



October 3, 2007

VIA FACSIMILE AND E-MAIL

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Copyright Division, Ministry of Culture and Tourism
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Re: Comments on draft legislation to amend the Copyright Act of Korea

Dear Director Shim:

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

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, 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.

Because the goal of the current draft amendments is to bring Korean copyright law into compliance with the requirements of the Korea-US Free Trade Agreement (KORUS FTA), that is the main focus of these comments. IIPA has noted in several previous submissions its concerns about other aspects of the CAK, and these comments are without prejudice to the suggestions we have previously made on other ways to improve Korean copyright law.

IIPA commends the drafters of the pending amendments. They have done a very good job of implementing many of the obligations Korea has taken on in the FTA. In the interests of brevity, this submission focuses on areas where the draft would not fully implement the FTA, or in which the implementation could be improved, in IIPA’s view.

1. Definitions

Revised Art.2-22 is intended to implement the FTA requirement to recognize the copyright owner's exclusive right to make temporary copies. IIPA strongly recommends that a broader and more flexible definition be used, and one that more closely tracks the language of FTA Art. 18.4.1. The definition of "reproduction" should encompass "*fixation of a copy, in whole or in part, by any direct or indirect means and in any form, including but not limited to temporary or permanent storage in electronic form.*"

2. Duration of Protection

Proposed Art. 3(4) departs from the principle of national treatment and would make the term of protection for foreign works a matter of reciprocity. (Proposed Art. 64-1(2) would make similar change for the objects of neighboring rights.) While this should not affect US works given the current term of protection provided by US law, the application of reciprocity would create a degree of uncertainty about the duration of protection in Korea. This could lead to trade frictions that are contrary to the intent of the KORUS FTA, while yielding little or no benefit to Korean society. IIPA urges that these unnecessary provisions be reconsidered.

3. Exceptions and Limitations

The draft amendments create two new exceptions to protection. IIPA believes that the first of these (proposed Art. 35-2, regarding temporary copies) is too broad to meet the FTA requirement that any exceptions or limitations satisfy the Berne/TRIPS three-step test (FTA Art. 18.4.10.a). While we agree that temporary copies made "from illegally reproduced materials" must be excluded from any exception, the same should be true of temporary copies made in the course of a transaction not authorized by the right holder. For instance, if a user hacks into a website without authorization, and makes a temporary copy of a work stored on that website, the temporary copy should be considered infringing, even though the original copy stored on the website is not itself an illegal reproduction. Thus, the proviso to Art. 35-2 should read: "provided, however, that those cases where temporary reproduction occurs from illegally reproduced materials, *from materials to which the copier did not have authorized access, or in the course of a transaction not authorized by the right holder*, shall be excluded." Moreover, because there may well be other scenarios in which the application of this exception would make it difficult or impossible for a copyright owner to take effective action against infringements, the statute should explicitly make Art. 35-2 applicable only where the three-step test is satisfied. This could be done by making proposed Art. 35-2 subject to a provision similar to proposed Art. 35-3(2).

The second new exception, proposed Art. 35-3, would be for fair use. Fair use is an approach associated primarily with common law legal systems, and particularly with the U.S. legal system, rather than with civil law systems such as in Korea. IIPA member associations do business in many jurisdictions around the globe. Our experience is that either system – a common law system that employs the fair use doctrine, or a civil law system that relies on more specific exceptions and limitations -- can be successful in keeping the rights of copyright owners sufficiently strong while accommodating the legitimate interests of copyright users. Employing

both approaches simultaneously, as Korea apparently now proposes to do, is much less common, and therefore its impact is much less predictable. If Korea chooses to pursue this path, we urge it to do so cautiously, and to ensure that the practical impacts of introducing a fair use exception do not exceed the permissible bounds of exceptions and limitations under the FTA, as well as under other international treaties applicable to Korea.

4. “Exclusive use” rights

The draft amendment contains provisions on “exclusive use rights”(see proposed Arts. 57-63, and 90-2) that are based to a great extent upon the provisions governing “right of publication” under current law. Both the existing provisions and those in the proposed amendment raise some questions about compliance with Art. 18.4.6 of the FTA, which provides that the holder of any economic right must be able to “freely and separately transfer that right by contract,” and that the contractual grantee of any such right must be “able to exercise that right in that person’s own name and enjoy fully the benefits derived from that right.” Either or both of these FTA provisions may be violated by a statute that dictates the terms and conditions under which an exclusive rights may be transferred, if the statute does not allow the parties to reach a different arrangement by contract.

While the proposed amendment seems to preserve contractual freedom in some instances, in others it may not, such as in proposed Arts. 60(1) and (2) (conditions under which a right holder may terminate an exclusive license that has not been exercised); 61(1) (ability of licensee to transfer or pledge an exclusive use right); and 63(2) (author’s right to modify the work before republication). In all these instances, it should be made clear that the statutory provision is simply a default setting that may be changed by agreement of the parties. Furthermore, proposed Art. 61(2) is ambiguous and could be read to limit the ability of a right holder to require its licensee to refrain from activities that might otherwise fall within the scope of certain exceptions. If this reading is correct, it would be a serious incursion on contractual freedom. Finally, proposed Art. 62(1) should be reviewed to ensure that it does not make registration of an exclusive license a formality prohibited by the FTA and the Berne Convention.¹

5. Rights of sound recording producers

The proposed amendments leave unchanged Art. 83 of the CAK, denying sound recording producers an exclusive right to control webcasting, subscription digital broadcasting, and other “digital sound transmission services.” Although FTA Art. 18.6.3.c allows Korea to limit such exclusive rights with respect to “non-interactive transmissions,” any such limitations must comply with the three-step test, as spelled out in Art. 18.4.10. U.S. law denies exclusive rights to non-interactive transmissions only when very detailed conditions are complied with. In

¹ The proposed amendments also fail to correct several provisions of Korean copyright law that restrict contractual freedom by mandating that equitable remuneration for certain uses of works and other subject matter be channeled through a collecting society designated by the Minister of Culture and Tourism. See, e.g., Articles 25 (5)-(9) (use of works for educational purposes); 82 (use of phonograms for broadcasting); 83 (use of phonograms for digital sound transmission service). None of these requirements appears consistent with Art. 18.4.6 of the FTA.

short, these conditions operate to ensure that non-interactive services do not substitute for physical sales or unfairly compete with interactive services. Absent such protections, the failure to provide exclusive rights to digital communications such as webcasting would be inconsistent with the obligations of the FTA and represent an exception to rights that both conflicts with the normal exploitation of sound recordings, and creates unreasonable prejudice to the legitimate interests of sound recording producers and performers. Accordingly, IIPA urges that Art. 83 be repealed, and that the exclusive rights of sound recording producers and performers be extended to all forms of digital dissemination of sound recordings.

6. Liability of Internet service providers

While in general proposed CAK Art. 102 implements the extensive requirements of FTA Art. 18.10.30, there are several gaps which must be filled, including the following:

(a) Scope of safe harbors. The FTA clearly provides in Art. 18.10.30.b that the benefit for complying with safe harbor requirements is limited to the “scope of remedies,” and that while monetary relief may be “precluded,” injunctive relief is only subject to “reasonable restrictions” (Art. 18.10.30.b.i). However, proposed revised Art. 102(1) of the CAK states that “online service providers shall not assume any liability” if they meet safe harbor requirements, which appears to be a broad immunity against injunctions as well. The proposed provision on injunctive relief (new Art. 123) does not mention service providers or provide for injunctions against those otherwise immune from liability for infringements. This must be changed, so that courts may order online service providers to take appropriate action against infringement, even if those providers come within a safe harbor and are immune from monetary damages.

(b) Modification of content. Under FTA Art. 18.10.30.b.i.A, the “mere conduit” safe harbor is unavailable to service providers who engage in “modification of [the] content” that they carry. The corresponding provision of the CAK amendment (proposed Art. 102(1)-1) lacks this feature and should be corrected.

(c) Caching. Proposed Art. 102(1)-2(c) includes a proviso that allows a service provider to claim the safe harbor even if it ignores rules set by the information provider regarding refreshment of cached material, that are “in accordance with computer or information and communication network standard protocols,” but that “unreasonably limit temporary storage.” The FTA (Art. 18.10.30.b.iv.B) contains no basis for this proviso, and it should be deleted.

(d) “Facts or circumstances” test. Proposed CAK Art. 102(1)-3(c) does not line up with FTA Art. 18.10.30.b.v.B. Under the latter, the service provider loses safe harbor status by failing to take down infringing material after “becoming aware of facts or circumstances from which the infringement was apparent.” Because it lacks this “facts or circumstances” test, sometimes called a “red flag” test, the proposed CAK provision would require either actual knowledge, or receipt of a compliant notice from a right holder, before a takedown requirement applied. This would encourage service providers

to overlook strong evidence of infringement unless and until the right holder became aware of it and sent a notice. The “red flag” test must be added to proposed Art. 102(1)-3. (e) Monitoring. Proposed CAK Art. 102(2) flatly states that “an online service provider shall not bear an obligation to monitor its services or to proactively investigate violations...”. This statement goes well beyond the corresponding FTA provision, FTA Art. 18.10.30.b.vii, which makes it clear that the obligation to monitor or to “affirmatively seek facts indicating infringing activities” cannot be made a condition of “limitations in this subparagraph,” i.e., of eligibility for the safe harbor. However, the liability rules under Korean law, which must provide “legal incentives for service providers to cooperate with copyright owners” against online piracy, see FTA Art. 18.10.30.a, certainly may impose such obligations; and they could also be ordered by a court in an appropriate case. Proposed Art. 102(2) should be amended to refer only to safe harbor eligibility.

(f) Designated agent. Art. 18.10.30.b.v.C requires the service provider to “publicly designate” its agent for receiving takedown notices. Proposed Art. 103-4 of the CAK (not substantively changed from current law) seems to require only that this designation be sent to “users of [the service provider’s] facility or service,” in which case a rights owner might never become aware of it. This should be corrected, such as by requiring the designation also to be posted on a specified governmental site, so that rights owners will know where to direct their notices.

(g) Disclosure of identities of infringers. Under Proposed Art. 103-2(1), a right holder must first send a takedown notice (“notice as provided in Article 103(1)”) before seeking an order from the Minister for disclosure of identifying information on online infringers who have stored infringing material on the provider’s network. But this remedy is particularly important in another scenario: to identify infringers in a peer-to-peer system. In such a case, the request from a right holder to the service provider will not have been made under Art. 103(1), but rather under the Presidential Decree implementing Art. 104, dealing with “online service providers of special types.” To accommodate this scenario, a reference to Art. 104 should be added to the last sentence of proposed Art. 103-2(1) (i.e., “...after substantiating that the party has given notice as provided in Article 103(1) hereof, *or made a request under Article 104.*”)

7. Technological protection measures (TPMs)

Although proposed Art. 104-2 of the CAK implements many of the FTA requirements regarding TPMs, it also leaves many issues to be addressed in a Presidential Decree (for example, the administrative procedure for recognizing additional exceptions to the prohibition on circumvention of access controls, see proposed Art. 104-2(2)). IIPA urges Korea to ensure that such a decree is drafted in a transparent and thorough manner.

We also suggest that the statutory damage civil remedy for violations of the TPM provisions (proposed CAK Art. 125-2, which references several provisions of proposed Art. 104-2) be re-examined. It would not be practical to make statutory damages for trafficking in circumvention devices or services depend on the number of works infringed: it is not necessary

to prove that any works were actually infringed in order to demonstrate a violation of proposed Art. 104-2(3), for example. Statutory damages for civil violations of these provisions should be measured by the number of “technologies, products, devices or components” involved, or by the number of circumvention services performed, as under the corresponding provision of U.S. law (17 USC § 1203(C)(3)(A)).

8. Criminal penalties

The draft amendment fulfills the FTA requirements for criminal penalties for certain violations, but in some cases it is questionable whether the authorized penalties are sufficiently stringent to provide deterrence. For example, there are criminal penalties for commercial trafficking in circumvention devices or services in violation of proposed Art. 104-2(3), see proposed Art. 136(3-2), but they may be too light to provide deterrence. The penalties are only three-fifths of the level of punishment for a single act of criminal copyright infringement, even though a violation of the TPM provisions may enable thousands of subsequent infringements. Since the FTA requires deterrent penalties for this offense, see FTA Art. 18.10.27.a (made applicable by Art. 18.4.7.a), this maximum penalty level should be re-examined.

The same concern applies to the proposed criminal penalties in Art. 136(3-2) for trafficking in devices to decrypt encrypted broadcasting signals in violation of proposed Art. 85-2(1). Similarly, the maximum penalty for unauthorized commercial distribution of signals that have been decrypted without authorization (in violation of proposed Art. 85-2(3)) is only one year in prison and a fine of KRW 10 million. IIPA urges that all these proposed penalty levels be re-examined.

9. Camcording prohibition

IIPA notes that proposed Art. 138-4 includes two exceptions that are not specifically provided for in the corresponding FTA provision (Art. 18.10.29). We ask that this provision be reviewed to ensure that it fully achieves the objective of the FTA provision.

IIPA appreciates the consideration of its views on this important topic. If there are any questions or if we can provide further information, please do not hesitate to contact the undersigned.

Respectfully submitted,

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