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Joint Civil Society Submission to the Committee on Economic, Social and Cultural Rights for State Compliance with the International Covenant on Economic, Social and Cultural Rights

Republic of Korea, Pre-sessional Working Group of the CESCR for the 60th Session

Briefing on copyright as a barrier to the exercise of cultural rights online

Submitted by the Association for Progressive Communications (APC), Korean Progressive Network Jinbonet and OpenNet Korea

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Introduction

1. The Association for Progressive Communications (APC), Korean Progressive Network Jinbonet, and OpenNet Korea¹ submit this report for the adoption of the List of Issues in order to review the Republic of Korea's compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR).
2. Through this document, APC, Jinbonet, and OpenNet Korea seek to provide the UN Committee on Economic, Social and Cultural Rights (CESCR) with additional information on how the internet impacts the rights enshrined in the ICESCR, with a particular focus on copyright as a barrier to the exercise of cultural rights online.²

Background

3. The internet is a valuable tool for ensuring cultural rights by allowing people to easily access information all over the world, collaborate with each other on cultural projects, and share their opinions and creative work. In particular, the internet and digital technology can help ordinary people become creators, while they were merely passive consumers of cultural products before the internet was popularised.
4. The Human Rights Council has affirmed that the same rights that people have offline must also be protected online,³ and recognised digital documentation as an effective strategy for preventing the destruction of cultural heritage.⁴
5. To maximise the potential of the internet as an enabler of cultural rights, access to the internet and information is essential. South Korea is one of the countries with the most developed internet infrastructure in the world, with the internet usage rate – based on the number of people aged three years and older who used the internet at least once within the past month – reaching 41.11 million, or 83.6% of the population, according to a 2014 survey on internet usage.⁵ While there remain digital gaps in access to some degree depending on gender, age, income, education, occupation and disabilities, an important factor which affect users' access to information even in a country which has a highly developed internet infrastructure like South Korea is the copyright regime.
6. Copyright controls what content can be accessed online, and under which conditions this content can be accessed, used, shared, stored, adapted, translated, etc. This system of

1 The Association for Progressive Communications (APC) is an international network and non-profit organisation founded in 1990 that wants everyone to have access to a free and open internet to improve lives and create a more just world (<https://www.apc.org>). Korean Progressive Network Jinbonet is a non-governmental organisation, founded in 1998 in South Korea, which aims to support the growth of civil activity and communication by providing network services to civil society organisations, trade unions, individuals and progressive projects. Open Net Korea is a not-for-profit organisation, founded in 2013, which aims to provide a forum for discussion and collaboration to explore effective policies and solutions to make the internet a platform for freedom, openness and sharing.

2 This report is based on a chapter on the same topic, written by Byoung-il Oh, in the 2016 edition of Global Information Society Watch. <https://www.giswatch.org/sites/default/files/gw2016-korea.pdf>

3 See Human Rights Council resolutions [20/8](#), [26/13](#) and [32/13](#) on "The promotion, protection and enjoyment of human rights on the Internet".

4 See Human Rights Council resolution [33/20](#) on "Cultural rights and the protection of cultural heritage".

5 Korea Internet & Security Agency. (2015). *Korea Internet White Paper 2015*. isis.kisa.or.kr/eng/ebook/EngWhitePaper2015.pdf

control could restrict the personal and non-commercial use of and access to information on the internet, preventing information from being copied, modified and distributed quickly and easily.

7. In the past, copyright mattered generally to professional creators because while everyone could be a creator, most people had no means to distribute their works. Digital technology, including image- and video-editing programmes and digital devices like digital cameras and smartphones, enabled ordinary people to create their own images and videos. The internet provided a cheap method to disseminate their works all over the world. Now copyright is a matter that not only concerns professional creators but all of us.

Legal framework

8. South Korea ratified the ICESCR on 10 April 1990 without any reservations. ICESCR's Article 15 establishes the right of everyone "to take part in cultural life" and "to enjoy the benefits of scientific progress and its applications." It also protects the right of authors "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production." However, in General Comment No.17 (2005), the CESCR points out: "It is... important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1(c)."⁶ The Committee also states that, as opposed to authors' rights viewed from the perspective of human rights, "intellectual property regimes primarily protect business and corporate interests and investments."
9. There are no explicit provisions to protect cultural rights in the constitution of South Korea;⁷ however, some provisions which deal with freedom of expression (Article 21.1), freedom of learning and the arts (Article 22.1), the rights of authors (Article 22.2) and the right to receive an education are related to cultural rights as established in Article 15 of the ICESCR.
10. As one of the means to implement the right of authors, South Korea has a Copyright Act.⁸ The purpose of copyright is to promote the development of culture by providing creators with exclusive rights temporarily, for 70 years after the death of the author, so that they are given incentive to create cultural works and be rewarded by the market. At the same time, copyright facilitates the dissemination and use of cultural works through fair use that permits limited use of copyrighted material without acquiring permission from the copyright holders (this is set out in section 4, subsection 2 of the Copyright Act). Copyright regimes should keep a balance between exclusive rights and fair use, which is in line with the cultural rights of everyone. Such a balance would differ depending on the economic and social context of each community or country.
11. The Copyright Act of South Korea has failed to reflect internal needs, and has been affected mainly by external factors such as pressure from the United States (US) and international

6 Committee on Economic, Social and Cultural Rights. (2005). General Comment No. 17. (E/C.12/GC/17) tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2fC.12%2fGC%2f17&Lang=en

7 www.law.go.kr/engLsSc.do?menuId=0&subMenu=5&query=%EB%8C%80%ED%95%9C%EB%AF%BC%EA%B5%AD%ED%97%8C%EB%B2%95#liBgcolor0

8 www.law.go.kr/engLsSc.do?menuId=0&subMenu=5&query=%EC%A0%80%EC%9E%91%EA%B6%8C%EB%B2%95#liBgcolor0

treaties. Major revisions to the Copyright Act since the 1990s were the result of trade negotiations between Korea and the US in 1996, accession to the World Trade Organization (WTO) in 1994, and the Korea-US Free Trade Agreement (KORUS FTA)⁹ concluded in 2007.

12. Since around 2000, digital copyright agendas have started to be included in the Copyright Act, and the so-called “Korean wave” – the rise in global popularity of South Korean culture abroad – triggered the strengthening of copyright during the 2000s. This included the so-called three-strikes policy (Article 133(2) of the Copyright Act)¹⁰ and filtering obligations (Article 104 of the Copyright Act) for a specific category of internet service providers that offer peer-to-peer and “web hard” services.¹¹ These regulations have not even been accepted yet in the international copyright-related treaties. This trend is reflecting the interest of right holders on the one hand, while also reflecting a policy direction by the Korean government to promote the cultural industry rather than considering the cultural rights of ordinary users.

Copyright as a barrier to the exercise of cultural rights online

13. As noted above, the three-strikes rule (Article 133-2 of the Copyright Act) and filtering obligation for special types of online service providers (OSPs) (Article 104 of the Copyright Act) that excessively protect copyright beyond the international standard unduly restrict the right to take part in cultural life and to enjoy the benefits of scientific progress and its application, as laid out in Article 15 of the ICESCR.
14. In 2009, when the rule was introduced, the government claimed that the three-strikes rule targets a few “heavy uploaders” who systematically distribute copyright-infringing materials. However, according to a source from February 2013, among 380 users whose accounts were shut down, 167 of them (44%) posted copyright-infringing materials less than 10 times, and 174 of them (45.8%) inflicted damages of less than USD 90, which shows that the three-strikes rule was being applied to petty copyright infringements.¹²
15. In March 2013, a report by the National Human Rights Commission of Korea on human rights and information and communications technologies (ICTs) recommended that “impact assessments should be implemented on laws violating the right to enjoy information and culture” such as the three-strikes rule, because “excessively strong copyright protection may threaten the enjoyment of human rights and hinder innovation online.”¹³ The former UN Special Rapporteur on freedom of opinion and expression also expressed his concerns

9 Ministry of Trade, Industry and Energy, KORUS FTA, www.fta.go.kr/us (Korean); Office of the United States Trade Representative, U.S.-Korea Free Trade Agreement, www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta (English).

10 The copyright “three-strikes” policy is the system whereby the minister of culture, sports and tourism can order the suspension of the account of anyone who violates copyright after being notified of allegedly violating copyright three times by the minister.

11 Web hard service refers to a file-sharing service where users can upload files and share them with other users. Many users in South Korea upload movies, music and TV programmes on web hard services, which have raised controversy over copyright violation.

12 Kim, J. Y. (2013, 28 March). South Korean Politician Moves to Repeal Biased Copyright Law. *Global Voices*. <https://advox.globalvoices.org/2013/03/28/south-korean-politician-moves-to-repeal-biased-copyright-law>

13 National Human Rights Commission of Korea. (2013). ICTs and Human Rights Report. https://www.humanrights.go.kr/common/board/fildn_new.jsp?fn=in_BB2014100709303543914011.pdf

on the three-strike law that disconnects users from internet access for copyright violations.¹⁴

16. There are already civil and criminal remedies for copyright infringement, and suspending the accounts of infringers additionally is an excessive infringement on the right to access the internet and as such, the right to enjoy the benefits of scientific progress. The OSPs' filtering obligation compels the companies to monitor and censor users' expression.¹⁵ Moreover, petty copyright infringements and infringements for not-for-profit purposes are all subject to excessive criminal punishment, and "copyright trolls" abuse the provisions to earn large sums in settlements that exceed real damages.
17. There are a number of cases of the excessive application of online copyright threatening the cultural rights for internet users in the Republic of Korea. For example, in 2009, a father's blog post with a video clip of his five-year-old daughter singing and dancing to a then popular song called "미쳤어(I'm Crazy)" was blocked following a request from the relevant collecting society.¹⁶ Later, the post was recognised as fair use by a court, but the case raised social concerns on the indiscreet requests for content take-downs by copyright holders.
18. In 2005, video clips and photos from a then popular TV drama, "Immortal Lee-Soon-Shin",¹⁷ that were uploaded on a bulletin board run by a community of fans of the drama¹⁸ were deleted by request of the KBS, the broadcasting company which produced the drama. The video clips and photos uploaded onto the bulletin board were just a way of the fans sharing their excitement with each other about the drama series. People usually communicate with each other by talking about movies, TV shows, books and songs which impress them. It is no different when users do this online – it is very natural to use cultural works as the subject of communication and as a way to seek connection with others.
19. This form of cultural participation is not only a right to be protected, but it also often helps popularise the cultural work. In the above case, the broadcasting company should have realised that the fan community it censored was one of the driving forces behind the drama's popularity. A good example of this is the song "Gangnam Style" sung by PSY.¹⁹ A large number of music videos parodying Gangnam Style were produced by users just for fun, such as London Style, Pusan Style, Police Style, etc. These in turn increased the popularity of the original hit.
20. Furthermore, royalty collection rules for podcasts have yet to be developed.²⁰ As a result there are no legal grounds on how much royalty one should pay for using music in one's

14 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, para. 49.

15 The EU prohibits imposing a general obligation on service providers to actively seek facts or circumstances indicating illegal activity (Directive on electronic commerce, Article 15). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>

16 Suh, J. (2012). UCC (User-created Contents) and Fair Use in Korea – In Light of "Son Dam-bi" Decision. *Seoul Law Journal*, 53(3). s-space.snu.ac.kr/bitstream/10371/79375/1/21%20%EC%84%9C%EC%A7%84%ED%98%B8.pdf

17 www.kbs.co.kr/drama/leesoonshin

18 cafe.naver.com/kbsleesoonshin.cafe

19 www.youtube.com/watch?v=9bZkp7q19f0

20 In South Korea, royalty collection rules for the specific use of copyrighted works are decided by the relevant collecting societies with the approval of the Ministry of Culture, Sports and Tourism.

podcast. Podcasts are regarded as “forwarding” under the Korean Copyright Act,²¹ which is in the same category of activity as posting an article in a blog. As a result, podcasts, which are often non-profit, have been blocked due to copyright claims, with no framework in place to resolve such situations.²²

Recommended questions for the List of Issues

21. What measures is the government taking to reform the Copyright Act to bring it in line with international standards, and to ensure that citizens are able to fully enjoy their right to take part in cultural life and to enjoy the benefits of scientific progress and its application, as laid out in Article 15 of the ICESCR? Is it considering abolishing the extreme copyright protection measures such as the three strikes rule (Article 133-2) and the filtering obligation for special types of online service providers (Article 104)?
22. What measures is the government taking to ensure access to information, allow remixing, and enable the dissemination of creative works for not-for-profit purposes to ensure that citizens are able to fully enjoy their right to participate in cultural life online as well as offline?
23. Has the government taken any steps to solve the problem of an absence of royalty collection rules dealing with podcasts by mediating the negotiations between stakeholders?
24. Is the government planning to develop a public policy to support artists and cultural creators so that they can make a living and continue their work without depending on copyright regimes for income?

21 According to the Korean Copyright Act, Article 2 (Definitions), the term “public transmission” means sharing works, stage performances, music records, broadcasting or databases (referred to as “works, etc.”) by means of radio communication or wire communication so that the public may receive them or have access to them; the term “forwarding” means to provide works, etc. for use so that the members of the public may have access at the time and place of their own choosing; and the term “digital audio transmission” means the transmission of sound in digital form initiated at the request of members of the public for the purpose of having the public receive the transmission simultaneously. It excludes forwarding. See: law.go.kr/engLsSc.do?menuId=0&subMenu=5&query=%EC%A0%80%EC%9E%91%EA%B6%8C%EB%B2%95#liBgcolor0

22 In early 2016, Maeul Media Creators, a podcast initiative of the Seoul Maeul Media Support Centre, ran into difficulties after Podbbang, one of the most popular podcast platforms in the Republic of Korea, sent notice on 18 December 2015 that it would block podcasts which violate music copyright, at the request of the music copyright society. One of the podcasts under the music category of the podcast site had already been blocked. Although their use of songs in their podcasts is for non-commercial purposes, it is still regarded as copyright infringement. The Seoul Maeul Media Support Centre approached Podbbang and the Korea Music Copyright Association (KOMCA) in an attempt to solve the problem, but did not receive a satisfactory response from them. Both sides have shifted responsibility back and forth, while Maeul Media Creators have expressed the intention to pay royalties if necessary, but there is no framework under which to resolve this.