Chuing*. Although a newer addition to the Act, the mere recent addition of the paragraph does not mean it is no less critical or in force than Art. 102(1) or 102(2), which were not newly inserted in 2011, but were still both amended in 2011.

### **PREDICTABLE AND FLEXIBLE KOREAN HYPERLINKING COPYRIGHT LAWS**

There are several challenges to overcome in criminal copyright enforcement against hyperlinking services.

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<sup>349</sup> Given inspiration for this section of the Korean Copyright Act from American law, use of this canon is not entirely inaccessible especially with influence of DMCA.

<sup>350</sup> Korean Copyright Act, art. 102(2) (S. Kor.).

<sup>351</sup> *Id.* at art. 102(3).

**A. HARMONIZATION OF INDIRECT LIABILITIES**

Major overseas precedents suggest that many countries recognize the potential indirect liability or aiding & abetting liability of linking. There are some differences in the elements of indirect liability among countries, and some discrepancies in decisions on that liability as well. Harmonization with the other laws from other nations and global laws is a process that is by no means automatic. Especially with regard to U.S. copyright laws that have their roots in case law, an easy import into Korean practice may take time.

The U.S. copyright regime has well-developed doctrines of secondary liability, i.e., contributory and vicarious liabilities.<sup>352</sup> The same specific requirements of these doctrines may be applicable to linking as well as any other activity. To support a claim for contributory copyright infringement in the context of linking, a plaintiff must demonstrate that (1) direct infringement was committed by a primary infringer; (2) a website providing links or its users had knowledge of that infringement; and (3) their activities were intended to materially contribute to that infringement.<sup>353</sup> Likewise, a website providing links for its users is vicariously liable for copyright infringement if they had the right and ability to supervise the particular performances and also had a direct financial interest in those performances. At times, U.S. courts have found that linking is not a volitional act, and thus does not cause copying or consequential infringement.<sup>354</sup>

As previously noted, in the European Union, making a hyperlink to a site with unauthorized content is regarded as communicating to the public.<sup>355</sup> Hyperlinks posted for “financial gain” presume that the person posting the link knew this fact, which is rebuttable presumption.<sup>356</sup> Knowledge is often important in establishing the possible illegal nature of the original source or profit-seeking nature of the hyperlinking website. Based on the relevant string of cases in the European Union, most cases, at least on the basis of a direct liability theory of copyright infringement, accept that hyperlinking is a form of communication to the general public. This applies to both express and implicit communications

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<sup>352</sup> “[A] defendant is vicariously liable for copyright infringement if it has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Hard Rock Café v. Concession Servs.*, 955 F.2d 1143, 1150 (7th Cir. 1992).

<sup>353</sup> *See e.g.*, *Grokster*, 545 U.S. 913; *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>354</sup> For background on how volition impacts copyright law, see Mala Chatterjee & Jeanne C. Fromer, *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, 119 COL. L. REV. 1187 (2019).

<sup>355</sup> Council Directive 2001/29, art. 3.

<sup>356</sup> *See id.*



classifications, with some exceptions where cases provided alternate rationale for extending liability.<sup>357</sup>

The EU explicitly provides for additional rights beyond that of Korean copyright law.<sup>358</sup> The right of communication coincides with the right to make available those works protected by copyright. EU Directive 2001/29/EC states that authors have the “exclusive right to authorize or prohibit any communication to the public of their works . . . including the making available to the public of their works.”<sup>359</sup> This communication to a “new public” requires (full) knowledge of the possible illegal nature of the original source and evaluates the profit-making nature of the hyperlinking website.<sup>360</sup>

Much like how the InfoSoc directive harmonized EU rights from earlier WIPO treaties, Korea has a need for harmonization of its own intellectual property rights in relation to those introduced through agreements with foreign nations.<sup>361</sup> At the same time, EU copyright law is also changing, with the Directive on Copyright in the Digital Single Market 2016/0280(COD), (EU Copyright Directive) approved by the Parliament and Council in 2019. Article 15 of the Directive as seen in the final draft from negotiations issued 26 March 2019 (Draft Article 11) and its ostensible ancillary copyright and “link tax” provisions would potentially require payments for linking to news articles versus suggested exemptions for hyperlinking and non-commercial use by individual online users.<sup>362</sup>

There exists a need to reflect the results of IP agreements with foreign countries.<sup>363</sup> Although copyright laws in the U.S. are most influential to those of S. Korea,<sup>364</sup> Germany, Japan, and the European Union also provide persuasive

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<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* (“Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”).

<sup>360</sup> See generally, Hugenholtz & van Velze, *supra* note 122.

<sup>361</sup> See Quintais, *supra* note 131; see also Raymundo Valdés & Maegan McCann, *Intellectual property provisions in regional trade agreements: revision and update* (WTO, Working Paper No. ERS-D-2014-14).

<sup>362</sup> See David Meyer, *EU Copyright Directive Article 13 Passed*, FORTUNE (Mar. 26, 2019), <http://fortune.com/2019/03/26/eu-copyright-directive-article-13-passed/>; James Vincent, *EU approves controversial Copyright Directive, including internet “link tax” and “upload filter.”*, THE VERGE (Sept. 12, 2018), <https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved>.

<sup>363</sup> Jung ET. AL., *supra* note 43.

<sup>364</sup> *Id.*

comparative viewpoints. Korean copyright developments need to consider the application and performance of relevant provisions from different laws.<sup>365</sup> Korean copyright law should strive to return to an elemental approach to copyright infringement with hyperlinking liability by focusing on rights implicated by online conduct. It is debatable how the decision to allow accessory liability would influence with the application of copyright principles due to the influence of criminal law. Additionally, broadening secondary liability through multifactor balancing tests may prove too complex for a Korean system that would rather rely on criminal bases. But, this may prove the best current solution as compared to an assessment of business models and intent or ad hoc definitions of intended users in an increasingly walled off Korean internet landscape.

## **B. PROTECTION OF COPYRIGHT AND FREEDOM ON THE INTERNET**

The effect of sanctions against the provision of links to illegal works could be avoided if courts would utilize the immunity provisions in consideration of various factors, for example, the willfulness of conduct and its potential public benefits.

Courts should consider that the potential adverse economic effect of links on advertising revenue could be variable with the technological types of the links. Inline linking, which deprives copyright holders or original transmitters of advertising revenue and may determine specific portions of the work for transmission, can be considered as infringing transmission right. Korean copyright could use liability limitation provisions in order to consider various factors such as the willfulness of a conduct and its potential public benefits. The Korean copyright regime must establish copyright as a meaningful right in reality to attempt to enforce rights and overcome a historical apathy to infringement. In resolving the tasks encountered, courts might need to pay more attention to legal theories from other laws in Korea in consideration of the total circumstances of Korea, rather than adopting wholesale the intellectual property theories from foreign jurisdictions. In cases of criminal copyright infringement, courts should get help from Korean criminal law and act in concert with the theories established in Korean criminal jurisprudence.

Given the fact that Korea does not maintain courts specializing in copyright law, enforcement actions are commonly sought in ordinary courts. Some, such as the Seoul Central District Court, have special panels that are dedicated to intellectual property disputes and judges exclusively focused on intellectual

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<sup>365</sup> *Id.*

property cases.<sup>366</sup> Increasing the number of these specialized panels and appointing more judges to handle intellectual property cases would be one way of mitigating the influence of changes to the law as a barrier to judicial application of the law. Improving the ownership mentality of judges over cases could also improve by modifying the four-year rotation program that affects judges' investment in intellectual property cases. Training should also address economic theories of monetization and the effects of advertising revenue on business models involving digital media.

Initially, it should be decided when indirect theories of infringement should apply to criminal copyright law. Criminal enforcement as well needs to: (1) establish guidelines for prosecutorial discretion; (2) limit prosecution to theories of liability already established in civil case law; and (3) target only prominent OSPs that openly defy civil enforcement actions.<sup>367</sup> Punishment can include selective punishment measures that establish quantitative (duration, amount of damages) or qualitative ("significant willful," "significant prejudicial") standards, or charging a fee for copying.

### CONCLUSION

It remains to be seen to what extent the legal community can establish a Korean hyperlink copyright regime that responds to rapidly changing societal and technological norms. The attribution and limitation liabilities rules from the Korean Copyright Act remain a tenuous complement to interpretation alongside preexisting theories of co-tortfeasors under Korean civil laws and of aider and abettor under Korean criminal laws.

The existing series of cases mean that Korean OSPs, users, and participants in online communities tend to suffer from the vagueness and inconsistency in interpretation. As such, legal development will require a sophisticated approach to balance the technological advancement of existing and future technologies with principles of fair use, safe harbors, and non-infringing uses.

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<sup>366</sup> See Yulchon, LLC, *Extensive Reorganization of the Intellectual Property ("IP") Litigation Divisions of the Seoul Central District Court*, LEXOLOGY (Apr. 24, 2017), <https://www.lexology.com/library/detail.aspx?g=f80e35a3-b2d6-427b-8573-c7ef34e181ef>.

<sup>367</sup> See also Benton Martin & Jeremiah Newhall, *Criminal Copyright Enforcement Against Filesharing Services*, 15 N. C. J. OF L. & TECH. 101 (2013).

# **APPENDIX**

Table 1. The number of trademark, patent, and copyright cases decided at the Supreme Court in Korea\*

Time Period	Trademark Cases	Patent Cases	Copyright Cases
15 Aug 1945 – 01 Mar 1998**	965	255	39
02 Mar 1998 – 30 Sep 2015	574	389	99

\*Search results of Supreme Court case holdings using the key words “trademark,” “patent,” and “copyright”

\*\*The Patent Court of Korea was, for the first time, established under Article 3(1) of the Court Organization Act on March 1, 1998.

Table 2. European cases before the Information Society Directive<sup>1</sup>

			Legality of the linked-to work	
			Legal	Illegal (copyright-infringing or pirated)
Type of liability for hyperlinker	Primary or direct liability	No communication	<ul style="list-style-type: none"> <li>• Dijonscope (2010)<sup>2</sup> (deep linking)</li> <li>• Paperboy (2003)<sup>3</sup> (deep linking; no circumvention; unfair competition: no)</li> <li>• Oberster Gerichtshof, 21.12.2004<sup>4</sup> (deep linking)</li> <li>• Sharemula (2008) (links to P2P files)</li> <li>• Sky v. Telecom, Trib. Milan 20.4.2010 (surface/deep linking)</li> <li>• RTI v. Sofri, Trib. Rome 16.07.2013 (links to live streaming)</li> <li>• Delibera AGCOM 680/13/CONS (2013) (links)</li> </ul>	<ul style="list-style-type: none"> <li>• GeenStijl v. Sanoma (App. 2013)<sup>5</sup> (deep linking; breach of duty of care: no)</li> <li>• Napster.no (2005) (linking to MP3 files)</li> <li>• BestWater v. Michael Mebes (2014) (framing of YouTube videos; no communication to a “new public” through circumvention of access-restrictive measures or the use of</li> </ul>

<sup>1</sup> See Evangelia Papadaki, *Hyperlinking, making available and copyright infringement: lessons from European national courts*, EUROPEAN J. OF LAW & TECHNOLOGY, Vol. 8, No. 1 (2017)

<sup>2</sup> Linking to other newspapers' articles in the form of a weekly review

<sup>3</sup> A deep link to copyrighted content already made available without any technological restrictions

<sup>4</sup> Mere implementation of a hyperlink was not deemed to be a reproduction of images

<sup>5</sup> A hyperlink which directed visitors to the leaked (unpublished) content on a third party website at another location on the internet; similar to footnote or reference

			<ul style="list-style-type: none"> <li>• Magistrate’s Court of Kilgis 965/2010 (links; no reproduction, no public performance; criminal offence: no)</li> <li>• C More Entertainment AB v. Linus Sandberg (2015) (deep links to a webpage with live streaming)</li> <li>• Svensson v. Retriever (2014) (links; no communication to a “new public” through circumvention of access-restrictive measures)</li> </ul>	different technical means)
		Communication	<ul style="list-style-type: none"> <li>• Shetland v. Wills (1996)<sup>6</sup> (deep linking &amp; the display of P’s headlines; reproduction)</li> <li>• Google v. Copiepresse et al. (2011)<sup>7</sup> (link to cached copies; reproduction)</li> </ul>	<ul style="list-style-type: none"> <li>• Paramount v. Sky (2013)<sup>8</sup> (surface, deep linking, uploading, &amp; content authorization)</li> <li>• Czech Supreme Court (8 Tdo 137/2013)<sup>9</sup></li> <li>• GS Media v. Sanoma (2015) (additional criteria: 1. (full) knowledge of the</li> </ul>

<sup>6</sup> Linking *per se* (non-logo); display of its headlines and the bypassing of its home page (decreased advertisement); sending by copyright holder

<sup>7</sup> Google news service linking to the titles and snippets of Belgian newspaper articles; the provision of a hyperlink to the cached copies (reproduction) on its servers allows end-users to view the cached copy

<sup>8</sup> Provision of links to the content on the host sites + uploaded the content to the host site; websites (access to them; categorized and searchable; not hosting the content; clickable hyperlinks which enabled them to view a stream of the chosen content hosted by a third-party website)

<sup>9</sup> Operating a website and providing embedded (→ direct) links to pirated movies that were hosted elsewhere

				possible illegal nature of the original source, and 2. profit-making nature of the hyperlinking website)
	Secondary or indirect (aiding and abetting)	No communication	<ul style="list-style-type: none"> <li>Sharemula (2008) (links to P2P files; contributory: no)</li> </ul>	
		Communication	<ul style="list-style-type: none"> <li>Sky v Telecom, Trib. Milan 20.4.2010 (surface/deep linking) (contributory: yes)</li> <li>RTI v Sofri, Trib. Rome 16.07.2013 (links to live streaming) (contributory: yes)</li> <li>Delibera AGCOM 680/13/CONS (2013) (links) (contributory)</li> </ul>	<ul style="list-style-type: none"> <li>Napster.no (2005) (linking to MP3 files) (contributory)</li> </ul>

Table 3. Korean mainline cases

			Legality of the linked-to work		
			Other infringement	Copyright infringement	
				No	Yes
Liability of linker	Principal	No	<ul style="list-style-type: none"> <li>Sayclub<sup>10</sup> (Seoul Central District 2004) (deep linking; not liable for the infringement of reproduction, transmission,</li> </ul>	<ul style="list-style-type: none"> <li>Cell Phone Bell Sound (SCt. 2009)<sup>12</sup> (deep or direct link to illegally saved music in D's server; provision of not linking</li> </ul>	

<sup>10</sup> (2004Gahap76058)

<sup>12</sup> Supreme Court 2008Da77405.



				<p>or displaying either as a principal or an accessory)</p> <ul style="list-style-type: none"> <li>Image Search Engine cases (SCt. 2010)<sup>11</sup> (inline linking; no principal offense for infringing reproduction or public transmission right because linker did not transmit or make the work available to public) (See Table 5)</li> </ul>	<p>itself but tag for linking; no reproduction, no public transmission)</p> <ul style="list-style-type: none"> <li>Chuing (SCt. 2015)<sup>13</sup> (deep or direct link; no principal or accessory offense for infringement of reproduction or public transmission right)</li> </ul>
		Yes	<ul style="list-style-type: none"> <li>PantyNews (SCt. 2003) (simple link, public display of obscene content: yes<sup>14</sup>, co-principal according to the doctrine of functional control over the infringement)</li> </ul>		
		No	<ul style="list-style-type: none"> <li>TwistKim (Seoul High Ct. 2009, an appeal to</li> </ul>		<ul style="list-style-type: none"> <li>Chuing (SCt. 2015)<sup>15</sup> (deep or direct link; no</li> </ul>

<sup>11</sup> Supreme Court 2009Da80637, Supreme Court 2009Da4343, Supreme Court 2009Da5643, Supreme Court 2009Da76256, Supreme Court 2007Da76733.

<sup>13</sup> Supreme Court 2012Do13748.

<sup>14</sup> Art. 44-7.1.1., Art. 74.1.2. of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.

<sup>15</sup> Supreme Court 2012Do13748.

	Accessory (aiding and abetting)		S.Ct. rejected without giving reason to the Court) (direct link, defamation – no aiding & abetting)		principal or accessory offense for infringement of reproduction or public transmission right)
		Yes			<ul style="list-style-type: none"> <li>AllaTV (S.Ct. 2017) (embedded links; infringement of public transmission right)</li> </ul>

Table 4. U.S. cases

			Legality of the linked-to work	
			Legal	Illegal (copyright-infringing or pirated)
Liability of hyperlinker	Primary or direct liability	No	Linking is not a volitional conduct. Perfect 10 <sup>16</sup> (9th Cir. 2007) (inline linking, no reproduction) Flava (7th Cir. 2012) (“bookmarking,” framing; no infringement of rights of reproduction or distribution)	
		Yes		
	Secondary or indirect (aiding and abetting)	No	Flava (7th Cir. 2012) (“bookmarking,” framing; no infringement of rights of reproduction, distribution, or public performance)	
		Yes		

<sup>16</sup> Perfect 10 v. Google, 508 F.3d 1146 (9th Cir. 2007).

Table 5. Five major Korean image search cases decided together

Case Name	Framing	Viewing a detailed version of external images	Viewing a detailed version of internal images
Yahoo Korea (1)* (2009Da4343)	No infringement	No infringement	No infringement (direct, aiding & abetting, vicarious)
Naver*	No infringement	No infringement	No infringement (aiding & abetting, vicarious)
Yahoo (2)*	No infringement	No infringement	No infringement (aiding & abetting, vicarious)
Freechal	---	---	No infringement (direct)
Empas	---	Infringement; no fair use; no limitation of liabilities	

\*No infringement of attribution right

Table 6. Linked-to work in Korea by frequency

Liability		Work not infringed				Infringed work			
		Principal		Aider & abettor		Principal		Aider and abettor	
		Y	N	Y	N	Y	N	Y	N
Linking technology type	Simple link	1 (PantyNews)							
	Direct and deep link		1 (SayClub)		1 (SayClub)		2 (Bell, Chuing)		2 (Bell, Chuing)
	Framing, inline link, and embedded link	Saved server image: No fair use 8/8 (No immunity, 6/8)	Thumbnail image in list: Fair use 5 (fair use defence 5/5); thumbnail image in list (no	Detailed viewing of external	Detailed viewing of stored image, 8/8;			Embedded link, 1/1 (AllaTV); knowledge of infringement	

			reproduction or transmitting, displaying irrelevant, fair use 5/5*)  Framing: 5/5	image, 1/4	Detailed viewing of external image, 3/4				
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\* The 5 cases decided together on March 11, 2010 at Supreme Court (See Table 5)

Table 7. Exclusive rights protected by copyright law in Korea and the United States

Korea	U.S.
Art. 16 of Korean Copyright Act (reproduction)	17 U.S.C. §106(1) (reproduction)
Art. 17 of Korean Copyright Act (public performance)	17 U.S.C. §106(4) (public performance)
Art. 18 of Korean Copyright Act (public transmission)	17 U.S.C. §106(3) (distribution); 17 U.S.C. §106(4) (public performance); 17 U.S.C. §106(6) (public performance of sound recordings by means of a digital audio transmission)
Art. 19 of Korean Copyright Act (public display)	17 U.S.C. §106(5) (public display)
Art. 20 of Korean Copyright Act (distribution)	17 U.S.C. §106(3) (distribution)
Art. 21 of Korean Copyright Act (lease)	17 U.S.C. §106(3) (distribution)
Art. 22 of Korean Copyright Act (derivative works)	17 U.S.C. §106(2) (derivative works)