

Abstract

**Derivation as a requirement of copyright infringement -
focusing on Seoul Appellate Court Case No.
2012Na17150**

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To infringe an exclusive right of copyright, an accused work must (1) derive from the copyrighted work, and (2) be substantially similar in expression to the copyrighted work. According to the Korean Supreme court, the subjective requirement "derivation" is composed of "access" and "substantial similarity". As for the motion picture industry, if copyright infringements are neglected, the creators will lose incentive for creation. Such result will be against the purpose of cultivating and developing culture through the copyright law. On the other hand, if copyright infringement claims are too generously admitted, cooling effect may lead to the withering of the industry.

On December 20, 2012, the Seoul Appellate Court held that TV drama Seondeokyeowang(Queen Seondeok) infringed on the copyrights of the musical Seondeokyeowang(2012 Na 17150). As for "derivation", the Court found "access" from the fact that the musical had been played on several events like gala concert at a luxury hotel. The Court also supported "substantial similarity" of "derivation" by finding "common historical errors" through Princess Deokman's sufferings at the Taklamakan Desert.

However, as the musical has never been performed at a public stage, it will not be easy for the drama writers to have "reasonable opportunity to view" the musical. Considering lots of relics showing trades between Shilla Dynasty and western countries by way of silk road, ascribing Princess Deokman's activities at the desert to "common historical errors" seems unreasonable. Lastly, even if the Court used the concept "substantial similarity" as the item of "derivation", "probative similarity," however, seems to be a better term in

evading confusion because the same term is also used as objective requirement of copyright infringement.

Keywords

motion picture industry, copyright infringement, access, substantial similarity, probative similarity, striking similarity, common errors, Seondeokyeowang, Queen Seondeok