

## ARCHIVAL INSTITUTIONS AND COPYRIGHT IN KOREA\*

## INSTITUIÇÕES DE ARQUIVAMENTO E DIREITOS AUTORAIS NA CORÉIA

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## ABSTRACT

Archiving copyrighted materials is often mandated to preserve them for years to come, and especially when handling digital materials created in formats, or housed on media, that are likely to become obsolete. The predominant parts of the archives are unpublished works. In order for archiving institutions to gather, house and preserve mass collection of copyrighted resources, they need to be wise enough to comply with copyright law. The copyright law issues surrounding archiving institutions have arisen out of disputes over the relationship among authors, archiving institutions, and users of archives. The Korean copyright law has already had first sale doctrine, limitation to copyright protection for reproduction and/or public transmission of libraries, etc. temporary copying exception, fair use exception, exploitation of cultural facilities exception, and database right. On the other hand, it lacks PLR scheme, ECL system, and text and data mining exception. In terms of ECL system and text and data mining exception, a bill on the Korean Copyright Act was submitted to the Korean National Assembly in order to newly insert ECL in 2021. Especially, revision of the Korean Copyright Act needs to be made to introduce text and data mining exception because the fair use doctrine has not been used by the Korean courts so far and because collected data are commonly used to train models to generate similar archives by using AI technology. In addition, archiving institutions need to take into account moral rights of authors in archiving copyrighted materials.

## RESUMO

Arquivamento de materiais de direitos autorais frequentemente são obrigatórios para preservá-los nos anos seguintes, e especialmente quando estão lidando com materiais digitais criados em formatos, ou armazenados em mídias, que são propensas a se tornarem obsoletas. A maior parte dos arquivos são trabalhos não publicados. Para as instituições de arquivamento coletar, armazenar e preservar coleções massivas de recursos de direitos autorais, elas precisam ser sábias o bastante para cumprir com as leis de direitos autorais. Os problemas legais dos direitos autorais envolvendo as instituições de arquivamento têm crescido a partir de disputas sobre o relacionamento entre os autores, instituições de arquivamento, e usuários de arquivos. A lei coreana de direitos autorais já possui a doutrina de primeira venda, limitação à proteção de direitos autorais para reprodução e/ou transmissão pública de bibliotecas, exceção temporária de cópia, exceção de uso justo, exceção de exploração de instalações culturais, e direito de base de dados. Por outro lado, falta um esquema de Direitos de Marca Própria (Private Label Rights ou PLR), sistema ECL (Enterprise Control Language), e exceção de mineração de textos e dados. Se tratando do sistema ECL e exceção de mineração de textos e dados, uma emenda à Lei Coreana de Direitos Autorais foi submetida à Assembléia Nacional Coreana em virtude de inserir recentemente a ECL em 2021. Especialmente, revisões à Lei Coreana de Direitos Autorais precisam ser feitas para introduzir a exceção

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**KEYWORDS:** Archives. Archiving institution. First sale doctrine. Fair use. Artificial intelligence. Text and data mining.

*de mineração de textos e dados em virtude da doutrina do uso justo ainda não ser utilizada pelos tribunais coreanos até então e porque dados coletados são comumente utilizados para treinar modelos para gerar arquivos similares utilizando tecnologia de IA. Em adição, instituições de arquivamento precisam levar em conta os direitos morais dos autores nos arquivamento de materiais de direitos autorais.*

**PALAVRAS-CHAVE:** Arquivos. Instituições de arquivamento. Doutrina de primeira venda. Uso justo. Inteligência Artificial. Mineração de textos e dados.

## INTRODUCTION

Archiving copyrighted materials is often mandated to preserve them for years to come, and especially when handling digital materials created in formats, or housed on media, that are likely to become obsolete. The predominant parts of the archives are unpublished works. In order for archiving institutions to gather, house and preserve mass collection of copyrighted resources, they need to be wise enough to comply with copyright law.

In this context, the Korean copyright law purports to protect the rights of authors and the rights neighboring on them and to promote fair use of works in order to contribute to the improvement and development of culture and related industries.<sup>1</sup> Hence, the Korean copyright law aims in striking a balance between the protection of the rights of authors and neighboring rights and the promotion of fair use of copyrighted works. Archiving institutions in Korea play an important role in promoting the purpose of the Korean copyright law in the course of preserving archives.

This Article deals with copyright law issues relating to archiving institutions in taking into account the purpose of the Korean copyright law. The copyright law issues surrounding archiving institutions have arisen out of disputes over the relationship among authors, archiving institutions, and users of archives.

At the outset, this Article clarifies the distinction between archiving institutions and archiving materials to analyze viewpoints of authors, archiving institutions, and users of archives, respectively.

Secondly, it discusses economic rights related to archiving institutions. In this context, it deals with public lending right scheme, first sale doctrine in connection with distribution right, reproduction or public transmission exception for libraries, etc, temporary copying exception, exploitation exception

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1 Article 1 of the Korean Copyright Act whose current version is Act No. 17588, revised on 8 December 2020 and effective since 9 June 2021.

for cultural facilities, fair use doctrine, orphan works limitation and extended copyright licensing scheme.

Thirdly, it explores issues related to moral rights of authors in connection with archiving institutions.

Fourthly, it explains database right of archiving institutions.

Fifthly, it scrutinizes archiving activities of archiving institutions which use artificial intelligence technology.

In conclusion, it summarizes all of copyright law issues related to archiving institutions in Korea.

## 1. CLARIFICATION OF TERMINOLOGY

### 1.1. THE DEFINITION OF ARCHIVES

A term, “archives”, is to illustrate both archival materials and the archival institutions which collect, store, and preserve those materials.<sup>2</sup> As far as archival materials are concerned, they are classified as the typical or broader definition of archives. The typical definition of archives is “a collection of historical documents or records providing information about a place, institution or group of people.”<sup>3</sup> The broader definition of archives, which is likely to be relied on by archivists, is “archival materials are materials in all formats, created or received by a person, family or organisation in the conduct of their affairs and preserved because of their enduring value and significance.”<sup>4</sup> Hence, the distinction between archival materials and archiving institutions is made in this context.

### 1.2. ROLES OF ARCHIVING INSTITUTIONS AND FUNCTION OF COPYRIGHT

The Universal Declaration on Archives, as adopted by the 36<sup>th</sup> Session of the General Conference of UNESCO in 10 November 2011 sets forth the role of archives as follows:

“Archives record decisions, actions and memories. Archives are a unique and irreplaceable heritage passed from one generation to another. Archives are managed from creation to preserve their value and meaning. They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens’ rights and enhances the quality of life.”<sup>5</sup>

2 D. SUTTON, *Background Paper on Archives and Copyright, prepared for Thirty-Eighth Session*, WIPO Standing Committee on Copyright and Related Rights (Geneva, 1 to 5 April, 2019), SCCR/38/7, 29 March, 2019, at 4.

3 Id.

4 Id.

5 INTERNATIONAL COUNCIL ON ARCHIVES, *Universal Declaration on Archives on 10<sup>th</sup>*

In short, the role of archiving institutions is to preserve, manage, describe and provide access to archives. By doing so, they aim in expanding the public's capacity to provide access to archival materials and in promoting academic researches and the free exchange of information in our community. Archiving institutions are by and large non-profit organizations which houses both published and predominantly unpublished works.<sup>6</sup> In this context, the main focus needs to be on archival materials rather than archiving institutions because they are frequently stored in places other than archiving institutions, such as “libraries, museums, schools, universities, hospitals, private foundations, authors' houses, religious organizations, charities, arts bodies, community goods, government departments and businesses.”<sup>7</sup> Hence, based on the broader concept of archives, even libraries, museums, schools or private foundations can be archiving institutions to the extent to which they play a role in collecting, storing and preserving archiving materials. In a sense, the copyright regime may encourage archiving institutions to preserve unique materials and to make those materials accessible to users.

## 2. ECONOMIC RIGHTS AND LIMITATIONS TO THEIR PROTECTION

### 2.1. PUBLIC LENDING RIGHT

Public lending right (hereinafter “PLR”) is the right of authors to receive payment for free public use of their copyrighted works in libraries. PLR was introduced by Denmark in 1946 for the first time. In UK, it was adopted by the PLR Act of 1979. As of 1 September, 2021, 34 countries adopted PLR scheme.<sup>8</sup> For example, a published author, illustrator, editor, translator or audio book narrator can receive up to £6,600 per year as a result of public library book loans in UK.<sup>9</sup> The libraries covered by PLR scheme vary depending upon each country's situation. Most of them cover only public libraries<sup>10</sup> but some of them include school libraries<sup>11</sup> or limit the coverage to governmental libraries.<sup>12</sup>

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*November 2011*, available at <https://www.ica.org/en/universal-declaration-archives>, accessed on 10 October, 2023.

6 SUTTON, *supra* note 2, at 4-5.

7 *Id.* at 5.

8 PLR INTERNATIONAL, available at <https://plrinternational.com/established>, accessed on 10 October, 2023.

9 BRITISH LIBRARY, *PLR*, available at <https://www.bl.uk/plr#>, accessed on 10 October, 2023.

10 See, e.g., Dutch Copyright Law (1988 and 1995), program in place since 1971; 1994 legislation revised in 2006 Spanish IP Act to include public libraries.

11 See, e.g., Australian PLR Act (1985), Program since 1974.

12 Libraries covered by Italian PLR Law (2006) are State-funded and local government libraries. See PLR International, available at <https://plrinternational.com/established>, accessed on 10 October, 2023.

Whether PLR scheme can be extended to digital materials is well explained in *Vereniging Openbare Bibliotheek v Stichting Leenrecht*.<sup>13</sup> The European Court of Justice held that the scope of the derogation of the PLR under the EC Rental and Lending Rights Directive<sup>14</sup> extends to certain digital materials under specific conditions.<sup>15</sup> As a result, libraries in EU countries are not necessary to obtain prior permission for lending of e-books if they pay remuneration to authors.<sup>16</sup>

In Korea, Korean Publishers Association has criticized the 2021 Bill on the Korean Copyright Act submitted by Legislator Jong-hwan Do<sup>17</sup> because it did not include PLR scheme.<sup>18</sup> As of 10 October, 2023, public libraries, among archiving institutions, are not under PLR scheme in Korea.<sup>19</sup>

## 2.2. DISTRIBUTION RIGHT AND FIRST SALE DOCTRINE

The term “distribution”, is defined as “a transfer by assignment or lending of the original or its reproduction etc. to the public for free or at charge.”<sup>20</sup> An author is entitled to distribution right as one of his/her economic right. However, the owner of a lawfully acquired original or copy of a work is entitled to sell or lend that work without having to obtain permission of the copyright owner.<sup>21</sup> It

13 ECJ case C-174/15 (10 November 2016).

14 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

15 ECJ case C-174/15 (10 November 2016).

16 Id.

17 A Bill of the Korean Copyright Act (Bill No. 2107440, submitted to the Korean National Assembly on January 15, 2021), available at [https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_Q2T1M0X1D0M4W1T4M3O0R3Y4C7O3D2&ageFrom=21&ageTo=21](https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Q2T1M0X1D0M4W1T4M3O0R3Y4C7O3D2&ageFrom=21&ageTo=21), accessed on 12 October, 2023.

18 D. SEONG, *Publishing industry criticizes that “the hasty bill to amend the Copyright Act ... will cause side effects”*, 3 February 2021, *Yonhap News*, available at <https://www.yna.co.kr/view/AKR20210203152400005>, accessed on 10 October, 2023.

19 HEUNG YONG LEE and YOUNG-SEOK KIM, *A Study on the Operation of the Public Lending Right System*, *Journal of Korean Library and Information Science Society*, vol. 46 no. 4, 2015, at pp. 355 – 377.

20 Article 2, subparagraph 23 of the Korean Copyright Act.

21 See, e.g., Article 20 of the Korean Copyright Act prescribing that “The author shall have the right to distribute the original or copy of his/her work: Provided, That if the original or reproduction of the work has been offered to a deal by means of sale, etc. with permission of the relevant holder of author’s property right, the same shall not apply.”; 17 U.S.C. §109 (a) stating that “(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on-

(1) the date of the publication in the Federal Register of the notice of intent filed with the

is called as “first sale doctrine.” This doctrine covers the lending of published materials by archiving institutions. According to Korean case law, the first sale doctrine is applicable to transfer or sale of copyrighted tangible materials only.<sup>22</sup> Assignment or lending of copyrighted intangible works falls within the scope of public transmission.<sup>23</sup>

### 2.3. LIMITATION TO PROTECTION OF REPRODUCTION RIGHT OR PUBLIC TRANSMISSION RIGHT

In 1968, Vanderbilt Television News Archive (hereinafter “VTNA”)<sup>24</sup> had begun to record, gather, index, and have the public acceded to three major U.S. television networks’ news broadcasts.<sup>25</sup> The VTNA recorded the national news broadcasts from the local affiliates rather than gathered or licensed from the networks. Researchers could view the news programs in Nashville or can ask to have copies of chosen programs, pieces, or even commercials compiled and sent to them.<sup>26</sup> CBS, one of the three major TV networks, brought a lawsuit against VTNA for copyright infringement in 1973, arguing that the VTNA modified and rent its news broadcasts to users. In this lawsuit, the VTNA’s primary argument was that it had performed a public service protected by the First Amendment of the U.S. Constitution by making the news information available to users, resulting in the public good.<sup>27</sup> The lawsuit lasted for three years and created significant public controversies over TV news preservation. Finally, the U.S. lawmakers revised the US Copyright Act in 1976 to solve this problem.<sup>28</sup> The U.S. Copyright Act of 1976 prescribes that a library or archives, or any of its employees acting within the ambit of their employment are exempted from copyright infringement when they reproduce no more than one copy or

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Copyright Office under section 104A(d)(2)(A), or (2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first.”.

22 Korean Supreme Court Decision on 14 December 2007 (Case No. 2005 Do 872). See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) (holding that the “first sale” doctrine of U.S. Copyright Act applies to copyrighted works lawfully made and first sold outside the U.S.); D. ILAN et al., *Supreme Court Finds “First Sale” Copyright Doctrine Applies to Copies Lawfully Made and First Sold Abroad*, 25 No. 6 *Intell. Prop. & Tech. L.J.* 7, 7-8 (2013).

23 H. LEE, *Copyright Law*, Seoul, Pakyoungsa, 2015, at 506 (3<sup>rd</sup> ed.).

24 VANDERBILT UNIVERSITY, *Vanderbilt Television News Archive*, available [https://sr.ithaka.org/wp-content/uploads/2015/08/SR\\_Vanderbilt\\_20140129.pdf](https://sr.ithaka.org/wp-content/uploads/2015/08/SR_Vanderbilt_20140129.pdf), accessed on 10 October, 2023.

25 L. HILDERBRAND, *Inherent Vice: Bootleg Histories of Videotape and Copyright*, Durham, Duke University Press, at 117 (2009).

26 Id.

27 Id. at 118.

28 17 U.S.C. §108 (Limitations on exclusive rights: Reproduction by libraries and archives).

phonorecord of a work, or distribute such copy or phonorecord with certain conditions.<sup>29</sup> The certain conditions are as follows:

- That the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- That the collections of the library or archives are i) open to the public, or ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- That the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced.<sup>30</sup>
- Under UK copyright law, archiving institutions are allowed to make single copies of unpublished works housed in their archives for users. When this exception was introduced to UK, archiving institutions may or may not charge the user a specified sum of money for making the copy. However, archiving institutions are only permitted to make a copy of an unpublished work for a user if:
  - 1) The copy is provided in response to a written request containing specific information;
  - 2) The work was not published or communicated to the public before it was deposited with the archiving institution; and
  - 3) The copyright owner has not prohibited making copies of the work.

In Korea, non-profit archiving institutions are exempt from copyright infringement when they reproduce or transmit interactively copyrighted works under certain conditions.<sup>31</sup> If National Library of Korea collects archives to

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29 17 U.S.C. §108 (a).

30 17 U.S.C. §108 (a) (1) to (3).

31 Article 31 (1) to (7) of the Korean Copyright Act prescribes that

“Article 31(Reproduction, etc. in Libraries, etc.) (1) Libraries under the Library Act and the facilities (including the heads of the relevant facilities; hereinafter referred to as “libraries, etc.”) as prescribed by Presidential Decree among those facilities which provide books, documents, records and other materials (“hereinafter referred to as “books, etc.”) for public use may reproduce the works by utilizing books, etc. held by the libraries, etc. (in the case of subparagraph 1, including the books, etc. reproduced by or interactively transmitted to the libraries, etc. in accordance with the provision of paragraph 3 hereof) in any of the following cases: provided that in the case of subparagraphs 1 and 3, the works may not be reproduced in digital format.

1. Where, at the request of a user and for the purpose of research and study, a single copy of a part of books, etc. already made public is provided to him;

2. Where it is necessary for libraries, etc. to reproduce books, etc. for the purpose of preserving such books, etc.; and

preserve online materials, they can be reproduced without permission of authors.<sup>32</sup>

## 2.4. TEMPORARY REPRODUCTION EXCEPTION

Archiving Institutions often assist their users in locating documentary information and manuscript collections via the Internet. Moving from one web site to another, the computer user downloads images and text temporarily before the next site is visited. Article 35 bis of the Korean Copyright Act provides temporary reproduction exception. It states that “Where a person uses works, etc. on a computer, he/she may temporarily reproduce such works, etc. in that computer to the extent deemed necessary for the purpose of smooth and efficient information processing: Provided, That this shall not apply where the use of such works, etc. infringes on copyright.”<sup>33</sup>

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3. Where libraries, etc. provide other libraries etc. with a reproduction of books, etc. that are out of print or scarcely available for similar reasons at the request of other libraries etc. for their collection purpose.

(2) Libraries, etc. may reproduce or interactively transmit their books, etc. to allow users to peruse them in such libraries, etc. by using devices capable of information processing such as computers, etc. In such case, the number of users who may peruse them at the same time shall not exceed the number of copies of such books, etc. held by the libraries, etc. or authorized to be used by the persons with copyrights or other rights protected according to this Act.

(3) Libraries, etc. may reproduce or interactively transmit their books, etc. to allow users in other libraries, etc. to peruse them by using computers, etc.; provided that, in those cases where all or a part of the books, etc. have been published for sale, such books, etc. shall not be reproduced or interactively transmitted unless a period of five years has elapsed since the publication date of such books, etc.

(4) In reproducing books, etc. pursuant to subparagraph 2 of paragraph (1), paragraph (2) or paragraph (3), libraries, etc. shall not reproduce such books, etc. in digital format if they are being sold in digital format.

(5) In reproducing books, etc. in digital format pursuant to subparagraph 1 of paragraph (1), or reproducing or transmit interactively books, etc. for the purpose of allowing perusal inside other libraries, etc. pursuant to paragraph (3), libraries, etc. shall pay remuneration to the holder of economic right in accordance with the standards determined and published by the Minister of Culture, Sports, and Tourism; provided that the said provision shall not apply to books, etc. (excluding those books, etc. which are, in part or in whole, published for a sales purpose) regarding which the state, local governments or schools as provided in Article 2 of the Higher Education Act hold economic right.

(6) In terms of distribution of remuneration, etc. under paragraph 5, paragraphs 7 to 11 of Article 25 shall apply mutatis mutandis to the foregoing paragraph 5.

(7) If books, etc. are reproduced or transmitted interactively in digital format pursuant to the foregoing paragraphs (1) through (3), libraries, etc. shall take necessary measures, such as reproduction prevention measures, as provided by Presidential Decree in order to prevent infringement of copyrights and other rights protected under this Act.”

32 Article 31 (8) of the Korean Copyright Act.

33 This Article Newly Inserted by Act No. 11110, Dec. 2, 2011.

## 2.5. EXPLOITATION OF ARCHIVES

The Korean copyright law allows cultural facilities to reproduce, distribute, perform public, display or transmit publicly the works by using the archived materials for the purpose of collecting, sorting out, analyzing and preserving the materials, excluding cases for profit.<sup>34</sup> The cultural facilities refer to National Assembly Library, National Library of Korea, Regional Central Library, National Museum of Korea, National Museum of Modern and Contemporary Art and National Folk Museum of Korea.<sup>35</sup> The holder of economic right may demand that the use of the relevant work be stopped with respect to its use by the cultural facilities and the cultural facilities in receipt of the request shall suspend its use without delay.<sup>36</sup> The holder of economic right

34 Article 35 quater of the Korean Copyright Act provides that “Article 35 quater (Reproduction, etc. by cultural facility)

(1) If the holder of the economic right of a public work or his/her residence (excluding the work of a foreigner under Article 3) is unknown despite the fact that Among the facilities continuously used for cultural and artistic activities operated by the State or local government, cultural facilities prescribed by Presidential Decree (including the head of the relevant facility; hereinafter referred to as “cultural facilities” in this Article) shall meet the standards prescribed by Presidential Decree, the cultural facilities may reproduce, distribute, perform public, display or transmit publicly the work by using the materials archived in the cultural facilities for the purpose of collecting, sorting out, analyzing and preserving the materials, excluding cases for profit.

(2) The holder of economic right may demand that the use of the relevant work be stopped with respect to its use by the cultural facilities under paragraph (1), and the cultural facilities in receipt of the request shall suspend its use without delay.

(3) The holder of economic right may claim remuneration for the use pursuant to paragraph (1), and the cultural facilities shall pay the remuneration through negotiation with the holder of economic right.

(4) In the event that negotiations on remuneration have been carried out pursuant to paragraph (3), but no agreement has been reached, the cultural facilities or the holder of economic right shall apply to the Minister of Culture, Sports and Tourism to determine the amount of the remuneration.

(5) When there is an application for determination of the amount of the remuneration under paragraph (4), the Minister of Culture, Sports and Tourism shall determine the size and timing of remuneration in consideration of the purpose of use of the copyrighted work, form of its use, scope of its use, etc. and inform the cultural facilities and the holder of economic right of them.

(6) In cases where cultural facilities intend to use copyrighted works pursuant to paragraph (1), necessary measures, such as the posting of information related to the list and contents of works used and measures preventing reproduction, shall be taken by the cultural facilities to prevent infringement of copyrights and other rights protected under this Act in accordance with Presidential Decree.

(7) Matters necessary for the procedure and method for requesting suspension of use of copyrighted works pursuant to paragraphs (2) through (5), and the application and decision procedure for determining the amount of remuneration shall be prescribed by Presidential Decree.”

35 Article 16 bis of the Enforcement Decree of the Korean Copyright Act.

36 Article 35 quater (2) of the Korean Copyright Act.

may claim remuneration for the use of archives by archiving institutions, and the cultural facilities shall pay the remuneration through negotiation with the holder of economic right.<sup>37</sup> Cultural facilities are limited to certain archiving institutions under the Korean Copyright Act.

## 2.6. FAIR USE EXCEPTION

The Korean Copyright Act provides fair use doctrine for copyrighted works and computer programs.<sup>38</sup> The fair use doctrine was first introduced to implement the Free Trade Agreement between Korea and USA<sup>39</sup> in 2011.<sup>40</sup> The court will take into account the following factors to determine whether archiving activities are fair:

- (i) Purposes and characters of use including whether such use is for or not-for nonprofit;
- (ii) Types and natures of works, etc.;
- (iii) Amount and substantiality of portion used in relation to the whole works, etc.; and
- (iv) Effect of the use of works, etc. on the current or potential market for or value of such work etc.<sup>41</sup>

However, the Korean courts have been conservative in applying for fair use doctrine, so that there has been only a few Korean Supreme Court's decisions applying for fair use doctrine.<sup>42</sup> In this context, US copyright law and

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37 Article 35 (3) of the Korean Copyright Act.

38 Article 35 quinque of the Korean Copyright Act.

39 The United States-Korea Free Trade Agreement (hereinafter "KORUS FTA") was signed by both governments on June 30, 2007 and was entered in to force on March 15, 2012.

40 Article 35 ter of the Korean Copyright Act, which was Act No. 11110, revised on 2 December 2011 and effective since 1 August 2013. Now, the provision is prescribed under Article 35 quinque of the Korean Copyright Act.

41 Article 35 quinque of the Korean Copyright Act provides that "Article 35 quinque (Fair Use of Works, etc.)

(1) Except as provided in Articles 23 through 35-2 and 101-3 through 101-5, where a person does not unreasonably prejudice an author's legitimate interest without conflicting with the normal exploitation of works, he/she may use such works. <Amended by Act No. 14083, Mar. 22, 2016>

(2) In determining whether an act of using works, etc. falls under paragraph (1), the following shall be considered: <Amended by Act No. 14083, Mar. 22, 2016>

1. .Purposes and characters of use including whether such use is for or not-for nonprofit;
2. Types and natures of works, etc.;
3. Amount and substantiality of portion used in relation to the whole works, etc.;
4. Effect of the use of works, etc. on the current or potential market for or value of such work etc."

42 I. Lee, *Fair Use Under Korean Copyright Law-An Analysis of Case Law-*, Copyright Quarterly, Vol. No. 36, Issue No. 1, p. 156 (2023), available at <https://doi.org/10.30582/kdps.2023.36.1.151>, accessed on 10 October, 2023; The Korean Supreme Court Decision on 26 November 2015 (Case No. 2015 Do 7887); The Korean Supreme Court Decision on 27

case law may be informative resources helpful for the Korean cases which will be dealt with in the future.<sup>43</sup>

## 2.7. ORPHAN WORKS

“Orphan works” are defined as works which remain in copyright, but whose copyright holder is unknown or untraceable or has ceased to exist. Where any person fails, despite his/her considerable efforts to meet the standards prescribed by Presidential Decree, to identify the holder of author’s economic right to a work (excluding foreigners’ works) made public, or his/her place of residence, and therefore is unable to obtain any authorization for its exploitation, he/she may exploit the work by depositing remuneration.<sup>44</sup> The standards prescribed by the Enforcement Decree of the Korean Copyright Act are as follows:

## 2.8. EXTENDED COLLECTIVE LICENSING (ECL)

Extended collective licensing (hereinafter “ECL”) can be an alternative solution for rights clearance of mass collection of archiving institutions.<sup>45</sup> However, the present Korean Copyright Act does not provide ECL scheme. In

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December 2019 (Case No. 2019 Do 15768); The Korean Supreme Court Decision on 10 September 2019 (Case No. 2019 Do 9955).

43 The U.S. Copyright Act provides several fair use exceptions for uses of copyrighted works by library and archive. Therefore, it states Sections 107 (fair use), 108 (limitations for libraries and archives), 109 (first sale), 110 (face-to-face instruction and teaching), 121 (copies for print disabled users), 504(c)(2) (limitations on remedies for good faith asserters of fair use), and 602(a)(3)(C) (exception to import restrictions for library lending and archival purposes). See D. HANSEN, *Copyright Reform Principles for Libraries, Archives, and Other Memory Institutions*, 29 *Berkeley Tech. L. J.* 1559, 1563-64 (2014).

44 Article 50 (1) of the Korean Copyright Act. See Article 50 of the Korean Copyright Act prescribes that “Article 50 (Exploitation of Works Whose Holder of Author’s Economic Right is Unknown)

(1) Where any person fails, despite his/her considerable efforts to meet the standards prescribed by Presidential Decree, to identify the holder of author’s economic right to a work (excluding foreigners’ works) made public, or his/her place of residence, and therefore is unable to obtain any authorization for its exploitation, he/she may exploit the work by depositing remuneration as determined by the Minister of Culture, Sports and Tourism after obtaining his/her approval as prescribed by Presidential Decree.

(2) The person who exploits a work pursuant to paragraph (1) shall indicate the intention to use and the approval date.

(3) When the work legally licensed pursuant to the provisions of paragraph (1) becomes the object of statutory license again, the procedures of considerable endeavors corresponding to the standards prescribed by Presidential Decree pursuant to the provisions of paragraph (1) may be omitted: Provided, That if the holder of author’s economic right raises an objection according to the procedures prescribed by Presidential Decree before approval on statutory license to the work, the same shall not apply.

(4) The Minister of Culture, Sports and Tourism shall post the content of statutory license on the information and communication network as prescribed by Presidential Decree.”

45 SUTTON, *supra* note 2, at p. 19.

this context, a bill on the Korean Copyright Act was submitted to the Korean National Assembly in order to newly insert ECL in 2021.<sup>46</sup>

### 3. MORAL RIGHTS AND LIMITATION TO THEIR PROTECTION

#### 3. 1. RIGHT TO DISCLOSE COPYRIGHTED WORKS

In Korea, moral rights of an author are inalienable, unwaivable and non-patrimonial rights. Author's moral rights shall belong exclusively to the author.<sup>47</sup> In particular, the right of disclosure of works has an essential impact on archival activities. In other words, if a work has not been divulged by its author, it is not accessible and reproduced by the archiving institution. The authorship of a work made for hire which is made by an employee of a legal person is vested in the legal person.<sup>48</sup> In this context, if the legal person does not disclose the work made for hire even though it is expected to be disclosed or if the legal person does not disclose a computer program, an archiving institution cannot have any access to the copyrighted work for hire or the computer program for hire. However, where the author donates his/her pieces of unpublished work, etc. to Libraries under the Libraries Act and the facilities prescribed by Presidential Decree (including the heads of relevant facilities; hereinafter referred to as "libraries, etc.") among facilities which provide books, documents, records and other materials (hereinafter referred to as "books, etc.") designed for public access, it shall be presumed that he/she consents to making them public at the time of his/her donation unless otherwise expressly stated.<sup>49</sup> Here, the facilities prescribed by Presidential Decree refer to any of the following institutions:

46 Articles 2 subparagraph 29 and 155 of Bill No. 2107440, submitted to the Korean National Assembly on 15 January, 2021.

47 Article 14(1) of the Korean Copyright Act.

48 Article 9 of the Korean Copyright Act prescribes that "The authorship of a work made for hire which is made by an employee of a legal person, etc. during the course of his duties and is, or is supposed to be, made public under the name of such a legal person, etc. as the author shall be attributed to that legal person, etc., unless otherwise stipulated in the contract or work regulation, etc.: Provided, That in cases of a computer program work (hereinafter referred to as "program"), being made public is not required."

49 Articles 11(5) and 31(1) of the Korean Copyright Act. See Article 11 of the Korean Copyright Act prescribes that:

"Article 11 (Right to Make Public)

- (1) The author shall have the right to decide whether or not to make his/her work public.
- (2) If the author has transferred by assignment his/her economic right on a work which is not yet made public pursuant to Article 45, authorized its use pursuant to Article 46, or established the exclusive publication rights pursuant to Article 57 or publication rights pursuant to Article 63, he/she shall be presumed to have given the other party his/her consent to make it public.
- (3) If the author has transferred by assignment the original of his/her work of art, architectural work or photographic work (hereinafter referred to as "work of art, etc.") which has not been made public, he/she shall be presumed to have given the other party his/her

- The National Library of Korea, public libraries, university libraries, school libraries, and specialized libraries pursuant to the Libraries Act (excluding the specialized libraries established by any legal person or organization for the purpose of making profits, whose main purpose is to provide library services only to the persons belonging thereto);  
or
- Facilities established by the State, local governments, or nonprofit corporations or organizations for the purpose of preserving and lending books, documents, records, and other materials (hereinafter referred to as “book, etc.”), or for the purpose of public use.<sup>50</sup>

In this regard, where the author donates his/her pieces of unpublished work, etc. to a non-profit archiving institution, it shall be presumed that he/she consents to making them public at the time of his/her donation unless otherwise expressly stated. Furthermore, where co-authors of a joint work donate their pieces of unpublished work, etc. to a non-profit archiving institution, their donation needs to be made with the unanimous agreement of all co-authors.<sup>51</sup>

### 3.2. LIMITATION TO PROTECTION OF MORAL RIGHTS OF AUTHORS

Even after the death of the author, no person who uses his/her work shall commit an act which would be prejudicial to author’s moral rights if he/she were alive. However, if such act is deemed to have not defamed the honor of the author in the light of the nature and extent of the act, and in view of the prevailing social norms, it is not a violation of moral rights of the dead author.<sup>52</sup> If archiving activities are deemed to have not defamed the honor of the dead

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consent to make it public in the manner of exhibition.

(4) If a derivative work or compilation work produced with the consent of the author has been made public, its original shall be also considered to have been made public.

(5) Where the author donates his/her pieces of unpublished work, etc. to libraries, etc. under Article 31, it shall be presumed that he/she consents to making them public at the time of his/her donation unless otherwise expressly stated.”

50 Article 31(1) of the Korean Copyright Act and Article 12 of Enforcement Decree of the Korean Copyright Act.

51 Article 15 of the Korean Copyright Act prescribes under the title, “Author’s Moral Right to Joint Work”, as follows:

“(1) Author’s moral right to a joint work may not be exercised without the unanimous agreement of all the authors concerned. In such cases, each of the authors may not, in bad faith, prevent the agreement from being reached.

(2) Authors of a joint work may designate one of them as a representative in the exercise of their moral rights.

(3) Limitations imposed on the representation under paragraph (2), if any, shall not be effective against a bona fide third person.”

52 Article 14 (2) of the Korean Copyright Act.

author, they are permissible without infringement of moral rights of the dead author. As far as a legal person who is an author is concerned, the dissolution of the legal person is considered to correspond to the death of an author who is a national person.

#### 4. DATABASE RIGHTS OF ARCHIVING INSTITUTIONS

The term “database” means compilation whose materials are systematically arranged or composed, so that they may be individually accessed or retrieved.<sup>53</sup> The term “producer of database” means one who has made a substantial investment in human or material resource for the production of database, or for the renewal, verification or supplement of their materials (hereinafter referred to as “renewal, etc.”)<sup>54</sup> However, the following works are not databases under the Korean Copyright Act:

- Computer programs which are used for the production, renewal, etc. or operation of the database; and
- Database which are produced or renewed, etc. in order to have wireless or wire communications technically possible.<sup>55</sup>

Database producers shall hold the rights to reproduce, distribute, broadcast, or interactively transmit the whole or considerable parts of relevant database.<sup>56</sup> Hence, archiving institutions hold the database rights if their archives constitute databases. The rights of database producers shall commence from the time of completing a production of database, and shall continue to exist for five years counting from the next year of the completion.<sup>57</sup> Where a considerable investment in human or material resources has been made for the renewal,

53 Article 2 subparagraph 19 of the Korean Copyright Act.

54 Article 2 subparagraph 20 of the Korean Copyright Act.

55 Article 92 of the Korean Copyright Act.

56 Article 93 of the Korean Copyright Act (Rights of Database Producers). See Article 93 of the Korean Copyright Act prescribes that “(1) Database producers shall hold the rights to reproduce, distribute, broadcast, or interactively transmit (hereafter referred to as the “reproduction, etc.” in this Article) the whole or considerable parts of relevant database.

(2) Individual materials of the database shall not be considered as the considerable parts of relevant database under the provisions of paragraph (1): Provided, That even for the reproductions, etc. of individual materials of database or of the portions falling short of their considerable parts, if the said reproductions conflict with the normal exploitation of relevant database, or infringe unduly on the interests of database producers, by making them repeatedly or systematically for specific purposes, they shall be considered as the reproductions, etc. of the considerable parts of relevant database.

(3) Protections under this Chapter shall not affect the copyright of materials forming constituent parts of the database, and other rights protected under this Act.

(4) Protections under this Chapter shall not extend to the materials themselves forming constituent parts of the database.”

57 Article 95 (1) of the Korean Copyright Act.

etc. of database, the rights of database producers for the relevant parts shall commence from the time of making relevant renewal, etc., and shall remain effective for five years counting from the next year of the renewal.<sup>58</sup>

## 5. AI AND ARCHIVING ACTIVITIES

According to Article 2(2) of the DSM Directive,<sup>59</sup> “text and data mining” is defined as “any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.” Article 3 of DSM Directive sets forth reproduction and extraction made by “research organizations and cultural heritage institution.” Here, Article 2(3) refers to a “cultural heritage institution” as “a publicly accessible library or museum, an archive or a film or audio heritage institution.” In addition, a “research organization” is either a not-for-profit entity or an entity tasked by an EU Member State with a public service research mission.” Hence, text and data mining of an archiving institution is exempt from copyright infringement, so that it is carried out by artificial intelligence.

The scope of text and data mining exception under Japanese Copyright Act<sup>60</sup> is much broader Articles 3 and 4 of the DSM Directive. According to Article 30 quater of Japanese Copyright Act, it is permissible to exploit work, in any way and to the extent considered necessary in terms of exploitation for using the work in text and data mining, which means the extraction, comparison, classification or other analysis of language, sound, or image data, or other elements of which a large number of works or a large volume of data is composed.<sup>61</sup> Under Article 30 quater of Japanese Copyright Act, text and data mining is broader than the DSM Directive in that it is permissible for commercial purpose, for sharing of dataset for another’s text and data mining and for not-computational text and data mining.

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58 Article 95 (2) of the Korean Copyright Act.

59 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.)(hereinafter “DSM Directive”).

60 Japanese Act No. 30 (2018), revised on 18 May 2018 and effective since 1 January 2019.

61 Article 30 quater of the Korean Copyright Act prescribes that “It is permissible to exploit work, in any way and to the extent considered necessary, in any of the following cases or other cases where such exploitation is not for enjoying or causing another person to enjoy the ideas or emotions expressed in such work; provided, however that this does not apply if the exploitation would unreasonably prejudice the interests of the copyright owner in light of the natures and purposes of such work, as well as the circumstances of such exploitation:

(i) Omitted;

(ii) exploitation for using the work in a text-and-data mining (meaning the extraction, comparison, classification, or other analysis of language, sound, or image data, or other elements of which a large number of works or a large volume of data is composed...);

(iii) Omitted.”

In this regard, archiving institutions are allowed to use AI technology in order to collect, store and preserve a large volume of texts and data without permission of authors or copyright holders under DSM Directive or Japanese Copyright Act.

Under US Copyright Act, data and text mining may or may not be fair use, depending upon several factors, such as whether mechanisms for licensing it are, or are likely to be, provided<sup>62</sup> and how the extracted text and data will be used.<sup>63</sup> The following factors will be taken into account to determine whether the use is fair: (i) the purpose and character of the use, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used, and (iv) the effect of the use upon the potential market for or value of the copyrighted work.<sup>64</sup> Citing to *Authors Guild v. Google Inc.*<sup>65</sup> and *Authors Guild, Inc. v. HathiTrust*,<sup>66</sup> many observers assert that text and data mining is exempt from copyright infringement based on fair use principles because data and text extraction is transformative.<sup>67</sup> However, it is criticized by resulting in clear-cut line “between extraction and post-extraction expressive use.”<sup>68</sup> This distinction becomes unclear with AI technology because copyrighted input data are normally used to train models to produce similar output.<sup>69</sup>

It is difficult to apply fair use doctrine in terms of data and text mining of archiving institutions in Korea because the fair use doctrine has not been used by the Korean courts so far and because collected data are commonly used to train models to generate similar archives by using AI technology.<sup>70</sup> Hence, revision of the Korean Copyright Act needs to be made to introduce text and data mining

62 *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991).

63 N. TURKEWITZ, *Sustainable Text & Data Mining, Part II: US and Fair (and Unfair) Uses*, 21 May, 2019, available at [https://medium.com/@nturkewitz\\_56674/sustainable-text-data-mining-part-ii-us-and-fair-and-unfair-uses-770e4aad705](https://medium.com/@nturkewitz_56674/sustainable-text-data-mining-part-ii-us-and-fair-and-unfair-uses-770e4aad705), accessed on 10 October, 2023.

64 17 U.S.C. § 107.

65 804 F.3d 202, 216-17 (2d Cir. 2015)(holding that Google Books’ unauthorized reproductions of copyrighted works was a transformative fair use of the texts because Google Books provides information “about books, not the books’ expression.); B. HUGENHOLTZ, *The New Copyright Directive: Text and Data Mining (Articles 3 and 4)*, 24 July, 2019, available at <http://copyrightblog.kluweriplaw.com/2019/07/24/the-new-copyright-directive-text-and-data-mining-articles-3-and-4/>, accessed on 10 October, 2023.

66 *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

67 *Id.*

68 *Id.*

69 B. SOBEL, *Artificial Intelligence’s Fair Use Crisis*, 41 *Colum. J. L. & Arts* 45 (2017).

70 J. IM, *Legislative Review Report for Bill No. 2107440*, February 2021, p. 30, available at [https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_Q2T1M0X1D0M4W1T4M3O-0R3Y4C7O3D2](https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Q2T1M0X1D0M4W1T4M3O-0R3Y4C7O3D2), accessed on 10 October, 2023 (Suggesting the potential application of fair use doctrine under 35 quinqué of the Korean Copyright Act to data mining).

exception. Article 43 of the Bill of the Korean Copyright Act provides text and data mining exception in 2021.<sup>71</sup>

## CONCLUSION

The copyright law issues surrounding archiving institutions have arisen out of disputes over the relationship among authors, archiving institutions, and users of archives. The Korean copyright law has already have first sale doctrine, limitation to copyright protection for reproduction and/or public transmission of libraries, etc. temporary copying exception, fair use exception, exploitation of cultural facilities exception, and database right. On the other hand, it lacks PLR scheme, ECL system, and text and data mining exception. In terms of ECL system and text and data mining exception, a bill on the Korean Copyright Act was submitted to the Korean National Assembly in order to newly insert ECL in 2021. Especially, revision of the Korean Copyright Act needs to be made to introduce text and data mining exception because the fair use doctrine has not been used by the Korean courts so far and because collected data are commonly used to train models to generate similar archives by using AI technology. In addition, archiving institutions need to take into account moral rights of authors in archiving copyrighted materials.

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71 Articles 43 of Bill No. 2107440, submitted to the Korean National Assembly on 15 January, 2021 prescribes that “Article43 (Reproduction or Interactive Transmission for Analysis of Information)

- (1) When one purports to generate additional information or value by analyzing a large amount of information including multiple works, i.e., by extracting information such as rules, structures, trends, correlations, etc., through automated analysis technology using a computer without enjoying the ideas or emotions expressed in the works, the works may be reproduced or transmitted to the public to the extent necessary. However, it is limited to cases where the relevant works can be accessed legally.
- (2) Copies made in accordance with paragraph (1) may be kept to the extent necessary for information analysis.”

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