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IFPI Comments on the Amendment of the Copyright Act in relation to the Graduated Response Regime in the Republic of Korea

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INTRODUCTION

It has been brought to the attention of the International Federation of the Phonographic Industry (IFPI) that the Honourable Congressman Choi, Jaechun, together with 12 other Honourable Congressmen proposed a bill (the “Bill”) to the National Assembly on 17 January 2013 to amend the Copyright Act (“Act”).

IFPI is very concerned about the proposed amendments to abolish the existing graduated response regime as they would detrimentally affect the development of the digital music market in South Korea. As the international organisation representing over 1,400 record companies globally, IFPI would like to submit the below comments concerning said proposed amendments. These comments supplement our submission titled “IFPI Comments on the Partial Amendment of the Copyright Act in South the Republic of Korea”.

EXISTING COPYRIGHT LEGISLATION BENEFITS THE ECONOMY

South Korea’s music industry is one of a small number of markets that have reported growth in recorded music sales over the past few years. The recorded music sales in South Korea experienced a drastic decrease of about 50% since 2000, reflecting the global trend. However, digital sales returned to growth in 2009 – and this development is due to a series of legislative amendments commenced in 2006 addressing online piracy. These legislative changes culminated in April 2009, with the Government’s proposal to introduce a graduated response regime. This law became effective in July 2009 and was accompanied by a major public awareness campaign. In parallel, the EU and Korea strengthened their bilateral commitment to enforce IP protection in the EU-Korea Free Trade Agreement completed in October 2009. In April 2011, the Government further

tightened the law against illegal cyberlockers and P2P services by requiring such services to be registered and to implement filtering measures. In November 2011, Copyright Act was amended again to comply with the IP protection obligations under the US-South Korea Free Trade Agreement, notably extending the term of protection of sound recordings to 70 years. The effects of these amendments were reflected in the music sales, in particular through the sales in digital channels, which increased by 27% in 2009 and this positive performance has continued in 2010 and 2011. Digital channels now account for an estimated 54% of record company revenues in South Korea. Under this favourable legislative environment, in which rightholders are ensured that their rights are effectively protected and enforceable, more resources can be re-invested back to the music industry in South Korea, making it the vibrant and innovative music market that the world knows today.

All of the above positive factors have triggered the rejuvenation of “K-pop” music in South Korea and other Asian markets. “K-pop” has not just swept across Asia, but extends to the global market. Many artistes and bands such as PSY, Girls’ Generation, Wonder Girls and Super Junior have contributed immensely towards the rise of K-pop culture. Due to their remarkable popularity, there is now a trend of idolatry of these K-pop stars that influences people globally to experience Korean culture through listening to their music.

The above legislative developments create a ripple effect benefiting the economic in South Korea such as attracting foreign investment to South Korea, creating more job opportunities, more revenue tax be collected, etc., in which no such favourable effect has been seen in other Asian territories. We would like to refer to the case study on the South Korean music market dated March 2011 and annexed to this submission for further details on the market developments since the legislative changes have been brought in.

GRADUATED RESPONSE REGIME CREATES A HEALTHY ECOSYSTEM FOR ALL PARTIES CONCERNED - USERS, RIGHTHOLDERS AND ONLINE SERVICE PROVIDERS

In a nutshell, the existing provisions of the Copyright Act provides a foundation for the South Korea Government to educate the public on the importance of copyright in the society. It also provides a healthy, time and costs effective ecosystem for record companies to protect their works. At the same time, it does not create additional burdens on online service providers (“OSPs”).

The “graduated response” regime in Articles 133-2 and 133-3 of the Act provides a vital incentive for the public to respect copyrighted works in the internet. The internet users

know that if they infringe rightholders' copyrighted works, their accounts will be suspended eventually. The regime is a much preferable approach for all involved (users, OSPs and rightholders) to handle infringements than a court procedure would be. It is more time- and cost-effective and it avoids any impact on privacy because the user's identifying details need not be disclosed to rightholders at any stage of the process.. And the regime does not create any additional burdens on OSPs, since virtually all OSPs invariably already have a contractual right to terminate a user's account included in their standard terms and conditions, in cases where the user infringes the law.

OTHER POSITIVE EFFECTS IN EXISTING FRAMEWORKS

We observe that although the regime has not yet been fully implemented at this stage, as the focus remains on webhard "enforcement"¹, the operation of the regime already so far has had great positive effects on the market and on public awareness levels. As described in more detail in the annexed case study, since the introduction of the regime piracy rates have steadily declined and many legitimate digital music downloading services were launched by content service providers/OSP's and are now successfully operating in the market. The above provisions also provide a foundation for the Administrations to launch and promote copyright education and public awareness programs² throughout the territory. It is encouraged to note the determination of MCST and KCC to develop a healthy copyright ecosystem from legal and educational perspective as stated in its 2011 Annual Report on Copyright :

"In order to create a healthy "copyright ecosystem" in which authors are respected and high-quality works are smoothly distributed and read, it is still insufficient to merely make related legal improvements and develop IT technology. What is ultimately required is to change the perceptions and attitudes of people, who are members of the copyright ecosystem, toward a more desirable direction. To this end, the MCST has concentrated its policy capabilities on copyright education and public awareness programs designed to raise awareness of the importance of copyright and implemented a wide range of policy measures."³

Internationally, the provisions in the Copyright Act to suspend online accounts and bulletin board services of infringers have presented a precedent case for Western countries such as France, the United Kingdom and New Zealand. The regime's positive effects on the market have led to South Korea's exclusion from the Special 301 Watch List

¹ 2011 Annual Report on Copyright in Korea, MCST and Korea Copyright Commission, page 46.

² 2011 Annual Report on Copyright in Korea, MCST and Korea Copyright Commission, pages 51-77.

³ 2011 Annual Report on Copyright in Korea, MCST and Korea Copyright Commission, pages 51.

released by the United States Trade Representative (USTR) for four consecutive years since 2009. There is no doubt that this has enhanced South Korea's international image as a country with a vibrant, safe online environment for businesses to operate in⁴.

All the positive effects described above will cease, if the Copyright Act is amended as currently proposed in the Bill. These amendments would be (1) detrimental to the economy and (2) send out a wrong message to the industry and to the public – a message entirely contrary to the Government's successful efforts over the past few years to protect and foster the Korean music market.

(1) THE AMENDMENTS WOULD HAVE A DETRIMENTAL EFFECT ON THE ECONOMY

Without the graduated response regime provided in the Copyright Act, OSPs would not have the authority to send warning messages and suspend repeat infringers' accounts. A wrong message would be delivered to the public that there is no harm and that there are no legal consequences to infringing others' works on the internet. The consequence would be that more and more people would again engage in infringing activities and revenues generated from legitimate services would decrease. This would create a ripple effect throughout the economy, negatively affecting employment rates, tax collections, and Korea's image. We therefore urge the Government not to remove Articles 133-2 and 133-3 of the Act.

According to our records, the recorded music revenue generated from digital market was 23% higher than from physical market in South Korea in 2011. However, the digital music market is still at a crucial stage and record companies need to take a cautious approach on their investment strategy. Although the digital music market has been picking up in recent years, the development of legitimate business activities on the internet is still very slow in comparison; revenue generated increased by 6% from 2010 to 2011. Therefore, any unexpected increase in cost or decrease in revenue would have a direct effect on record companies' business decisions on how to allocate their resources. If the law no longer provides effective protection of their rights, record companies will have fewer incentives to invest further in the South Korea market because it will be difficult for them to enforce their rights in the territory.

(2) DELIVERING THE WRONG MESSAGE TO SOCIETY

⁴ Cf. *ibid*, page 7.

Removing Articles 104, 133-2 and 133-3 of the Act would deliver a wrong message to the public that there is no negative effect and that there are no legal consequences when infringing copyrighted works on the internet. Further, administrations would no longer have the foundation to educate the public⁵ on the importance of copyright in their life. Internet users would engage in infringing activities without a single notice that they infringe others' copyrights. The market would be inundated once again with infringing content and rightholders would no longer be able to obtain equitable remuneration from their works or protect their works in the South Korea market. Eventually, the incentives to invest further in the South Korea digital market would dry out. This bad ripple effect would not only affect the South Korea economy, but adversely affect the image of South Korea worldwide.

CONCLUSION

The digital music market started to pick up in recent years. This is due to the cooperation efforts made by the artists, composers, record companies, OSPs and content service providers that were enabled by the provisions of the graduated response regime. Amending and removing these provisions from the Act that protect rightholders' rights would adversely affect the development of the now growing market, and destroy the very foundation for public education and the image of South Korea internationally. Therefore, we urge the Government to withdraw these proposals.



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⁵ 2011 Annual Report on Copyright in Korea, MCST and Korea Copyright Commission, pages 51-77.