

Abstract**A Critique of the Open Capture Decision**

- focusing on the logic of the distinction between ‘use’ and ‘make use of’, the logic for imposing copyright infringement liability based on license violations

Park, Jun-Seok*

Despite the meaningful significance of the Open Capture decisions which declared that temporary reproduction accompanied by execution of a computer program could also be protected under the Article 35-2, one of the fair use clauses in the Korean Copyright Act (KCA), this article intensively criticized the appeal court decision in Open Capture case for the two particularly notable logic errors.

First of all, it is unreasonable to distinguish between the “use” in the area where the exclusive right of copyright is granted and the “make use of” in the area where such a right is not permitted. It is merely a deadly follow-up to the discussion in Japan that does not at all match the KCA, and the section on “License to Use of Works” of Article 46 is also applicable to a license agreement covering areas where copyright is not granted.

Secondly, it is incorrect to take a position that only a license violation for the “use” as described above can cause copyright infringement liability, for a criterion for imposing the copyright infringement liability based on license violations. After thorough review on the related discussion of the United States, Japan and Korea all together, it is founded in this article that a powerful opinion in Korea whose position is similar to that of the appeal court decision in Open Capture case overlooks the fact that it is not the violation itself but the unauthorized use which critically decides whether or not the copyright infringement liability would be finally imposed. Even though there is not a license violation for the “use” in the area where the exclusive right of copyright

* Professor, School of Law, Seoul National University

is granted, the copyright infringement liability should be imposed if there is a major license violation which is enough to support the de facto confirmation of no authorization use. By this way, in my opinion, it is most appropriate to choose a criterion under which the copyright infringement liability will be imposed for any major violation after discerning between major violation and minor violation. The above criterion favored by this article is unavoidably having not only some flexibility but also some vagueness because the reflection of two policy considerations atypically does restrict the scope of copyright infringement liability even though any license violation originally would always invoke copyright infringement liability.

Besides those things, the Open Capture decision strongly implies that the legislative intent of Article 117 (a) of the US Copyright Act must be partially reflected in the interpretation of the fair use provision of Article 35-2 and that it is necessary for the court to positively apply the copyright misuse doctrine in civil lawsuits related to the so-called “settlement money business”. In addition, this article tried to clearly summarize the above analysis contents in the “conclusion” part as far as possible.

Keywords

copyright license, copyright license agreement, license to make use of, article 46 license clause, article 35-2 temporary reproduction, Open Capture case, use and make use of, imposing of contractual liability and copyright infringement liability based on license violations, legitimate holder of computer programs, application of the copyright misuse doctrine to so-called settled money business