

**Abstract**

**Reconstruction of the ‘Substantial Similarity’ concept in  
Copyright Infringement judgment**

**- Through a comparative review of continental laws on  
criteria of similarity -**

Kim, Kyungsuk

In Korea, general views on the requirements of Copyright infringement are as the following : Firstly, a copyright holder who alleges claims of copyright infringement must have the effective right on his own work(‘Copyrightability’). Secondly, the person creating a second work had access to the original work and copied the protectable expression of the original work(‘Access’). Thirdly, the copied expressions would be substantially similar(‘Substantial Similarity’).

Among the three requirements “substantial similarity” requirement is very critical because copyright infringement may be judged depending on substantial similarity. Substantial similarity is the term ‘similarity’ modified by ‘substantial’ which may be construed as meaning that a work constituting of infringement must substantially be similar to the original work. However, the term ‘substantial’ is very abstract and vague concept in the construction of copyright infringement.

Substantial similarity is a principle established in judicial precedents of the United States. There exist various theoretical guidelines and methods for determining substantial similarity according to the type of work, and also it has been applied differently in each District Circuit of the United States. Nonetheless, it has been introduced through theories, and has also affected on Korean case laws.

Taking account of that Korean Copyright Law belongs to civil law, this paper will examine comparatively the copyright infringement standards of civil laws to clarify ‘substantial’ meaning. The issues dealt in this paper include the analysis of ‘similarity’, the examination of ‘direct perception of essential

characteristics’, ‘free use’ used as a doctrine denying the infringement in Germany and France, and how to judge the copyright infringement.

## Keywords

substantial similarity, copyrightability, access, direct perception of essential characteristics, derivation of essential individuality, free use, improper appropriation

## 참고문헌

### 1. 국내문헌

권영준, 저작권침해판단론, 박영사(2007)

박성호, 저작권법, 박영사(2014)

오승중, 저작권법[제3판], 박영사(2013)

이규호, 저작권법[제4판], 진원사(2014)

이해완, 저작권법[제3판(전면개정판)], 박영사(2015)

김경숙·박수곤·김원태, 『저작권 침해판단 기준의 비교법적 분석과 국내 기준과의 조화방안 연구』, 한국저작권위원회(2014)

김민기·김경숙, “대중음악의 실질적 유사성 판단을 위한 시론 - 대중음악 침해판단에서 전문가 관점에 의한 멜로디 분석-”, 계간 저작권 제110호(2015. 여름)

박용규, “미국관례상 저작권침해판단의 구조와 기준”, 재판자료 제65집, 법원도서관(1994년)

박인환, “판례평석 : 만화저작권 침해와 구제”, 지적재산권법상의 제문제, 세창출판사(2004)

서달주, “실질적 유사성 검증방법의 도입가능성”, 계간 저작권, 제75호(2006. 가을)

오승중, “지적재산권침해에 있어서 실질적 유사성 요건과 그 판단기준”, 비교사법 제10권 제2호 통권 제21호(2003. 6)

이성호, “저작권침해여부의 판단기준과 각종 저작물의 유형별 특성에 따른 실제적 적용”, 동천김인섭변호사 화갑기념논문집, 박영사(1996년)

정경석, “실질적유사성론”, 계간 저작권, 제85호(2009. 봄호)

정상조, “창작과 표절의 구별기준”, 서울대학교 법학, 제44권 제1호(2003. 3.)

허희성, “음악저작물의 창작성과 실질적 유사성 : 대법원 2004. 7. 8. 선고, 2004다18736 판결”, 계간 저작권, 제68호(2004. 겨울)

## 2. 국외문헌

上野達弘 「ドイツ法における翻案—「本質的特徴の直接感得」論の再構成—」 著作権研究34号(2007)

島並良 「二次創作と創作性」 著作権研究28号(2001)

設楽隆一 「複製ないし翻案について」 著作件研究30号(2004)

田村善之 『著作権法概説[第2版]』 有斐閣(2001)

田村善之・平澤卓人・高瀬亜富 『ロジスティクス知的財産法II 著作権法』 信山社(2014)

高部眞規子 「判例からみた翻案の判断手法」 著作権研究34号(2007)

中山信弘 『著作権法』 有斐閣(2008)

半田正夫 『著作権法概説 [第13版]』 法学書院(2007)