

## **Fair Use in Practice: South Korean Film Directors' Copyright Understanding**

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This study, based on a survey of 100 South Korean film directors, investigates their understanding and employment of fair use. South Korean film directors are largely unaware of this law that could improve their capacity to create work more effectively and at lower cost. Furthermore, they engage in self-censorship, which can limit their creative choices. Many such choices inhibit the exploration of South Korea's vigorous popular culture and its history. These obstacles largely lie not with the law, but with knowledge and norms in the field. Results are also compared with a survey of U.S. documentary filmmakers, whose organizations have educated the field about the utility of the fair use doctrine since 2005. U.S. filmmakers routinely employ fair use and have positive attitudes about it. Thus, public campaigns about the existence of fair use as a creative tool could better promote cultural expression in South Korea.

*Keywords: copyright, fair use, film, intellectual property, cultural policy*

Copyright exceptions and limitations are key features of copyright law because they offer the flexibility that keeps copyright from functioning as private censorship. These exceptions and limitations serve as a safety valve from the private-censorship features of copyright monopoly (Goldstein, 1994; Kaplan, 1967). As copyright terms have extended and expanded since the 1970s, exceptions and limitations have grown in importance (Elkin-Koren, 2017; Samuelson, 2017). One well-recognized consequence of strong copyright laws is a chilling effect on the freedom of speech, which is well documented, both

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Date submitted: 2020-06-10

<sup>1</sup> This work was supported by the School of Communication, American University.

<sup>2</sup> This work was supported by Hankuk University of Foreign Studies Research Fund of 2020.

theoretically and empirically (Nazer & Stoltz, 2017; Priest, 2015; Yu, 2008). Private censorship not only significantly erodes the freedom of speech, but also reduces opportunities for users who can potentially participate in “social processes of meaning-making” (Bracha & Syed, 2014, p. 229). Thus, while copyright monopolies provide an important incentive for creators and monetizing an asset creates a market for it, at the same time, existing creators act as private censors of the future by being able to block references to existing culture by creators who come after them. These effects happen not only because of the law, but also because of creators’ understanding of the law and because of routine industry practice.

The most general and flexible copyright exception is *fair use*, pioneered in the United States. Fair use is the right to reuse copyrighted material for a new purpose in appropriate amounts. Qualifying something as fair use has been deliberately left as an abstraction in the law; the “four factors” itemized—“the purpose and character of the use,” “the nature of the copyrighted work,” “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and “the effect of the use upon the potential market for or value of the copyrighted work”—do not in principle exhaust the considerations.<sup>3</sup> In practice, since 1990, U.S. jurists have typically applied a standard articulated by Appeals Court Judge Pierre Leval in a famed law review article written when he was still a district court judge (Leval, 1990): Is the use transformative? (That is, does the use have a purpose different from the original?) And, is the amount used appropriate? (That amount could be the entire work, very little, or somewhere in between depending on the transformative purpose). Those two criteria demystify the question of how to assess the effect on the market. Fair use has become increasingly important as a safety valve for the right of free expression given that copyright has gotten longer and stronger (Aufderheide & Jaszi, 2018). U.S. judicial practice currently favors fair use (Beebe, 2008; Netanel, 2011; Sag, 2012). Indeed, the U.S. Supreme Court has pointed to fair use as a justification for extremely long and strong copyright terms because of its capacity to provide access to existing culture in spite of what are, effectively, lifelong copyright terms (*Eldred v. Ashcroft*, 2003; *Golan v. Holder*, 2012).

Fair use has been adopted in a few other countries as well, including Israel, the Philippines, and South Korea (Elkin-Koren & Netanel, forthcoming). It has been recognized as particularly important for a digital era. Search functions, for instance, depend on fair use as they copy entire Web pages to find relevant terms. *Remix*—repurposing, reinterpreting, and further developing previous works—has become an entire cultural movement (Lessig, 2008; Manovich, 2007; Sinnreich, 2010). As Adler (2016) notes, “Artistic expression has emerged as a central fair use battleground in the courts” (p. 559). Given that artistic or creative expressions build on preexisting works, fair use, as a limitation and exception to the exclusive right of the author of a creative work, is becoming even more important in the age of remix culture, providing leeway for creators to use copyrighted creative works (Adler, 2016; Manovich, 2007; Mielczarek & Hopkins, 2020).

It matters how well copyright exceptions and limitations, including fair use, actually function in practice (Aufderheide & Jaszi, 2018). Even in countries where fair use is well known, there can be public confusion about it (Aufderheide, 2020; Rathemacher, 2012). In the United States, ignorance of the application of fair use for routine activities such as digitally copying video to insert into a new work (something that could violate the Digital Millennium Copyright Act without an exemption) is widespread

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<sup>3</sup> Limitations on Exclusive Rights: Fair Use 17 U.S.C. § 107.

(Aufderheide, Sinnreich, & Graf, 2018). In Israel (Elkin-Koren & Netanel, forthcoming), scholars have yet to fully use the rights enacted in 2008. A study of Norwegian documentary makers also found that there was "a widespread uncertainty on copyright issues in general and in terms of invoking exception from copyright, such as fair use, in particular" (Larsen & Nærland, 2010, p. 46).

When understood, especially by creative professionals, fair use can be a powerful tool for creativity. With fair use knowledge, for instance, makers of OpenCourseWare (free curriculum materials online) have been able to put online dozens of humanities courses previously off-limits to them. Insurers for documentary film in the United States have been able to insure for fair use, enabling hundreds of films to reach theaters and broadcast distribution. University and museum archives have been put online, and art historians have been able to publish work about current artists (Aufderheide & Jaszi, 2018; Aufderheide, Jaszi, Bello, & Milosevic, 2014).

Empirical research into creative practices in relation to copyright is still a relatively new area of research, and much of the work has been done in the United States, as an overview of recent research shows (Sprigman, 2017). There is little empirical research on use of exceptions in a non-U.S. context. This study addresses that lack by investigating South Korean film directors' perceptions and understanding of copyright and fair use.

## **Literature Review**

### ***Fair Use Under the Copyright Act of Korea***

Copyright, as a constitutional right, was recognized in 1948 when the Republic of Korea was proclaimed and its first Constitution was promulgated (Choi, 2003). The first Copyright Act of Korea was enacted in 1957; since then, it has been revised several times (Jong, 2013). Under the Copyright Act of Korea, the scope of exclusive rights and the level of copyright protection have been increasing for the past two decades through revisions to comply with international treaties, such as the Berne Convention, the World Intellectual Property Organization Copyright Treaty, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (Hahn & Lee, 2016). Problematizing the government's pursuit of ever-stronger copyright laws, some South Korean copyright scholars have argued that adopting a U.S.-style fair use provision can provide a way to balance interests between copyright holders and users (Hahn & Lee, 2016).

The Copyright Act of Korea has a list of specific exceptions to copyright owners' exclusive rights, including "Quotation From Works Made Public" (Article 28) and "Reproduction for Private Use" (Article 30). Article 28 states, "Works already made public may be quoted for news report, criticism, education, research, etc., in compliance with the fair practices within the reasonable extent." The "master-servant" distinction, meaning that exceptions are permissible when "the quoting work is superior, while the quoted work is subordinate" (as cited in Nam, 2016, para. 4), comes in when courts determine whether a certain quotation is permitted. The bottom line, as one prominent South Korean legal scholar notes, is that "a user's work (the quoting work) must clearly distinguish itself from the other's work (the quoted work), and the quoted work must be in a status of a means to meet the ends of supplementation, elaboration, illustration, or reference" (Jong, 2013, p. 189).

South Korean courts tended to narrowly interpret these specific limitations, based on the so-called “master–servant relationship” (Nam, 2016, para. 4). The master–servant logic accords roughly with fair use logic in that simply reproducing something for its original market purpose or taking so much of it as to satisfy the original market purpose would exceed the exception (Nam, 2016). Suppose, for example, a third party, seeking a marketing authorization of a functional food product, copies an entire article published in an academic journal and submits it to the Korean Food and Drug Administration. This would, according to the Supreme Court of South Korea, constitute a copyright infringement.<sup>4</sup>

Meanwhile, in two recent cases related to digital media (i.e., search engine and user-generated content), South Korean courts have interpreted Article 28 in a broader sense, recognizing “the importance of more flexible copyright limitations” (Nam, 2013, para. 5). In 2006, the South Korean Supreme Court ruled that a search engine’s use of thumbnail images can be considered a fair practice under Article 28.<sup>5</sup> The other case was about user-generated content. In that case, a father of five-year-old girl posted on his “Naver” blog a video of his daughter singing and dancing to the popular Korean song “Crazy.” The Korean court found that the father’s uploading of the content does not constitute copyright infringement and the Korea Music Copyright Association’s take-down request violates the father’s right to upload the content (Nam, 2013).

In 2011, fair use was added to the Copyright Act of South Korea, greatly expanding the potential range of noninfringing use of copyrighted material. Major revisions to the copyright act were made in accordance with the Korea–United States Free Trade Agreement. Negotiations were difficult; Korea and the United States went through eight rounds of negotiation.<sup>6</sup> A sticking point was the U.S. government’s demand to strengthen intellectual property protection, including lengthening copyright protection terms, enhancing enforcement mechanisms against copyright infringement.<sup>7</sup> A huge controversy arose over whether to include temporary storage in reproduction rights of the copyright owner, a term that would affect many automatic processes in processing digital information (Nam, 2020). The government of South Korea was expected to protect its industry and cultural development. The South Korean negotiators thought that adopting the U.S. proposal for temporary storage would negatively affect the (fair) use of copyrighted works by related industries as well as users and limit access to information (Nam, 2020). After going through several negotiations, the two parties ended up including a broad copyright exception—fair use—in the footnote of the Korea–United States Free Trade Agreement (Nam, 2020). Table 1 shows the fair use provisions of South Korea and the United States.

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<sup>4</sup> Supreme Court of South Korea, Decision 2011Do5833, 2013.

<sup>5</sup> Supreme Court of South Korea, Decision 2005Do7793, 2006.

<sup>6</sup> See [http://www.sice.oas.org/TPD/USA\\_KOR/USA\\_KOR\\_e.ASP](http://www.sice.oas.org/TPD/USA_KOR/USA_KOR_e.ASP)

<sup>7</sup> See <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/fact-sheet-us-korea-free-trade-agreement>

**Table 1. Fair Use in South Korea and the United States.**

The Copyright Act of Korea	The Copyright Act of the United States
Article 35-3 (Fair Use of Works, etc.)	Section 107. Limitations on exclusive rights: Fair use
“(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.	“Notwithstanding the provisions 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
(2) In determining whether an act of using works, etc., falls under paragraph (1), the following shall be considered:	(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
1. Purposes and characters of use including whether such use is for or not-for nonprofit;	(2) the nature of the copyrighted work;
2. Types and nature of works, etc.;	(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
3. Amount and substantiality of portion used in relation to the whole works, etc.;	(4) the effect of the use upon the potential market for or value of the copyrighted work.”
4. Effect of the use of works, etc. on the current or potential market for or value of such work etc.” <sup>a</sup>	

<sup>a</sup>Copyright Act, Act No. 432, Jan. 28, 1957, amended by Act No. 14083, Mar. 22, 2016, art. 35-3 (South Korea), translated in Korea Legislation Research Institute & Korea Law Translation Center, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=49128&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49128&lang=ENG)

Note. Article 35-3 was moved to Article 35-5 in November 2019 and Article 35-5 (2)1 does not include the following phrase: “including whether such use is for or not-for nonprofit.”

The Copyright Act of South Korea’s adoption of the fair use provision, Article 35-3 (“Fair Use of Works, etc.”), can be considered a byproduct of the Korea–United States Free Trade Agreement (Nam, 2020). It was, according to H. Lee (2015), a rebalancing of a broad copyright exception in exchange for a broad copyright protection, as well as a way to address the digital environment (pp. 551, 711). A white paper by the Ministry of Culture, Sports and Tourism and Korean Copyright Commission also notes that Article 35-3 (the general fair use provision) was adopted to cover situations that arise with digitization and digital distribution, implying that Article 28 was not sufficient for these purposes (Ministry of Culture, Sports and Tourism & Korean Copyright Commission, 2011, p. 8).

South Korean courts have as yet not openly embraced the U.S. courts’ interpretation of fair use. In the United States, fair use has existed in case law since 1841 and in statute since 1976. However, from 1976 to 1990, judicial interpretation of fair use was ad-hoc and varied greatly from case to case. In 1990, judicial interpretation of fair use became more consistent with a seminal law journal article by then District Court Judge Pierre Leval (see Leval, 1990). Interpretation in U.S. courts of fair use’s “four factors” now most

commonly consists of two general questions (Aufderheide & Jaszi, 2018): Is the unlicensed reuse of copyrighted materials “transformative,” that is, used for a different purpose than that for which the original is in the marketplace? And second, if so, is the amount/kind of use appropriate to the transformative use? With the stabilization of interpretation, and increasing education around fair use, fair use has been seen as increasingly reliable and flexible (Netanel, 2011).

It is not clear whether South Korean courts will draw on that example. Although South Korean courts have been building precedents that can show how the four factors of the fair use provision are applied in practice, thus far there has been very little case law (Y. H. Lee & Lee, 2019, pp. 171–179).

### ***South Korean Film Directors and Their Perceptions and Understanding of Copyright and Fair Use***

In 2019, the South Korean film industry celebrated its 100th anniversary. One year later, director Bong Joon-Ho’s *Parasite* made Oscar history, becoming the first non-English-language film to win Best Picture along with three other Oscars (Dove, 2020). South Korean popular culture is surging across the globe, and interest in South Korean films has increased among not just the general public but academics as well (D. H. Kim, Chung, An, & Cabot, 2018).

Domestic films are immensely popular in South Korea (D. H. Kim et al., 2018). They have also become an important part of the South Korean economy.<sup>8</sup> As cultural artifacts, domestic films play an important role in shaping cultural identity as well as protecting cultural sovereignty (Jin, 2006). As C. H. Kim (2000) notes, “The variety of cultural attributes embodied in films makes them a powerful medium through which to transmit cultural values and morals” (p. 373). Thus, the production of films (including documentaries) is important in promoting South Korean culture and transmitting cultural values from one generation to another.

We know almost nothing about how copyright works in practice in the South Korean film industry. Copyright holders routinely celebrate the power of copyright, and existing research has focused on extending copyright monopolies, not exceptions. More public attention has been given to campaigns that emphasize the importance of protecting copyright rather than educating users of copyrighted materials regarding copyright exceptions and limitations, including fair use (Oh, 2014). But there has not been research on the constraints of strict copyright or the employment of the new right of fair use. And yet, it is as important in creative practice to ask about constraints as it is about affordances.

To address this lacuna, we asked how South Korean directors understand their fair use rights, how they apply them, what they are currently avoiding or abandoning because of copyright concerns, and what they would like to make if they could. Finally, we compared the results with a similar study of U.S. documentary filmmakers.

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<sup>8</sup> See <https://www.mpa-apac.org/press/korean-film-industry-generated-usd-18-45-billion-in-2018/>

### Method

We used a survey questionnaire to collect data from South Korean film directors. The questionnaire included 40 questions (see the Appendix), most of which were identical to questions previously used in the 2014 U.S. fair use survey of documentary filmmakers (see Aufderheide & Sinnreich, 2016). We decided to closely follow the U.S. survey for a few reasons; because the fair use law is so similar, the central issue of private censorship/self-censorship is common among them, and doing so would permit comparison. A few questions were modified or newly added to reflect differences in copyright law and in the creative industry. For example, questions that were asked only in South Korea include, "Which genre of film do you primarily work in?" "How important is it for you to exercise copyright in terms of author's economic right?" "How important is it for you to exercise copyright in terms of author's moral right?" "In your opinion, has the discussion and/or awareness of fair use increased in the recent years in the film industry in general?"

We recruited survey participants through several film directors' associations. We chose these associations to access filmmakers who are active in the field. We also expected that the encouragement from the organizations for their members to participate in the survey would be helpful in boosting the survey response rate. The Directors Guild of Korea (DGK), the biggest membership association of South Korean movie directors, was most active in encouraging its members to participate in the survey. DGK's members work in various genres of films including independent documentary films, but the population is skewed to the professional and commercial side of the film industry. We were unable to target specifically documentary filmmakers because the few associations relating to independent documentary film directors are loosely formed. That is, they are formed based on a particular independent film festival and/or the membership includes not only film directors but also film critics and aspiring filmmakers, among others. Also, we likely missed independent documentary filmmakers, some of whom do not belong to associations.

Participants were asked to select the main kind of film they make: (a) documentary films, (b) independent films, (c) commercial films (i.e., made for the theatrical, TV, and streaming marketplace), (d) animation films, and (e) others. These are categories used by DGK and by the industry itself, and are also commonly used in popular discourses in South Korea.

The survey questionnaire was distributed via an online link generated through SurveyMonkey.com, and the data were collected from January 13, 2020, through March 23, 2020. Several film directors' associations including DGK sent out the link to their members via e-mail and text message inviting their members to complete the survey online. The survey was anonymous, and we had no access to members' names. In addition, a few independent filmmakers sent out the survey link to the independent documentary film directors they personally knew. One hundred directors replied, which we estimate is roughly between one third and one fifth of all South Korean directors.<sup>9</sup>

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<sup>9</sup> There are no official statistics to rely on to estimate an exact number of film directors in South Korea. For one, the Korean Film Council provides the number of workers in the "film planning and production" sector and has the following subcategories: screenwriter, performance, investment, direction, music, planning development, production (producer), movie distribution, shooting, editing, lighting, sound, computer graphics, special effects, etc. Among these subcategories, direction (*Yeon-chul* in Korean) is the closest

## Results

The demographics of the group reflect the South Korean film industry: The majority are older men on the commercial side of the field. Eighty-four percent of the respondents were men, and participants ranged in age from 26 to 61 years, with an average age of 45 years. Eighty-one percent had worked in the field at least 10 years, and 34% for more than 20 years. However, only 61% of them either depend on filmmaking for a living or found the income "important." Sixty-one percent mostly worked in commercial film, with 24% in independent, 11% in documentary, and 2% in other.

These demographics are roughly comparable with those of U.S. documentary filmmakers in the 2014 survey (see Aufderheide & Sinnreich, 2016). The majority were experienced professionals. Almost 70% had worked in the field for more than a decade, most for more than 20 years. More participants worked full time in the field; 79% of them depend on film work for their income (Aufderheide & Sinnreich, 2016).

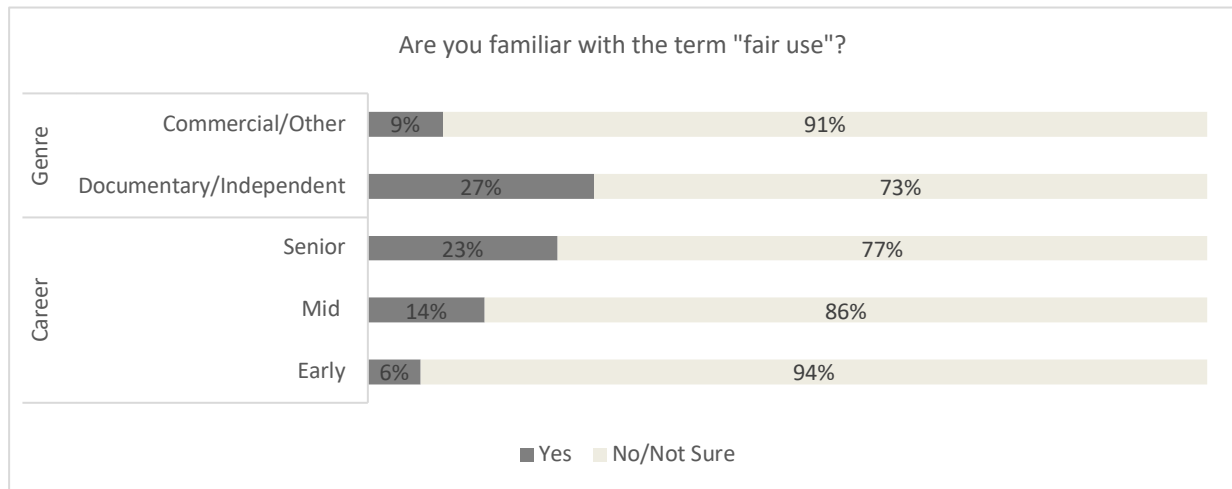
### ***Lack of Awareness of Fair Use Among South Korean Film Directors***

Overwhelmingly, South Korean film directors said that they were unaware of fair use. Most film directors (84%) were not even familiar with the term. When asked to free-associate with the term *fair use*, respondents often associated it with fair payment or fair marketplace practice, not with the purpose of fair use. One respondent even associated it with fair trade. When asked how they rank their personal comfort level with interpreting fair use, whether or not they would use it, about 71% of the respondents replied that they were not sure how to use it. In addition, the same percentage of the respondents had an unclear or incorrect understanding of fair use, so in reality the figure is higher. Figure 1 shows the respondents' awareness of fair use based on their career duration and what genre of film they primarily make. For comparison purposes, career duration was recategorized as follows: early career (<10 years), mid-career (10–20 years), and senior (>20 years). Primary genre was recategorized as follows: (1) documentary or independent and (2) commercial or other. As shown in Figure 1, about 27% of documentary/independent filmmakers were aware of the term *fair use*, whereas only 9% of commercial filmmakers were familiar with the term. There was a variation based on career duration. Senior filmmakers (23%) were more likely to know the term *fair use* than mid-career (14%) or early-career (6%) filmmakers.

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category to that of film directors. According to Korean Film Council statistics in 2017, there were 213 direction workers. On the other hand, DGK has 363 members. To be a regular DGK member, a person must have at least one feature film that had been released for at least a week at 10 theaters nationwide. DGK members pay monthly membership dues and give 1% of direction fees to DGK when they make a film. A DGK member who is also a university professor in a film department estimated that there are approximately 450 film directors in South Korea, meaning that most film directors who are commercially active (i.e., who have released at least one feature film in theaters within the last five years) are DGK members.





**Figure 1. South Korean directors' awareness of fair use (%).**

Furthermore, when asked to freely share their perspectives on copyright and fair use, directors expressed both confusion and a need for more education.<sup>10</sup> One respondent said, "I completed the survey without knowing the concept of fair use. . . . I admit that I was not sure what this is all about while completing the survey." Other responses included

The concept of fair use is unfamiliar. Does that mean I can use a certain work or source for free? I know music sampling requires fees. Is it different from this? In a situation where there is insufficient awareness of copyright, it appears that fair use may seem to be the opposite concept. I think a clear explanation and campaign is needed.

The concept of fair use feels very difficult and complicated. I think it is necessary to establish an organization responsible for the judgment and mediation [of fair use] and if it already exists, I believe it is necessary to actively promote it.

The definition of fair use is somewhat ambiguous. In the case of filmmaking . . . I often refer to newspaper articles, professional books, etc. . . . I believe we need a more clear example of whether this situation can be considered to be fair use.

By contrast, awareness of fair use is widespread among U.S. filmmakers (Aufderheide & Sinnreich, 2016). Some 93% were familiar with the term, and 70% could accurately describe it. Indeed, more than half (59%) of U.S. filmmakers had recently employed fair use in their work. Their free associations with *fair use* evoked terms such as public purpose, democracy, and freedom of speech (Aufderheide & Sinnreich, 2016).

<sup>10</sup> All responses were written in Korean and translated in English by the authors.

### ***Self-Censorship Among South Korean Film Directors***

South Korean film directors tend to pay more than they think they should to clear rights for third-party work. To examine self-censorship practices among South Korean film directors, the following question was asked: "Do you ever get permission and/or pay for use of copyrighted material when you do not think you should have to?" Approximately a third (31%) of respondents said "yes," and another 19% were not sure.

Furthermore, when asked whether they have ever changed their final product because of concerns about copyright restrictions on their use of other people's work, almost half (49%) said they have abandoned or changed their work because of copyright-related concerns, largely because of their own concerns or budgetary constraints. In some cases, they cited examples for which fair use might not apply. For instance, one respondent wrote, "I wanted to use [Inessa] Galante's 'Ave Maria,' but instead I used a recording of a domestic vocalist due to the unaffordable copyright fees." Also, several cited soundtrack issues: using sound as background for the beginning and ending of films or for emotional effect. These are uses that U.S. filmmakers in a consensus document have agreed fall beyond fair use (Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, & Women in Film & Video, 2005).

In other cases, they provided examples showing that they often have changed factual evidence in documentary work—in cases where fair use, as interpreted in the United States, might apply. They deleted a video, changed music, or simply gave up using a song they wanted to use. One respondent wrote,

A song played in the museum was accidentally inserted in the film, and I could not reach out to the copyright holder of the song. I even tried to use statutory license by paying a deposit to the court, but due to the filming schedule I could not proceed with that plan, so ultimately, I hired a voice actor and filmed that part of the film again.

Another respondent wrote, "I gave up using necessary information for the story such as music and art and video clips appearing on television screens in the film because of potential copyright problems." Some had to use a composed song instead of using a pop song, although it was not clear whether this use was in fiction or documentary films. Changing music due to concerns about copyright issues was a repeated example.

The respondents were asked what they would like to try if they were not limited by copyright restrictions. Examples include:

- Make a documentary film using only archived videos
- Make a film using archives about Woosuk Hwang<sup>11</sup>
- Make a documentary about film history
- Make a history documentary film

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<sup>11</sup> He is a South Korean researcher who was once considered as a national hero for his pioneering stem cell research. Later, it turned out that he had fabricated a series of experiments.

- Make a biography film featuring a famous person
- Make a biography film about The Beatles or Hae Chul Shin<sup>12</sup>
- Make an omnibus music documentary
- Make a music film with nostalgic music from the past
- Re-edit a preexisting film

Of course, all of these examples could in fact be accomplished, if executed within the terms of the law, employing fair use. When asked who raised concerns about their use of copyrighted work, 69% of the respondents said that they did themselves, knowing others would probably have a problem with it, followed by "creative partners" (48%) and funders (13%).

U.S. documentary filmmakers also face copyright problems, but demonstrate a higher degree of awareness that, at some point in their careers, they had been constrained beyond what the law requires: "More than half (58%) of [U.S.] respondents say that at some point in their careers they have had to clear copyrighted work when they did not think they should be required to do so" (Aufderheide & Sinnreich, 2016, p. 183). This level of response demonstrates, among other things, a higher level of awareness of fair use than in South Korea. It is also worth noting that due to concerns about copyright issues, four of five respondents (78%) had changed the final versions of their work (Aufderheide & Sinnreich, 2016). American filmmakers, like South Korean film directors, had overwhelmingly made their decisions on their own.

#### ***Attitudes About the Ethics of Remixes***

A majority of South Korean film directors believe that it is wrong in principle to reuse copyrighted works without permission, regardless of the artistic value of recombinant work such as mash-ups and remixes. Eighty-four percent said that they think that a remix could be creative. But only 57% said that unlicensed uses through mash-ups and remixes could be appropriate, and 43% of the respondents believe that any use of copyrighted materials without the copyright owner's permission should be treated as theft.

When asked whether they have ever used a Creative Commons or open-source license to make their work more available to others, only 11% said "yes." But approximately 29% of the respondents said they have searched for and/or used another person's work because it is open source, Creative Commons licensed, or in the public domain. Among those who have sought out open-access materials, a majority of them (73%) were mid-career (10–20 years).

These results differ dramatically from U.S. documentary filmmakers, whose copyright views align with their opinions about creativity. According to Aufderheide and Sinnreich (2016), "When asked about culturally appropriative forms such as remixes and mash-ups, 93% of respondents thought that some or all of the uses were acceptable fair use" (p. 182). U.S. documentary filmmakers were also much more likely than South Korean film directors to seek out open-access materials (74%), and even to make some of their own materials available open-access (26%; Aufderheide & Sinnreich, 2016).

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<sup>12</sup> He was one of the most influential South Korean musicians and passed away because of alleged medical negligence.

The survey results of South Korean film directors are much closer to those of the U.S. general population, as expressed in a 2017 survey conducted via Mechanical Turk by Aram Sinnreich and made available for this study (personal communication, September 10, 2019). Only 75% of the U.S. general population—even lower than the South Korean directors—believe that remixes could be original, and 59% believe that unlicensed use could be appropriate.

### Discussion

In the data, we see tensions between the opinions of South Korean film directors and their actual experience of copyright. South Korean film directors strongly support authors' economic and moral rights and are often suspicious of unlicensed uses. At the same time, many believe that they have overpaid for licensing. This is also a group that thinks that recombination can be a new creative act (thus qualifying for fair use, if in appropriate amounts), but far fewer of them agree that unlicensed use would be ethical. They experience copyright as an owner's right, but not as the user's right that copyright law also includes. As owners, they are comfortable; as users, they are uncomfortable. And yet, fair use is designed not to threaten monopoly rights, but to temper them appropriately to protect future references to modern culture, for new uses that range from criticism to Internet searches. Uses that substitute for the original work in the marketplace are, by definition, not fair use. Thus, their discomfort appears related to their unfamiliarity with the law, which appears to be general; very few of the respondents, even those who claimed knowledge, were knowledgeable about the 2011 law of fair use.

This tension then plays out in their creative choices. Due to copyright royalties that are either expensive or unobtainable, they often give up referencing existing cultural expression in their films, and change or abandon their work. The work they want to do sometimes might be eligible for fair use, but they are not aware of the law.

These losses are not just losses for the makers, but for the public, as we see from examples of work they want to make. Documentaries analyzing the wildly prolific and innovative South Korean popular music, popular film, and popular television industries cannot proceed. Historical films are prohibitively, and unnecessarily, expensive. Biographies of famous South Korean figures cannot be made. South Korean cultural and political history, and analysis and critique of South Korean culture, go unmade.

Fair use has not, by and large, been tested to the point of normalizing fair use interpretation in South Korean courts (Hahn & Lee, 2016). Creators and their legal teams may see this as a limitation. But U.S. experience suggests a different path: establishing industry norms that normalize fair use interpretation and make the doctrine accessible to creators.

When we compare South Korean and U.S. filmmakers, we see the power of education and consensus around the interpretation of existing law. U.S. filmmakers are strikingly better informed, more confident, and routine users of fair use. They similarly faced the problem of a paucity of case law to guide their choices. This was why, in 2005, five national filmmaker organizations jointly launched the Documentary Filmmakers' Statement of Best Practices in Fair Use. This statement, disseminated by the associations involved, has been embraced by errors-and-omissions insurers to guide their decisions to routinely insure

for fair use. The field widely disseminated the news, in festivals, conferences, trade journals, and listservs (Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, & Women in Film and Video, 2005).

The results of that decade-long educational process were clear in the 2014 U.S. documentary survey results. Almost a decade after the Documentary Filmmakers Statement of Best Practices in Fair Use was issued, almost everyone knew the term *fair use*, and most could apply it correctly. The great majority had recently employed fair use in their work. U.S. documentarians overwhelmingly believe that remix could be original, and most believe that it is eligible for fair use. U.S. documentarians were far more likely than South Korean directors to believe they had been forced to overpay in the past for licenses or to pay for licenses they should not have had to get, signaling their understanding of their rights under the law and the discrepancies between law and practice.

The U.S. documentarians' confidence was also associated with a major industry change. After the statement was issued, filmmakers and lawyers met with providers of errors-and-omissions insurance. Within a year of the creation of the statement, insurers changed their position from routinely denying coverage of fair use claims to routinely accepting them, with a lawyer's letter. This also completely changed the risk assessment of broadcasters and distributors. Thus, filmmakers' establishing of norms triggered change in the wider industry (Aufderheide & Jaszi, 2018).

Even so, the U.S. documentary survey also showed some insecurity. When asked an open question—what they would do if there were no copyright restrictions—many replied, as did South Korean film directors, with examples of projects that were entirely executable under existing law. They suggested examples such as compilation work, archival film, and collage. Thus, even a decade of education does not necessarily eliminate fear of reprisal or confusion around copyright. Chilling effects linger. This is even more reason for South Korean creators to begin the process of education.

### ***Limitations and Future Research***

This study did not focus on filmmakers mainly working in the documentary genre, the area in which filmmakers are most likely to be able to employ fair use. The study was also limited to a survey only, and future studies could also benefit from interviews. The study did not methodically consider cultural and industry differences that could intervene in comparative results between U.S. and South Korean filmmakers.

This first effort to explore how South Korean creators interpret, understand, and use the copyright act to make South Korean culture can be extended across creative practices and platforms, and also extended to areas of technical innovation, where fair use is essential to basic tasks.

### **Conclusion**

South Korean film directors are largely unaware of the features of a law that could improve their capacity to create work more effectively and at lower cost. The result is not only a chilling effect on the field, but also a deeply internalized self-censorship. The impact could be far greater on documentary makers than

on fiction makers. The impact could be as important culturally as it would be economically. And the obstacles largely lie not with the law, but with knowledge and norms in the field.

Education about the existence of fair use as a creative tool would improve the quality and quantity of cultural expression. There is some precedent. The Korea Copyright Commission has recently renewed efforts to encourage individuals to use works more freely that belong to the public because of the expiration of copyright, to raise awareness of open licenses such as Creative Commons, and create a culture of copyright donation through various campaigns and conferences.<sup>13</sup> The Korea Copyright Commission could extend such work to raising awareness about the value and legitimacy of fair use.

But just as important, filmmakers through their own organizations can conduct such education campaigns. Similarly, film journalists can educate their readerships about the link between fair use and cultural productivity. Improving the competency of future filmmakers and empowering them to contribute to the culture need to be done by informing them of their legitimate rights to invoke exception from copyright.

If South Korean film directors better understood the affordances of the law, they would be able to do more work, less expensively, and with more diverse creative options without impinging on their or others' royalty rights. They would, moreover, be able to do so without surrendering any of their rights or profits from copyright monopoly. They currently suffer the chilling effects of strict copyright unnecessarily, and often unknowingly.

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#### Appendix: Survey Questions Used

1. What is your gender?
  - A. Male
  - B. Female
  - C. Nonbinary/Rather not to say
  
2. How old are you? \_\_\_\_\_ years old

3. How long have you been working in the film business?
  - A. Less than 5 years
  - B. At least 5, but less than 10 years
  - C. At least 10, but less than 15 years
  - D. At least 15, but less than 20 years
  - E. 20 years and above
  
4. How important is your filmmaking income to your livelihood?
  - A. I support myself primarily through filmmaking
  - B. Filmmaking is important in the mix of ways I make a living
  - C. Filmmaking is incidental to the way I make a living
  - D. I do not depend on filmmaking at all to make a living
  
5. Which genre of film do you primarily work in?
  - A. Documentary film
  - B. Independent film
  - C. Commercial film
  - D. Animation film
  - E. Other (Explain: \_\_\_\_\_)
  
6. How important are documentaries in your filmmaking work?
  - A. I primarily work in the documentary genre
  - B. I sometimes work in documentary
  - C. I occasionally work in documentary
  - D. I never work in documentary
  
7. How important is it for you to exercise copyright in terms of author's economic right? (The types of author's economic right are right of reproduction, right of public performance, right of public transmission, right of exhibition, right of distribution, right of rental, and right of production of derivative works.)
  - A. Extremely important
  - B. Very important
  - C. Somewhat important
  - D. Not very important
  - E. Not important at all
  
8. How important is it for you to exercise copyright in terms of author's moral right? (The types of author's moral right are right to make public, right of paternity, and right of integrity.)
  - A. Extremely important
  - B. Very important
  - C. Somewhat important
  - D. Not very important
  - E. Not important at all

9. Considering your latest project, about how much of the costs of making them would you estimate went to licensing? \_\_\_\_\_ KRW
10. Considering your latest project, can you estimate the amount of time that went to licensing? \_\_\_\_\_ hours and \_\_\_\_\_ minutes
11. Are you familiar with the term "fair use"?
  - A. Yes
  - B. No
  - C. Not sure
12. How would you rank your personal comfort level with interpreting fair use, whether or not you would use it?
  - A. Excellent
  - B. Good
  - C. Not sure how to use it
  - D. Not comfortable
  - E. Other (Explain: \_\_\_\_\_)
13. Fair use is the right to use copyrighted material without permission or payment, when you are repurposing the material and use an appropriate amount for your new purpose. Does this match your understanding of fair use, to the extent that the term is familiar to you?
  - A. Yes
  - B. No
  - C. Not sure
14. Off the top of your head, what words would you associate with fair use? \_\_\_\_\_
15. How useful or damaging overall do you think fair use rights are for filmmaking?
  - A. Absolutely necessary
  - B. Very useful
  - C. Somewhat useful
  - D. Not sure
  - E. Somewhat damaging
  - F. Very damaging
  - G. Totally unfair
16. Do you ever get permission and/or pay for use of copyrighted material when you do not think you should have to?
  - A. Yes
  - B. No
  - C. Cannot recall

17. If you answered "yes" on Question 16, can you tell us more about that?
18. Have you ever changed your use of others' copyrighted work in your final product because of copyright?
- A. Yes
  - B. No
19. If you answered "yes" on Question 18, can you tell us more about that? \_\_\_\_\_
20. Who raised the concerns about your use of copyrighted work? (Check all that have applied in the situations you are thinking about)
- A. My funders
  - B. My creative partners
  - C. Lawyer/legal department
  - D. Rights holder of the copyrighted material
  - E. Distributors
  - F. Broadcasters
  - G. I did, knowing others will probably have problems with it
  - H. Other (Explain: \_\_\_\_\_)
21. Are there films or filmmaking techniques or processes you would like to try if you were not limited by copyright restrictions on your use of other people's work?
- A. Yes
  - B. No
  - C. Never really thought about it
22. If you answered "yes" on Question 21, can you tell us more about that?
23. Have you used fair use in any of your last three productions?
- A. Yes
  - B. No
  - C. Not sure
24. Why haven't you used fair use? (Check all that apply)
- A. Had no third-party material eligible for fair use
  - B. Could have employed fair use, but had the budget to clear everything
  - C. Broadcaster, lawyer, or producer insisted on clearance
  - D. I thought the broadcaster/lawyer/producer would insist on clearance
  - E. Did not understand how to employ fair use in my work
  - F. Did not believe I had the right to employ fair use
  - G. Other (Explain: \_\_\_\_\_)

25. Of the last three productions, choose the one that employed the most copyrighted material. How much of that production's third-party material was employed under fair use?
- A. Under 10%
  - B. 10%–25%
  - C. 26%–50%
  - D. 51%–75%
  - E. 76%–90%
  - F. 91%–100%
  - G. Not applicable
26. Has someone else's legitimate employment of fair use hurt your business?
- A. Yes (Explain: \_\_\_\_\_)
  - B. No
  - C. Do not know
27. Are you ever worried that someone else's legitimate fair use will hurt your business?
- A. Yes
  - B. No
28. Have you ever had your work subjected to a takedown online for supposed copyright infringement?
- A. Yes
  - B. No
  - C. Do not know
29. Did you believe that you had employed fair use for the use that was being labeled infringement?
- A. Yes
  - B. No
  - C. Do not know
30. Did you issue a counter-takedown notice, invoking your fair use rights?
- A. Yes
  - B. No
  - C. Do not know
31. If you answered "yes" on Question 30, how did your counter-takedown notice work out?
- A. My work went back up online
  - B. My work was still taken down in full
  - C. My work was taken down in part (for instance, sound was off)
  - D. My work was accompanied by an ad
  - E. Cannot remember/Do not know
  - F. Other (Explain: \_\_\_\_\_)

32. Have you ever used a Creative Commons or open-source license to make your work more available to others?
- A. Yes
  - B. No
  - C. Do not know
33. Have you ever searched for and/or used another person's work because it is open source, Creative Commons licensed, or in the public domain?
- A. Yes
  - B. No
  - C. Do not know
34. To what extent do you consider mash-ups and remixes "original"?
- A. I think that any use of preexisting materials is unoriginal
  - B. I think that some uses of preexisting material are unoriginal, but other uses constitute original or innovative use
  - C. I think that all uses of preexisting materials for remixes and mash-ups constitute original or innovative use
35. In your opinion, how should copyright apply to mash-ups and remixes?
- A. I think that any use of copyrighted materials without permission of the owner should be treated as theft
  - B. I think that some uses of copyrighted materials should require permission, and other uses should not
  - C. I think that all uses of copyrighted materials for remixes and mash-ups should be allowed without permission
36. In your opinion, has the discussion and/or awareness of fair use increased in the recent years in the film industry in general?
- A. Yes
  - B. No
  - C. Not sure
37. If you answered "yes" on Question 36, can you estimate how recent has it been? (For instance, if you believe that the discussion and/or awareness of fair use has increased in two years, please write down "2.")
- \_\_\_\_\_ years

38. Article 35-3 of the Copyright Act specifies the following four factors for courts to consider in fair use cases. In your opinion, which factor is the most important?
- A. Purposes and characters of use including whether such use is for or not-for nonprofit
  - B. Types and natures of works
  - C. Amount and substantiality of portion used in relation to the whole works
  - D. Effect of the use of works, etc. on the current or potential market for or value of such work
39. Is there anything else you would like to tell us about copyright and fair use in filmmaking?
- \_\_\_\_\_
40. Would you be willing to make yourself available for an additional interview on this topic?
- A. Yes (Please write down your contact information: \_\_\_\_\_)
  - B. No