representing the recording industry worldwide

# IFPI Comments on the Partial Amendment of the Copyright Act 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 to the National Assembly on 17 January 2013 to amend the Copyright Act (the "**Bill**"). Our submission titled "IFPI Comments on the Amendment of the Copyright Act in relation to the Graduated Response Regime in the Republic of Korea" supplements this submission.

IFPI represents the recording industry worldwide, with a membership comprising some 1400 record companies in 66 countries and affiliated industry associations in 56 countries, including Korea.

We would like to raise our serious concerns regarding the proposed amendments in relation to (1) the right of reproduction – Article 2(22); (2) the exception for temporary copies - Article 35-2; (3) potential problems under proposed amendments to Article 102 regarding ISP liability; (4) burdensome requirements for the notice and take down provision under Article 103; (5) the deletion of Articles 133-2 and 133-3 and the proposed amendments to Articles 104 and 142 regarding graduated response; (6) the limitations on the provisions on protection of technical protection measures; and (7) Article 125-2 on statutory damages.

If adopted, these amendments, and in particular the ones relating to graduated response, would seriously affect the Republic of Korea's music market, which has shown tremendous growth in recorded music sales since 2007 (moving up from the 23rd largest market to the 11th largest market since that time) – due largely to the successful operation of the

graduated response regime, which drove down piracy figures and at the same time helped legitimate businesses to enter the market.

## (1) PROPOSED NEW DEFINITION OF THE RIGHT OF REPRODUCTION WOULD VIOLATE KOREA'S INTERNATIONAL TREATY OBLIGATIONS

The right of authors, performers and 'phonogram producers' to authorise or prohibit copying of their works and other protected material has been a longstanding feature of international instruments in the copyright field before the 1996 WIPO Treaties. The Berne Convention (1971), Rome Convention (1961), Geneva Phonograms Convention (1971), and the WTO TRIPs Agreement (1994) by incorporation of Berne Convention requirements, all require protection of this important right. The 1996 WIPO Internet Treaties clarified and confirmed the broad scope of this reproduction right, particularly in its application to works and phonograms in the digital environment. Both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) re-state the Berne Convention requirement that the reproduction right must cover reproductions in 'any manner or form'. Furthermore, the WPPT explicitly protects 'direct and indirect reproductions,' as provided by the Rome Convention. The full scope of this right is further clarified in an Agreed Statement that was adopted unanimously in the treaty negotiations. The Agreed Statement confirms that the right of reproduction 'fully applies in the digital environment, in particular to the use of phonograms in digital form. It is understood that storage of a protected phonogram in digital form in an electronic medium constitutes a reproduction.'[1] This is confirmed in WIPO's *Guide to the Copyright And Related Rights Treaties Administered by WIPO* (2003) at page 195 in its commentary on Article 1 of the WIPO Copyright Treaty, where it states that the idea that "too temporary, too transient' reproductions must not be recognized as reproduction … would have been in conflict with Article 9 of the Berne Convention under which the duration of the fixation (including the storage in an electronic memory) – whether it is permanent or temporary – is irrelevant (as long as, on the basis of the (new) fixation, the work may be perceived, reproduced or communicated)."[2]

[1] See Article 11 of the WPPT which states that "producers of phonograms shall enjoy the exclusive right of authorizing the ***direct or indirect reproduction*** of their phonograms, ***in any manner or form***", as well as Agreed Statement concerning Articles 7, 11 and 16 of the WPPT which states: "***The reproduction right,*** as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, ***fully apply in the digital environment***, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles." [Emphasis added.] See also Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works ("Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works***, in any manner or form***.").

[2] See also page 249 of WIPO's *Guide to the Copyright And Related Rights Treaties Administered by WIPO* (characterising the discussion at page 195 as being applicable in the context of Article 11 of the WPPT).

The Bill suggests amending Article 2(22) as follows:-

> **Article 2(22)** : "Reproduction" shall mean ~~temporarily or permanently fixing~~ fixing (for permanently or for the case where reproduction is viable after the reasonable period of time has passed) or the reproduction in a tangible medium by means of printing, photographing, copying, sound or visual recording, or other means;

This new definition limits the sound recording producers' right of reproduction in Art 78 Copyright Act as it specifically excludes special forms of reproduction, i.e. temporary reproductions. This is inconsistent with the Republic of Korea's international treaty obligations set out above.

It is in particular the provisions in the WPPT and the Berne Convention referring to "in any manner or form" which reflects the broad concept of the reproduction right covering "all methods of reproduction" and "all processes known or yet to be discovered".[3] Moreover, any reproduction of a work within the meaning of copyright has to be considered a form of fixation. A sufficient degree of stability of the form of fixation has been identified as the main function-oriented element for the definition of a fixation; that degree of stability is met when what is fixed can be perceived, reproduced or communicated.[4] Hence, technical, incidental or transient copies made for the purposes of caching, browsing or storage in electronic memories are, by definition, also acts of reproduction.

It is crucial in the online environment to cover all forms of reproductions, including for instance reproductions in the course of streaming. Limiting the reproduction right to exclude temporary fixation would violate the minimum standards for the reproduction right as stipulated by the above mentioned international instruments.

## (2) THE PROPOSED AMENDMENTS TO ARTICLE 35-2 WOULD VIOLATE THE THREE STEP TEST

The Bill provides the following amendments to Article 35-2:

> **Article 35-2:** The course of using copyrighted works in a computer**,** temporary reproduction of the copyright works within the computer can be allowed to the extent **or in the case where reproduction is allowed as for the part of**

[3] Jorg Reinbothe & Silke von Lewinski. *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty – Commentary and Legal Analysis.* Butterworths. 2002, p.42.
[4] Ibid, p.43

**technical process** that it is necessary in order to handle information effectively and efficiently; ~~provided however that this provision shall not apply when such use of copyright works infringes copyright.~~

Article 35-2 Copyright Act was introduced with the ratification of the EU-Korea Free Trade Agreement in November 2011. In comparison to the international standards of other countries having enacted an exception for temporary copies aimed at certain special cases in the context of network communications, it is a very broad exception which falls outside of the usual scope of exceptions being limited to transient reproductions that take place during network communications and that do not have independent economic value. The sole purpose of such exceptions is to enable transmissions in a network between third parties by an intermediary or for a lawful use.[5] However, instead of narrowing the exception, the Bill aims at further broadening it, which raises serious concerns regarding the provision's compliance with the three-step test, in particular in connection with the broad definition of "reproduction" in Article 2(22). Overall the provision seems to indicate a greater time-frame than only "truly temporary" or "transient" copies. Moreover, we urge not to delete the requirement that the exception does not apply in cases of copyright infringement. The suggested amendments are of particular concern in light of the suggested amendments to Article 102 regarding the limitation of liability of certain types of activities of online service providers ("OSPs"). Article 35-2, if amended as proposed under the Bill, would further widen the scope of the liability limitations in Article 102. We refer to our comments below under point (2).

In addition, the suggested amendments would run afoul of the Three-Step Test, as stipulated in Article 9(2) Berne Convention, Article 13 of the TRIPS Agreement, Article 10(1) of the WCT, Article 16(2) of the WPPT, and Article 10.11 of the EU-Korea Free Trade Agreement. This test provides that an exception and limitation:

(1) may only apply in certain special cases;
(2) must not conflict with the normal exploitation of the work; and
(3) must not unreasonably prejudice the legitimate interests of rightholders.

The exception in Art 35-2 if amended would not comply with any of the conditions of the Three-Step Test as it would not apply only in certain special cases and would conflict with the normal exploitation of a work as it would also allow reproductions that infringe

[5] See for example the provisions of Article 5(1) of the EU Copyright Directive on exceptions and limitations:
" Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."

copyright, and therefore also unreasonably prejudice the legitimate interests of rightholders.

For the above reasons, we urge the Government not to introduce the proposed amendments to Article 35-2.

## (3) POTENTIAL PROBLEMS UNDER PROPOSED AMENDMENTS TO ARTICLE 102

The Bill proposes to change the heading of the so-called "safe harbour" provisions set out in Article 102 from "Restriction on the Liability of Online Service Providers" to "Immunity of Online Service Provider". We respectfully submit that a reference to "immunity" wrongly implies a broader concept of safe harbours than what is the concept under international standards and in particular the wording set out in Sub-Section C of the EU-Korea FTA. We therefore submit that the heading referring to liability restrictions should be kept as is.

In addition, the Bill includes a new Art 102(4) setting out that OSPs do not have a general obligation to monitor. Article 102(4) does not add anything of substance to Article 102(3) and we therefore suggest deleting it.

## (4) BURDENSOME REQUIREMENTS FOR THE TAKE-DOWN PROVISIONS IN ARTICLE 103

The Bill proposes to include detailed requirements for rightholders' infringement notifications to OSPs ("takedown requests"). These requirements are not consistent with the notification requirements stipulated in legalisation in other countries around the world, for example the (fairly detailed) DMCA procedure in the US. IFPI has a long experience with notice and take-down procedures in countries around the world, including working with 587 service providers. For example, in 2011, IFPI sent 500,385 notifications which facilitated the removal of over 15 million infringing URL links.

Some of the proposed new requirements would result in a burdensome procedure making the mechanism ultimately ineffective. For instance, the scope and extent of the third requirement, "information of location where the copyrighted works are infringed on information communication networks where online service providers operate" is unclear.

IFPI always provides sufficient information for an OSP to locate infringing content in the form of the online location of the infringing material – the URLs. This information is the standard requiremet in notice and take-down systems in many countries around the world,

including for example the US[6]. The infringement notice simply has to contain sufficient information to enable the OSP to locate the material. Requirements for additional information, such as further detailed descriptions and screen shots would be burdensome for both the rightholder and the OSP, and the information would not be necessary for the OSP to act.

Furthermore, and most importantly, the requirement set out in newly inserted paragraph 3 of Article 103 regarding an indemnification statement of the rightholder, is not in line with successfully run take-down regimes in countries around the world, which demonstrate that such a requirement is not necessary. We respectfully submit that it is the OSPs who are in the best position to address this issue through terms and conditions agreed to with their customers; they should clearly set out in their terms and conditions that they are entitled to remove material that is alleged to be infringing. In our view it is relevant that the economic damage of having infringing material online for even a few hours can be substantial to rightholders, whereas the possible economic damage for ISPs in the unlikely case that material was taken down by mistake is minimal, since the ISP can deal with this in its terms and conditions.

We would also like to emphasise that the error rate for IFPI notices is extremely low. When sending a takedown request IFPI always includes a statement as follows: "*We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law. We assert that the information in this notification is accurate, based upon the data available to us*."[7]

The proposed amendments to the take-down procedure would create substantial burdens to rightholders and risk to render the system inefficient and unworkable. We therefore urge the Government not to introduce the proposed amendments.

## (5) THE DELETION OF ARTICLES 133-2 AND 133-3 WOULD HAVE A DETRIMENTAL EFFECT ON KOREA'S MUSIC MARKET

As set out in more detail in our supplementary submission, the abolishment of the graduated response regime set out in Articles 133-2 and 133-3 and the proposed amendments to Articles 104 and 142 would have a detrimental effect on the Korean

[6] See section 512(a)(C)(3)(iii) US Copyright Act requires "Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material".

[7] For example, this wording mirrors the wording of section 512(a)(C)(3)(v) of the DMCA which requires a statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

economy. This would deliver a wrong message to the public that there is no harm and that there are no legal consequences to infringing copyright-protected works on the internet, driving up infringement again and, in consequence, decrease revenues generated from legitimate music services. This would create a ripple effect throughout the economy, negatively affecting employment rates and tax collections, as well as Korea's international image as a country with a vibrant, safe online environment for businesses to operate in. We therefore urge the Government to withdraw these proposals.

## (6) THE LIMITATIONS ON THE PROVISIONS ON PROTECTION OF TECHNICAL PROTECTION MEASURES ARE NOT IN LINE WITH WIPO PROTECTION STANDARDS AND THE EU-KOREA FTA

The Bill's proposed amendments 104-2(2) are inconsistent with Article 10.12(2) of the EU-Korea FTA. Article 10.12(2)(a) FTA requires "adequate legal protection against the manufacture, import […] of devices, products or components, or the provision of services which are promoted, advertised or marketed for the purposes of circumvention of […] any effective technological measures." Whereas the current version of the Copyright Act referring to the "publicising, advertising or promoting for the purpose of neutralising of TPMs" is in line with the FTA, the Bill's proposed limitations to devices/services etc that are "marketed" for the purposes of circumvention would deprive rightholders of adequate legal protection against the circumvention of technological measures as provided for in international treaties, notably Article 18 of the WPPT. Similar concerns apply to the proposed amendments to Article 104-2(2) No. 3 which aim at limiting the protection against devices/services etc. to those which are "designed and manufactured" for the "main purpose" of circumvention, instead to devices/services etc. which are "designed, manufactured, or modified" for the purposes of circumvention (cf. also the wording of Article 10.12(2)(c) of the FTA). In particular the wording "for the main purpose" would open the door wide to possible circumvention – and bring Korea out of line with international protection standards set out for example in the WIPO Internet Treaties. The current provisions of the Copyright Act are in line with Korea's obligation under international treaties and the FTA's provisions and therefore we respectfully submit that the Bill's proposed amendments should not be enacted.

## (7) Article 125-2 Claim for Statutory Damages

We understand that the Bill limits rightholders' ability to claim statutory damages and provides that the provisions will not apply if "the country is a party for the contract made

under the Act on Contracts to which the State is a Party". This wording is unclear but we have serious doubts whether it would be consistent with Article 18:10.6 of the Korea-US FTA which provides that "In civil judicial proceedings, each Party shall, at least with respect to works, phonograms, and performances protected by copyright or related rights, …, establish or maintain pre-established damages, which shall be available on the election of the right holder," or with Article 10.50(3) of the EU-Korea FTA which provides for a right for a Party to establish pre-established damages, which are to be available on the election of rightholders. Statutory damages are essential for rightholders' ability to protect and enforce their rights, in particular in the online environment, since it is not always possible to provide evidence regarding losses suffered due to piracy. Therefore we respectfully submit that the statutory damages provision should apply in all circumstances and the Bill's proposed amendments should not be introduced.

## CONCLUSION

By virtue of being a signatory state to various international copyright treaties and conventions, notably the Berne Convention and the WIPO Internet Treaties, the Republic of Korea is obliged to grant minimum protection levels as required under these treaties. According to established international law principles, contracting parties must fulfill their treaty obligations in good faith. For this reason the Korean law should be developed in a manner that is in line with the Republic of Korea's international obligations. It is our respectful submission that the proposed amendments referred to in detail above would violate the Republic of Korea's obligations in the said international treaties. For this reason the proposed Bill should be withdrawn.

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For further information, please contact:

**Kwee Tiang Ang**, Regional Director email: kweetiang.ang@ifpi.org
IFPI Asian Regional Office, 22/F Shanghai Industrial Investment Building, 48-62 Hennessy Road, Wanchai, Hong Kong, Tel: +852 2866 6862, Fax: +852 2865 6326