INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®

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VIA E-MAIL *choi355@mcst.go.kr* **and VIA FAX** *+82 2 3704 9479*

Mr. Choi Jong-cheol
Copyright Policy Division
The Ministry of Culture, Sports, and Tourism
42 Se-jong Ro, Jong-ro Gu
Seoul, Republic of Korea (110-703)

Dear Mr. Choi:

RE: Proposed Amendments to Copyright Act

The International Intellectual Property Alliance (IIPA) greatly appreciates this opportunity to comment on draft legislation to amend the Copyright Act of Korea (CAK).

Introduction

IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries — business software, films, videos, music, sound recordings, books and journals, and interactive entertainment software — in achieving stronger copyright laws and enforcement worldwide. IIPA is comprised of seven trade associations (listed below), each representing a significant segment of the copyright community. IIPA has made numerous submissions to many Korean government agencies on a wide range of copyright law and enforcement topics over the past 20 years.

Because we refer in this submission to unofficial translations of the draft legislation and of the CAK, and also of the Computer Program Protection Act (CPPA), we apologize in advance if any of the following comments are unclear due to translation problems. References in these comments to "works" encompass sound recordings and other objects of neighboring rights protection, and references to "copyright owners" or "right holders" include the beneficiaries of neighboring rights protections, unless otherwise indicated.

One main goal of the current draft amendments is to bring into the CAK relevant provisions of the CPPA, and to make other changes necessary to accommodate coverage of computer programs under the CAK. The other main goal (reflected in proposed Articles 133-2 and 133-3) is to strengthen administrative enforcement and sanctions against online copyright infringements. These comments focus primarily on these issues.

IIPA has noted in several previous submissions its concerns about other aspects of the CAK. See, for example, our submissions of October 3, 2007; May 16, 2005; February 6, 2005; December 14, 2004;

and August 27, 2004. The current comments are without prejudice to the suggestions we have previously made on other ways to improve Korean copyright law.

Finally, we thank the Ministry for accommodating a short extension of time for submission of these comments. Nevertheless, we note that we have had a very limited opportunity to review the draft amendments, and hope that these comments can be treated as preliminary, and that we will have the opportunity to supplement them later if needed.

IIPA commends the drafters of the pending amendments. They have done a very good job of combining the CAK with relevant provisions of the CPPA, and have also proposed an important step toward better enforcement against online infringement. In evaluating the amendments, the main question that we seek to answer is whether the proposed changes will increase the effectiveness of enforcement efforts and decrease piracy. In the interests of brevity, this submission focuses on areas where IIPA believes the combination of the two statutes, or the regime for combating online copyright infringement, may fail to meet that test, or where clarifications are needed.

I. Incorporation of the CPPA/Computer Program Provisions

The decision to centralize copyright law in one statute, under the direction of one ministry, brings Korea's legal regime into the world mainstream, and could help to minimize inconsistencies with regard to different categories of copyright works. As noted above, it appears that the proposed amendments accomplish the goal of melding the CPPA with the CAK, for the most part.

We have noted two areas in which important provisions of the CPPA are not brought forward into the CAK, and in which existing provisions of the CAK may fall short of providing the protections currently enjoyed under the CPPA. The first concerns acts of circumvention of technical protection measures, and the second concerns the complaint requirement in Article 48 of the CPPA.

Article 30(1) of the CPPA states that "No person shall disarm technical protection measures without proper legal basis through means such as avoidance, removal, damage, etc.", subject to certain exceptions listed in the statute. The CAK lacks a similar provision. Article 124(2) of the CAK prohibits providing, manufacturing, importing, transferring, renting or transmitting tools designed to circumvent technical protection measures, but not the act of using such tools to circumvent. Computer program copyright owners should not be asked to sacrifice the protections they currently enjoy against acts that defeat the technical measures they choose to employ. Instead, similar protection should be extended to owners of copyright in other kinds of works besides computer programs, through an amendment to the CAK along the lines of Article 30(1) of the CPPA.

The interests of computer program copyright owners would also be affected adversely by the change with regard to the complaint requirement for criminal prosecution. Article 48 of the CPPA currently requires a criminal complaint to be filed by the rights owner as a condition for prosecuting most criminal offenses under the Act. Copyright owners in computer programs have incorporated this requirement into their enforcement strategies to achieve the most efficient and effective methods of bringing end-user business software pirates into compliance with their legal obligations. Software piracy that takes place in the workplace – corporate end user piracy – is the most damaging form of software piracy. This type of piracy has been the primary focus of industry enforcement actions in Korea and the rest of the world. We have appreciated the close cooperation of the police and prosecutors in conducting criminal raids against businesses engaged in corporate end user piracy. These actions, which in nearly all

cases have resulted in settlements requiring the infringer to convert to legal software and pay damages for the violations, have contributed to a steady decrease in the software piracy rate in Korea.

The proposed amendments do not carry Article 48 of the CPPA forward into the CAK. Under Article 140 of the CAK, a formal complaint is not required for criminal prosecution in a number of situations, notably cases that involve "habitual" infringements "for commercial purposes." Assuming that "habitual" infringements "for commercial purposes" includes corporate end user piracy, software publishers will no longer be able to settle these cases. Without a possibility of settlement, current high levels of enforcement activity will not be sustainable due to the increased burden on Korea's judicial system. The inevitable result would be decreased levels of enforcement. We urge the drafters to exclude computer programs used in business from the exception to the complaint requirement under Article 140, paragraph 1, or, at a minimum, to apply the principle of "vindication of right holder's will," whereby prosecution of cases of end user piracy will not proceed over the right holder's objection.

With regard to the offenses to which Article 140 of the CAK currently applies, IIPA strongly supports the status quo under which a right holder complaint is not required in most cases. Such offenses implicate critical interests of the state, not just those of private right holders, and thus should be prosecutable ex officio. Article 140 of the CAK, within its current scope of application, properly underscores this principle.

Other beneficial aspects of the CPPA should also be preserved in the way that the amended CAK is implemented. For example, under Article 34(3) of the CPPA, the Minister of Information and Communications is authorized to request "organizations such as an association related to the protection of program copyright to provide assistance in case technical advice and its equivalent assistance is needed" in exercising the administrative enforcement authority established by that article. The Minister of Information and Communications has used this authority to call on the Software Property-rights Council (SPC) to assist in enforcement. This arrangement has worked well, and if this legislation is enacted, IIPA urges the Minister of Culture, Sports and Tourism to exercise his parallel authority under Article 133 of the CAK to continue the fruitful collaboration between SPC and the Korean government in enforcement against business software piracy.

II. Enhanced Administrative Enforcement Against Online Infringement

IIPA commends the drafters on the most important substantive change in the amendment, which is found in proposed new Articles 133-2 and 133-3 of the CAK. This seems to be a bold and ambitious step to improve the effectiveness of enforcement against the widespread and serious problem of online copyright piracy. While IIPA is still studying this proposal, and of course much depends on how it is implemented, we believe that its approach is fundamentally sound. The legal regime (including but not limited to copyright law) should provide strong incentives for cooperation between service providers and right holders in combating online infringement. However, for service providers that show by their actions that they refuse to cooperate, a system of escalating sanctions makes sense.

We do, however, have a number of questions about the proposed new administrative enforcement regime. We urge that these issues be carefully considered before final approval is given to the amendment.

1. It is not entirely clear how the new administrative enforcement process would be initiated. Would a formal complaint from the right holder be required, or could the Ministry initiate a case itself? Would any complaint be directed to the Minister, or to the Copyright Commission? While it is clear that

an order under the new provision would be issued by the Minister, "based on deliberation by the Commission," it is not clear where the process is supposed to start. If a complaint must be submitted to the Minister, then referred to the Commission for deliberation, then sent back to the Minister for issuance of an order, this would seem to be an unusually complicated procedure for administrative enforcement.

2. Depending in part on the answers to the preceding point, how long would it take for an order to be issued? In this regard, we have reviewed Article 72(1) of the current Enforcement Decree for the CAK, which implements the existing authority (under Article 133(4) of the CAK) for the Minister to order deletion of infringing materials being made available over the network. (The amendment would repeal Article 133(4), and we presume the new administrative authority under Article 133-2 would replace it). Article 72(1) of the Decree provides that deliberations of the existing Copyright Commission under Article 133(4) can take up to 14 days, and that deliberation period may be further extended. This time period seems much too long for an efficient administrative enforcement system, even though the amendment provides that an order of the Minister or a recommendation of the Commission, once issued, must be responded to within three days (see proposed Articles 133-2(5) and 133-3(2)) . For example, if a right holder learns of infringing material posted on a board maintained by an online service, would the Commission have up to two weeks to "recommend," under proposed Article 133-3(1) or (2), that a warning be issued, and/or that the material be taken down? By that time a great deal of economic harm could have been inflicted on the right holder. On the other hand, will the Commission be capable of completing its deliberations in a matter of hours after receiving a complaint, which might well be required for an effective system that can deliver timely orders?

3. The issue of timeliness may be an even greater concern with regard to the more serious sanctions that Minister would be empowered to impose under proposed Article 133-2(4). These require that an online service provider have been previously fined two times (in the case of proposed Article 133-2(4)(1)) or three times (in the case of proposed Article 133-2(4)(2)). Realistically, how long would it take to get to this point in the process?

4. It would be helpful to clarify the circumstances under which the Minister can exercise his authority to order the termination of a service provider's access to the network under Article 133-2(4). First, can such an order be triggered in either of the two circumstances defined in subparagraphs (4)(1) and (4)(2), or must both circumstances be present? Second, if a triggering circumstance is present, must the Minister also find that the service provider "seriously harms the order of using copyrights, etc., in light of the form of the service, the quantity and nature of reproduced materials transmitted, etc."? Third, if both the triggering circumstance and the finding of "serious harm" are present, does the Minister still have the discretion to decide not to impose this sanction (this is suggested by the phrasing "may order"? While the sanction contained in this provision may have a deterrent impact, this will only be so if there is a credible threat that it will be imposed whenever a service provider is repeatedly fined for ignoring orders issued under either Article 104(1) or Article 133-2.

5. Is there flexibility to speed up the process in case of an emergency? For instance, we note that Article 34-2(2) of the current CPPA empowers the Minister of Information and Communication to dispense with giving a service provider "the advance opportunity to present its opinion" under certain circumstances. Proposed Article 133-2(6) does not grant a similar flexibility to the Minister of Culture, Sports and Tourism (unless this flexibility is contained in the provisions of the Administrative Procedures Act which are referenced in proposed Article 133-2(7)). Such flexibility should be added.

6. We were uncertain about the meaning of proposed Article 133-3(4). This states that the Commission does not need to deliberate if the Minister issues an order under Articles 133-2(1) or 133-

2(2) at the request of the Commission, even though those provision do require Commission deliberation. It would be useful to provide the Minister with the authority to act without going through the process of deliberation by the Commission, at least in some circumstances, in order to achieve a more speedy resolution. Article 133-3(4) does not seem to do this.

7. Proposed Article 142(2)(3) would authorize a fine of up to KRW 10 million (US$9800) for failure to comply with orders of the Minister under the new administrative enforcement process. That level of fine may be insufficient to deter non-compliance with these orders, especially considering the high revenues of some of the services involved. Furthermore, considering the "graduated sanctions" approach that underlies the proposal, it would be useful to authorize higher fines for second and subsequent violations.

8. It should be made clear that this administrative process is intended as a supplement to, and not a substitute for, other means of enforcement against online piracy. Specifically, the fact that a particular infringement was the subject of deliberation by the Copyright Commission, or that it was the subject of an order by the Minister, should not prevent a criminal prosecution or a civil lawsuit based on the same conduct.

In sum, the administrative enforcement process set out in Articles 133-2 and 133-3 has significant potential as one ingredient of the overall effort to combat the serious problem of online infringement in Korea. We commend the drafters for proposing it and look forward to clarifying the questions above about its operation. We also think that it demonstrates a useful approach that could provide valuable lessons for policy-makers in other countries that are grappling with similar problems. It is important to underscore, however, that this new process should supplement and support other critical aspects of the effort against online piracy, including the notice and takedown system established by Article 103; the additional obligations of "online service providers of special types," under Article 104; liability rules for online service providers that are clear, and that encourage cooperation with right holders to combat infringement; and vigorous criminal prosecution of online piracy in appropriate cases, leading to the imposition of deterrent penalties. IIPA has previously offered its views regarding steps that should be taken to strengthen Korea's copyright laws on several of these topics, and we look forward to the opportunity to present these again in an appropriate forum.

III. Other Issues

1. Article 134 of the CAK currently empowers the Minister to "pursue undertakings" on some topics and to "formulate and implement policies" on other topics. The proposed amendment would switch some topics from the "undertakings" category to the "policies" category. Could the difference between a "policy" and an "undertaking" be clarified? For instance, does a "policy" promulgated by the Minister have a more binding effect than an "undertaking" which s/he "pursues"?

2. Proposed Article 113-2 would authorize the Copyright Commission to conduct conciliation proceedings, while proposed Article 114-2 would formalize the existing authority to carry out mediation. Existing Article 117(1) appears to require the consent of both parties for mediation, but this should be spelled out for conciliation as well. It should be made clear that both these procedures are voluntary and that a copyright owner cannot be required to participate or adversely affected if it declines to do so.

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IIPA appreciates the opportunity to make these comments and thanks you in advance for considering them. If there are any questions or further information is needed, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/ Steven J. Metalitz

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