Publication contracts and their legal interpretation in Korea

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Abstract

This study intends to help editors and publishers understand what to be aware of when signing a publishing contract in Korea. The legal interpretation of publishing rights may vary depending on the type of contract. It is vital for publishers to understand the different characteristics of each type of contract: author-publisher agreements, establishment of publishing rights, transfer of the author's economic rights, and lump-sum agreements. Lump-sum agreements are a unique practice common in Korea, in which intellectual copyright is transferred upon a one-time lump-sum payment. Decisions regarding the infringement of publication rights in a given case will be rendered in accordance with the specific aspects of the relevant type of publication rights, and the work in question must be reviewed to determine whether it shows substantial similarity or sameness in order to prepare for any potential issues. Meanwhile, in Korea, electronic publishing requires an additional agreement separate from the printing publication agreement, but regulations regarding electronic publishing shall be confirmed through international agreements after considering the specific statutes and practices of publication in each country, as legal statutes and their interpretation may vary widely. Editors and publishers of academic papers and books must be aware of the various types of publishing contracts in practice.

Keywords

Journal publishing; Legal interpretation; Precedents; Publication contracts; Publication rights

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Introduction

Publishing is generally defined as the act of reproducing and distributing the original content of a work in documents or pictures by way of printing. The process of publication, therefore, by definition entails the rights to copy and distribute. Article 63 of the South Korean Copyright Act states that "a person who holds the right to reproduce or distribute a work may establish the right to publish such work for a person who intends to publish such work in documents or pictures by printing them or by other method similar thereto."

From the perspective of contract law, a publishing contract is an agreement to grant the

publisher his/her rights and obligations regarding reproduction and distribution. The two most common types of publishing agreements in practice in Korea are the establishment of publication rights and the authorization of publication, although the unique practice of lump-sum payment is also frequently used.

These types of publishing agreements are widely implemented, and some contracts may combine different characteristics of each type of agreement. The details of each specific contract must be evaluated to understand the legal factors that it may include. Below, we will explore the legal implications of each type of publishing contract based on examples.

Types of Publishing Contracts

Authorization of publication

Authorization of publication has to do with the “authorization of use of works” stipulated in article 46 of the Copyright Act. This type of agreement can be either a non-exclusive agreement, in which the author simply authorizes the publisher to publish a given work, or an exclusive agreement, in which the authorized publisher shall be the only person who can publish the work and the author shall not authorize a third party to publish the same content. In a non-exclusive agreement, the publisher does not have the right to prevent a third party from publishing the same content or hold the copyright holder accountable in such a case, unlike in an exclusive agreement, where publisher may hold the copyright holder accountable for a breach of obligations if a third party publishes the same content. However, the exclusivity only applies between the author and the publisher, and the publisher does not have the right to ban a third party from publishing the same content. In other words, the publisher only has the right to request the author not to authorize an act of publication by a third party, but not the right to enforce such a ban, in case the third party’s act of publication is not authorized by the author. Meanwhile, if the author responds with inaction upon a request from the publisher to act on a third-party publication, the publisher may exercise the subrogation right of obligee according to article 404 of the Civil Law of Korea.

Establishment of publication rights

Establishment of publication rights is considered a semi-real rights contract between the author and publisher with the purpose of establishing publication rights. The “publication rights” defined in Section 7-2, Special Provisions Concerning Publication of the Copyright Act refer to the very rights obtained by this type of agreement. This agreement provides the publisher with both exclusive rights and the obligation to publish under article 58 of the Copyright Act. The publication

rights acquired by Section 7 of the Copyright Act are specifically known as “established publication rights,” to avoid confusion with the rights granted from authorization of publication. “Established publication rights” are exclusive in that the rights holder may wield them to prohibit publication or to claim damages without consulting the author in case of infringement of reproduction and distribution rights for the work. The author’s right to prohibit is simultaneously acknowledged, so both the author and the publisher share the right to prohibit. Since the authorization of publication relates to the authorization of use of works, in this article, the discussion will be limited to “established publication rights.” “Publication rights” shall hereinafter refer to “established publication rights” unless otherwise specified.

Transfer of the author’s economic rights

The author’s economic rights may be transferred by assignment in whole or in part, according to article 45, paragraph 1 of the Copyright Law. Although the author’s economic rights include many different types of rights related to publishing, it is also possible to transfer only the reproduction and distribution rights that are minimally essential to publishing. This is considered partial transfer of the author’s economic rights in accordance with article 45, paragraph 1.

Lump-sum agreements

Legal interpretation of lump-sum agreements

Compensation for a published work is paid to the author in multiple steps in the form of royalties contingent on the number of editions printed and the number of copies sold. In contrast, in a lump-sum agreement, the publisher makes a one-time flat rate payment to the author regardless of the volume of sales of the work [1]. A publishing contract can be either a lump-sum payment contract or a royalty contract, according to the payment method that is chosen. A lump-sum payment is a one-time advance payment as compensation for writing the work, without considering how many copies are sold. On the contrary, royalties are calculated by agreeing on a certain percentage rate of the sales price of the work, then multiplying it by the actual number of copies issued or sold [2]. Lump-sum agreements refer to all cases where compensation for publication is made at once in the form of a manuscript fee rather than as a royalty.

This method of compensation has long been used in Korea, especially for the publication of translated works. It is also used in cases where a number of authors are involved, making it difficult to divide the shares, or in order to motivate authors when royalties are low [1]. If a contract is entered into under the condition of a lump-sum payment, controversy often emerges regarding which of the four types the contract falls

under or whether it can be seen as a transfer of the author's economic rights. The key is to interpret the intentions of both parties regarding the concrete terms of the agreement at the time of signing it, and determine the characteristics of the contract by considering a set of factors such as how much higher the lump-sum payment is than the royalties, whether the payment amount can be changed, and whether there are any contingency terms regarding the volume of circulation or additional editions.

Precedents

Precedents indicate that the key to distinguishing the establishment of publication rights from a transfer agreement of the author's economic rights is the amount of compensation paid for the manuscript or writing. The Seoul District Court decision 94KaHap on June 1, 1994 determined that "the agreement between the applicant and A was to provide compensation for the use of work in the form of lump-sum payment, not pertinent to sales volume, thus the agreement shall be considered a lump-sum agreement, equivalent to establishment of publication rights or exclusive publication rights unless there is any evidence that the amount of lump-sum payment exceeds the royalties by far."

Content of Publication Rights

The holder of reproduction and distribution rights may establish publication rights for the person who wishes to publish the work by way of print or other similar methods in the form of a document or picture, according to article 57, paragraph 1 of the Copyright Act. In other words, an agreement to establish publication rights is signed between the author and the publisher, and as a result the publisher acquires the publication rights. The holder of the publication rights may publish the original copy of the work that is the object of the publication rights, as prescribed by the act of establishment (article 57, paragraph 2, Copyright Act).

Articles regarding exclusive publication rights shall apply *mutatis mutandis* to other terms of the publication rights, including their duration; transfer, limitation, and registration of the rights; the publisher's obligations, such as the obligation to publish the same content as the original; the obligation to publish within 9 months; the obligation to continue publishing; the obligation to indicate the reproduction rights holder; the obligation to notify the author of a recurring edition; the rights upon death of the author, the right to notify the author of the extinction of publication rights, and the right to modification and revision, so the details should be analyzed in light of what we have learned from the right of exclusive publication. The following few points are notable: A publication right

is defined as the right to publish the "original copy" of the work that is the object of the publication right. Therefore, an act of unauthorized publication that is in breach of the publication right shall be an act of publishing an original copy of the work that is the object of the publication right, which can be acknowledged as reproduction and distribution of a work that has 'substantial sameness' with the original. While 'substantial similarity' with the original is normally sufficient to constitute infringement of copyright, 'substantial sameness' is required in the case of publication right infringements. An unauthorized publication act that constitutes infringement of the publication right not only refers to cases of reproduction and distribution of the whole published work, but also to cases of the reproduction of a substantial part of the published work.

Supreme Court decision 2003Da47782 on September 9, 2005 is a case in point. The plaintiff had acquired the right to publish the Korean version of a Japanese comic book series entitled *Romance of the three kingdoms* and published them under the title *Strategic romance of the three kingdoms*. Then, he found out that the same comic series published by the defendant under the title *Super romance of the three kingdoms* had copied or slightly modified the specific wording and descriptions of the characters, background, and dialogue, in breach of the plaintiff's publication rights. The Supreme Court decided that the act constituted infringement of publication rights since the third party published a work that had 'sameness' with all or substantial part of the original work without permission from the publication right holder, while a modified publication to the extent of damaging its sameness to the original would constitute infringement of the right to create derivative works, not the right to publication.

Another Supreme Court decision, 2001Do3115, on February 28, 2003, ruled that "although article 57, paragraph 2 of the Copyright Act stipulates that a person for whom the publication right is established pursuant to the Act may hold the right to publish the original copy of the work that is the object of the publication right as prescribed by the act of establishment, the 'original copy' here refers to publishing the original work without making modification through adaptation or translation and not only to publishing the original work as a whole. Therefore, the infringer has breached the publication rights of the publisher when substantial parts of the original work were replicated, though not as a whole."

Typographical Arrangement Rights

The typographical arrangement must not be confused with the colophon. The colophon is a statement at the beginning or the end of a book, typically with the title, date of publica-

tion, place of publication, publisher name, edition, price, and authorship of the book.

In the process of publication, the person who holds the right to publication contributes to the process by putting in many efforts after receiving the manuscript, such as proof-reading, typography, binding, choice of font, and editing, all of which require substantial creativity, specialized skills, and know-how. Today, with the advent of computerized editing and designing, there is a greater need to protect such efforts made by the publisher. Against this backdrop, the United Kingdom protects typographical arrangements for 25 years from the first date of publication, while Taiwan protects 10 years of typographical arrangement rights and recognizes plate-making rights, and Germany acknowledges 10 years of rights for publishers who publish ancient manuscripts for academic purposes. Meanwhile, South Korea has yet to establish specific rules on this matter, which should be a subject for future legislation [2].

Liabilities for Publishing Illegal Work

The publisher's liability often becomes an issue when the author's work include content that infringes a third party's copyright. There have been many cases where the original author sued both the person who plagiarized the work and the publisher who published it. In accordance to the principle of fault liability of the Civil Act of Korea, no legal ground exists to hold the publisher liable for such infringement, provided that he/she was neither aware of the plagiarism nor was negligent. However, if the publisher had any intention or negligence, he/she bears liabilities for damages, pursuant to article 125 of the Copyright Law. Meanwhile, the right to demand suspension of infringement according to article 123 of the Copyright Law, for example, does not require intention and/or negligence of the infringer as a precondition, meaning that the author or the copyright holder may demand that the publisher suspend infringement, regardless of his/her intention or negligence.

If the published work infringes a third party's copyright and the infringement results in damages to the publisher (i.e., being unable to publish the work), the publisher may hold the author liable for the damages due to breach of contract or an illegal act [2].

Electronic Publishing

Electronic publishing refers to the act of publication in the form of a digitalized electronic document instead of traditional paper books. This type of publishing has triggered controversy over whether it shall be seen as act of publication defined under the Copyright Law.

Subparagraph 24 of article 2 of the Copyright Law defines the term 'publication' as meaning "reproduction and distribution of the works or phonograms to meet public demand." Subparagraph 22 of the same article defines the term 'reproduction' as "the temporary or permanent fixation of works in a tangible medium or a remaking of works by means of printing, photographing, copying, sound or visual recording, or other means," while distribution is defined by subparagraph 23 as "a transfer by assignment or lending of the original or its reproduction etc. to the public for free or at charge." Based on these definitions, publication must always involve a tangible object. Given this, electronic publications that do not produce any kind of packaged objects such as CDs or DVDs and are circulated only in the form of digital files do not meet the definition of a publication under the Copyright Law [3]. Therefore, the establishment of publication rights for electronic publications pursuant to the Copyright Law is equivalent to creating legally undefined semi-real rights, which is not acceptable. In order to apply the same rules of established publication rights to electronic publications, exclusive publication rights that encompass reproduction, transmission, and distribution are needed.

Another potential issue is whether signing an agreement to establish publication rights automatically grants permission for electronic publication in addition to paper publication, even without a special clause. This is ultimately a matter of interpreting the intention of the parties at the moment of signing such an agreement, but fundamentally it would be reasonable to interpret that a separate contract or exclusive publication rights are required for electronic publication, unless otherwise mentioned in the contract [4]. This is a particularly significant point given that electronic publication consists of digitalized information that can be easily duplicated and/or transmitted *en masse*, thus having a greater potential influence on the rights of the author than conventional printing.

The last, but not least, point is whether the first sale doctrine can be applied to digital content. This doctrine was developed under the premise that publishing requires tangible objects, so it will be challenging to apply this concept to electronic books. However, abolishing the first sale doctrine for electronic publications may bring enormous confusion in existing practices and regulations established among copyright holders and users, given its vital role in restricting copyright abuse and ensuring the free distribution of information. The prevailing wisdom is that the first sale doctrine shall be made applicable to electronic books as well as other digital content in general [5].

Conclusion

The legal interpretation of publication agreements should involve careful attention to the type of the contract; that is, whether it is an authorization of publication, establishment of publication rights, transfer of copyright, or a lump-sum agreement. “Substantial sameness” is required to constitute an infringement of publication rights, whereas “substantial similarity” is sufficient to constitute a general copyright infringement. As for typographical arrangement rights, South Korea has yet to establish its own specific rules. Unless otherwise included in the print publication contract, a separate contract or establishment of exclusive publication rights shall be required for additional electronic publication of the same work. Understanding the various types, practices, and legal interpretations of publication contracts in Korea is fundamental for publishers of academic papers or books.

Conflict of Interest

No potential conflict of interest relevant to this article was reported.

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