



Sustainability and Copyright

September 19, 2023

We serve leading businesses and individuals from across the world doing business in Korea. We bring to bear expertise at the highest level to help our clients face the challenges and take advantage of the opportunities that are available in this market.

© BAE, KIM & LEE LLC. ALL RIGHTS RESERVED.



Copyright in the Age of OTT/SVOD

bkl



Key Issues

- Profit Sharing Upon Assignment of Copyrights
 - > Right of Just Compensation / Right of Additional Remuneration
 - Buy-out of rights to the work
 - Legislative bills to amend the Copyright Act
- Music Copyright / The Saga of the New OTT Rate
- Creators / Content Producers (OTTs) / Regulator
[Consumers]
- Co-prosperity (*Sangseng*)

Profit Sharing after Assignment of Copyrights

- > **Issue:** Whether the creators of the show (e.g., producers, writers and other creators) should be entitled to share in the success of the AV content (e.g., the “Squid Game”)
- vs.** the practice of buying out upfront **all rights to the work** at the production stage (i.e., having the creator assign and transfer to the production company all rights to the work up front)
 - rights for transmission, reproduction, and distribution (*“in all media now existing and/or hereafter devised”*), promotional rights, merchandizing rights, publishing rights, stage rights, remake rights (in another language), format rights, music rights, theme park rights, rights to sequels and prequels, right to create derivative works, etc.
 - Reservation of rights on a case-by-case basis

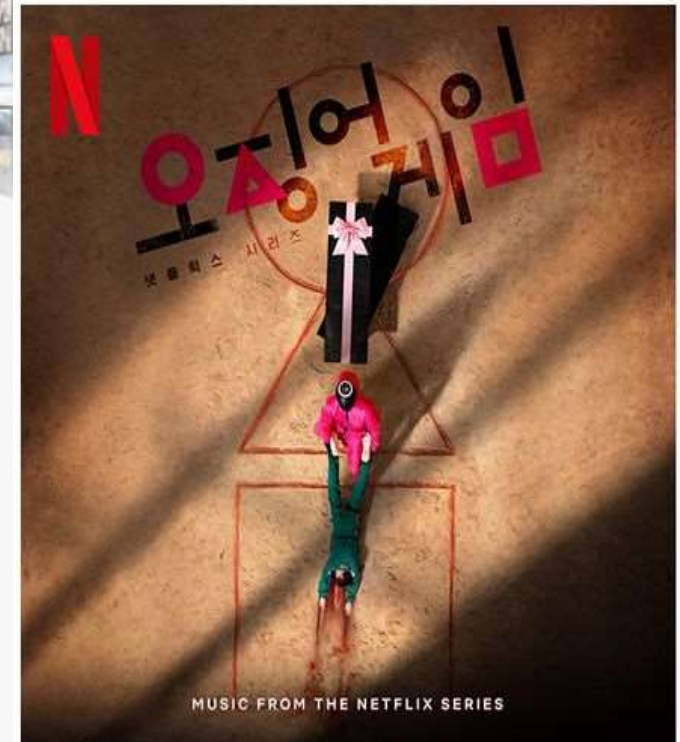
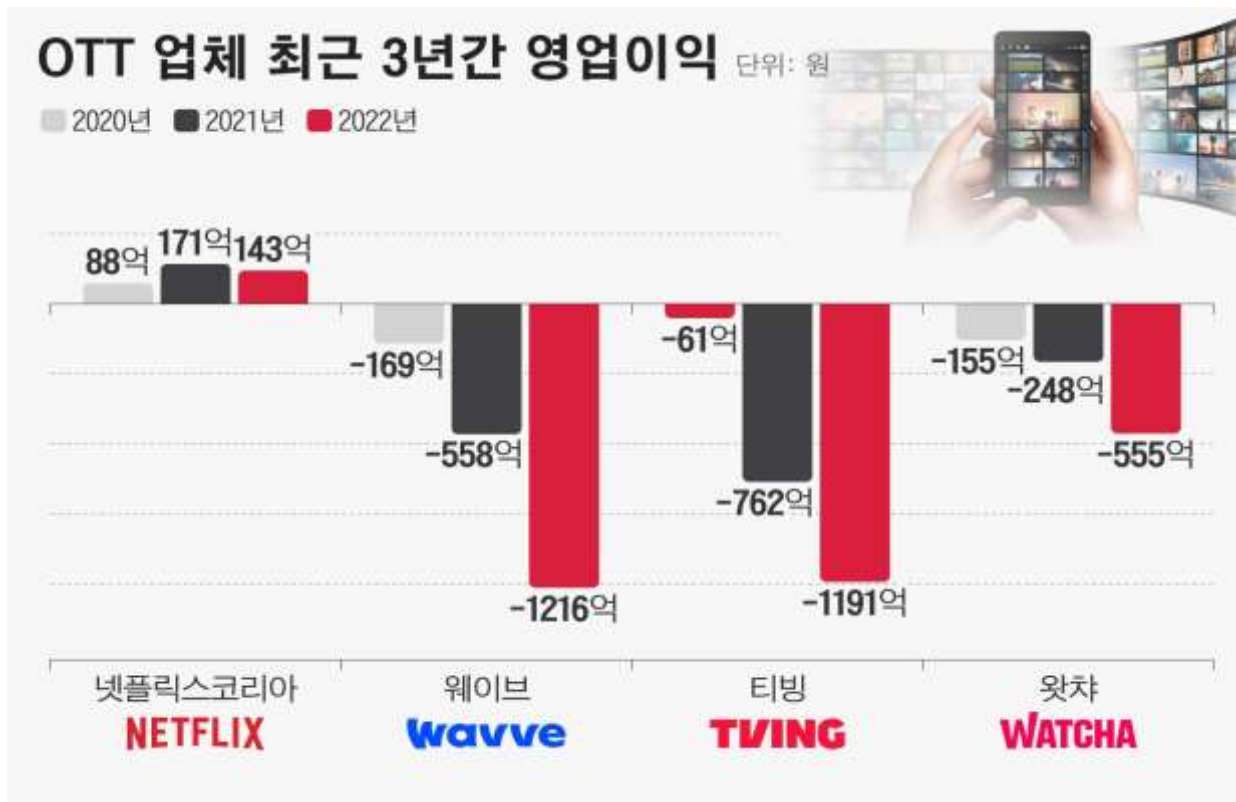
Legislative Amendments to Copyright Act Proposed to Provide for Creators' Right to Share In Profits (2022)

- > Bill to allow producers, directors, writers and certain other copyright holders/creators to be designed by the President Decree who have assigned their copyrights to the work the right to be compensated from the final content distributor making the content available to the public (a.k.a. the right to seek just compensation)
 - any time within 70 years after publication of the work
- > Bill to allow original copyright holders (who have assigned the copyright to the work) the right to seek additional remuneration, where the compensation paid to such original copyright holder at the time of production is markedly out of balance with the amounts of profit generated from the assignee's use of the copyrighted work (the right to seek additional remuneration) (a.k.a. the right to seek additional remuneration).
 - any time within 10 years following the assignment.

- **Proposed bills are not gaining traction in the legislative process**
 - > Criticism: Lack of clear basis for seeking additional remuneration
Examples of the European (Germany) practice are the results of a long-history of copyright legislation
- **Ministry of Culture, Sports and Tourism (MCST) releases the results of its research (June 2023)**
 - > Applying an arbitrary compensation rate of 2.5% to the 2022 revenue
 - Feature films (theater and VOD): KRW 398 억 (USD 30 million)
 - Broadcast: KRW 392 억 (USD 30 million)
 - OTT/SVOD: KRW 338 억 (USD 25 million)
 - Total: 1,129 억 원 (USD 85 million)

Source: MCST's press release on public briefing on profit sharing for AV content dated June 18, 2023.

Recent 3-Year Operating Profits for Leading OTTs (for 2020 through 2022)



Source: Chosun Biz (June 19, 2023)

Music Performance Rights Royalties

- KOMCA (Korea Music Copyright Association) introduces the new OTT Rate into its Collection Regulation (effective as of **Jan. 1, 2021**)

Article 24-2 of Collection Regulation: The **greater of**

- (1) Revenue x 1.5% x Annual Co-efficient x Music Management Ratio; and
- (2) KRW 105 x number of Subscribers x Music Management Ratio

Year	2021	2022	2023	2024	2025	2026
Annual Coefficient	1.000	1.066	1.133	1.200	1.266	1.333
Royalty rate after applying the Annual Coefficient (for services where music is not the primary purpose)	1.5%	1.599%	1.6995%	1.8%	1.899%	1.9995%

- Definitions for Revenue and Subscriber

January 1, 2021: KOMCA's new OTT rate takes effect.

February 10, 2021: Local OTTs file two (2) separate administrative lawsuits against MCST seeking to cancel the 1.5% rate for being too high (vs. 0.625% for broadcasting royalty)

> Throughout 2021: - Co-prosperity Council (discussion on issues not central to pending litigation)

- Most of local OTTs have been criminally sued for copyright infringement by KOMCA.

> Feb. 2022 MCST issues its opinion on some of the issues related to the OTT rate (definition of “subscriber,” in-app payment fees to be included in “revenue”)

December 2022: Courts in the first instance level rule in favor of MCST.

September 2023: Decision from the appeals courts to be issued.

- Recent developments in the OTT/SVOD sector are the prime examples of the dynamic transitioning in the area of copyright.
- Co-prosperity: As briefly illustrated through the current public discourse on the issues related to additional remuneration for content creators and the OTT music copyright royalties, for sustainable copyright, the stakeholders (i.e., the creators (CMOs/PROs/KOMCA), OTT platforms, and MCST) need to find a way to cooperate on finding the most efficient solution **to promoting creativity and quality AV content** which has been a key driver for the huge success of the K-pop and K-drama culture around the world.
- In the process, all potential impact of the legislative and regulatory efforts should be carefully considered to avoid any unintended adverse effect on consumers (i.e., by way of unnecessarily high subscription fees).

Thank You.

For any questions, please
contact Susan Park
(susan.park@bkl.co.kr)