

Abstract

Rethinking Dependence (Copying) Requirement, Part I: Its Conceptual Construction

Shiwon Ryu*

‘Dependence’ (‘Copying’ in the U.S. law) is the very most important requirement of copyright infringement in that it embodies the inherent relative nature of copyright. However, the legal construction and nature of the dependence has not been sufficiently examined as compared to substantial similarity, which led to the dominant tendency of calling it as a subjective requirement without any concrete basis. Through historical and comparative analysis, this article finds that dependence is not yet a fully established concept in Korean copyright jurisprudence, and there is room for reconstruction thereof by referring to corresponding concepts in other jurisdictions. Two main arguments studied herein are as follows.

First, dependence should be reinterpreted as a factual and an objective requirement. The characterization of dependence as a subjective requirement is inconsistent with the reality of mechanical mass reproduction and is highly anomalous in comparative law. While there is a body of literature in Korea that seems to question or not actively favor treating dependence as a subjective requirement, there is a lack of studies that directly argues that dependence has objective features or discusses why it is so. It is discussed that viewing dependence as an objective requirement helps avoiding some problematic situations that are difficult to explain based on treating it as subjective element, as well as unnecessary practical debates about the inner workings of the human mind.

* Chonnam National University Law School, Associate Professor, J.S.D.

Second, dependence is constructed as causality as an objective requirement. As the phrase “relationship of depending upon” suggests, dependence is relational in nature, and its content is a causal link from the former work to the later one. The case law in United Kingdom uses expressions such as “causal connection” and “derivation” to characterize the causal nature of the element similar to our dependence, and similar approaches are found in Japan, the United States, and elsewhere. The causality constituting the concept of dependence is organized as a normative causality rather than a purely factual one. Therefore, the determination of dependence should be viewed as a process of subjecting considerations of various indirect facts which include but not limited to reasonable opportunity for access to the purpose of copyright law. There should be provided caution against an overly easy finding of access in the modern media environment, and the judgment of dependence is to be based on a balanced view taking into consideration that expanded opportunities of access to other works may also open up new creative horizons.

Keywords

copyright infringement, dependence, subconscious copying, independent creation, substantial similarity, objective requirement, causality, mechanical reproduction