



CENTRE FOR LAW
AND DEMOCRACY

Republic of Korea

Analysis of the Korean Copyright Act

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Introduction

The Republic of Korea (South Korea) is broadly recognised as a global leader in the online revolution. In addition to having one of the highest Internet penetration rates in the world, South Korea has been a pioneer in promoting online educational materials and provision of government services.

In South Korea, as in the rest of the world, an important measure of the success of the Internet is the extent to which it operates in a free and open manner. However, in 2009, a package of amendments (the 2009 amendments) were passed to the Korean Copyright Act¹ which included a controversial provision to suspend websites and potentially even Internet access of people engaged in copyright violations. The revised Copyright Act, which is among the most draconian anti-piracy laws in the world, has attracted widespread criticism from journalists and civil society for violating freedom of expression.

On 17 January 2013, Congressman Choi Jae-Cheon, along with 12 other sponsors, announced a reform proposal which would scale back some of the Copyright Act's harsher anti-piracy provisions.² Lobbying groups representing rights holding bodies have campaigned against any measures to repeal the 2009 amendments. Among the most prominent opponents of Congressman Choi's proposal is the International Federation of the Phonographic Industry (IFPI), which has submitted two sets of comments to the Korean National Assembly criticising the reform proposals.³

A successful approach to Internet regulation should create an appropriate balance between the legitimate interests of rights holders and the need to protect the free flow of information online. This Analysis considers the Copyright Act from a freedom of expression perspective, discussing the law's impact and how it should be reformed in order to bring it into line with international human rights standards. The Korean Copyright Act, as amended, includes a comprehensive system for protection of copyright benefits. This Analysis focuses only on those provisions which are of particular relevance for freedom of expression on the Internet.

1. The Internet and Human Rights

¹ Act No. 432 of January 28, 1957, as last amended by Act No 9625 of April 22, 2009. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=7182>.

² Bill No. 3349. An English translation by the Library of the Korea National Assembly of part of the Bill is available at: <http://opennet.or.kr/copyright-reform/bill-to-amend-copyright-act>.

³ Available at: <http://opennet.or.kr/copyright-reform/written-opinion-of-ifpi-against-the-copyright-reform-bill>.

The Internet is a key mechanism for communication and rules which allow for user's websites and access to be suspended are, as a result, a serious interference with the right to freedom of expression. The international human rights community is increasingly recognising that access to the Internet should itself be considered a human right. The four special international mandates on freedom of expression (special rapporteurs)⁴ have adopted a Joint Declaration on a freedom of expression theme every year since 1999. The 2011 Joint Declaration, titled Freedom of Expression and the Internet, included the following statement:

Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet.⁵

At the very least, the Internet represents a vital delivery mechanism for human rights. Any rules impacting on the Internet should be carefully designed so as to preserve its free and open character. A landmark statement of principles embracing this idea was made at the 2003 World Summit of the Information Society in Geneva, which was signed by delegates from South Korea:

We, the representatives of the peoples of the world, assembled in Geneva from 10-12 December 2003 for the first phase of the World Summit on the Information Society, declare our common desire and commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life, premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights.⁶

In line with these principles, denial of access to the Internet should be considered in only the very most serious of cases. As the 2011 Joint Declaration of the special international mandates on freedom of expression states:

Denying individuals the right to access the Internet as a punishment is an extreme measure, which could be justified only where less restrictive measures are not

⁴ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

⁵ Adopted 1 June 2011, clause 6(a). Available at: <http://www.osce.org/fom/78309>. For a broader discussion of the Internet and human rights see: Centre for Law and Democracy, *A Truly World-Wide Web: Assessing the Internet from the Perspective of Human Rights* (Halifax: Centre for Law and Democracy, 2012). Available at: <http://www.law-democracy.org/wp-content/uploads/2010/07/final-Internet.pdf>.

⁶ Available at: <http://www.itu.int/wsis/docs/geneva/official/dop.html>

available and where ordered by a court, taking into account the impact of this measure on the enjoyment of human rights.⁷

The special mandates also cautioned against blocking of websites, which would presumably be even more relevant to the suspension of hosting of websites (which would ‘block’ them everywhere):

Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.⁸

These principles are particularly pertinent for a country where the Internet is as central to modern life as South Korea. Human rights standards mandate that South Korea carefully consider the impact of any legislation that would allow for websites or access to the Internet to be suspended.

2. Overview of the System

The relevant provisions of the Korean Copyright Act, as amended, along with its implementing regulations, adopted as a Presidential Decree,⁹ target the illegal reproduction and “interactive transmission” of copyright protected material online. They empower various actors – copyright holders, the Ministry of Culture, Sports and Tourism (MCST) and the Korean Copyright Commission (KCC) – to request, order or recommend that online service providers (OSPs)¹⁰ take various measures – issuing warnings, deleting or taking down offending material, preventing transmission of offending material and suspending accounts – in light of copyright breaches or claims thereof.

Pursuant to Article 103(1) of the Act, anyone who believes that his or her rights are being infringed “due to the reproduction and interactive transmission of works” may request an OSP to delete the offending reproduction and/or stop transmission. The request must be in writing and show proof of ownership of the copyright being claimed (Article 40 of the Decree). Reproduction is defined to include “the fixation or the reproduction in a tangible medium by means of printing, photographing,

⁷ Note 5, clause 6(c).

⁸ *Ibid.*, clause 3(a).

⁹ Enforcement Decree of the Copyright Act, Presidential Decree No.22003, January 27, 2010, enforced on February 1, 2010.

¹⁰ OSPs are defined broadly in Article 2(30) to include “persons who provide others with services that reproduce or interactively transmit works, etc. through information and telecommunications networks”. This includes what are commonly referred to as Internet service providers (ISPs), but also the operators of any websites that facilitate the reproduction or transmission of works.

copying, sound or visual recording, or other means”, while interactive transmission is defined as “making works, etc. available to the public in such a way that members of the public may access them from a place and at a time of their choosing”.¹¹

Upon receiving such a request, the OSP “shall immediately suspend” the reproduction and/or transmission (stoppage), giving notice to the user and claimant within three days of that action (Article 103(2) of the Act and Article 41 of the Decree). The user may then protest the stoppage through a showing that he or she owns the copyright or that it has come to the end of its life. The OSP shall then, within three days, determine whether the stoppage was legal and, if not, notify the claimant and schedule a time for restoring services to the user, which shall be between seven and 14 days after the protest (Article 103(3) of the Act and Articles 42 and 43 of the Decree). Where an OSP takes action pursuant to this article to stop or resume a service, it shall be protected against liability (Article 103(5)).

Any person who makes a claim to delete and/or stop transmission or lodges a claim for restoration of the service without possessing the requisite underlying copyright shall be liable to compensate any damages that result from their action (Article 103(6) of the Act).

Article 102 of the Act sets out a graduated system of waivers of responsibility on the part of OSPs for infringements of the Act by third parties, depending on whether the service provided consists of mere conduit, caching, hosting or searching. In all cases, OSPs must adopt measures to cancel the accounts of repeated infringers and apply such measures in a “reasonable manner”. OSPs that provide hosting or searching services are protected only if they stop the infringing activity upon being made aware of it, but OSPs are not required to monitor or investigate infringements. The OSP’s liability shall be waived if it attempts to stop the infringing action but is technically unable to do so.

Where infringing material is being “transmitted through information and telecommunications networks”, the MCST has the power to order OSPs to issue warnings against the responsible users and/or to delete the material or stop the transmission (Article 133-2(1) of the Act). Where three such warnings have been issued, and illegal transmissions continue, the MCST, after consultation with the KCC, may order the OSP to suspend the “account” for up to six months (Article 133-2(2) of the Act). The Act does not define an account, but it at least includes website hosting and providing access to the Internet and does not include accounts which are exclusively for the provision of email. The user must be notified of this action seven days before it is taken (Article 133-2(3)), and OSPs must notify the MCST of their responses within five days for an Article 133-2(1) order and within ten days for an Article 133-2(2) order (Article 133-2(6)). Pursuant to Article 133-2(7), the MCST

¹¹ Articles 2(22) and 2(10) of the Act.

must give “an opportunity to submit an opinion in advance” to OSPs subject to Article 133-2(1) or (2) orders, or users affected by an Article 133-2(2) order. Failure of an OSP to comply with an MCST order can lead to a fine of up to KRW 10 million (approximately USD 8,800).

According to a local group, the MCST issued 916 warning orders, 260 delete/stop transmission orders and 28 account suspension orders in 2010 and 2011. The MCST stopped issuing all sorts of orders in 2012.¹²

The KCC is a body whose members are appointed by the MCST, with equal representation from rights holders and users (Article 112-2 of the Act). Unlike the MCST, it does not have binding order powers, but it can recommend the same measures, namely that OSPs issue warnings, delete material, stop transmission of material or suspend accounts (Article 133-3(1) of the Act). OSPs must notify the KCC of the actions they have taken in response to a recommendation within five or ten days (the latter for suspension recommendations) (Article 133-3(2) of the Act). OSPs are not required to implement KCC recommendations, but in this case the KCC may request the MCST to issue a binding order (Article 133-3(3) of the Act). Pursuant to Article 102, a KCC recommendation would clearly notify OSPs about a potential infringement, and they would then bear liability should the recommendation prove to have been justified.

The KCC has been far more active than the MCST in terms of its recommendations, and it did not stop issuing recommendations in 2012, unlike MCST. According to local observers, it has issued over 240,000 warning recommendations, 226,000 delete or stop transmission recommendations and 380 account suspension recommendations.¹³

Different rules apply to Article 104 organisations, defined as OSPs whose main purpose is to enable people to transmit files among themselves via computer (i.e. file-sharing websites). These OSPs are required to “take necessary measures such as technical measures for blocking illegal interactive transmission of works, etc. upon the requests of rights holders”. These may include measures to identify works by comparison and blocking the illegal transmission of works, and such measures must be implemented “without delay” upon receiving a request (Article 46 of the Decree). Failure to take the necessary measures pursuant to Article 104 can lead to a fine of up to KRW 30 million (approximately USD 26,000).

3. Suspending Accounts

¹² See <http://opennet.or.kr/copyright-reform>.

¹³ *Ibid.* We do not have information about the response of OSPs to these recommendations.

The most serious criticisms of the Copyright Act have been in relation to the powers to suspend accounts. Severing a user's Internet access, or the hosting of their websites, is an extremely severe restriction, and one which, as the quote above from the special international mandates 2011 Joint Declaration makes clear, is rarely if ever justified under international human rights standards.

Furthermore, the specific way in which the Copyright Act implements this restriction is particularly problematic. There is no timeframe set out in the law for how the warnings must be spaced out, and no requirement that any particular infringement must be of a certain level of severity before a warning may be issued. Despite the law being ostensibly targeted at heavy infringers, in practice the law has been broadly enforced against rather minor offenders. Local groups claim that nearly one-third of the 408 people who have had their websites suspended so far were involved in less than ten instances of infringement, and that the average number of infringements from among 380 suspensions was less than thirty.¹⁴

While a binding MCST suspension order may only be issued after three warnings, no such limitation is imposed on a KCC suspension recommendation, which may be issued whenever infringements are repeated (i.e. an account could be suspended without warning if it had been alleged that multiple infringements had taken place). While OSPs are not technically bound to follow these recommendations, the risks of not doing so are such that few can be expected to refuse.

There are also serious problems with government bodies – namely the MCST and the KCC, which is appointed by the MCST – having the power to take these actions. As the special international mandates made clear in their 2011 Joint Declaration, suspension of access to the Internet could only be legitimate if done pursuant to a court order. International law makes it clear that bodies which exercise regulatory powers over the media must be protected against political interference. The same logic should apply to other important regulatory powers over the exercise of the right to freedom of expression, such as ordering the suspension of websites.

The chief arguments in favour of these draconian restrictions, as advanced by the IFPI, are that they are necessary in order to protect South Korea's content producing industries. In its comments to the National Assembly, the IFPI claimed that the anti-piracy measures were responsible for the recovery of the music industry. However, their figures show that the upswing in music sales actually began in 2006 and that the main driver of growth was the strong pickup of digital music sales. In 2009, a year before the amendments came into force, the South Korean music industry grew

¹⁴ See <http://opennet.or.kr/copyright-reform>. There are two ways websites may be suspended, and we were able to access more information about the more prolific method, responsible for 380 of the 408 suspensions.

by 10%.¹⁵ Given the severity of the restriction imposed by these provisions, and the tenuous evidence that they have been effective in their aim of helping South Korea's content producing industries, there is no justification for keeping them on the books.

Recommendation:

- The provisions which allow the MCST to order and KCC to recommend the suspension of users' accounts should be repealed.

4. OSP Liability

Safe harbour is one of the cardinal legal principles underlying the Internet. Broadly speaking, this means that OSPs and websites should not be held responsible for the actions of their users, as long as they do not intervene in or support these actions. For example, if a user posts a defamatory message onto a social networking website like Facebook, liability for the statement should attach only to the user, and not to Facebook or to the OSP from whom the user purchases his or her Internet access. The same rationale behind this principle also holds true for copyright; liability for piracy should lie only with the pirate. Given the Internet's decentralised nature and reliance on user-generated content and other user actions, safe harbour provisions are vital to the viability of Internet-based companies and the vitality of the Internet as an expressive medium. As the 2011 Joint Declaration by the special international mandates on freedom of expression states:

2. Intermediary Liability

- a. No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle').

There are problems with the system of OSP responsibility under the Copyright Act. Pursuant to Article 103 of the Act, once a rights holder makes a claim, the OSP is required to ('shall') take immediate remedial (stoppage) action. This is referred to as a notice and takedown type of provision. There is a system for users objecting (see below), but apparently no discretion on the OSP to reject unmeritorious claims, along with responsibility should the OSP fail to act on the complaint (see below).

¹⁵ *South Korean Music Market - A Case Study*, March 2011. Available at: <http://opennet.or.kr/wp-content/uploads/2013/04/IFPI-South-Korean-Music-Market-Case-Study-March-2011.pdf>

Better practice, however, as reflected in the above quotation from the special mandates, is to require the matter to go before an independent decision-maker – ideally the courts but potentially an independent administrative body – rather than OSPs. This is because the incentive structure under notice and takedown systems is biased against the freedom of expression rights of the user. OSPs risk liability for copyright infringement if they do not takedown potentially infringing material, but no liability if they remove innocent material (subject to restoration at the request of the user).¹⁶ As commercial businesses, this creates a situation where OSPs can be expected to take action in response to any claim, regardless of its merits.

Furthermore, it is not reasonable to place the burden on OSPs to determine whether or not claims are meritorious. Copyright is a complex area of law, particularly with regard to derivative and fair use exceptions, and OSPs simply cannot be expected to have the requisite expertise to decide whether claims are just. It is not clear from the Article 103(5) waiver of liability whether OSPs are required to ‘get it right’ or whether they are protected as long as they act in accordance with the (potentially conflicting) requests of rights holders and users. However, the reference in Article 43 of the Decree to “deciding” whether the claims are based on a legitimate right, and the allocation of three days for this decision, suggests that it may be the former. Instead of locating responsibility for action in such cases with OSPs, there should be a system for resolving complaints which involves an independent and expert decision-maker.

Third, Article 104 places an obligation on file-sharing websites to put in place active measures to prevent or limit infringing activity. The measures mentioned in the Decree are very general measures, which are likely to screen out not only infringing material, but also legitimate content. Among other things, these measures would appear to be completely incapable of distinguishing fair use of works from copyright infringing uses. As with Article 103 claims, the incentives all line up in one direction, in this case including a risk of incurring a heavy fine. As a result, once a claimant raises a potential issue, regardless of its true merits, OSPs are very likely to take action. Although file-sharing websites are a locus of pirate activity, it is not clear why this special positive obligation on OSPs to take action against users is necessary or justified. In such situations, there is in any case a need for an independent decision-making process.

Understanding the Internet as a human right places weighty significance on the role of the OSP in facilitating access. Threatening OSPs with liability for the actions of their users, especially in light of the weak protection afforded by Article 102, sets a dangerous precedent in undermining the fundamental principle of safe harbour.

¹⁶ Their discretion to do so is normally built into their contracts with users.

Recommendations:

- Article 103 claims should trigger a review by an independent body, rather than an immediate responsibility on OSPs to implement stoppages.
- Article 104 should be repealed.

5. Oversight and Procedural Protections

Whenever the State contemplates action that impacts the right to freedom of expression, it is important to include appropriate procedural safeguards to ensure that these powers are being exercised in line with international human rights standards. As noted above, this implies, at a minimum, that the decision-maker be protected against political and commercial interference. Neither the MCST, which is a government ministry, nor the KCC, which is effectively created by the MCST, remotely meet this standard.

Given the very serious actions involved, potentially including suspension of accounts, the procedural protections afforded by the Copyright Act are wholly insufficient. In an Article 103 complaint the complainant need only show that they benefit from copyright protection. This triggers an obligation on the OSP to take remedial action. The OSP is only required to notify the user within three days, and even if the user protests immediately, it will be between 7 and 14 days before remedial action will be taken. Thus, even in a best case scenario, a completely warrantless claim would lead to deletion or stoppage for 7 days, which could increase to 20 days (three to notify, three to decide and 14 to resume service) in a worst case scenario. It may be noted that the risk of abusive claims is far from theoretical. In the United States, for example, the Church of Scientology and Creationist groups are notorious for using frivolous copyright infringement claims as a mechanism for silencing their critics.¹⁷

Among Congressman Choi's reform proposals are a standard set of information that complainants should be required to provide as part of a takedown request:

1. Name in full (including signature), personal data and contact information of the rights assertor.

¹⁷ Eva Galperin, "Massive Takedown of Anti-Scientology Videos on YouTube". Electronic Frontier Foundation, 5 September 2008. Available at: <https://www.eff.org/deeplinks/2008/09/massive-takedown-anti-scientology-videos-youtube>. Bob Beschizza, "YouTube Bans Anti-Creationist Group Following DMCA Claim", Wired, 16 September 2007, available at: <http://www.wired.com/wiredscience/2007/09/youtube-support/>. See also: <https://www.eff.org/takedowns>.

2. Reasonable information with which the online service provider can easily identify copyright infringements etc.
3. Information concerning the location at which copyrighted materials etc. have been infringed on the information communication network operated by the online service provider.
4. Statement to the effect that the reproduction or transmission of copyrighted materials etc. belonging to the rights assertor has not been allowed.
5. Statement to the effect that the rights assertor shall compensate damages pursuant to paragraph 6 if he/she has demanded the suspension of reproduction or transmission without just rights or will be punished pursuant to Article 137 (1) 6 if he/she has interfered with the services of the online service provider by maliciously demanding the suspension of reproduction or transmission even though he/she is aware that he/she has no just rights.

This type of requirement is reasonable, and broadly in line with the requirements most countries impose on copyright claimants, such as those found in the United States' Digital Millennium Copyright Act.¹⁸ It is worth noting that, even with this sort of safeguards, the Digital Millennium Copyright Act has been criticised for undermining legitimate speech.¹⁹

Under the Copyright Act, users have only limited powers to object to Article 103 actions, which do not accord with their usage rights under the copyright regime. They may protest OSP action against them only on the basis either that they directly possess the copyright (as demonstrated by registration, a copy of the work showing them as author or a contractual right to use the work) or that the copyright has expired. This leaves out the extremely important questions of fair uses and legitimate derivative uses. The situation with Article 104 is even worse, and there do not appear to be any avenues to appeal against actions taken pursuant to that article.

There are also extremely limited protections against wrongful administrative action by either the MCST or the KCC. Pursuant to Article 133-2(7), the MCST must give "an opportunity of presentation of an opinion in advance", but it is unclear what this actually means and, at best, it would appear simply to be an opportunity to be heard. Even that is limited for while OSPs which are subject to either Article 133-2(1) or (2) orders (i.e. takedown or suspension orders) benefit, users may only claim this right if they are affected by suspension orders. In other words, MCST may order serious takedown or transmission stoppage measures against a user without even being required to hear the objections of that user.

Even this limited procedural right does not apply to KCC actions. While formally these are only recommendations to OSPs, the way the incentives line up, as described above, means that most OSPs will implement them so as to avoid risk. In such cases, the only redress available to users would be to go to court.

¹⁸ Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

¹⁹ See, for example: <https://www.eff.org/takedowns>.

If these administrative powers are retained, even if they are vested in an independent body, a stronger system of procedural protections is needed to prevent abuse of the system and to ensure due process (natural justice). At a minimum, users should benefit from having access to the claim against them, along with a full right to present their own case before any action which negatively affects their service may be taken.

Recommendations:

- The power to order and even to recommend action by OSPs against infringing users should be vested in an independent body rather than the MCST and KCC.
- All remedial claims by rights holders should be subjected to the procedural rigours suggested by Congressman Choi, including a good faith requirement and a statement of willingness to indemnify users who are subjected to frivolous or abusive requests.
- Users should have the power to assert any legal right in response to an Article 103 claim.
- Adequate due process guarantees should be put in place to protect users threatened with administrative action to prevent potentially infringing activity, which should include an adequate opportunity to present a case as to why the action should not be taken.

6. Defining ‘Reproduction’

Currently, Article 2(22) of the Copyright Act defines reproduction broadly to include both permanent and temporary copies. Under this formula, anyone who views copyrighted material online is party to the infringement and assumes liability for the piracy.

This is problematical because web users can view pirated material unintentionally. It is often difficult to determine whether the material one sees or hears online was made legitimately, especially given that browsing the Internet exposes users to enormous volumes of creative material in the form of text, images, sound clips and videos. Including temporary reproductions effectively makes users responsible for ensuring the legitimacy of everything they come across on the Internet, an impossible standard to follow. It should not be incumbent upon the casual user who is browsing YouTube to consider the potential copyright implications of every video they watch. There is, as a result, a need to draw a distinction between users who

reproduce copyrighted material with a clear intent to commit piracy and passive web users who merely view it.

Among Congressman Choi's proposals is the amendment of Article 2(22) to draw a distinction between active copiers and passive viewers:

"Reproduction" shall mean 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;

Under this approach, liability would attach to users who upload copyrighted material, or who download a permanent copy of it (such as through a peer-to-peer file sharing program), but not to users who simply view material through a web browser.

The Copyright Act also fails to distinguish between copying as a deliberate process and copying which occurs as a result of standard network communication protocols. Browsing the Internet exposes users to a lot of material which loads automatically when a browser is directed to a particular page, "copying" them onto the subject's monitor. The Act is unclear as to whether or not this type of automatic copying violates copyright. Vagueness is always an issue when dealing with laws that impact on the right to freedom of expression, but where the penalties are as serious as those spelled out in the Copyright Act this is a significant concern. Furthermore, automatic copying processes have no adverse impact on rights holders.

Recommendations:

- Article 2(22) should be amended to include only permanent copies, in line with Congressman Choi's proposal.
- Article 35(2) of the Copyright Act, which provides for acceptable reproductions, should be amended to include reproductions that are made as a result of standard Internet protocols.

7. Digital Rights Management

Digital rights management is among the most controversial areas of modern copyright law. In the face of a dramatic rise in the popularity of file sharing, content producers have resorted to increasingly rigid technological means to protect their products from unauthorised reproduction. However, with the spread of technology a skilled user can crack even the most sophisticated digital locks. The Internet also

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allows users who lack the technical wherewithal to crack digital locks themselves to access programs which can do it for them.

In response to the decreasing efficacy of digital protections, content producers in many States have lobbied in favour of laws criminalising the circumvention of digital locks, or the distribution of software to facilitate this circumvention. In the Copyright Act, Article 104-2 prohibits devices which are “publicized, advertised or promoted for the purpose of neutralizing technical protective actions.”

Congressman Choi’s reform proposal would amend this to prohibit only devices which are “marketed to be used for neutralizing technical protective actions.” While this slightly narrowed definition is an improvement, both formulations are problematic in that they fail to account for legitimate circumventions, such as where the user wishes to copy or modify a product in line with fair use, as recognised under Article 35-3 of the Copyright Act. Digital locks make no distinction between legitimate and illegitimate modification or copying. A book reviewer or a remix artist will face the same roadblocks as a pirate and, as a result of Article 35-3, will have no legal means of exercising their legitimate rights.

Customisation and modification of products, as well as derivative uses of content, are vital aspects of the creative process. Although it is understandable that content producers should seek to protect their products, these protections must allow for legitimate uses. If digital locks cannot be designed which discriminate between legitimate and non-legitimate uses, as the safeguards currently in use generally cannot, then it is important to allow users a legitimate avenue to circumvent these measures.

Recommendation:

- Article 104-2 should be repealed or amended to provide for an exception for circumvention for purposes of fair use.