

GISWatch
10th Edition

GLOBAL INFORMATION SOCIETY WATCH 2016

*Economic, social and cultural rights
and the internet*



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND INTERNATIONAL DEVELOPMENT RESEARCH CENTRE (IDRC)

Global Information Society Watch

2016



Global Information Society Watch 2016

Economic, social and cultural rights and the internet

Coordinating committee

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Project coordinator

Roxana Bassi (APC)

Editor

Alan Finlay

Assistant editor, publication production

Lori Nordstrom (APC)

Proofreading

Valerie Dee

Lori Nordstrom

Graphic design

Monocromo

info@monocromo.com.uy

Phone: +598 2400 1685

Cover illustration

Matías Bervejillo

This work was carried out with the aid of a grant from the International Development Research Centre (IDRC), Ottawa, Canada, as part of the APC project “A rights based approach to internet policy and governance for the advancement of economic, social and cultural rights”.

More information at: <https://www.apc.org/en/projects/internet-rights-are-economic-social-cultural-rights>



APC would like to thank the Swedish International Development Cooperation Agency (Sida) for its support for Global Information Society Watch 2016.



Published by APC and IDRC

2016

Printed in USA

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Global Information Society Watch 2016 web and e-book

ISBN 978-92-95102-70-5

APC-201611-CIPP-R-EN-DIGITAL-260

KOREA, REPUBLIC OF

COPYRIGHT AS A BARRIER TO CULTURAL RIGHTS AND THE NECESSITY FOR COPYRIGHT REFORM



KEYWORDS: **commerce, copyright, culture**

Korean Progressive Network Jinbonet
Byoung-il Oh
act.jinbo.net/drupal/english

Introduction

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ deals with cultural rights in its Article 15, protecting 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.”

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 just passive consumers of cultural products before the internet was popularised.

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.² 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 developed internet infrastructure like South Korea is the copyright regime. 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 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.

Copyright in South Korea

South Korea ratified the ICESCR on 10 April 1990 without any reservations. While there are no explicit provisions to protect cultural rights in the constitution of South Korea,³ 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 contained in Article 15 of the ICESCR.

As one of the means to implement the right of authors, South Korea has a Copyright Act.⁴ The purpose of copyright is to promote 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.

However, 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 treaties. Major revisions to the Copyright Act since the 1990s were the results 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)⁵ concluded in 2007.

1 www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

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

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

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

5 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).



Seoul Maeul Media Center.

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 policy⁶ and filtering obligations for a specific category of internet service providers that offer peer-to-peer and web hard services.⁷ 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 and the Seoul Maeul Media podcast case

In the past, copyright mattered generally to professional creators because while everyone could be a creator, most of them have 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.

In many cases in the digital world, new works are created drawing on the works of others. Digital technology makes it easy to copy and modify parts of existing content and to mix them to create new content. Harvard law professor Lawrence Lessig called it a “remix” or “read-write” culture.⁸ In general, professional creators get licences from rights holders for using their works. This, however, can be burdensome for creators who do not seek to make a profit from their creations, resulting in a constriction of the not-for-profit production of cultural works. The Seoul Maeul Media case illustrates this dilemma well.

“Maeul” means village in Korean. Maeul media is a media cooperative owned by residents in a village and has played a role as a space for communication and dialogue, where residents share creative works and their opinions using different media – including newspapers, webzines, movies and podcasts. In doing so, they restore community

6 The copyright “three-strikes” policy, which is set out in Article 133(2) of the Copyright Act, 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.

7 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.

8 Lessig, L. (2005, 28 December). Creatives face a closed Net. *Financial Times*. www.ft.com/cms/s/2/d55dfe52-77d2-11da-9670-0000779e2340.html#axzz4Jf9xgSH

culture. The Maeul Media project was launched in Seoul in 2012 through the Seoul Maeul Media Support Centre,⁹ which is operated by MEDIACT, a non-profit media organisation. The support centre helps citizens establish and operate their maeul media cooperatives by providing training courses, consulting, and supporting the creation and organisation of a maeul media network. There are now over 100 maeul media projects including about 20 maeul media podcasts within Seoul. Maeul media productions in podcast format are uploaded to Podbbang,¹⁰ one of the most popular podcast platforms in South Korea. Users can listen to the podcasts through streaming or by downloading them. Seoul Maeul Radio Dong-Ne-Bang-Ne,¹¹ a live internet radio programme, was launched in October 2015 as a cooperative maeul media project.

In early 2016, maeul media creators ran into difficulties after Podbbang sent notice on 18 December 2015 that it would block podcasts which violate music copyright, by the request of the music copyright society. One of the podcasts under the music category of the podcast site had already been blocked. Many maeul media podcasts often use local or international music in their programmes, in the same way that many commercial radio programmes include music between news stories, discussions and shows. 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)¹² in an attempt to solve the problem, but did not receive a satisfactory response from them. Podbbang said that it would negotiate with KOMCA with regard to licensing when it comes to its live-streaming service, but that the licensing of podcasts rested with the creators. KOMCA's position was that it would not negotiate with individual creators, but rather with platform providers such as Podbbang, because it needs to secure usage statistics through the platform providers. Both sides have shifted responsibility back and forth, while maeul media creators have expressed the intention to pay royalties if necessary.

What is worse, while there are royalty collection rules for the live streaming and downloading of music, royalty collection rules for podcasts have

yet to be developed.¹³ As a result there are no legal grounds on how much royalty one should pay for using music in one's podcast. Podcasts are regarded as "forwarding" under the Korean Copyright Act,¹⁴ which is in the same category of activity as posting an article in a blog.

As of August 2016, no additional blocking of podcasts had happened, but the current unstable situation is likely to stunt the development of maeul media. The Ministry of Culture, Sports and Tourism needs to come forward to solve the problem by mediating the negotiations between stakeholders so that maeul media creators can devote themselves to production, without worrying about copyright violation. The royalties from the not-for-profit use of music in maeul media projects, and others like them, should be free or low enough for not-for-profit creators to afford them. The Korean Progressive Network Jibonet and IPLeft,¹⁵ another civil society organisation in South Korea, provided legal advice on copyright to the Seoul Maeul Media Support Centre and cooperated with it to try to solve the problem.

Copyright as a barrier to cultural rights

This is not the first time that not-for-profit creations have been threatened by copyright in South Korea. 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.

The excessive application of online copyright could threaten cultural participation for internet

¹³ 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.

¹⁴ 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#libgcoloro

¹⁵ ipleft.or.kr

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

⁹ www.maeulmedia.org

¹⁰ www.podbbang.com

¹¹ www.podbbang.com/live/maeulmedia

¹² www.komca.or.kr/foreignz/eng/Kot.jsp

users. 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.

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.

As the ICESCR clearly states, the rights of authors should be protected. However, while a copyright regime is one way to protect the moral and material interests of authors, it is not the only means to protect their rights. Moreover, copyright owners are not always the authors of the works in question. General Comment No.17 (2005) of the Committee on Economic, Social and Cultural Rights points out: “It is... important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1(c).”²⁰ It 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.”

Conclusions

The internet can be an enabler of ESCRs, but without reforming the current copyright regime in South Korea so that it is suitable for the digital environment, its potential will not be fully realised. Current copyright regimes should be reformed so that they do not restrict access to information, allow not-for-profit remixing, and enable the free dissemination of and access to these new creative works by users. For that, broadening the concept of “fair use” would be a way to rebalance the current copyright regime, which is skewed towards copyright holders.

However, the potential for copyright reform in South Korea has limitations, because the Korean copyright regime is enforced by international treaties such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²¹ and bilateral agreements like KORUS FTA. Global copyright regimes became homogenised through the TRIPS Agreement and strengthened through bilateral and multilateral trade agreements. We first need to stop additional copyright-related negotiations in recent trade agreements under discussion, such as the Trans-Pacific Partnership (TPP)²² and Regional Comprehensive Economic Partnership (RCEP), and then promote global recognition for copyright reform.

While admitting the necessity to protect authors’ rights, this does not necessarily have to depend on a copyright regime. There are many other means to protect the rights of authors to benefit from the protection of their moral and material interests, while not restricting the use and dissemination of an author’s works. This could include public grants for artists, crowd-funding for the creation of artistic works, and alternative business models which share profits with creators while allowing some freedom in using those works, such as Magnatune²³ and Jamendo,²⁴ which allow free access to all the music they provide under Creative Commons licensing while sharing profits with musicians by directly working with them.

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

18 cafe.naver.com/kbsleesooshin.cafe

19 www.youtube.com/watch?v=9bZkp7q19fo

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

21 www.wto.org/english/tratop_e/trips_e/t_agmo_e.htm

22 <https://ustr.gov/tpp>

23 <https://magnatune.com>

24 <https://www.jamendo.com>

Action steps

The following are advocacy priorities for civil society in South Korea:

- The Korean government should solve the problem of an absence of royalty collection rules dealing with podcasts by mediating the negotiations between stakeholders. As noted above, this will allow maeul media creators to devote themselves to production without worrying about the violation of copyright. The royalties for not-for-profit use of music like maeul media should be free or low enough so that creators can afford them. To maximise its potential as an enabler of ESCRs, the current copyright regime should be reformed so that it does not restrict access to information, allows remixing, and enables the dissemination of creative works for not-for-profit purposes. Civil society could play a vital role in demanding copyright reform at the global level. It has already done great work in fighting against multilateral trade agreements such as the Anti-Counterfeiting Trade Agreement (ACTA) and in establishing the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.²⁵ This potential needs to be renewed in the field of global copyright monopolies.
- The government should 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.
- The internet and digital technology are useful ways to enable the cultural rights of ordinary people, allowing them to create and disseminate their works through the internet and to promote cultural participation. The government should support and encourage this potential.

²⁵ www.wipo.int/treaties/en/ip/marrakesh

Economic, social and cultural rights and the internet

The 45 country reports gathered here illustrate the link between the internet and economic, social and cultural rights (ESCRs). Some of the topics will be familiar to information and communications technology for development (ICT4D) activists: the right to health, education and culture; the socioeconomic empowerment of women using the internet; the inclusion of rural and indigenous communities in the information society; and the use of ICT to combat the marginalisation of local languages. Others deal with relatively new areas of exploration, such as using 3D printing technology to preserve cultural heritage, creating participatory community networks to capture an “inventory of things” that enables socioeconomic rights, crowdfunding rights, or the negative impact of algorithms on calculating social benefits. Workers’ rights receive some attention, as does the use of the internet during natural disasters.

Ten thematic reports frame the country reports. These deal both with overarching concerns when it comes to ESCRs and the internet – such as institutional frameworks and policy considerations – as well as more specific issues that impact on our rights: the legal justification for online education resources, the plight of migrant domestic workers, the use of digital databases to protect traditional knowledge from biopiracy, digital archiving, and the impact of multilateral trade deals on the international human rights framework.

The reports highlight the institutional and country-level possibilities and challenges that civil society faces in using the internet to enable ESCRs. They also suggest that in a number of instances, individuals, groups and communities are using the internet to enact their socioeconomic and cultural rights in the face of disinterest, inaction or censure by the state.

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