

Royalties? Not Joseon Dynasty Kings – A Comparative Analysis of Copyright and Music Licensing Groups in the United States and Korea

Darren QX Bean!^{*}, Yuna Lee^{**}

Abstract

Media has been one of the United States' premier exports for several years. Recently, the "Korean Wave" has garnered coverage in many international arenas, with "Big Bang" winning best international group at the 2011 MTV European Music Awards and "Gangnam Style" reaching number one on the Billboard Social 50 Chart. This Article compares and contrasts the copyright and music licensing regimes in the Republic of Korea and the United States, focusing on substantive copyright protection but also including discussion of the function of rights management societies. We address cultural, historical, and economic factors contributing to the distinctive treatment of musical regulation and offer our opinion as to which nation's approach is more legally and logically sound in key areas of legal difference in order to encourage reconsideration of certain points within the legal regimes in both nations.

KEY WORDS: Korea, copyright, music licensing, rights management organizations, comparative law

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^{*} Hankuk University of Foreign Studies, Associate Professor of International Law, Department of International Trade and Law; Foreign Advisor, Sojong Partners, Seoul, Korea; California attorney. This work was supported by Hankuk University of Foreign Studies Research Fund of 2013. The "!" is a legal part of the name pursuant to *Bean v. Sup. Ct.*, D048645 (Cal. App., Nov. 28, 2006). The authors are grateful to Ji-ho Lee and Jae-kan Seo of the Korea Copyright Commission for their time and Hyung-seok Ryou of KOMCA for his patience with numerous questions and multiple interviews. We would also like to thank the reviewers of the Journal of Korean law and Editor-in-Chief Joon Park for their suggestions and assistance. Any errors remain those of the authors.

Contact: theadvocatingbean@yahoo.com.

^{**} Associate, Sewoo Law Firm; Korean attorney; J.D., February 2013, Chonbuk National University School of Law.

Contact: id850629@daum.net.

I. Introduction: Music, Copyright, and Comparative Law

Music is not simply a form of entertainment or relaxation—it is a sizeable industry.¹⁾ In 2012, Recording Industry Association of America members alone sold over \$4 billion digitally, and nearly \$7.1 billion in total.²⁾ Korea’s pop media, which has grown from twenty-third worldwide in 2007 to eleventh in 2012,³⁾ is continuing to increase its share of international attention. “Big Bang” won the “Best Worldwide Act” award in the 2011 MtV Music Awards,⁴⁾ Girls’ Generation appeared on Letterman in early 2012,⁵⁾ and “Gangnam Style” reached number one on the Billboard Social 50 Chart in Fall of 2012.⁶⁾

Music’s profitability derives largely from its protection by copyright⁷⁾ or similar neighboring right⁸⁾ law. Like all law, however, intellectual property regimes—though governed by numerous treaties⁹⁾—are hardly uniform.

1) *IFPI Digital Music Report 2011*, IFPI.ORG http://www.ifpi.org/content/section_resources/dmr2011.html, click on “download report,” p. 5 (last visited June 10, 2013). Unless indicated otherwise, all online sources are on file with the author as .pdf files.

2) Joshua P. Friedlander, *News and Notes on 2012 RIAA Music Industry Shipment and Revenue Statistics*, RIAA.COM, <http://76.74.24.142/06D7FA0A-8ADD-1A14-F7E1-ED630E697E9E.pdf>, alternatively go to http://www.riaa.com/keystatistics.php?content_selector=2008-2009-U.S-Shipments-Numbers then click on “2011-2012 U.S. Year-End Industry Shipment and Revenue Statistics” (last visited June 10, 2013).

3) *IFPI Digital Music Report 2013*, IFPI.ORG http://www.ifpi.org/content/section_resources/index.html, click on “download” next to “Digital Music Report 2013,” p. 30 (last visited June 10, 2013).

4) *2011 Winners*, MTV EMA, Jun. 11, 2011, <http://tv.mtvema.com/news/2011-mtv-ema-winners>, (last visited June 10, 2013).

5) Sterling Wong, *Girls [sic] Generation Continue Move Toward World Domination With Debut US TV Performance*, MTV NEWS, <http://newsroom.mtv.com/2012/02/01/girls-generation-debut-us-tv-performances/> (Feb. 1, 2012) (last visited June 10, 2013).

6) William Gruger, *Gangnam Style Helps PSY Dance His Way to No. 1 on Social 50 Chart*, BILLBOARD.COM, <http://www.billboard.com/news/gangnam-style-helps-psy-dance-way-to-no-1007917752.story#/news/gangnam-style-helps-psy-dance-way-to-no-1007917752.story>, Aug. 31, 2012 (last visited June 10, 2013).

7) 17 U.S.C.A. § 101 *et. seq.* (Westlaw 2013).

8) *See infra*. Part III.C.

9) Treaties governing music or copyright include, *inter alia*, The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and

Similarly, the private markets and business models that emerge to handle the myriad financial and contractual transactions, though similar in practice, are not identical in formality. Any contemplator of copyright law may better their mental model of the ideal by contrasting multiple regimes, and therefore, to stimulate further discussion of how the copyright law of both nations could be further improved, this Article compares the legal and industrial systems dealing with music in the United States and Korea.

After this introduction, Part II of discusses copyright law and music licensing in the United States, beginning with the constitutional foundations of the law and eventually covering industry-specific businesses such as specific rights management societies and how they transfer royalties to right holders. Part III uses a similar organizational structure to expound Korean law and practices, although due to the two countries' substantially different approach to copyright law a parallel organizational structure is not possible. Finally, Part IV discusses how international accords have affected both nations' law, and highlights remaining differences between the two, including moral rights, neighboring rights, trust societies, and other issues. We also offer explanations for the dissimilarities and brief analysis of each, including our judgment of whether one nation's approach is more beneficial for society in key areas of legal divergence. Concluding remarks are made in Part V.

II. The United States: An Economic Constitutional Basis, Unpaid Fair Use, Limited Moral Rights, and no Neighboring Rights.

Prior to the United States' independence, copyright or its analog had been established in England for over 200 years,¹⁰ so it is unsurprising that

amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter "Berne"], Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299(1994) [hereinafter "TRIPS"], and WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [hereinafter "WPPT"].

10) Marshall Leaffer, *Doermann Distinguished Lecturer: Protecting Authors' Rights in a Digital Age*, 27 U. Tol. L. Rev. 1, 3-4 (1996) ("licensing" regime by the crown began in the mid-16th

the Constitution explicitly provides for copyright.¹¹⁾ Current law in the U.S. includes notable limitations on copyright including fair use for parody or education (among other uses),¹²⁾ and compulsory licenses for certain uses¹³⁾ discussed in subsection D. After addressing the legal concepts mentioned, this section ends with a discussion of the various artist and publisher representation groups and how they manage musical copyrights.

1. Constitutional Basis and Scope of Protection

Article I, Section 8, Clause 8 of the United States Constitution provides that:

The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

The policy justification is clearly social progress, not reward to authors, thus moral rights are arguably at odds with the constitution. The provision “for a limited time,” truncates all rights at a specific point in time, although to-date the Supreme Court has declined to state exactly when.¹⁴⁾

2. Eligibility for Copyright; Duration of Copyright

Not all creation is eligible and protection is not limitless; statutory law

century and the “first copyright statute,” the Statute of Anne was enacted in 1710). For information on Colonial and American copyright, see generally Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* (J.S.D. dissertation, Harvard Law School), June 2005, <http://www.utexas.edu/law/faculty/obracha/dissertation/> (last visited June 10, 2013).

11) U.S. CONST. art. 1 sec. 8 cl. 8.

12) 17 U.S.C.A. § 107 (Westlaw, 2013).

13) *Id.* §§ 114-115.

14) *Eldred v. Ashcroft* 537 U.S. 186, 199-204 (2003) (finding the Copyright Term Extension Act (extending copyright protection from “life plus 50” to “life plus 70”) constitutional and declining to say when an extension of term would be unconstitutional).

sets forth specific requirements that must be met before a copyright is protected and treatment of a work can vary depending not only on where or by who a work was published but also when. Fortunately for works protected, terms of protection are relatively uniform, if controversially long.

1) *Basic Requirements*

To be eligible for copyright, a work must be original and fixed.¹⁵⁾ In the case of music generally, neither of these requirements are an issue. Nearly any arrangement of chords and melodies will have sufficient original content, and any notation of that on paper will be sufficient to fix the musical work; similarly any digital or analog session, no matter how “garage” is sufficient to create a sound recording. The distinction between the two, however, is important, as the two carry quite different sets of rights due to compulsory licenses discussed further in II.D.2.

2) *National Treatment*

Unpublished works are protected regardless of the location of their publication and the status of their author.¹⁶⁾ However, when a work is published, the author or the work must meet one of the following requirements: (1) at least one of the authors “is a national or domiciliary of the United States ... a treaty party, or is a stateless person,”¹⁷⁾ (2) publication first occurs in the U.S. or a treaty party,¹⁸⁾ or (3) “the work is a sound recording that was first fixed in a treaty party.”¹⁹⁾ (Other possibilities exist but are outside the scope of this article.²⁰⁾)

3) *Restoration of Copyright for Foreign Works*

Various formalities were previously required to protect a work in the

15) 17 U.S.C.A. § 102(a) (Westlaw, 2013).

16) *Id.* § 104(a).

17) *Id.* § 104(b)(1).

18) *Id.* § 104(b)(2); note that the foreign nation must have been a treaty party at the time of publication; becoming a treaty party thereafter does not grant protection.

19) *Id.* § 104(b)(3).

20) *Id.* § 104(b)(4) - (6) discussing works “incorporated in buildings,” published by the U.N., or nations specifically mentioned in Presidential Proclamations, respectively.

U.S., including notice of copyright²¹⁾ and renewal of a copyright term.²²⁾ Foreign works that had failed to comply with those formalities, though still protected in their home countries, were not protected in the United States. To end this disparity, a restored copyright was created in certain foreign works previously in the public domain in the United States due to failure to comply with U.S. formalities.²³⁾ Nonetheless, a reliance party who began using the work prior to its restoration may continue to use the work in certain circumstances.²⁴⁾

4) *Duration of Protection*

Works created on or after January 1, 1978 are protected for the life of the author plus seventy years.²⁵⁾ Anonymous, pseudonymous, and works for hire are protected for the shorter period of 120 years after creation or 95 years after publication.²⁶⁾ Similarly, if the date of death of an author cannot be determined, the “life plus 70” term is presumed to expire 95 years after publication or 120 years after creation of the work.²⁷⁾ Various, more complex rules apply to works created before 1978 but generally result in a 95-year protection term.²⁸⁾

21) Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U. L. REV. 847, 866 (2007). Footnote 68 therein also quotes the original notice provisions from the 1909 Copyright Act.

22) *Id.* at 856 - 59 and citations therein.

23) Uruguay Round Agreements Act, Pub. L. No. 103 - 465, amending 17 U.S.C. § 104A; 17 U.S.C.A. § 104A (Westlaw, 2013); subsection (h)(6) describes the specific requirements for a work qualifying as a “restored work.” For a more detailed discussion of this section and its complexities, see William Gable, *Restoration of Copyright: Dueling Trolls and Other Oddities Under Section 104A of the Copyright Act* 29 COLUM. J.L. & ARTS 181 (2005).

24) 17 U.S.C.A. § 104A(d) (Westlaw, 2013).

25) *Id.* § 302(a).

26) *Id.* § 302(c).

27) *Id.* § 302(d).

28) *Id.* § 304; see also §304(a)(1)(A), (a)(2)(A), (a)(2)(B), providing for various “first terms” of 28 years, with automatic renewals of 67 years (totaling 95 years) and §304(b) protecting a work for 95 years.

3. Rights Protected (“Nobody, Nobody but You”²⁹⁾)

A copyright holder generally has five exclusive rights enumerated in section 106: reproduction, preparation of derivative works, distribution, public performance, and public display.³⁰⁾ A sound recording right holder does not have a right of public performance, however that right holder can control public performance that is made by a digital audio transmission.³¹⁾ Terrestrial (radio) stations and internet “radio” (webcasts and podcasts) are therefore treated very differently³²⁾ which we will discuss in depth in II.D.2.b.

There is no distinction made in U.S. law between “copyright” and “neighboring rights.” Whereas many countries³³⁾ (including Korea³⁴⁾ and Germany³⁵⁾ treat the rights of performers and producers of phonograms separately, but similarly, as neighboring rights, the US lumps all into the category “copyrights” (although sound recording right holders are treated

29) WONDERGIRLS. “Nobody” on NOBODY [Single Release]. JYP Entertainment, 2009. CD.

30) 17 U.S.C.A. §106 (Westlaw, 2013).

31) *Id.*, see also Robert J. Delchin, *Musical Copyright Law: Past, Present, and Future of Online Music Distribution* 22 CARDOZO ARTS & ENT. L.J. 343, 352-3 (noting that the right was added relatively recently—in 1995—under pressure from the Recording Industry Association of America (sound recording right holder) lobby).

32) 17 U.S.C.A. § 114(d) (Westlaw, 2013).

33) *E.g.*, Michael Gruenberger, *A Duty to Protect the Rights of Performers: Constitutional Foundations of an Intellectual Property Right*, 24 CARDOZO ARTS & ENT. L.J. 617 (2006), 624-30 (discussing the history of international accords recognizing “neighboring rights”).

34) Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 64 *et. seq.*, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013); see also Chung Hwan Choi, *Protection of Artists Rights Under the Korean Copyright Law*, 12 PAC. RIM L. & POL’Y J. 179 (2003) (discussing the previous copyright act but the “neighboring rights” provisions were not substantially changed in subsequent amendments).

35) *E.g.*, Tom Bragelmann, *Copyright Law in and under the Constitution: Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits Imposed by Constitutional an European Law on Copyright Law in Germany*, 27 CARDOZO ARTS & ENT. L.J. 99 (2009), 131-32 (discussing the “Schallplatten” case of 1971 wherein the legislative change of phono-record right status from “copyright” to “neighboring right” was upheld by the German Court).

differently from musical work right holders).³⁶⁾ Thus, the producer of a phonogram, in the absence of an original contribution, would have no rights in the phonogram;³⁷⁾ contrast Korean law, wherein a producer need only be responsible for fixation to hold a right.³⁸⁾ Similarly, a performer does not have a copyright in the unfixed performance,³⁹⁾ though the performer may prevent unauthorized fixation (and sale of unauthorized fixations) and transmission of the performance.⁴⁰⁾

As the United States views creative labor as toil to benefit the public domain (“the progress of useful arts”) to be motivated economically (through exclusive rights), the concept of moral rights is similarly lacking.⁴¹⁾ This is true even though the U.S. is a signatory to both the Berne Convention for the Protection of Literary and Artistic Works, (“Berne”) and the World Intellectual Property Organization Performances and Phonograms Treaty (“WPPT”), and both require some degree of “moral rights.”⁴²⁾ A minority of states offer some degree of moral right protection,⁴³⁾ but on a federal level, the United States has only granted moral rights to authors of visual art;⁴⁴⁾ thus one commentator has stated that the lack of monitoring bodies in those two conventions has “allowed the United States

36) E.g. 17 U.S.C.A. §§ 106, 114(b) (Westlaw, 2013).

37) Cf. 17 U.S.C.S. § 102 (“production of a phonogram” is not listed as an example category of authorship); see also Gruenberger, *supra* note 33 at 635 fn. 18.

38) Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 2. 6 (defining “phonogram producers”), 78 *et. seq.* (giving producers neighboring rights), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

39) 17 U.S.C.A. §§ 102(a) (requiring fixation); 101 (defining “fixed”) (Westlaw, 2013).

40) 17 U.S.C.A. § 1101(a) (Westlaw, 2013). The performer does have all the same remedies as a copyright holder per section 1101(a).

41) U.S. Const. art. 1 § 8 cl. 8; see also Galia Aharon, *You Can't Take it with You, Can You?: A Comparative Study of Post-Mortem Moral Rights Statutes from Israel, France, and the United States*, U. BALT. INTELL. PROP. L.J. 103, 115 - 116 (2009).

42) Berne, *supra* note 9 art. 6bis, WPPT *supra* note 9 art. 5.

43) See generally Laura Nakashima, *Comment: Visual Artists' Moral Rights in the United States: An Analysis of the Overlooked Need for States to Take Action*, 41 SANTA CLARA L. REV. 203, 212 - 17 (2000).

44) 17 U.S.C.A. § 106A(a); an implicit exception to this can be found in § 115(a)(2), discussed further in part II.D.2.a.

to claim that its law ... complies" despite the opposite being true.⁴⁵⁾

4. *Non-Infringing Uses*

The United States has a broad "fair use" exception for education, parody, and other socially beneficial purposes.⁴⁶⁾ Statutory regimes specific to music also allow for compulsory licenses in various situations, such as when a musical work has already been recorded,⁴⁷⁾ or when a sound recording is digitally transmitted (and other requirements are met).⁴⁸⁾ Because fair use effectively negates, in certain contexts, the monopoly a rightholder has, and because statutory licenses set an effective ceiling on negotiations, we turn next to these issues.

1) *Fair Use and Public Policy Exceptions*

All copyright holders' rights are subject to fair use. A court-created doctrine codified in section 107, use of a work is "fair" (and thus non-infringing) when the use is for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."⁴⁹⁾ In determining fair use, four factors are considered:

- (1) the purpose and character of the use, ...
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used ...
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁰⁾

A pivotal factor in this analysis is the purpose of the use and whether

45) Gruenberger, *supra* note 33 at 649; therein Gruenberger is only discussing Berne but the point can be extended by analogy to WPPT.

46) 17 U.S.C.A. § 107 (Westlaw, 2013).

47) *Id.* § 115.

48) *Id.* § 114.

49) *Id.* § 107.

50) (Westlaw, 2013).

such use is “transformative,” and “adds something new”;⁵¹⁾ statistically, a finding of transformativeness almost guarantees a finding of fair use.⁵²⁾ Parody is thus a strongly protected right; authors denied a license to use a work who nonetheless went on to make a quite vulgar parody were vindicated as “fair users” at the Supreme Court.⁵³⁾ In contrast, cases dealing with “sampling” (the use of one or more previous sound recordings in a new context in a new work⁵⁴⁾) are few, but have generally held that sampling is not a fair use.⁵⁵⁾

Although the last sentence of section 107 states that “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors,” in a music-specific context we will see that publication can be determinative of other rights, particularly under section 115, in II.D.2.b. There are also significant public benefit exceptions codified in section 110 for not-for-profit uses, these include performance or display in the context of education, copies for the blind, playing music in small venues, and playing music in record stores.⁵⁶⁾ Libraries may also make copies of difficult-to-locate works.⁵⁷⁾ Noteworthy is the fact that these are non-infringing, non-licensed uses; that is, no royalties

51) *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994).

52) Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 156 U. PA. L. REV 549, 605 (2008). Therein, 36.8% of post-*Campbell* opinions made no mention of fair use, but all of 13 circuit court opinions and 27 of 29 district court opinions finding transformativeness found fair use.

53) *Campbell v. Acuff-Rose*, 510 U.S. 569, at 573 (license denial), 594 (holding of fair use due to parody).

54) See, e.g., Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context* 84 N.C. L. REV. 547, 561 (2006).

55) E.g., *Bridgeport Music, Inc. v. UMG Recordings Inc.* 585 F.3d 267 (6th Cir., 2009) (despite transformative use, sampling not fair use of sound recording); *Newton v. Diamond*, 388 F.3d 1189 (9th Cir., 2003) (sampling not fair use of underlying musical work, although ultimately the underlying musical work was held to be insufficiently original to be protectable). Arewa, *supra* note 55, has argued heavily against this ignorance of the tradition of “musical borrowing.”

56) (Westlaw, 2013). Section 110(5)’s exemption of small businesses resulted in some trouble for the US, as the WTO Dispute Settlement Body found a significant part of its exemptions in violation of obligations under TRIPS. Panel Report, *United States – Section 110(5) of the US Copyright Act* WT/DS160/R (June 15, 2000).

57) 17 U.S.C.A. § 108 (Westlaw, 2013).

need be paid. This stands in contrast to the Korean royalty-paying “public use” regime we will examine in III.D.

2) *Music-Specific Exceptions*

Returning to musical works specifically, there are two particular provisions that limit the rights of musical composition and sound recording right holders. First, a composition right holder must give compulsory licenses to create new sound recordings of the work under section 115.⁵⁸⁾ Second, a sound recording right holder generally lacks the public performance rights of section 106 unless the performance is via a digital audio transmission, in which case a compulsory license will generally permit the transmission.⁵⁹⁾

(1) “Welcome to the Machine:”⁶⁰⁾ Section 115 Compulsory (“Mechanical”⁶¹⁾ Licensing

After “phonorecords of a [] musical work have been distributed to the public in the United States under the authority of the copyright owner,”⁶²⁾ any person may obtain a compulsory license to record the musical work, provided that the licensee’s “primary purpose is to distribute [phonorecords] to the public for private use.”⁶³⁾ The licensee is forbidden from altering “the basic melody or character of the work”⁶⁴⁾ (indirectly, this grants a form of moral rights to the author⁶⁵⁾). The compulsory license

58) (Westlaw, 2013).

59) *Id.* §§ 114, 106(6) (Westlaw 2013).

60) PINK FLOYD. “Welcome to The Machine” on WISH YOU WERE HERE. Columbia/CBS Records, 1975. CD.

61) This and similar voluntarily negotiated agreements are often called “mechanical royalties” due to the fact that the first such licensing involved mechanical pianos automatically playing certain notes. *See generally* Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA COMP. & HIGH TECH. L.J. 225, 218-220 (2010) (on the history of the act) and FAQ, HARRYFOX.COM at <http://www.harryfox.com/public/FAQ.jsp> (last visited June 10, 2013) (explaining the term “mechanical”).

62) 17 U.S.C.A. § 115(a)(2) (Westlaw, 2013).

63) *Id.*

64) *Id.*

65) *Accord*, Rejan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10

provision is relatively rarely used, with negotiated licenses forming the vast majority of the market.⁶⁶⁾ However, the existence of the compulsory license and its set rate sets an effective ceiling on the market,⁶⁷⁾ and therefore is of great importance to both the artist that would “cover” the underlying musical work and the composer whose work would be utilized.

(2) “21st Century Digital Boy:”⁶⁸⁾ Digital Public Performance

Section 114 greatly limits the public performance right of the sound recording right holder by creating special permissions for transmissions that are not “interactive.”⁶⁹⁾ A transmission is “interactive” if the content is “specifically created for the recipient, or on request, a transmission of a particular sound recording.”⁷⁰⁾ (Hence an on-demand service or a service that custom-tailors its broadcasts to an individual’s request cannot qualify for special treatment.) We are more interested, however, in noninteractive transmissions.

Four different types of noninteractive transmissions are given special treatment: (1) nonsubscription broadcast transmissions, (2) subscription transmissions, (3) eligible nonsubscription transmissions, and (4) satellite transmissions. The first use, transmission by a terrestrial broadcaster to the general public, is completely non-infringing.⁷¹⁾ Satellite radio must pay a compulsory license.⁷²⁾ Subscription transmissions, requiring some form of

U. BALT. INTELL. PROP. L.J. 1, 6 (2001).

66) Abrams, *supra* note 61, at 239 (0.0143% of licenses in 2008 were compulsory, the remainder were negotiated).

67) *Id.* at 235-36; *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Proposed Findings of Fact of Nat’l Music Pub’s Ass’n, Inc, The Songwriters Guild of America, Inc., and The Nashville Songwriters Ass’n Int’l, Docket No. 2006-3 CRB DPRA ¶¶ 557 *et. seq.* [hereinafter “2006 Findings”].

68) BAD RELIGION, *21st Century Digital Boy on STRANGER THAN FICTION* (Atlantic Records 1994).

69) 17 U.S.C.A. (Westlaw, 2013).

70) *Id.* § 114(j)(7).

71) *Id.* § 114(d). This statutory compromise can be seen as the result of two powerful lobbies, the broadcasting industry and the recording industry, being unable to alter the *status quo* that existed at the time of section 114’s enactment. Delchin, *supra* note 31 at 353.

72) 17 U.S.C.A. § 114(d)(2) (Westlaw, 2013).

consideration, are treated similarly.⁷³⁾ However, many podcasts and webcasts do not require a subscription. For those transmissions to be eligible for a compulsory license, their primary purposes must be “to provide to the public such audio or other entertainment programming, and ... not to sell, advertise, or promote particular products ... other than sound recordings, live concerts, or other music-related events.”⁷⁴⁾ Two points are worth noting here: First, “simulcasting” (webcasting a transmission at the same time it is broadcast by radio) is subject to license;⁷⁵⁾ thus most AM/FM simulcasts have ceased.⁷⁶⁾ Second, the rates for webcasters can vary tremendously depending on the size of the webcaster due to special provisions of law that encouraged negotiation of rates to be flexible and reasonable based on the size of the webcaster.⁷⁷⁾

3) Summary: Section D

The exclusive rights guaranteed under section 106 are subject to numerous limitations including unpaid fair use for education, parody, scholarship, and other purposes.⁷⁸⁾ Small-scale public performances for public benefit (such as free parades) need not license.⁷⁹⁾ Even those who need to license music may find themselves the beneficiary of a compulsory license in section 115 (for mechanical reproduction) or 114 (for digital transmission). We next briefly overview the rights of the traditional music transporter, the broadcaster, and thereafter track the flow of fees from copyright user to intermediary to copyright holder and licenses that travel the other direction.

73) *Id.*

74) 17 U.S.C.A. § 114(j)(6) (Westlaw, 2013).

75) *Bonneville Int'l Corp. et. al. v. Peters* 347 F.3d 485 (3d. Cir., 2003) (upholding the Copyright Office's determination that simulcasting was subject to license).

76) Delchin, *supra* note 31 at 375.

77) 17 U.S.C.A. § 114(f)(5)(C) (Westlaw, 2013).

78) *Id.* § 107.

79) *Id.* § 110(4); *see also* § 108, 110 (as a whole) for other exemptions.

5. “Guerilla Radio”:⁸⁰⁾ Broadcasters’ Rights

Although not exclusively limited to music or sound recordings, as we did just address several means of transmitting music, it would not to neglect a brief mention of broadcasters’ rights. In preparation for our later examination of Korea’s protection of the neighboring rights of broadcasters, we should note three major points. First, American broadcasters enjoy a sound recording copyright in whatever original and fixed content they produce; when mixed with another’s work (with permission if an exclusive right is involved), they have legitimately prepared a derivative work and enjoy copyright therein.⁸¹⁾ Second, broadcasters also have special rights, such as the ability to transmit sound recordings without licensing.⁸²⁾ Finally, the retransmission of broadcasts is also regulated, and an intricate compulsory license system governs retransmission by a cable system.⁸³⁾

6. PROfessionals: Rights Management Organizations⁸⁴⁾

It is well enough to say “rent must be paid,” but the questions remain: to whom, through whom, and how much? Numerous organizations handle the valuation and transfer of moneys from users to artists and composers; this section details the various ways that a work’s licensing can be handled and the right holder can gain recompense. We first deal with songwriters, and different uses of their work; thereafter we address sound recording right holders’ rights.

A songwriter is, in the absence of a transfer or assignment, the holder of

80) RAGE AGAINST THE MACHINE. “Guerilla Radio” on THE BATTLE OF LOS ANGELES. Epic, 1999. CD.

81) 17 U.S.C.A. §§ 101 (defining “derivative work”), 103 (extending copyright protection to derivative works) (Westlaw, 2013).

82) *Id.* at § 114.

83) *Id.* at § 115.

84) For a more detailed breakdown of royalty collection and distribution, the reader may wish to see, e.g. Andrey Spektor, *How “Choruss” Can Turn Into a Cacophony: The Record Industry’s Stranglehold on the Future of Music Business*, XVI RICH. J.L. & TECH. 3, 18-31 (2009), available at <http://law.richmond.edu/jolt/v16i1/article3.pdf> (last visited June 10, 2012).

the right to the musical work, including lyrics thereto.⁸⁵⁾ However, his or her rights will typically be licensed, if not fully assigned, to and represented by a music publisher⁸⁶⁾ who will aid in collecting and distributing mechanical royalties.⁸⁷⁾ Rather than directly negotiate royalties with licensees, the publisher will typically utilize a rights management group such as the Harry Fox Agency⁸⁸⁾ (“HFA”) or American Mechanical Rights Agency⁸⁹⁾ (“AMRA”).

This pathway of rights distribution holds true for most uses that invoke the underlying musical work including mechanical rights, synch rights, and digital distribution rights (a subset of mechanical rights). However, there are three major exceptions: First, “print” rights (the right to print the music in a written form) are not managed.⁹⁰⁾ Second, uses of the sound recording (such as sampling) are not managed,⁹¹⁾ because such uses require the consent of the sound recording holder as well as the musical work holder. Third, public performance rights are typically represented by other organizations—known as Performing Rights Organizations or “PROs.”

The three PROs in the US are the American Society of Composers, Artists, and Performers⁹²⁾ (“ASCAP”), Broadcast Music, Inc.⁹³⁾ (“BMI”), and SESAC.⁹⁴⁾ These groups collect royalties for public performances of music such as the playing of music in clubs (by recorded means or live musicians), radio or TV broadcasts, internet webcasts, and satellite radio.⁹⁵⁾ They will

85) 17 U.S.C.A. § 102 (Westlaw, 2013).

86) 2006 Findings, *supra* note 67 pp. 287-294.

87) *Id.* at 294.

88) <http://www.harryfox.com> (last visited June 10, 2013).

89) <http://www.amermechrights.com> (last visited June 10, 2013).

90) FAQ (subheading “What does HFA do?”), HARRYFOX.COM at <http://www.harryfox.com/public/FAQ.jsp> (last visited June 10, 2013)

91) *Id.*

92) www.ascap.com (last visited June 10, 2013).

93) www.bmi.com (last visited June 10, 2013).

94) www.sesac.com (last visited June 10, 2013). At one point “SESAC” was known as the “Society for European Stage Artists and Composers” but has since elected to simply be called SESAC, (*Frequently Asked Questions: General Licensing* (heading “Who is SESAC”), SESAC.COM at <http://www.sesac.com/Licensing/FAQsGeneral.aspx> (last visited June 10, 2013).

95) See generally ASCAP Music Licensing FAQ [and links contained therein], ASCAP.COM at <http://www.ascap.com/licensing/licensingfaq.aspx#general> (last visited June 10, 2013); HFA

typically measure usage of songs through surveys of licensees,⁹⁶⁾ and may also survey non-licensees to attempt to force individuals and entities to purchase licenses.⁹⁷⁾ PROs have often come under fire for overzealous enforcement,⁹⁸⁾ or contrived legal positions,⁹⁹⁾ and ASCAP and BMI, moreover, have been defendants in numerous antitrust suits, although their conduct was not found unlawful by the courts.¹⁰⁰⁾

Rights held by the sound recording right holder, practically speaking, include only the right to make new works based on the sound recording (synching and sampling) and public performance by means of a digital audio transmission.¹⁰¹⁾ Regarding synching and sampling, a potential licensee must get permission from both the sound recording right holder and the musical work right holder, and so must contact both, or use an intermediary such as a clearance agency to do so.¹⁰²⁾ The smaller sound

FAQ, *supra* note 90. Note that a terrestrial radio station may broadcast a sound recording without owing any payment to the sound recording rightholder but the musical work rightholder (composer or publisher) will still be owed royalties.

96) ASCAP *Payment System*, ASCAP.COM at <http://www.ascap.com/members/payment/keepingtrack.aspx> (last visited June 10, 2013).

97) See, e.g., *Restaurant Music Licensing Fees Enforced More Consistently by BMI*, ASCAP, HUFFINGTON POST (Sep. 12, 2011) at http://www.huffingtonpost.com/2011/09/12/restaurant-music_n_958419.html/ (last visited June 10, 2013).

98) Elisabeth Bumiller, *ASCAP Asks Royalties From Girl Scouts, and Regrets It*, N.Y. TIMES (Dec. 17, 1996) available at <http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html?pagewanted=all&src=pm> (last visited June 10, 2013).

99) ASCAP has attempted to argue that a download that cannot be perceived is a “public performance.” *United States v. Amer’n Soc’y of Composers, Artists, and Performers* (In re: Realnetworks), 627 F.3d 64, 71 - 75 (2d. Cir. 2010) (permanent download to a computer via the internet not a public performance); *United States v. Amer’n Soc’y of Composers, Artists, and Performers* (In re: Application of Cellco Partnership), 663 F. Supp. 2d 363, 371 -74 (S.D.N.Y., 2009) (downloading ringtone not a public performance).

100) See, e.g., William C. Holmes, *INTELLECTUAL PROPERTY AND ANTITRUST LAW* § 36:6, (Westlaw, 2012), text accompanying footnotes *supra* note 1-17 (discussing various suits against ASCAP and BMI under the Sherman Act and stating that older cases holding the practices unlawful are of doubtful validity). Due to suits brought by the United States, consent decrees have also been entered, Michael A. Epstein and Frank L. Politano; Al Kohn and Bob Kohn, *DRAFTING LICENSE AGREEMENTS* § 15.02[A][1] - [2] (Westlaw, 2013) (citing Al Kohn and Bob Kohn, *KOHN ON MUSIC LICENSING*, 4th. ed. (Aspen Law & Business 2009)).

101) 17 U.S.C.A. §§ 106, 114 (Westlaw, 2013).

102) Michael A. Aczon, *Sampling and Copyright - How to Obtain Permission to Use Samples*,

recording right holders typically enforce their rights individually, larger labels are collectively known as and represented by the Recording Industry Association of America,¹⁰³⁾ now legendary for suing its customers for downloading, regardless of their age¹⁰⁴⁾ or computer ownership status.¹⁰⁵⁾

The limited performance right of sound recording right holders – the digital audio transmission performance right¹⁰⁶⁾ is enforced solely by SoundExchange,¹⁰⁷⁾ per its appointment by the Library of Congress.¹⁰⁸⁾ Right holders must collect their royalties through SoundExchange and cannot attempt to enforce their rights directly.¹⁰⁹⁾ Presumably because SoundExchange is a holder of a government-sanctioned monopoly and is the only avenue through which right holders may collect, SoundExchange is subject to significantly more regulation than the other PROs.¹¹⁰⁾

7. Summary: United States Music Licensing

The United States constitution limits copyright to “a limited time” and to a purpose of “promoting progress,” not rewarding authors. All rights are called “copyrights” but sound recording right holders have fewer rights

EMUSICIAN (Mar. 1, 2002) at http://emusician.com/tutorials/emusic_clear/ (last visited June 10, 2013).

103) www.riaa.org (last visited June 10, 2013).

104) *12-Year-Old Sued for Music Downloading*, FOX NEWS (Sep. 9, 2003), available at <http://www.foxnews.com/story/0,2933,96797,00.html> (last visited June 10, 2013) (citing the New York Post).

105) Nate Anderson, “*I thought it was a scam*”: NH Woman sued by RIAA, ARS TECHNICA (Mar. 17, 2009), at <http://arstechnica.com/tech-policy/news/2009/03/i-thought-it-was-a-scam-nh-woman-sued-by-riaa.ars> (last visited June 10, 2013) (woman who did not own a computer named as defendant).

106) 17 U.S.C.A. § 106(6) (Westlaw, 2013).

107) soundexchange.com (last visited June 10, 2013).

108) *Organization*, SOUND EXCHANGE.COM, at www.soundexchange.com/about (last visited June 10, 2013); 37 C.F.R. 380.11, July 1, 2011 (“Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 license period, the Collective is SoundExchange, Inc”).

109) *Id.* 380.4(a) (“A licensee shall make the royalty payments ... to the Collective”).

110) See generally 37 C.F.R., ch. III (§§ 370.1 *et. seq.*), wherein many restrictions (confidentiality, filing of notices, annual reports, dissolution reports, etc.) are mandated; no similar such provisions affect the other representative groups.

than other right holders. Fair use acts as a check on the monopoly of the right holder, and compulsory licenses exist for previously recorded musical performances and some digital transmissions of sound recordings. A number of representation groups handle different rights for different right holders, with noticeable overlap and very limited government regulation.

III. “Gangnam Style:”¹¹¹⁾ The Korean Approach

We will now examine the protection of copyright and licensing of music in the Republic of Korea. Korean law has been heavily influenced by Japanese law¹¹²⁾ (which itself was influenced by German law¹¹³⁾) and thus the legal method of protecting copyrights is more European than American. There is a provision granting the legislature power to protect authors’ property in the constitution,¹¹⁴⁾ but the specific rights protected and to whom they are assigned differ greatly.¹¹⁵⁾ Limitations to rights are handled via an entirely different approach, a statutory list of possible uses instead of a flexible test.¹¹⁶⁾ Finally, the flow of royalties is handled by a variety of non-profit, governmentally regulated trusts that differ based on which usage is licensed and who must be paid. Each of these is examined in more detail below.

111) PSY. “Gangnam Style” on PSY 6 Part 1. YG Entertainment, 2012. CD.

112) *Overview of Korean Legal & Court System*, KOREALAW.COM, <http://www.korealaw.com/sub/information/boardView.asp?brdIdx=1&mode=view&brdId=overview> (last visited June 10, 2013). Although the American influence on Korean law is noted in this source (as well as others, e.g., Hyeon-Cheol Kim and Inyoung Cho, *South Korean Law Research on the Internet*, GLOBALLEX (Jan. 2008) http://www.nyulawglobal.org/globalex/south_korea.htm (last visited June 10, 2013)), this part will show that the Korean approach to *copyright and similar rights* is noticeably more “continental” than “Americanized.”

113) *Japanese Civil Code*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/301097/Japanese-Civil-Code> (last visited June 10, 2013).

114) DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 22 (2), *translated in Statutes of the Republic of Korea*, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution of the Republic of Korea” in the search bar) (last visited June 10, 2013).

115) *Cf. infra* Sections III.B and III.C with *supra* Section II.C.

116) Copyright Act, Act. No. 11110, Dec. 2, 2011, art.s 23-36.

1. Introduction: A Broader Constitutional Basis, “Neighboring Rights,” and Prerequisites for Protection.

The Korean constitution explicitly commands protection of intellectual property.¹¹⁷⁾ The law separates copyrights, which are held by authors, from neighboring rights held by performers and other non-author right holders.¹¹⁸⁾ Certain prerequisites must be met for authors to receive protection,¹¹⁹⁾ however neighboring right holders are granted their rights based more on their status and role than based on original contributions.¹²⁰⁾ We examine the constitutional clause first, then the prerequisites for protection of authors’ works and national origin requirements. Later sections will examine the rights of authors or neighboring right holders in greater detail.

1) Broader Constitutional Basis Focused on Creators

The Korean Constitution states no rationale but makes clear that “[t]he rights of authors, inventors, scientists, engineers, and artists shall be protected by Act.”¹²¹⁾ The Constitutional court of Korea has said this article is intended to boost the development of academy and art and also to protect the “industrial property” of authors.¹²²⁾ This interpretation allows

117) DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 22 (2), *translated in Statutes of the Republic of Korea*, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution of the Republic of Korea” in the search bar) (last visited June 10, 2013).

118) Cf. Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, ch. 2 § 4 (property rights) *with* ch. 3 (neighboring rights), *translated in Statutes of the Republic of Korea*, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

119) *Id.* art. 2. 1; Seoul High Ct., 2009Do291, Feb. 10, 2011.

120) GYU-HO LEE, JEJAKGWONBEOB (SARYE, HAESEOL) [COPYRIGHT ACT (EXAMPLES, EXPLANATIONS)] 395 (Jinwonsa Press, 2d ed. 2011).

121) DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], Art. 22(2), *translated in Statutes of the Republic of Korea*, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution of the Republic of Korea” in the search bar) (last visited June 10, 2013).

122) Constitutional Court [Const. Ct.], 2001Hun-Ma200, April 25, 2002. Translations of

for the legislature to focus on two different competing interests: the enrichment of society¹²³⁾ and rewarding the creator. Because of the emphasis on those who create, moral rights are protected in Korea.¹²⁴⁾

Copyright-like rights in Korea can be broadly separated into three kinds: moral rights, property rights, and neighboring rights.¹²⁵⁾ This distinction can affect many issues, including the protection term or rights granted.¹²⁶⁾ Performers, producers of phonograms, and broadcasters enjoy neighboring rights, whereas authors enjoy property rights.¹²⁷⁾ We first examine authors.

2) *Qualifications for Protection*

The Copyright Act generally protects the rights of “authors” in their “works.”¹²⁸⁾ The first two inquiries regarding copyright are thus what is a “work” and who is an “author.” Works are “creative productions in which human ideas or emotions are expressed.”¹²⁹⁾ This definition creates two requirements for a work: (1) creativity and (2) the expression of human

Korean legal literature usually use the term “industrial property” to refer to what many in the West would refer to as “intellectual property.”

123) Article 22(1) states that “[a]ll citizens shall enjoy freedom of learning and the arts.” DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution of the Republic of Korea” in the search bar) (last visited June 10, 2013). As this is the companion to the sentence commanding protection, it would seem reasonable to assume that a court could consider excessive protection of intellectual property pursuant to art. 22(2) to violate this public “freedom.”

124) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 11 *et. seq.*, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

125) *Cf. id.* ch. 2 § 3 (moral rights) *with id.* ch. 2 § 4 (property rights) and ch. 3 (neighboring rights).

126) *Cf. id.* art.s 11 - 22 (authors’ rights) *with* art.s 66 - 76-2 (performers’ rights); art. 39 (authors’ term of protection) *with* 86 (neighboring right holders’ protection period).

127) *Cf. id.* art.s 64 *et. seq.* (neighboring rights) *with* art.s 4 - 10 (author’s rights are copyrights).

128) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 16 *et. seq.*, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

129) *Id.* art. 2.

ideas or emotion. Regarding the first requirement, a work should not merely an imitation of someone else's but must contain the author's individual ideas and expression of his or her emotions.¹³⁰⁾ If a certain work is bound to be very similar to or simply be same expression as that of another work, the work cannot be considered as "creation that contains author's creative individuality";¹³¹⁾ this is similar to the U.S.'s requirement of originality.¹³²⁾ Turning to the second requirement, ideas or emotions should be expressed by the authors' efforts externally in a concrete form with words, letters, sounds or colors;¹³³⁾ this is similar to the notion of fixation in American law.¹³⁴⁾ Example categories of works given in the act are fairly standard to those familiar with copyright, and includes "musical works," known better as compositions.¹³⁵⁾

"Authors" are "the people who create works."¹³⁶⁾ If a name or pseudonym is affixed to a work, that is presumed to be an indication of authorship.¹³⁷⁾ Works are protected only if they are created by a national of Korea, a national of a treaty party, a person habitually residing in Korea, or first published in Korea. If a nation does not adequately protect Korean nationals' rights then the protection may be limited.¹³⁸⁾

No formalities are required under the Korean Copyright Act.¹³⁹⁾ There is no provision for restored copyright, presumably due to Korea's youth as a modern nation. Terms of protection are being steadily lengthened but still differ; author's rights are protected for "life plus seventy" while most

130) Seoul High Court [Seoul High Ct.], 2009Do291, Feb. 10, 2011.

131) *Id.*

132) 17 U.S.C.A. § 102(a) (Westlaw, 2013).

133) Seoul High Ct., 2009Do291, Feb. 10, 2011.

134) 17 U.S.C.A. § 102(a) (Westlaw, 2013).

135) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 4(1) *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013). The example categories are: literary works, musical works, theatrical works, artistic works, architectural works, photographic works, cinematographic works, diagrammatic works, and computer programs.

136) *Id.* art. 2 ¶ 2.

137) *Id.* art. 8(1).

138) *Id.* art. 3.

139) *Id.* art. 10(2).

neighboring rights enjoy protection for seventy years (an increase from the pre-KORUS FTA period of fifty).¹⁴⁰⁾

2. “You’re the Only One”:¹⁴¹⁾ Rights of Authors

Authors’ rights fall broadly into two categories: moral rights and property rights. We examine moral rights first. As those rights are not transferrable, this Article will use the term “author” to refer to the holder of inalienable moral rights and the term “right holder” to refer to the owner of the transferrable property rights.

1) Moral Rights

Korea protects moral rights, basing this protection on the idea that a work reflects the author’s personality.¹⁴²⁾ The Copyright Act explicitly states that an “[a]uthor’s moral rights shall belong exclusively to the author.”¹⁴³⁾ Therefore, unlike property rights, moral rights cannot be transferred; however, the family of the author may continue to enforce the moral rights after the author’s death.¹⁴⁴⁾ There are four moral rights: (1) the right to make the work public, (2) the right to indicate the author’s name, (3) the right to preserve the integrity of the work, and (4) the right to be free from defamation using the work.¹⁴⁵⁾

140) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 39 (author’s rights, life plus seventy) 86 (neighboring rights, seventy years except broadcasts), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013). Both were amended in 2011 after the approval of the EU and U.S. FTAs; cf. Copyright Act, Act. No. 9625, July 23, 2009.

141) BOA. “Only You,” on ONLY ONE. SM Entertainment, 2012. CD.

142) WON-SEOK KIM, ALGI SUIUN EUMAK JOJAKKWON, [EASY KNOWLEDGE OF MUSIC COPYRIGHT] 54 (Yon-seon Ju, Publisher, Unhaeng Namu Press, 2d ed. 2007).

143) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 14, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

144) *Id.* at art. 128; WON-SEOK KIM, *supra* note 142 at 54-55.

145) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 11, 12, 13, 124. translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then

First, the author has “the right to decide whether or not to make his work public.”¹⁴⁶⁾ An author who transfers one or more property rights to another will generally be presumed to have consented to the other party’s making public of the author’s work.¹⁴⁷⁾ Pursuant to the second right, any reproductions or publications of the work must display the author’s “real name or chosen pseudonym.”¹⁴⁸⁾ Where a work has multiple right holders, this article applies to each one. Thus, when a manager of an online music site indicated the phonogram producer’s name but neglected the name of the composer, the court ruled that the online music company infringed this right of the composer.¹⁴⁹⁾

Third, the “integrity of the content, form, and title of his work” must be preserved.¹⁵⁰⁾ If a certain musical passage is sectionalized, extracted, or modified, and saved to be used for internet users as a recorded service for purposes like trial listening, ring back (the tone heard by a caller while waiting for the recipient to pick up) or ringtones, this use infringes the right to preserve the integrity.¹⁵¹⁾ Nevertheless, the author cannot object to a modification for certain uses including school education¹⁵²⁾ and “other modification within the limit as deemed unavoidable in the light of the nature of a work and the purpose and manner of its exploitation.”¹⁵³⁾

Finally, “defaming the honor of [the] author” by use of the author’s work is also an infringement of moral rights.¹⁵⁴⁾ Korean defamation law is

select “Copyright Act” on the left) (last visited June 10, 2013).

146) *Id.* art. 11(1), *Id.* art. 128; WON-SEOK KIM, *supra* note 142 at 54-55.

147) *Id.* art. 11(2).

148) *Id.* art. 12(1).

149) Seoul High Ct., 2007Na70720, Sep. 23, 2008.

150) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 13(1), *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

151) Seoul High Ct., 2007Na70720, Sep. 23, 2008.

152) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 13(2), *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

153) *Id.* art. 13(2) ¶ 5.

154) *Id.* art. 124(4).

much broader than that of most countries, generally allowing truth only a limited defense.¹⁵⁵⁾ The Constitutional guarantee to free speech is limited to speech that does not “violate the honor .. of other persons ... or undermine public morals.”¹⁵⁶⁾ Any injury to “liberty or fame” or infliction of “mental anguish” gives rise to a claim for damages.¹⁵⁷⁾ Remedies for violation of this article are also comparatively broad: “An author or a performer may demand a person who has infringed on his ... moral rights ... take measures necessary to restore his honor or reputation in return for or together with compensation for damages.”¹⁵⁸⁾

Joint authors must unanimously consent to the use of moral rights in their work, though none may prevent an accord “in bad faith.”¹⁵⁹⁾ The authors may designate a representative for purposes of moral rights,¹⁶⁰⁾ but any “[l]imitations imposed on the ... representation” will not be binding against a third party without knowledge of those limitations.¹⁶¹⁾

2) Property Rights

A property right protects the ability of a right holder to economically exploit a work; this right can be transferred or inherited.¹⁶²⁾ There are seven kinds of property rights: (1) reproduction, (2) public performance, (3) public transmission, (4) exhibition, (5) distribution, (6) rental, and (7) production of

155) See, e.g., Daniel Fiedler, *Slander and coffee shop gossip*, KOREAN HERALD, Dec. 20, 2011, available at <http://www.koreaherald.com/opinion/Detail.jsp?newsMLId=20111220000253> (last visited June 10, 2013).

156) DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 21(4), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution of the Republic of Korea” in the search bar) (last visited June 10, 2013).

157) Civil Act, Act. No. 09650, May 8, 2009, art. 751, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Civil Act” in the search bar) (last visited June 10, 2013).

158) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 127, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

159) *Id.* art. 15(1).

160) *Id.* art. 15(2).

161) *Id.* art. 15(3).

162) WON-SEOK KIM, *supra* note 142 at 56.

derivative works.¹⁶³⁾ Because Korean performers and producers of phonograms possess different but similar neighboring rights, we should note before we go on that the rights discussed in this subsection are those held by composers of music or lyrics, not producers or performers. The rights of exhibition and rental are also generally irrelevant to our current concern, music.¹⁶⁴⁾

The right of reproduction prohibits people other than the right holder from fixing the work in a tangible medium.¹⁶⁵⁾ If a person burns a CD, or duplicates an MP3 file, this right is infringed. However, receiving or giving an MP3 via email is regarded as a violation of the right of public transmission.¹⁶⁶⁾ This differs from the American treatment of such use as an offense to the distribution or reproduction rights.¹⁶⁷⁾

The right holder also has the exclusive right to perform the work publicly.¹⁶⁸⁾ Singers and performers must obtain a license from the copyright holder of the composition to sing or perform in public. Playing a recording of a certain performance in public also is covered by the right of public performance; thus the owner of a *noraebang* (“singing room,” similar to karaoke) must have a license for public performance.¹⁶⁹⁾

The right of public transmission protects the right holder’s ability to

163) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 16 - 22, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

164) *Id.* art.s 19, 21.

165) *Id.* art. 2 ¶ 22.

166) WON-SEOK KIM, *supra* note 142 at 57.

167) *United States v. Amer’n Soc’y of Composers, Artists, and Performers* (In re: Realnetworks), 627 F.3d 64, 71 - 75 (2d. Cir. 2010) (permanent download to a computer via the internet not a public performance); *United States v. Amer’n Soc’y of Composers, Artists, and Performers* (In re: Application of Cellco Partnership), 663 F. Supp. 2d 363, 371 -74 (S.D.N.Y. 2009) (downloading ringtone not a public performance); *A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (file sharing violates the right of distribution by the uploader and the right of reproduction by the downloader).

168) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 17, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

169) WON-SEOK KIM, *supra* note 142 at 58.

“communicate his work to the public”¹⁷⁰⁾ by “wire or wireless means intended for reception or access by the public.”¹⁷¹⁾ Public transmission is a broad concept that encompasses traditional over-the-air broadcasting and digital sound transmission as well as interactive transmission (wherein the user can choose the time, place, and content).¹⁷²⁾ This differs from neighboring right holders’ more limited rights; performers may only control distribution by interactive transmission and may only claim compensation for broadcasters’ or digital sound transmitters’ use of their works.¹⁷³⁾

The right holder has “the right to distribute the original or reproduction [sic] of his work.”¹⁷⁴⁾ However, the right holder cannot prevent subsequent sale of the physical copy of the work; the “first sale” of a work to one person prevents the right holder’s complaining against the purchaser’s resale of the work¹⁷⁵⁾ (although rental for profit is still restricted).¹⁷⁶⁾ Finally, the right to “produce and exploit a derivative work based on [the] original work”¹⁷⁷⁾ prohibits another from making a creation “by means of translation, arrangement, alteration, dramatization, cinematization, etc. of an original work.”¹⁷⁸⁾ However, similar to the U.S., Korea permits

170) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 18, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

171) *Id.* art. 2 ¶ 7.

172) *Id.* art.s 2 ¶ 7 (defining public transmission), 2 ¶ 8 (defining broadcast), 2 ¶ 11 (defining digital sound transmission), and 2 ¶ 10 (defining interactive transmission); GYU-HO LEE, *supra* note 120 at 152.

173) *Id.* art.s 74 (interactive transmission), 75 - 76 (performer’s right to recompense). art. 73 gives the performer the right to control broadcast of performances *unless* those performances were fixed with the authorization of the performer.

174) *Id.* art. 20.

175) WON-SEON YIM, SILMUJAREUL UIHAN JOJAKKWON [COPYRIGHT LAW FOR HANDS-ON WORKERS], 193, 195, 199 (Korea Copyright Commission, 2d ed. 2009).

176) GYU-HO LEE, *supra* note 120 at 400.

177) WON-SEOK KIM, *supra* note 142 at 61.

178) Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 5(1), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

compulsorily licensed recordings of previously published musical works. The differing specific limitations are discussed below in III.D.3.

3) *Duration of Property Rights*

The E.U.-Korea FTA negotiations resulted in harmonization of what both treated as copyright, the rights of authors.¹⁷⁹⁾ Property rights continue until seventy years after the death of an author.¹⁸⁰⁾ Anonymous and pseudonymous works are protected until seventy years after publication, except if there are reasonable grounds for recognizing a date seventy years after the death of the author (such as revelation of the author or registration of a name), such property rights will not lapse until seventy years after death.¹⁸¹⁾

3. *“Won’t You Be My Neighbor?”¹⁸²⁾: Neighboring Rights*

A neighboring right is a right similar to copyright granted to performers, phonogram producers, and broadcasting organizations. Each neighboring right holder holds different rights, and performers are the only neighboring right holders who have moral rights. Furthermore, unlike authors, neighboring right holders typically hold two types of property rights: exclusive property rights and compensatory rights. The compensatory rights function similarly to compulsory licenses; provided a legally set sum of money is paid, the neighboring right holder cannot forbid certain uses of a work. This Article next examines performers’ neighboring rights, as they are the strongest and broadest of the neighboring rights.¹⁸³⁾

179) INTERVIEW WITH JI-HO LEE AND JAE-KAN SEO, Copyright Consulting Team, Korea Copyright Commission, in Seoul, Korea, Feb. 23, 2012 [hereinafter “KCC Interview”].

180) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 39, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

181) *Id.* art. 40(1).

182) FRED ROGERS, *WON’T YOU BE MY NEIGHBOR* (1967).

183) The issues mentioned in this paragraph are discussed in detail in the immediately following sections; please refer to appropriate references therein for primary citations.

1) Performers' Rights

Performers are the “persons who express a work by acting, dancing, musical playing, singing, narrating, reciting, or other artistic means or who express something other than a work by a similar method.”¹⁸⁴ Conductors, directors, and those who “supervise performances” are also considered “performers.”¹⁸⁵ Performances enjoy protection in Korea if they are (1) performances by Korean nationals, (2) protected under international treaties, (3) fixed in protected phonograms, or (4) broadcasted by protected broadcast, unless the performance was aurally or visually fixed before broadcast.¹⁸⁶ We now discuss performers’ moral, exclusive property rights, and compensatory rights, in that order.

(1) Performers’ Moral Rights

A performance naturally includes some degree of a performer’s personality, therefore performers have the moral rights to (1) indicate the performer’s name and (2) preserve the integrity of their performance.¹⁸⁷ Phonogram producers and broadcasting organizations, however, do not have these rights¹⁸⁸ because their work necessarily must greatly depend on both the author’s and performer’s creations. Performer’s moral rights, like author’s moral rights, are inalienable.¹⁸⁹

(2) Performers’ Exclusive Property Rights

Performers enjoy neighboring property rights similar to, but not perfectly alike, authors’ property rights. Specifically, performers have the rights of (1) reproduction, (2) distribution, (3) rental, (4) public performance, (5)

184) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 2 ¶ 4, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

185) *Id.*

186) *Id.* art. 64.

187) *Id.* art.s 66 - 67.

188) *Cf. id.* ch. 3 § 2 (performers hold moral rights) with §§ 3-4 (no such rights for other neighboring right holders).

189) *Id.* art. 68.

broadcasting of performances, and (6) interactive transmission.¹⁹⁰⁾

“Reproduction” here indicates not only reproduction of a performance but also the initial recording or videotaping.¹⁹¹⁾ Distribution and rental of physical fixations of the performance are separate rights.¹⁹²⁾ Sale exhausts the distribution right but not the rental right;¹⁹³⁾ thus a person may re-sell a phonogram the person bought but cannot rent the same phonogram for profit.¹⁹⁴⁾ The U.S. “first sale” doctrine, by contrast, exhausts all distribution rights upon sale—the purchaser is free to distribute the work in any fashion, including rental for profit.¹⁹⁵⁾

Only the performer may “perform [his or her] unfixed performances publicly,” with an exception for broadcast performances.¹⁹⁶⁾ This right is sufficiently broad to prevent simultaneous projection;¹⁹⁷⁾ a singer can claim this right is violated when a live performance in a stadium can be seen in another area outside the stadium, such as via a projection screen on the outside of a building.¹⁹⁸⁾ Performers also control broadcasts of their performances, but cannot control broadcasts of fixed performances (e.g., phonograms) if those recordings were made with permission.¹⁹⁹⁾ Broadcasting a fixed performance only implies a compensatory right discussed in III.C.1.c.

190) *Id.* art.s 69 - 74, respectively.

191) GYU-HO LEE, *supra* note 120 at 399.

192) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 71, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

193) GYU-HO LEE, *supra* note 120 at 400.

194) *Id.* The purchaser may, however, rent the phonogram if not for profit (*id.*).

195) 17 U.S.C.A. § 109 (Westlaw, 2013).

196) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 72, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

197) GYU-HO LEE, *supra* note 120 at 400.

198) *Id.*

199) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 73, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

The right to control transmission “in an interactive manner,”²⁰⁰⁾ grants a performer control of the providing of their fixed performance to members of the public at a time and place chosen by the consumer.²⁰¹⁾ When a fixed performance is transmitted at the request of a person, whether that transmission is a stream or a permanent download, this right is infringed.²⁰²⁾ This treatment of a permanent download as transmission (and not reproduction) is similar to the protection of author’s rights previously discussed.²⁰³⁾

One noteworthy legal license whose focus is actors can also affect musical performers who appear in motion pictures. A performer in a cinematographic works is presumed to transfer the rights of reproduction, distribution, broadcasting, and interactive transmission to the producer unless contrary intent is indicated.²⁰⁴⁾ No such presumed license exists in the U.S., though most likely a contractual agreement would dispose of the manner.

(3) Performers’ Compensatory Property Rights

Rights to claim compensation arise in three scenarios, all stemming from the usage of a fixed performance. If a phonogram is (1) broadcast, (2) digitally transmitted, or (3) performed publicly, the performer may claim compensation.²⁰⁵⁾ A persons’ nationality and location can affect the first and third rights (a national of a nation whose laws do not protect Koreans’ rights cannot expect compensation in those circumstances), but because digital transmission is inherently transnational, inquiries as to citizenship and location do not affect the second right.²⁰⁶⁾ The rates for compensation are set by agreement between rights management trusts and the users of

200) *Id.* art. 74.

201) WON-SEON YIM, *supra* note 175 at 283.

202) *Id.*

203) *See* text accompanying footnotes 168 - 169.

204) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 100(3), *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

205) *Id.* at art.s 75(1), 76(1), 76-2(1), respectively.

206) GYU-HO LEE, *supra* note 120 at 402.

the media²⁰⁷⁾ or arbitration if negotiation fails.²⁰⁸⁾

2) Producers' Rights

Phonogram producers are “the persons who plan and assume responsibility for the fixation of sound on phonograms.”²⁰⁹⁾ Protection for producers of phonograms is similar to protection for performers—only phonograms manufactured by nationals of Korea (or a treaty party) or fixed in Korea (or a treaty party) are protected.²¹⁰⁾ Phonogram producers have no rights similar to moral rights, only property rights. Their exclusive property rights are the rights of (1) reproduction, (2) distribution, (3) rental, and (4) interactive transmission.²¹¹⁾ The apparent difference in rights from performers is illusory; producers are excluded from the right to perform an unfixed performance (in which presumably they had no hand in the creation) and the right to broadcast a performance fixed without permission (which could never happen per the definition of a producer). Producers also have the same three compensatory property rights as performers—rights to claim compensation for (1) using a commercial phonogram in a broadcast, (2) digitally transmitting a commercial phonogram, and (3) publicly performing a commercial phonogram.²¹²⁾

3) Broadcasting Organizations' Rights

Broadcasting organizations are those engaged in business of transmitting “sounds, images or sounds and images intended for simultaneous reception by the public.”²¹³⁾ Broadcast differs from interactive

207) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 75(3), 76(3), 76-2(2), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

208) *Id.* art.s 75(4), 76(4), 76-2(2).

209) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 2 ¶ 6, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

210) *Id.* art. 64.

211) *Id.* art.s 79 - 82, respectively.

212) *Id.* art.s 82(1), 83(1), 83-2(1), respectively.

213) *Id.* art. s 2 ¶ 9 (defining “Broadcasting Organization”); 2 ¶ 8 (defining

transmission in that people receiving the communication cannot control its timing or content.²¹⁴⁾ In the U.S., broadcast means wireless communication only, specifically that of a terrestrial radio station;²¹⁵⁾ however, in South Korea, it also includes diffusion by wire or satellite.²¹⁶⁾ Rules similar to the other neighboring rights govern “national treatment” of broadcasts; broadcasts made by nationals of the Republic of Korea or made in facilities located in Korea (or by nationals of or through facilities in a treaty party) are protected.²¹⁷⁾

Broadcast organizations must obtain permission from authors (or designees and right holders) as well as compensate neighboring right holders.²¹⁸⁾ Thereafter, the broadcast organization will have three rights: reproduction,²¹⁹⁾ simultaneous relay,²²⁰⁾ and public performance.²²¹⁾ The right of reproduction protects the right to record, photograph, otherwise fix, or reproduce a fixed broadcast; taking a picture of a screen or making a recording and selling either fixation would infringe upon this right.²²²⁾ Recording a broadcast and transmitting it in a different time or making that reproduction available online (whether for streaming or download) without permission also infringes this right; moreover, the original broadcaster could also allege infringement of the right of the author’s property right of public transmission.²²³⁾

“broadcasting”).

214) WON-SEON YIM, *supra* note 175 at 295.

215) 17 U.S.C.A. § 114(j)(3) (Westlaw, 2013).

216) WON-SEON YIM, *supra* note 175 at 297.

217) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 64(1) ¶ 3, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

218) WON-SEON YIM, *supra* note 175 at 298.

219) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 84, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

220) *Id.* art. 85.

221) *Id.* art. 85-2.

222) WON-SEON YIM, *supra* note 175 at 298.

223) *Id.* at 299.

The right of simultaneous relay encompasses receiving a broadcast and re-broadcasting the same content at the same time. Therefore, if a person receives a broadcaster's programs and re-broadcasts it to anywhere without the original broadcaster's permission, this right is infringed.²²⁴⁾ (A similar provision is encompassed in U.S. law, albeit through a different mechanism: a retransmission of a nonsubscription broadcast transmission, made by the broadcaster under certain geographic or other limitations, is not an infringement of the sound recording right holder's rights.²²⁵⁾ Finally, the right of performance for broadcasters protects the ability to charge admission to watch a broadcast in a public area.²²⁶⁾ Thus, even if a person neither records nor retransmits the broadcast, but merely charges for its viewing, the broadcaster's rights are still implicated.

4) Protection Period of Neighboring Rights

Neighboring rights are not protected for the same term as authors' property rights, and furthermore not all neighboring rights enjoy the same protection period.²²⁷⁾ Due to the KORUS FTA, neighboring rights of performers and producers were expanded from fifty years to seventy years;²²⁸⁾ the protection period starts after certain triggering events such as a first performance or broadcast. Broadcasters' rights remain at the shorter term of fifty years.²²⁹⁾

5) Neighboring Rights: Summary

The somewhat vague term "neighboring rights" encompasses various concepts including moral rights, exclusive rights, and compensatory rights.

224) GYU-HO LEE, *supra* note 120 at 408.

225) U.S.C.A. § 114(d)(1)(b) (Westlaw, 2013).

226) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 85-2, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

227) *Id.* art 86.

228) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 86, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013); KCC interview, *supra* note 179.

229) *Id.*

Performers alone hold moral rights, and performers and producers have similar property rights. Broadcasters are granted a separate set of protections against unauthorized use of their broadcasts. The terms of protection are not uniform internally and also differ from authors' property rights. Both neighboring rights and property rights are subject to various limitations and exceptions, discussed next.

4. *Limitations to Rights*

Limitations to a right holder's rights are found under two headings in the Copyright Act: Chapter Two, Section Four ("Limitation on Author's Property Rights") and also Chapter Two, Section Five ("Exploitation of Works Under Statutory License").²³⁰ Section Four eschews a flexible test in favor of a clear list of fourteen statutorily authorized allowable uses of a work.²³¹ Some of these uses are unpaid, but other uses require a degree of compensation to the author.²³² This Article will separate the unremunerated uses and address those first, followed by the paid uses (which we will call "compensated uses" to distinguish from the compulsory licenses). Although Section Four's provisions are contained in the second chapter of the Copyright Act (which addresses author's property rights), the relevant portions (except the compensated uses) apply equally to neighboring rights per article eighty-seven.²³³ Section Five

230) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, *translated in Statutes of the Republic of Korea*, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

231) *Id.* art.s 23 - 36.

232) *Cf. id.* art.s 23-24 (use for judicial proceedings or use of material taken from political speeches are uncompensated uses) *with* art. 25(3) (certain uses of works in education result in an obligation of payment to the right holder) and art. 31(5) (certain duplications or transmissions of works within or between libraries gives rise to an obligation to compensate).

233) *Id.* Article 87 exempts payment to neighboring right holders for the use of audio or video material in education by exempting application of the payment provisions (art. 25(4) - (5)) to neighboring right holders (*id.*). Moreover, both articles 25 (educational use) and 31 (library use), by their own terms limit remuneration to holders of "author's property rights." The remaining two exceptions which I have deemed irrelevant disallow the making of braille copies of a phonogram for the blind (*id.* art. 33(1)) and the exhibition of a performance, phonogram, or broadcast in a work of architecture (*id.* art. 35).

compulsory licenses, discussed last, are granted in the case that the author cannot be found, a broadcast organization wishes to use a work already made public, or—similar to mechanical licensing in the U.S.²³⁴—when a new artist wishes to record a previously released musical work.²³⁵ The most important distinction between the two is that a person who fails to remunerate for a compensated use is seen as violating a general civil obligation and, though liable to pay money, not liable for copyright infringement.²³⁶ In contrast, a party who violates the payment provisions of compulsory licenses is seen as violating copyright and thus subject to various unique remedies (including possible criminal charges) per the Copyright Act.²³⁷

1) *Unremunerated Uses*

Reproduction for a judicial proceeding,²³⁸ from a political speech,²³⁹ for news reporting,²⁴⁰ quotations from works already made public,²⁴¹ copies for the blind,²⁴² and uses to make exam questions²⁴³ are unremunerated uses of a work, generally with a “reasonable” or similar limitation included in the relevant article. Korea also includes a “private use” exception in article thirty allowing for reproduction of a published work for use within a

234) See *supra* part II.D.2.a.

235) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 50 - 52, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

236) WON-SEON YIM, *supra* note 175 at 264.

237) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 123 *et. seq.* (remedies include destruction of goods, injunction, and election of damages including statutory damages), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013); sanctions up to five years incarceration can be seen at *id.* art.s 136 *et. seq.*

238) *Id.* art. 23.

239) *Id.* art. 24.

240) *Id.* art.s 26-27.

241) *Id.* art. 28.

242) *Id.* art. 33.

243) *Id.* art. 32.

“limited circle,”²⁴⁴⁾ effectively legalizing casual copying.²⁴⁵⁾ Article twenty-nine, exempting non-profit public performances from paying any royalty, appears on its face to be quite broad.²⁴⁶⁾ However, subsection two grants the power to the president to decree when public performances of a phonogram, though non-profit, would fall “outside” the exemption of article twenty-nine.²⁴⁷⁾ The Enforcement Decree has excluded nearly any profit-making public establishment: restaurants, bars, sporting events, airplanes, and more have been excluded from this use.²⁴⁸⁾ Thus small venues in Korea do not enjoy the freedom to publicly perform that the same size venues would in the United States.²⁴⁹⁾

2) *Compensated Uses*

Two major limitations on rights incorporate payment provisions into their exceptions and thus can function similarly to a compulsory license: educational use and library use.²⁵⁰⁾ Failure to pay for these uses is seen as a breach of an obligation, but not as a breach of copyright law.²⁵¹⁾ Applicable law furthermore mandates that compensation be paid to designated trusts

244) *Id.* art. 30.

245) For a further discussion of art. 30, see Darren Bean, *Korean Copyright Act Article 30: Does “Private Use” Under the Copyright Act Implicate International Obligations?*, CHOSUN DAEHAKKYO BEOBHAK NONCHONG [CHOSUN UNIVERSITY LAW REVIEW], Vol. 19 No. 1, 69 (May 2012), available at <http://scholar.dkyobobook.co.kr/searchExtAcademy.laf?vendorGb=01&academyCd=20062> (last visited Aug. 1, 2012).

246) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 29, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

247) *Id.*

248) Jeojakkwonbeob sihaengryung [Enforcement Decree of the Copyright Act], Presidential Decree No. 23001, June 30, 2011, art. 11, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Enforcement Decree” on the left) (last visited June 10, 2013).

249) 17 U.S.C.A. § 110(5) (Westlaw, 2013).

250) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 25 and 31, respectively, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

251) WON-SEON YIM, *supra* note 175 at 264.

rather than directly to right holders,²⁵²⁾ although if a right holder not registered with the applicable trust requests the trust collect on his or her behalf, the trust cannot refuse.²⁵³⁾ Finally, while the portions of these statutes allowing use do apply to neighboring right holders, the payment provisions do not;²⁵⁴⁾ thus these rights function as unremunerated uses in reference to performers, producers, and broadcast organizations.

Examining educational use, although the act permits usage “in textbooks,”²⁵⁵⁾ that phrase has been defined to include any media (audio, visual, electronic, or otherwise) used in school and can also include some degree of necessary supplemental media by the teacher when a text is not available.²⁵⁶⁾ Original work by the teacher however, which is presumably a derivative work, is excluded from this provision.²⁵⁷⁾ Governmentally created schools up to the secondary level (inclusive) are exempt from paying any remuneration except when they exhibit, rent, or prepare derivative works of a work;²⁵⁸⁾ reproduction, distribution, performance, broadcast, and transmission are free to such schools.²⁵⁹⁾ Private schools, however, must pay for usage of any of rights.²⁶⁰⁾ Libraries and certain related facilities may reproduce works they hold when requested by an user, for archival purposes, or for the purpose of loan to another similar institution.²⁶¹⁾ When reproducing to provide to a user or another library the

252) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 25(4) - (5), 31(5), *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

253) *Id.* art.s 25(6), 31(5).

254) *Id.* art.s 25(4), 31(5) (remuneration only need be paid to holders of “author’s property rights”).

255) *Id.* art. 25(1).

256) WON-SEON YIM, *supra* note 175 at 211.

257) *Id.*

258) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 25(4) (referring to “paragraph (2) users” which are government schools), *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

259) *Id.*

260) *Id.*

261) *Id.* art. 31.

library must pay compensation to a trust designated by MCST.²⁶² That trust, Korean Copying and Transmitting Rights Association, also receives moneys for uses within schools.²⁶³

3) *Statutory Licenses*

Finally, there are three “statutory licenses” categorized separately from “limitations to rights.” These uses are always compensated (failure to compensate is seen as copyright infringement²⁶⁴) and only apply in three specific circumstances: when an owner cannot be reached, when a broadcasting organization uses a work already made public, or when a person seeks to record an already published musical work three years or more after its previous recording and publication.²⁶⁵ We focus on the second and third of these, which share two prerequisites in common: negotiation and publication. The content user must have attempted to strike a deal with the right holder to no avail.²⁶⁶ (One could argue that this reflects Korean culture’s emphasis on harmonic relations made without force or fear of law, but a full discussion of Korean culture and law is well beyond the scope of this Article.) Only after such failure will the Korean Copyright Commission (“KCC”) then set a binding rate on the parties.²⁶⁷ Second, the work to be used must have been made public,²⁶⁸ but

262) *Id.* art. 31(5).

263) *Munhwach’eyukkwangkwangkwangbu goshi che2008-2ho* [Announcement of the Ministry of Culture, Sports, and Tourism, Vol. 2008 No. 2], “Hakkyogyokyoyukmokjeok deungeeui iyong bosangeum suryeongdanch’e jjeong” [Declaration of Party to Receive Royalties for School Use], Mar. 13, 2008, available at <http://www.mcst.go.kr/web/notifyCourt/notice/mctNoticeView.jsp?pSeq=3748> (last visited Aug. 12, 2012) [hereinafter “MCST Announcement 2008-2”].

264) WON-SEON YIM, *supra* note 175 at 264.

265) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 50 - 52, respectively, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

266) *Id.*

267) *Id.* (negotiation must be attempted before seeking a compulsory license); *id.* art. 113, (powers of KCC); KCC interview, *supra* note 179 (MCST has delegated the setting of royalty rates to KCC).

268) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 51, 52, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at <http://>

publication can be effectively revoked if the right holder withdraws all reproductions of a work²⁶⁹⁾

Turning to the relevant specific licenses, the first allows broadcasting, “for the public benefit” of a work already published under a compulsory license.²⁷⁰⁾ Although the phrase “for the public benefit” has not been defined through litigation or commentary, a reasonable interpretation suggests that it is for the benefit of the listener; that is, enjoyment of the song rather than repurposing the work to accompany an advertisement or similar commercial material. In any case, as negotiation is a prerequisite, and major broadcasters have already negotiated blanket licenses with the Korean Musical Copyright Association, this provision is rarely used.²⁷¹⁾

The last statutory license would function like a section 115 mechanical license in the United States with the addition of a lapsed time prerequisite.²⁷²⁾ Three years after a fixation of a musical work has been first released in Korea, another artist may record and release a new version of the underlying musical work, provided an amount is paid to the compositions’ right holder.²⁷³⁾ We say that this provision of law “would” function so because in practice it is never used, with voluntary licenses

elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

269) Jeojakkwonbeob sihaengryung [Enforcement Decree of the Copyright Act], Presidential Decree No. 23001, June 30, 2011, art. 22, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Enforcement Decree” on the left) (last visited June 10, 2013).

270) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 51, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

271) Interview with Hyung-Seok Ryou, Head of Legal Affairs Team, KOMCA, in Seoul, Korea, (Feb. 24, 2012) [hereinafter “First KOMCA Interview”].

272) Cf. 17 U.S.C.A. § 115 (Westlaw, 2013).

273) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 52, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013); WON-SEON YIM, *supra* note 175 at 262 (clarifying that although the act only requires publication, first publication must be in Korea).

taking up the whole of the market.²⁷⁴⁾

4) Conclusion: Limitations to Rights under Korean Law

The Korean Copyright Act divides legitimate uses into three categories: First there are a variety of unremunerated uses.²⁷⁵⁾ In nearby provisions, two uses (education and library archival) may require some degree of compensation to the right holder, through a designated trust.²⁷⁶⁾ Compulsory license provisions are similar to the U.S. but the specific terms differ: Three years must lapse from the publication of the underlying work, and an attempt at negotiation must be made before a compulsory license is sought.²⁷⁷⁾ Knowing the specific categorization of the use is essential as some are infringing, some are non-infringing, and most apply equally to neighboring right holders, but some do not.

5. Making it “Rain”:²⁷⁸⁾ Licensing of Works and Collection of Royalties

All Korean royalty-collecting groups are governmentally regulated non-profit entities,²⁷⁹⁾ and until recently all were monopolies.²⁸⁰⁾ The President may decree rules for them to follow, and furthermore MCST may regulate

274) INTERVIEW WITH HYUNG-SEOK RYOU, Head of Legal Affairs Team, KOMCA, in Seoul, Korea, (Apr. 16, 2013) [hereinafter “Second KOMCA Interview”].

275) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, ch. 2 § 4 subsec. 2, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

276) *Id.* art.s 25, 31.

277) *Id.* art. 52.

278) See, e.g., Wikipedia: Rain (entertainer) at http://en.wikipedia.org/wiki/Rain_%28entertainer%29 (last visited June 20, 2013).

279) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 105 *et. seq.*, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

280) Eumak Jeojakkwon Sint’akkwanrieop Heogadaesangja Sinjeonggyehoeok Kongko [Announcement of Intent to Accept Applications for Music Copyright Trust Business], MINISTRY OF CULTURE, SPORTS, AND TOURISM, Apr. 10, 2013, available at <http://www.mcst.go.kr/web/notifyCourt/press/mctPressView.jsp?pSeq=12658> (last visited June 11, 2013) [hereinafter “MCST Announcement 2013-1”].

and de-commission a trust that fails to obey regulations.²⁸¹⁾ Trusts are organized based on both what type of use is made and what type of right holder is represented. In certain cases, persons can attempt to license their work by themselves, outside of the trust, and in other cases this is not permissible. For example, uses for education are collected and distributed by the Korean Copying and Transmitting Rights Association (“KCTRA”) and only through that organization can monies be collected.²⁸²⁾ By contrast, The Korean Music Copyright Association (“KOMCA”) represents composers for the majority of other uses of their work (such as covering, synching, or other uses) but a composer is free to not join the trust and attempt to directly license and enforce rights directly when statutorily permissible.²⁸³⁾

Three major trusts handle musical issues: KOMCA represents authors or composers (including publishing businesses who are assignees of rights)²⁸⁴⁾ the Federation of Korean Musical Performers (“FKMP”)²⁸⁵⁾ represents performers, and the Korean Association of Phonogram Producers (“KAPP”) represents producers.²⁸⁶⁾ All three trusts are voluntary; that is, a right holder can forego membership and attempt to license and monetize works without joining the trust, provided the right holder is willing to contact the applicable trust should he or she desire to collect for remunerated uses. A performer or producer who refuses to join or contact the trust when royalties are due, however, will also give up collections from compensatory property rights because such royalties, pursuant to statute, are distributed only through trusts.²⁸⁷⁾

281) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 105 *et. seq.*, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

282) *E.g., id.* art. 25 (uses for education pay only to a designated trust); MCST Announcement 2008-2, *supra* note 263 (designation of a trust to receive payment).

283) First KOMCA Interview, *supra* note 271.

284) http://www.komca.or.kr/eng/dat_contents_03.jsp (last visited June 20, 2013).

285) <http://www.fkmp.kr/> (last visited June 20, 2013) (Korean only).

286) <http://www.kapp.or.kr/eng/trust/introduction.asp> (last visited June 20, 2013).

287) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 75(2), 76(2), 76-2(2) (performers’ compensatory rights), 82(2), 83(2), 83-2(2) (producer’s rights) (all cited articles state that the provisions of article 25(5) -25(9), which state

All three generally represent all rights of the people they represent; that is, whether a copyright user seeks to reproduce, distribute, perform, transmit, or otherwise use a work, the same trust is contacted. (The exceptions would be for uses where another trust already represents the issue, such as educational use.) Thus KOMCA, for example, is the Korean partner organization for not only Harry Fox but also ASCAP, BMI, and SESAC.²⁸⁸⁾ Much of KOMCA's work is similar to a U.S. PRO's work: Different geographical branches cover different areas and restaurants and bars are monitored.²⁸⁹⁾ Large broadcast organizations such as Korean Broadcasting System ("KBS")²⁹⁰⁾ pay a flat annual fee set as a percentage of their income; monitoring of broadcasts (for frequency of songs and similar issues) is outsourced. For the ever-popular *noraebangs*, a size-based criterion is applied and royalties are collected monthly.²⁹¹⁾

Prior to April 2013, it was thought that there was no interest in creating further quasi-competitive trusts handling the same rights as exist in the U.S. Because the Korean market is small, it was thought to be most efficient to keep overhead (trust expense) low and increasing the number of trusts would increase duplicative overhead and make it more difficult for an user to locate the proper trust to license works. This in turn could lead to higher prices for and lower demand from music consumers and be detrimental to the licensing market.²⁹²⁾ Recently, however, the Ministry of Culture, Sports,

that a trust must collect royalties for the relevant use (albeit in the case of educational use under article 25) are equally applicable to the mentioned compensatory rights)), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013); LEE, GYU-HO *supra* note 120 at 400 (FKMP represents performers); WON-SEOK KIM, *supra* note 142 at 94 (KAPP represents producers).

288) First KOMCA interview, *supra* note 271. Furthermore, each American group lists the affiliation on their website, and as of June 10, 2013, each group listed KOMCA and the respective URLs could be found at: <http://www.harryfox.com/public/ForeignAffiliates.jsp>, <http://www.ascap.com/about/collecting/affiliated.aspx>, http://www.bmi.com/international/entry/reciprocal_representation_agreements_foreign_performing_rights_societies, and <http://www.sesac.com/licensing/foreignpros.aspx>.

289) *Id.*

290) <http://world.kbs.co.kr/english/> (last visited June 20, 2013).

291) First KOMCA interview, *supra* note 271.

292) *Id.*

and Tourism (“MCST”) announced that it was ending the trusts’ monopolies and opening the market to competing trusts;²⁹³⁾ when pressed for reasons why, MCST effectively indicted KOMCA, alleging that non-transparent royalty payment systems and inefficient management were harming artists.²⁹⁴⁾ This is not the first time the concern about less-than-ideal representation stemming from monopoly has shown itself to be legitimate; in 2003, the now-defunct performers’ trust, the Korea Art Performers’ Association, was decried for inadequately distributing royalties to performers.²⁹⁵⁾

KOMCA questions if allowing a second trust will change the market in any significant fashion. Any new trust will still have to comply with government regulations; the trust would have very little freedom to actually change the royalty rates in use, and the concern about duplicative overhead and confusion remains quite real. In Japan, where a monopoly system was replaced with an open-but-regulated system (as Korea is transitioning to), there was almost no change in the market—the major trust (that existed as a monopoly) continued to license the vast majority of works after opening of the market.²⁹⁶⁾

A final point to note is that, despite promotional efforts and attention building, K-pop and Korean music’s influence is presently mostly limited to Asia.²⁹⁷⁾ In 2012, KOMCA collected about 58.6 million won (\$53,800) from ASCAP—less than was collected from any of the representation societies in Hong Kong, Singapore, Malaysia, or Taiwan.²⁹⁸⁾ The majority of income

293) MCST Announcement 2013-1, *supra* note 280.

294) Eumak Jeojakkwon Shint’akkwanrieup Gyeongjaeng Doip Ch’ujin Kwanryeon Munhwach’ayukkwanwangbu Seolmyeongjaryo [Music Copyright Trust Business Introduction Explanation by MCST], MINISTRY OF CULTURE, SPORTS, AND TOURISM, available at <http://www.mcst.go.kr/web/notifyCourt/press/mctPressView.jsp?pSeq=12681> (last visited June 11, 2013).

295) Chung Hwan Choi, *supra* note 34 at 194-95.

296) Second KOMCA Interview, *supra* note 274.

297) First KOMCA Interview, *supra* note 271.

298) Report from *Che 50 Ch’a KOMCA Cheongjich’onghoi* [50th Regular Meeting of KOMCA], February 19, 2013, 9 - 10 [hereinafter “KOMCA 50th Meeting Report”]. In converting currencies in this section the authors have used a figure of 1,100 won to the dollar. In contrast to how little KOMCA collected from U.S. PROs, the amount paid to U.S. PROs was approximately 2 billion won (\$1.82 million), or just short of half of the 4.3 billion won (\$3.91

(over 90%), approximately eleven billion won (\$10 million), came from Japan.²⁹⁹ Although demand in China is estimated to be tremendous, enforcement issues have led to little income.³⁰⁰

6. Korean Musical Copyright Law in Brief (Summary: Part III)

Korean copyright law divides rights, other than moral rights, into property rights³⁰¹ (for authors) and neighboring rights³⁰² (for performers, producers, and broadcasting organizations). The rights granted are not the same,³⁰³ and even differing neighboring right holders may have different rights.³⁰⁴ Moral rights are held by authors and performers.³⁰⁵ Neighboring right holders may also hold compensatory rights for certain uses, which function similarly to compulsory licenses.³⁰⁶

Limitations to rights may either be Section Four limitations to rights or Section Five statutory licenses.³⁰⁷ Uses in Section Four are not all free—uses for education or libraries require payment to a trust.³⁰⁸ Unlike the U.S., there is no general fair use exception, all exceptions to rights are explicitly

million) KOMCA distributed to foreign nations' collections societies in 2012. Second KOMCA Interview, *supra* note 274.

299) KOMCA 50th Meeting Report, *supra* note 298 at 9.

300) First KOMCA interview, *supra* note 271 (income from China in 2010 was under 21 million won, or barely 19 thousand dollars); *accord* KOMCA 50th Meeting Report, *supra* note 298 at 10 (income from China in 2012 was approximately 21.5 million won (\$19,545)).

301) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, § 4, subsec. 1 (art.s 16 *et. seq.*), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

302) *Id.* art.s 64 *et. seq.*

303) *Cf. id.* art.s 16 *et. seq.* (author's property rights) with art.s 64 *et. seq.* (neighboring rights).

304) *Cf. id.* art.s 66 *et. seq.* (performer's rights) with art.s 78 *et. seq.* (producers' rights) and art.s 84 *et. seq.* (broadcast organization's rights).

305) *Id.* art.s 11-13 (author's moral rights), 66-67 (performer's moral rights).

306) *E.g.*, text accompanying *supra* footnotes 209-212.

307) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 23 *et. seq.* (Section Four), 50-52 (Section Five), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

308) *Id.* art.s 25(4) (education), 31(5) (libraries).

codified and uses outside those articles are infringing.³⁰⁹⁾ Statutory licenses all require not only payment of some kind but failed attempts at negotiation are also a prerequisite.³¹⁰⁾

The use and licensing system is further complicated by various trusts. Different trusts represent different right holders (such as artists, performers, producers) as well as different uses of copyrighted material. In the case of compensated rights and compensated uses, because compensation is paid only to the trust, the right holder must contact the trust (if the right holder is a non-member). In contrast, voluntary licensing and statutory licensing may be completed directly by the right holder and user. In any case, KOMCA is the largest and most well-known trust and is the partner organization for nearly all American musical rights management organizations, although how long that status will continue is now unclear due to the ending of KOMCA's monopoly.

IV. "It's Hard to Face You":³¹¹⁾ Comparison and Contrast of the Two Systems

This Part compares and contrasts the copyright systems and music licensing systems in the two countries. First, the harmonization of copyright law through plurilateral documents and the recent Free Trade Agreement ("FTA") is illuminated. Second, remaining dissimilar points in law and legal structure are highlighted, including both the flow of authority from each legislature to the President or regulatory agencies as well as important or interesting statutory differences. Third and finally, the differences in the abilities and limitations of rights management organizations (due to alternative regulations or business models) are discussed.

309) Cf. 17 U.S.C.A. § 107 (Westlaw, 2013) *with id.* art.s 23 *et. seq.*

310) *Id.* art.s 50-52.

311) BUSKER BUSKER. "Keudael Majuhaneunkeon Himdeureo," ["It's Hard to Face You"] on BUSKER BUSKER 1ST WRAP-UP ALBUM. CJ E&M, 2012. CD.

1. Treaties

Numerous international accords can be cited as somehow affecting copyright or law in one or both jurisdictions; however, the three most relevant are: (1) the Berne Convention on the Protection of Literary and Artistic Works, (“Berne”), (2) the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), and (3) the WIPO Performances and Phonograms Treaty (“WPPT”).³¹² Berne and TRIPS have been in force in both nations for over a decade.³¹³ WPPT has been in force for three years in Korea and nearly ten years in the United States.³¹⁴ The two nations also signed a new Free Trade Agreement in late 2010 (which contained specific intellectual property provisions)³¹⁵ and implemented it through law in 2012.³¹⁶

Discussing Berne first, it compels numerous provisions now common to many nations’ copyright. First, formalities cannot be prerequisites to copyright protection.³¹⁷ This provision dictates the “protection upon creation” doctrines found in U.S. and Korean law.³¹⁸ Moral rights are also

312) All three treaties are cited in full at *supra* note 9.

313) Berne entered into force in the Republic of Korea in 1996 and the United States in 1989 (“Contracting Parties > Berne Convention,” *WIPO-Administered Treaties*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited June 20, 2013)); both nations joined the WTO in 1995 (“Members and Observers,” *Understanding the WTO: The Organization*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited June 20, 2013).

314) WIPO Performances and Phonograms Treaty: *Status on April 15, 2013*, WIPO, <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/wppt.pdf> (last visited June 20, 2013).

315) Korea-United States Free Trade Agreement, S. Kor.-U.S., available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited June 20, 2013) [hereinafter “KORUS FTA”]. Chapter Eighteen addresses intellectual property specifically.

316) *New Opportunities for Exporters Under the U.S.-Korea Trade Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited June 20, 2013).

317) Berne, *supra* note 9 art. 5(2).

318) 17 U.S.C.A. § 102(a) (Westlaw 2013); Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 10(2), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

required³¹⁹⁾ and, though Korea has complied with this obligation,³²⁰⁾ the United States' approach to the same issue is arguably non-compliant.³²¹⁾ A term of protection of "life plus fifty" for copyrights (but not neighboring rights) is required under Berne,³²²⁾ though treaty parties may extend it.³²³⁾ The term of protection becomes an issue when nations are major trading partners, as protection for a work "shall not exceed the term fixed in the country of origin."³²⁴⁾ In any case, the EU-Korea FTA resulted in Korea extending copyright protection (for authors) to a term of "life plus seventy," the equivalent of U.S. protection.³²⁵⁾

Berne allows for fair uses specifically for teaching³²⁶⁾ and news reporting³²⁷⁾ as well as an allowance of "quotations ... compatible with fair practice."³²⁸⁾ Thus the example categories of "news reporting" and "teaching" in the United States' fair use doctrine³²⁹⁾ are permissible under Berne. Similarly, exceptions for education³³⁰⁾ and news reporting³³¹⁾ (among many³³²⁾) in Korean law are condoned by this treaty. Finally, Berne provides for compulsory licenses of previously authorized recorded musical works,³³³⁾ the parallel provisions to this authorization were discussed

319) Berne, *supra* note 9. art. 6bis.

320) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 11 *et. seq.*, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

321) Text accompanying *supra* footnotes 43-45.

322) Berne, *supra* note 9 art. 7(1).

323) *Id.* art. 7(6).

324) *Id.* art. 7(8).

325) KCC Interview, *supra* note 179.

326) *Id.* art. 10(2).

327) *Id.* art. 10bis.

328) *Id.* art. 10(1).

329) 17 U.S.C.A. § 107 (Westlaw, 2013).

330) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 25, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

331) *Id.* art.s 26-27.

332) *Id.* ch. 4, § 2 (art.s 23 *et. seq.*).

333) Berne, *supra* note 9 art. 13(1).

above.³³⁴⁾

Turning next to TRIPS, articles three and four compel that nationals of all parties be treated equally,³³⁵⁾ similar provisions can be found in Title 17, section 104³³⁶⁾ and article three of the Korean Copyright Act.³³⁷⁾ TRIPS then incorporates by reference the substantive provisions of Berne.³³⁸⁾ and limits “exceptions” (fair uses) to “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”³³⁹⁾ As TRIPS obligations can be enforced through the WTO Dispute Settlement Body (“DSB”), TRIPS’ teeth are noticeably sharper. When the U.S. exempted businesses under a certain square footage from having to pay to broadcast within their establishments, the U.S. was brought before the DSB and ultimately forced to pay compensation to European PROs.³⁴⁰⁾

Finally, WPPT grants moral rights to performers and commands certain rights (reproduction, distribution, claiming compensation for uses of the phonogram).³⁴¹⁾ American law denies moral right protection to performers and producers but guarantees to those same parties the right to prepare derivative works.³⁴²⁾ Korean law gives performers an exclusive right of interactive transmission not found in WPPT³⁴³⁾ and also grants certain rights

334) Subsections II.D.2.a and III.D.3., *supra*.

335) TRIPS, *supra* note 9.

336) (Westlaw, 2013).

337) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

338) TRIPS, *supra* note 9 art. 9(1).

339) *Id.* art 13. This test is broader than the same test found in Berne Art. 9(2) as the test in Berne only applies to the right of reproduction” whereas this test applies to any exception to any exclusive right.

340) Landau, *supra* note 9 at 885-888.

341) WPPT, *supra* note 9 art. 5 (moral rights of performers), 6-10 (economic rights of performers), 11-14 (economic rights of producers), 15 (right to remuneration for both performers and producers).

342) 17 U.S.C.A. §§ 106A (moral rights only for visual artists); 106(2) (right to prepare derivative work guaranteed the same to all right holders, whether author, performer, or producer) (Westlaw, 2012).

343) *Cf.* Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 74 (*translated in*

to broadcasting entities,³⁴⁴ who are not addressed at all by WPPT.³⁴⁵ Finally, WPPT requires a term of protection of fifty years from fixation of a work.³⁴⁶ Thus a country which follows a neighboring rights approach may well have a different term of protection for copyrights than for neighboring rights.

As these agreements predated the FTA, it is not surprising there was little to discuss in the FTA. One major issue was the term of protection. Because the United States treats all rights as equal in terms of length of protection, the U.S. term of protection for performances and phonograms was “life plus seventy”³⁴⁷ whereas Korea’s protection was only fifty years from fixation.³⁴⁸ Korea ultimately agreed to extend its neighboring right protection to a compromise term of seventy years for performers and producers while the fifty-year term for broadcasters remained unchanged.³⁴⁹ Technological protection of copyright (including digital rights management) and control of access to copyrighted materials was negotiated but is beyond the scope of this article.³⁵⁰ Statutory damages were also adopted by Korea but enforcement procedures and remedies are

Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013)) with WPPT, *supra* note 9 art. 15 (WPPT treats interactive transmission as simply another form of transmission for which compensation is required, not as an exclusive right).

344) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 84 *et. seq.*, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

345) The draft Broadcasting Treaty may seek to address those bodies. *Protection of Broadcasting Organizations*, WIPO.ORG at <http://www.wipo.int/pressroom/en/briefs/broadcasting.html> (last visited June 17, 2013).

346) WPPT, *supra* note 9 art. 17.

347) 17 U.S.C.A. § 302(a) (Westlaw, 2013).

348) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 86, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

349) DAE-HEE LEE, *KORUS FTA and Intellectual Property Protection in Korea*, 5 THE ASIAN BUSINESS LAWYER 11 (2010); KORUS FTA, *supra* note 315 Art. 18.4.4.(a); *id.*, art. 86.

350) *Id.* art.s 18.4.7-18.4.8.

generally not covered herein.³⁵¹⁾ Parties were still allowed to make special concessions for analog broadcasts³⁵²⁾ as currently stand in U.S. law.³⁵³⁾ Perhaps the most telling fact regarding the FTA is that in the United States' implementing bill, copyright law is not referenced a single time.³⁵⁴⁾ Thus we can see the FTA as the final "harmonization" (or perhaps "exportation") of copyright between the U.S. and its trading partner. Despite the FTA, and the many international accords precedent, striking divergences remain in both the law and practice of the two nations.

2. *"I Don't Need to Try and Control You".³⁵⁵⁾ Dissimilar Points in the Comparative Flow of Authority, Substantive Law, and Artist Representation Organizations*

Here we contrast significant and interesting differences in the laws and licensing groups of the two nations. First, we observe the flow of authority from each Constitution to each nation's administratively created regulations. (Although previously we did not separately discuss the delegation of regulatory authority, the numerous provisions of law granting differing powers to different bodies create a need to discuss delegation of authority.) Second, we study selected legal areas featuring noteworthy statutory differences. Third and finally, we compare the functions of the different representative groups in each country.

1) *Granting and Use of Authority.*

The primary source of copyright law in the United States, after the

351) *Id.* art.s 18.10 6; Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 125-2 (statutory damages provision was legislated at the end of 2011 and went into effect Aug. 1, 2012), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013). Statutory damages were, of course, a longstanding provision of U.S. law, 17 U.S.C.A. § 504(a) (Westlaw, 2013).

352) *Id.* art. 18.6.3(b).

353) *E.g.*, 17 U.S.C.A. §§ 111, 114 (Westlaw, 2013).

354) *United States - Korea Free Trade Implementation Act*, H.R. 3080, P.L. 112 - 41, 112th Cong., Oct. 21, 2011.

355) MAROON 5. "Moves Like Jagger," on HANDS ALL OVER. A&M/Octone Records, 2010. CD.

Constitutional clause,³⁵⁶⁾ is Title Seventeen. Chapter Eight allows the Librarian of Congress to appoint “Copyright Royalty Judges” to set royalty rates and resolve disputes, taking into account testimony from various concerned parties.³⁵⁷⁾ The Register of Copyrights, also appointed by the Librarian of Congress,³⁵⁸⁾ heads the Copyright Office³⁵⁹⁾ and promulgates rules and regulations for copyright³⁶⁰⁾ like the regulations regarding SoundExchange discussed in II.F. The Copyright Office itself stores registrations,³⁶¹⁾ copies of works,³⁶²⁾ and recordings of transfers³⁶³⁾ and issuance of and royalty payments from compulsory (“mechanical”) licenses.³⁶⁴⁾ The President has fairly little power.³⁶⁵⁾

The supreme copyright authority in Korea (again, after a constitutional clause³⁶⁶⁾) is similarly the Korean Copyright Act. The Ministry of Culture, Sports and Tourism (“MCST”) serves some functions similar to the Copyright Office (such as accepting registrations³⁶⁷⁾) but other functions served by subsets of the Copyright Office (such as the Register promulgating regulations) are also handled by the MCST in addition to compulsory licensing matters.³⁶⁸⁾ A third body established by article 112 of

356) Art. 1 sec. 8 cl. 8.

357) 17 U.S.C.A. § 801 (Westlaw, 2013).

358) *Id.* at § 701(a).

359) *Id.* at § 701(b).

360) *Id.* at § 702.

361) *Id.* at § 408.

362) *Id.* at § 407.

363) *Id.* at § 205.

364) *Id.* at § 115.

365) *See, e.g., id.* § 104(b)(6) (one of the president’s few powers is the designation of nations that can be considered functionally equivalent to “treaty parties” for recognition of protection of their nationals’ works).

366) DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 22, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution” in the search bar then select “Constitution of the Republic of Korea” on the left) (last visited June 10, 2013).

367) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 55, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

368) *Id.* art.s 2 ¶ 2 (general regulatory power of trusts), 52 (ability to grant compulsory

the Copyright Act is the “Korean Copyright Commission” (“KCC”).³⁶⁹ Its powers include the setting of fees of the rights management trusts,³⁷⁰ dispute resolution,³⁷¹ and it also serves as a research institute for MCST, considering public input and suggesting proposals for regulatory revision.³⁷²

Korea gives much power to the president; he or she can decree various minutia (such as the items declared in a registration form),³⁷³ and the president generally sets the boundaries for policies to be regulated by the Ministry Of Culture, Sports, and Tourism.³⁷⁴ Perhaps most importantly though, the President is vested with the ability to decree the limitations of rights in certain circumstances. Presidential authority can and has set the effective parameters for one unpaid use.³⁷⁵ The Enforcement Decree limits “non-profit public performances” under article twenty-nine, paragraph two to exclude most venues such as bars and restaurants; this effectively reduces the very broadly worded “non-profit” exception to minimal circumstances.³⁷⁶ Also regulated by Presidential Decree are the procedures for compulsory licensing under articles fifty to fifty-two.³⁷⁷

This power given to the president allows for quick response to copyright concerns. If, for example, there were a WTO challenge to certain limitations to rights in Korean law, the president would have the power to

licenses and set royalty rates thereto).

369) *Id.*

370) *Id.* art 113 ¶ 2; KCC Interview, *supra* note 179.

371) *Id.* art.s 113-2 *et. seq.*

372) KCC Interview, *supra* note 179.

373) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 53(1) 4, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

374) *See, e.g. id.* art.s 2-2 25, 31, 50, 51, 52, 55, 56, 76, 105, 108, 109, 11, 112-2, and 113 all of which give certain powers to MCST and definition of those powers to presidential decree.

375) *Id.* art. 29; Jeojakkwonbeob sihaengryung [Enforcement Decree of the Copyright Act], Presidential Decree No. 23001, June 30, 2011, art. 11, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Enforcement Decree” on the left) (last visited June 10, 2013).

376) *Id.*

377) *Id.* art.s 18 *et. seq.*

quickly adjust certain statutes, by decree, to be within the bounds of TRIPS and assure compliance.³⁷⁸⁾ This flexibility and expediency, however, leads to policy and legitimacy considerations—in some circumstances it would be possible, by decree, to effectively enact policy that could be seen as contrary to legislative or democratic intent.

The disparity in the two nations' approaches stems from opposite prioritizations of expediency and legitimacy. Hundreds of years of legal and governmental studies have not conclusively resolved which should be the higher priority, and thus the authors do not attempt to reach a verdict now.

2) *Specific Substantive Differences*

Six areas of prominent substantive discrepancy can be seen in the laws of the two countries. First, the constitutional basis in each country for legislative enactment of copyright differs, as does its reasoning. Furthermore, the two nations also have dissimilar legal schemes in the following other areas: (1) moral rights (or the absence thereof), (2) neighboring rights (or the absence thereof), (3) limitations to rights (“fair uses”), (4) compulsory licenses, and (5) the defining and regulation of musical distribution channels through online or broadcast transmissions. Although the decision to regulate (or not regulate) rights management organizations could be properly characterized as a kind of substantive law, we choose instead to discuss such regulation when we discuss the function of the trusts, in the following subsection.

(1) Constitutional Authority and Rationale

The most fundamental unlikeness is the difference in constitutional statements and the freedom (or lack thereof) to pronounce rationales. The United States' Constitution's stated rationale is to “promote the progress” of society;³⁷⁹⁾ thus no court or statute can pronounce further rationales or

378) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 25(9), 29(2), 31(7), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013); Bean, *supra* note 245 at 80.

379) Art. I, § 8, cl. 8.

issues. The Korean Constitution, however, states only that “[t]he rights of authors ... shall be protected.”³⁸⁰⁾ This allowed the Constitutional Court to find a double rationale: both development of academy and protection of authors’ creations is at stake.³⁸¹⁾

As legal and economic theories tend to evolve over time, the open-endedness of the Korean approach seems preferable. Moral rights can be accommodated, or not, as the legislature deems fit. The acknowledgement of the need for a public domain in the companion clause³⁸²⁾ should assuage concerns regarding infinite protection. At the very least, we can note—again—that the U.S. Supreme Court, despite being explicitly told that copyright must be “for a limited time” and must “promote [] progress” has declined to strike down any copyright law based on either requirement, thus we have no basis for believing that the American approach is any more likely to protect the public domain, except in the case of moral rights, addressed just below.

(2) Moral Rights

Moral rights in the United States are incredibly limited,³⁸³⁾ but Korea provides specific and listed moral rights for both authors³⁸⁴⁾ and performers.³⁸⁵⁾ There are various arguments for and against moral rights based on inherent investment; numerous papers have discussed these

380) DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution of the Republic of Korea” in the search bar) (last visited June 10, 2013).

381) Const. Ct., 2004Hun-Ma200, April 25, 2002.

382) DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 22 (1), *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Constitution of the Republic of Korea” in the search bar) (last visited June 10, 2013).

383) The only moral rights are found in 17 U.S.C.A. § 106A (Westlaw, 2013), which grants moral rights to no one but “author[s] of a work of visual art.”

384) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 11 *et. seq.*, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

385) *Id.* art.s 66, 67.

assertions at length.³⁸⁶⁾ Korea's approach is likely more in line with treaty obligations and European norms, and places greater emphasis on authors' inherent and personal investment in their creations.

The authors personally favor moral rights in a general sense, in that creators have an undeniable personal investment in their work. However, how moral rights that survive an author can protect such a human investment is beyond the comprehension of the authors; we would prefer to see moral rights perish along with economic rights at some time, although the exact point in time is difficult to specify. We hope that such a temporal limitation to moral rights would make them more palatable to the U.S. Constitution; whatever negative impact moral rights may have against the "progress of the useful arts" would be thus limited in time and duration. An example of such a potential conflict which highlights a weak point in Korean law is the difficulty indistinguishing parody from "distortion" of a work (violating the right to integrity). Whereas other moral rights jurisdictions recognize fair-use like exceptions to moral rights,³⁸⁷⁾ in Korea where the right to free speech is quite limited, defamation is defined broadly, and parody is generally not acceptable.³⁸⁸⁾

386) A small sample of the academic work that cites to 17 U.S.C.A. § 106A (the federal moral rights statute) includes: Geri J. Yonover, *Precarious balance: Moral rights, parody, and fair use*, 14 CARDOZO ARTS & ENT. L.J. 79 (1996); Peter H. Karlen, *Joint ownership of moral rights*, 38 J. COPYRIGHT SOC'Y U.S.A. 242 (1991); *American artists burned again*, 17 CARDOZO L. REV. 373 (1995); *Hold on tighter/let go sooner: Visual Artists Rights Act of 1990: A review of free culture and an argument for the synthesis of public domain preservation and moral rights adoption*, Note, 15 DEPAUL-LCA J. ART & ENT. L. 99 (2004).

387) Paul Edward Geller, *A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?*, 57 J. COPYRIGHT SOC'Y U.S.A. 901, 902-03 (2010).

388) E.g., Saenuri, "Park Ch'ulsan Keurim, Nach'i Goebelseu Yeonsang ... Beobcheok Daeung" [Saenuri [Conservative Party]: "Painting of Park Giving Birth, Association with Goebbels ... Cause for Legal Action,"] CBS NO CUT NEWS, <http://www.nocutnews.co.kr/show.asp?id=2320057>, Nov. 19, 2012, (last visited April 6, 2013) (when a painting mocking a presidential candidate was circulated (depicting now-president Park Gun-hye giving birth to her father, dictator Park Cheong-hui) the party threatened to sue the artist for defamation); Choi, Sang-hun, "South Korean Gets Suspended Sentence in Twitter Case, NEW YORK TIMES, http://www.nytimes.com/2012/11/22/world/asia/south-korean-man-gets-suspended-sentence-for-tweets.html?_r=0, Nov. 21, 2012 (when a satirist retweeted North Korean propaganda in an obviously sarcastic context (indicating his wishes to send plutonium to North Korea as a condolence, and editing a propaganda poster to replace a rifle with a bottle of whiskey) he was convicted of violating national security laws).

Attempting to set aside our general desire to see Korea recognize freedom of speech, including parody, in a meaningful manner (discussed further when discussing limitations to rights, below), we could summarize our moral rights position by stating that moral rights should exist but must be constrained in such a way that they do not interfere with public discourse.

(3) Neighboring Rights, Sound Recording Rights, and Producers

A distinction that involves both nomenclature and protection of rights is the simplified nomenclature the United States uses, labeling all rights “copyrights,” while Korea, following a more continental approach, divides rights into author’s property rights and neighboring rights. Comparing the two, we can see distinctions in (1) legal structure, (2) substantive rights conferred to performers, (3) substantive rights conferred to producers, and (4) protection term. (Rights affecting transmission and broadcast will be discussed below in the section addressing transmission.)

Organizationally, the United States’ method here does not seem to confer any real benefit. Using a single term to describe largely disparate rights does little to clarify the actual rights held. The Korean system seems preferable for its clarity; rather than giving sound recording right holders a “copyright” that is different from other copyrights, it grants “neighboring rights” that are immediately and unquestionable cognizable as distinct legal privileges.

Addressing the alternative treatment of performers, we must consider four scenarios: (1) bootlegs, (2) first sale and its effect on rental, (3) derivative works, and (4) would-be remunerated uses. Both nations explicitly prohibit the creation, transmission, or sale of bootlegs, through different logical channels. The right of reproduction for Korean performers addresses the reproduction of performances (rather than phonorecords) and thus includes initial fixations (including bootlegs),³⁸⁹ but in the U.S., separate statutory grounds were needed for the same effective legal protection.³⁹⁰ The U.S. explicitly prohibits fixation or transmission of

389) GYU-HO LEE, *supra* note 120 at 399.

390) *Cf.* 17 U.S.C.A. § 106 (1) (addressing reproduction of phonorecords, which are the fixed (and therefore copyrighted) versions of performances) *with* § 1101 (prohibiting unauthorized fixation (Westlaw, 2013).

bootlegs (as well as sale of fixations)³⁹¹⁾ whereas Korea grants a performer control of unauthorized public performances (simultaneous relay) and broadcasts of unfixed performances without authorization.³⁹²⁾ Although there is no explicit ability to control non-interactive digital transmission in Korea, the article which authorizes compensated use when a phonogram is transmitted is limited to transmissions “using commercial phonogram[s]”;³⁹³⁾ this language seems sufficient to prohibit the compulsory license from attaching to unauthorized fixations.

Regarding rental, distribution in both nations is exhausted by first sale, but as Korea grants a separate right of “rental” (generally subsumed under the heading “distribution” in the U.S.), Korean artists maintain that right (of questionable relevance to modern life) for a longer period.

As far as derivative works are concerned, Korean performers have no property right regarding derivative works, whereas their American counterparts do; however, the Korean performers have a moral right of integrity. This unalienable right effectively grants Korean performers more control over derivative works than the alienable U.S. property right.

On the topic of remunerated uses (a limitation to rights), the authors find it intriguing that neighboring right holders (particularly performers) hold a separate, and lower, place in the hierarchy in Korea regarding educational and library fair use-like compensated use. We see no reason for the distinction, at least insofar as performers are concerned. Performers are treated nearly like authors in every other way, and given their original contributions, we cannot understand denying them the same benefit (although we do question the need to force educational institutions to pay to make use of works).

Turning now to producers’ rights generally, one can note that they generally hold fewer rights (and no moral rights) in light of their lack of original contribution (if the producer acts as a director, conductor, or in a

391) 17 U.S.C.A. § 1101 (Westlaw, 2013).

392) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 72 - 73, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

393) *Id.* at art. 76.

similar fashion, he or she will have the rights of a performer). One can also question whether it is fair to further ensure the producer's position as "gatekeeper" to the music industry, a right already typically protected by onerous contractual provisions, by granting neighboring rights to him for no reason but his or her role in fixing the phonogram. We must admit, however, that WPPT compels protection of producers' rights, and thus the Korean approach is more in keeping with international norms.

Finally, the shorter protection period for neighboring rights is more beneficial to the public domain but again places neighboring right holders at a disadvantage compared to authors. While we would like to see generally shorter protection terms, we must reiterate that we see no need to discriminate against neighboring right holders, particularly performers, without whom music (and many other art forms) could not exist.

(d) Limitations to the Right Holders' Rights

The two nations use distinctive methods to balance the monopoly of copyright and the public domain. The U.S. takes a broad and flexible approach,³⁹⁴⁾ while the Korean version is more narrow but also more predictable.³⁹⁵⁾ The broadest category of unlicensed uses in the U.S. hails from section 107, which enunciates certain fair uses (news reporting, education, criticism) and a four-part test to determine if an use is "fair."³⁹⁶⁾ (There are certain listed exceptions in separate sections but they are generally of less importance,³⁹⁷⁾ excepting the applicability of section 110's

394) 17 U.S.C.A. § 107 (Westlaw, 2013) (four-factor test).

395) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 23 *et. seq.* (enunciated but inflexible uses allowed), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

396) (Westlaw, 2013).

397) Those sections are 17 U.S.C.A. §§ 108 (libraries and archives), 109 (the first sale doctrine, of great importance in the software field but of limited relevance here), and 110 (certain educational issues and small venues) (Westlaw, 2013). Regarding the relative legal importance of these exceptions compared to section 107, the total length of section 107 annotated is approximately one-and-a-half times the length of sections 108-110 annotated (combined); although a very rough measure of prominence, we can see, at the least, that 107 gives rise to the greatest number of disputes and decisions.

exemption for small venues.³⁹⁸⁾ The Korean Copyright Act lists numerous separate uses in turn, using a separate article for each of numerous specific limitations to right including judicial proceedings,³⁹⁹⁾ education,⁴⁰⁰⁾ non-profit public performances (limited by presidential decree),⁴⁰¹⁾ casual copying,⁴⁰²⁾ and various other issues. There is no “catch-all” section inviting a court to balance certain factors and policies; use must fall within one of the listed limitations to rights.

The two systems show disparate resolutions of a debate on the merits of flexibility versus predictability.⁴⁰³⁾ Four factors do not lead to an easily foreseeable outcome, and there has been significant litigation involving whether uses are fair or not;⁴⁰⁴⁾ this less unpredictable system nonetheless does have the benefit of allowing instant inclusion of uses not explicitly contemplated. The opposite means has the advantage of making clear which uses are fair: A person who complies with the appropriate statute, decree, and regulations will not fear. Uses outside that scope are forbidden. This is not to say that there is no flexibility; the ability of the president to decree the specifics of certain uses and the ability of MCST to regulate certain uses does give the law some degree of responsiveness.⁴⁰⁵⁾

The authors, however, prefer the flexibility of the four-factor test (supplemented as it is with the U.S.’s list of specific acceptable uses), and particularly its ability to protect satirical or new forms of use. While the clarity of a “list of uses” is laudable, it still leaves a degree of uncertainty –

398) 17 U.S.C.A. 110(5) (Westlaw, 2013).

399) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 25, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

400) *Id.* art. 25.

401) *Id.* art. 29.

402) *Id.* art. 30.

403) Although section 107 was codification of judicially created doctrine (Copyright Law Revision, H.R. No. 94-1476, 94th. Cong. p. 64 (1976)), Congress was, of course, free to legislatively change that at any time, to statutorily add exceptions (like sections 108 *et. seq.*), or statutorily enumerate “unfair” uses.

404) *E.g.*, Beebe, *supra* note 52 (studying over 300 published opinions produced between 1976 and 2005 which applied section 107’s four-factor test to a variety of results).

405) *See* text accompanying *supra* footnotes 377-381.

reasonable minds can differ as to what “news reporting” or “educational use” are—particularly when other limitations on the use must be observed. The four-factor test gives guidance when trying to answer such questions, and furthermore allows for other uses, such as parody, that are generally not seen in Korean culture. Although satirists (particularly of the government or of the inter-Korean situation) are still being silenced, we believe that such forms of expression are on the rise in Korea and should not be further stifled by intellectual property laws.

A second criticism the authors would assert regarding Korean law is against its commanding of royalty payments even by libraries and educational institutions in certain circumstances. No matter how small, these payments can be burdensome, and inflate the cost of access to material. If the public domain is effectively being taxed then how is the public being served? A possible explanation of the difference is that private, for-profit educational institutions (known as *hagwons*) are a very large business in Korea.⁴⁰⁶ Exempting all educational institutions from paying could cost rightholders (particularly those who author educational material) tremendously without giving any real benefit to the public domain (as attendees would already be paying for the materials and privilege of enrolling in the *hagwon*). However, we still question if it would not be possible to broaden the range of schools that need not pay, to include all non-profit schools (or at least all non-profit schools under collegiate level). Finally, as the payment provisions only protect copyright holders (authors) and not neighboring right holders, those provisions also operate to discriminate against performers (and, for those who consider them essential, producers). If educators and librarians must compensate the makers of audio and video, then those creators should at least all be treated equally (perhaps excluding producers as noted above).

406) Koreans spent an estimated 19 trillion KRW (or nearly \$17 billion USD) on private institutes in 2012, and this represented the *lowest* spending since 2007. “*Sakyooyukbi 3 nyeonyeonsook kamso ... 6 neonmane ch’oeumeuro 20 chowon Mitdolda*” [“Spending on private education declines for three years ... for the first time in 6 years is under 20 *cho* won.”] FINANCIAL NEWS at http://www.fnnews.com/view?ra=Sent0701m_View&corp=fnnews&arcid=201302060100053880002706&cDateYear=2013&cDateMonth=02&cDateDay=06, Feb.6, 2013 (last visited April 9, 2013).

(5) Compulsory Licensing

Even in the handling of issues as longstanding and well-established as compulsory licenses, the nations show variance. The United States allows licensing of the second recording as soon as the first recording has been distributed in the U.S.⁴⁰⁷⁾ A person seeking a similar license in Korea must wait three years after the release of the first recording, however.⁴⁰⁸⁾ Although a licensee in the United States must serve notice on the copyright holder,⁴⁰⁹⁾ the licensee is free to negotiate, or not, with the right holder,⁴¹⁰⁾ as the licensee chooses. In contrast, attempting to negotiate a license is a mandated prerequisite in Korea, and a compulsory license may only be obtained if negotiations fail.⁴¹¹⁾

Although these distinctions are legally intriguing, functionally they have very little effect on actual music licensing. The three-year waiting period in Korean law is presumably designed to maximize the profitability of the first performer's recording, and in turn this should also increase the monetization that the composer receives from that same recording. In practice, particularly regarding "pop" music (as that term might be used to describe music that is not "jazz" or "classical"), the authors question the degree to which a "cover" is a substitutable performance for the original performer. Moreover, as the three-year delay only affects compulsory licenses and not voluntary licenses, the composer would still be free to license a composition, without any ceiling on the royalty rate.

The requirement of negotiation as a prerequisite also is not likely to have any real effect on the actual market. As stated, the vast majority of mechanical music licensing in the U.S. is done through a voluntarily

407) 17 U.S.C.A. § 115(a)(1) (Westlaw, 2013).

408) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 52, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

409) 17 U.S.C.A. § 115(b) (Westlaw, 2013).

410) *Id.* § 115(c)(3)(B) (Westlaw, 2013).

411) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 52, *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter "Copyright Act" in the search bar then select "Copyright Act" on the left) (last visited June 10, 2013).

negotiated license; even in the absence of a legal provision compelling negotiation, licensees seek to negotiate, presumably to undercut the known “ceiling” compulsory rate. In Korea this is all the more true; the compulsory license provision is known as “dead law” that is never used; parties have always been able to come to an understanding on the rate and never resorted to arbitration.⁴¹²⁾

In any case, it may be better to avoid creating a one-size-fits all ceiling. Using a single hearing to set multiple rates based on fame, recency, or other nebulous criteria would likely be an overly contentious and burdensome matter (disregarding these criteria, the matter is already quite contentious in the U.S.). However, it nonetheless seems quite strange that both a composition, the recording of which sells millions of copies, and a composition that sells dozens of copies, would have the same compulsory rate. Therefore if one wishes to consider recency and fame when determining compulsory licensing rates, it may be more efficient to simply arbitrate on a case-by-case basis. The fewer licenses that are actually made under compulsory provisions, the more true this statement would be as total expenditures from the process(es) decrease as fewer arbitrations are needed.

(6) Transmissions and Broadcasts

Assorted nuanced and intertwined legal dissimilarities can be seen in the treatment of the distribution of sound by broadcast, cable, and computer networks. Broadcast organizations in both nations enjoy some degree of protection; in Korea these are considered neighboring rights of the broadcast entity.⁴¹³⁾ The U.S. grants copyright protection to the original content of the broadcast (assuming it is fixed),⁴¹⁴⁾ but of course sound recording protection is limited.⁴¹⁵⁾ Cable operators in each country are subject to differing treatment, with Korea prohibiting cable retransmission as a violation of the right of simultaneous relay,⁴¹⁶⁾ and the U.S. utilizing a

412) Second KOMCA Interview, *supra* note 274.

413) *Id.* art.s 84 *et. seq.*

414) 17 U.S.C.A. § 102 (copyright exists for works original and fixed) (Westlaw, 2013).

415) *Id.* §§ 114, 115.

416) GYU-HO LEE, *supra* note 120 at 408.

complex compulsory licensing scheme.⁴¹⁷⁾

Terrestrial radio broadcasters in America enjoy the privilege of broadcasting free from obligation to the sound recording right holder,⁴¹⁸⁾ but must have permission from the composer. Broadcasters in Korea may broadcast works without permission from, but must compensate, producers and performers; permission from the composer is needed.⁴¹⁹⁾ In both nations however, the real practice is that “permission” comes in the form of a license from a representative group such as ASCAP or KOMCA.

Regarding the many forms of digital transmission, satellite radio is a form of “broadcast” in Korea⁴²⁰⁾ but treated as a digital transmission under section 114 in the U.S.⁴²¹⁾ Both countries treat interactive transmission as unique, and control licensing for it more strictly than for other transmissions.⁴²²⁾ In the U.S., interactive transmitters do not enjoy the option of a compulsory license (for the sound recording), while webcasters (who satisfy certain other requirements) do.⁴²³⁾ In Korea, performers are given an exclusive right to regulate interactive transmission, while other transmissions invoke merely rights to compensation.⁴²⁴⁾ In both nation,

417) 17 U.S.C.A. § 111 (Westlaw, 2013).

418) *Id.* at § 114.

419) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 76-2 and 83-2, translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

420) WON-SEON YIM, *supra* note 175 at 297.

421) (Westlaw, 2013).

422) 17 U.S.C.A. § 114(d)(2)(A)(1) (noninteractivity is a prerequisite to the compulsory license provisions of §114(d)(2)) (Westlaw, 2013); *cf.* Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 74 and 81 (performers and producers have absolute right of control over interactive transmission) *with* Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 76 and 83 (the same neighboring right holders only hold a right to compensation for noninteractive digital sound transmissions), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

423) 17 U.S.C.A. § 114(d)(2) (Westlaw, 2013).

424) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 74 (right of interactive transmission), 75 *et. seq.* (compensatory right for other transmissions), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select

authors retain greater control: Korean composers enjoy a right to deny any and all transmission⁴²⁵⁾ and similarly in the U.S., the composer's rights are not limited by the webcasting (section 115) license, only the sound recording right holder's rights are.⁴²⁶⁾ The U.S., however, goes noticeably further in its classification, dividing noninteractive transmission into subscription, eligible nonsubscription, and ineligible nonsubscription transmissions.⁴²⁷⁾

The authors question the need for American law to distinguish between subscription and non-subscription noninteractive transmissions.⁴²⁸⁾ If interactivity is critical, then interactivity should be the deciding factor; if we must further dissect transmissions, then why focus on payment or regularity (subscription) as opposed to the purpose of the broadcast? The determination of "eligibility" in the U.S. hinges upon separating the communication of music for general enjoyment from what would generally be understood as commercial speech. If, after interactivity, the so-called "quality" of speech determines rights under copyright law, then there is no reason to segregate subscription, as the focus should be on whether the purpose of the broadcast is to disseminate music or advertisement. Similarly, the authors see no reason, except the previously existing status quo and the power of the broadcast lobby,⁴²⁹⁾ that explains the special status broadcasters hold in American law. The Korean approach, which generally treats public disseminations the same (whether they be by broadcast (including satellite) or digital transmission) so long as they are not interactive, seems more logically consistent.

3) *Who's More Trust-worthy?*

Dissimilar legal systems, economies, and histories have all played a role in creating distinctive atmospheres in which the groups representing composers and performers operate; this predictably has led to

"Copyright Act" on the left) (last visited June 10, 2013).

425) *Id.* art. 18.

426) (Westlaw, 2012).

427) 17 U.S.C.A. § 115(d) (Westlaw, 2013).

428) 17 U.S.C.A. § 114 (Westlaw, 2013).

429) Delchin, *supra* note 31 at 353.

organizations that serve a practical similar function (managing licenses and royalties) approaching that task in unlike ways. The U.S. had various groups evolve over time, offering comparable services in the remarkably large private market.⁴³⁰ American artists are free not to join a trust and, though more difficult to license, their work will still be protected by copyright and they will still be owed royalties.⁴³¹ The exception to these statements is webcasting, which is exclusively handled by SoundExchange.⁴³² One could argue that this shows a trend—the only new Performing Rights Organization (“PRO”) is a governmentally regulated monopoly—but these authors believe that more data is needed before making such a strong assumption.

In contrast, only lately has Korean society embraced the idea of “entertainer” being a career path.⁴³³ Korea’s development, though legendary in speed, was relatively recent,⁴³⁴ and the population of Korea is estimated to be one-sixth that of the U.S.⁴³⁵ Thus, Korean rights groups should logically be fewer, notwithstanding legal differences. In any case, the Korean trusts are all non-profit and subject to significant government

430) Cf. *ASCAP History*, ASCAP.COM, <http://www.ascap.com/about/history.aspx> (last visited June 20, 2013) with *About BMI*, BMI.COM, <http://www.bmi.com/about/> (last visited June 20, 2013) and *About SESAC*, SESAC.COM, <http://www.sesac.com/About/About.aspx> (last visited June 20, 2013).

431) Cf. 17 U.S.C.A. § 106 (Westlaw, 2013) (exclusive rights are not enforced by third parties generally) with, e.g., the “compensated rights” of Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 75(1), 76(4), 76-2(2), translated in Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, available at http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013). The exception to this rule is addressed in the next footnote.

432) See text accompanying *supra* footnotes 106-110.

433) Choi, *supra* note 34 at 179-80.

434) E.g., Tai-hwan Kwon, *Population Change and Development in Korea* THE ASIA SOCIETY, asiasociety.org/countries/population-change-and-devel (last visited Ap. 26, 2012) (Korea’s historical poverty and rapid development).

435) E.g., cf. *South Korea*, WIKIPEDIA, http://en.wikipedia.org/wiki/South_Korea (last visited June 20, 2013) and *Demographics of the United States*, WIKIPEDIA http://en.wikipedia.org/wiki/Demographics_of_the_United_States (last visited June 20, 2013).

oversight.⁴³⁶⁾ Nearly all were legally mandated monopolies until recently⁴³⁷⁾ (even those no longer monopolistic are expected by some to continue to function in a market-dominant fashion⁴³⁸⁾) and the right holder must contact or register with the trust to collect certain kinds of royalties.⁴³⁹⁾

The evolution in Korea towards more societies may not be an efficient one. One can question whether having more representative groups actually serves any function; scholars have stated that, where a plurality of groups exist, they merely function as an oligopoly instead of a monopoly and the practical effect on the market is minimal.⁴⁴⁰⁾ Even assuming that there is increased “choice” by creators or users of music, this does not mean that more groups are a good thing unless the duplicative overhead is outweighed by the competitive benefit; in a market as small as Korea such gravity of benefit is quite doubtful. (There may already be numerous societies but they each handle certain kinds of uses and thus should be able to benefit from specialization.) American law seems to be acknowledging the oligopoly issue; the most recent PRO is a government-regulated (and sanctioned) monopoly as opposed to the previous system of pseudocompetitive collection societies, although a single example is hardly a strong basis from which to inductively conclude there is a new trend. If we assume that representation groups will always function in a monopolistic or oligopolistic fashion, then it would seem better to regulate that position as is done in Korea and some European communities.⁴⁴¹⁾ However, whether the U.S. is moving in such a direction, or is even capable

436) Jeojakkwonbeob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art.s 105 (2) 2 (Copyright Management Services must “[n]ot be for profit making”), 105, 108, 109 (respectively specifying requirements for, mandating reports from, and allowing decommission of Copyright Management Services), *translated in* Statutes of the Republic of Korea, KOREA LEGISLATION RESEARCH INSTITUTE, *available at* http://elaw.klri.re.kr/eng_service/main.do (enter “Copyright Act” in the search bar then select “Copyright Act” on the left) (last visited June 10, 2013).

437) MCST Announcement 2013-1, *supra* note 280.

438) Text accompanying *supra* footnote 296.

439) See text and accompanying footnotes for *supra* Section III.E.

440) E.g., Emily Lui, *The Eurovision Song Contest: a proposal for reconciling the national regulation of music collecting societies and the Single European Market*, 14(4) ENT. L. R. 67, 67 (2003),

441) Lui, *supra* note 440 at 71.

of moving in such direction despite a long history of minimal regulation, is a complex question that we do not address today.

The issue of whether it is better to require compulsory membership in royalty collecting societies involves economic analysis well beyond our current discussion. In brief, however, complaints and warnings about the services rendered by large representation groups to small artists are not difficult to find.⁴⁴² Regardless, compulsory membership does much to protect the music user; if he or she secures an appropriate license from the appropriate trust, he or she need not fear suit. Even if a suit comes, there is a clear—and single—correct plaintiff. Users of American music in Korea have found themselves on the receiving end of multiple-party suits (involving both artist and representation group) when less-than-reputable clearinghouses have failed to secure proper permissions for rights such as synching.⁴⁴³ Assuming the societies are functioning in an equitable manner (perhaps due to government oversight) then mandating membership should not be a problem, particularly considering that compulsory membership in Korean societies is not mandated for all types of uses; only compensatory rights provisions (or the similar remunerated uses) require the trust's involvement. In those cases, the artist has no ability to forbid the use of the work, and the society is merely assisting in setting a rate and acting as a conduit for the royalty.

3. Conclusion: Section IV

Although various agreements have substantially harmonized copyright laws in several nations, many important distinctions remain between the United States and Korea, particularly in the context of music. The organization of the law, the power of the president (or other regulatory bodies), the rights protected, and the regulation (or absence thereof) of

442) E.g., Moses Avalon, *Why You Should Think Twice Before Joining ASCAP, BMI or SESAC*, MOSES AVALON at <http://www.mosesavalon.com/why-you-should-wait-to-join-ascap-bmi-sesac/> (last visited April 11, 2013); Mike Masnick, *How ASCAP Takes Money from Successful Indie Artists and Gives it to Giant Rock Stars*, TECH DIRT, March 26, 2012 at <http://www.techdirt.com/articles/20120323/18055718229/how-ascap-takes-money-successful-indie-artists-gives-it-to-giant-rock-stars.shtml> (last visited April 11, 2013).

443) First KOMCA Interview, *supra* note 274.

musical rights organizations all differ substantially. Even similar provisions, such as the compulsory license, have unique requirements and procedures. In general, Korea's law is much more in keeping with the "continental" approach of European countries, although trading relationship with the U.S. has led to some Americanization of Korean copyright law.

Korean law also tends to be more logical. There seems to be no reason the U.S. refuses to grant moral rights despite acceding to various treaties compelling those rights; nor is there a cogent basis for treating broadcast music differently from the many other methods of noninteractive musical transmission. And if a "sound recording right holder" holds a quite different set of rights, what is to be gained by organizing those rights under the same "copyright" heading instead of under a separate heading of "neighboring rights?" The Korean government has also chosen to recognize the market-dominant situation of representation groups and regulate them accordingly.

As Korea's market is much smaller it is unlikely that more trusts will emerge, even though the legally sanctioned monopoly given to KOMCA has been lifted. In the U.S., though the youngest trust is a governmentally regulated monopoly, the majority of music management is still done by long-established private, competitive organizations. We wonder if it is appropriate to hope that the U.S. is shifting towards a more regulated approach, which we believe would be a sound direction.

We are not, however, saying that Korean copyright law is perfect. Forcing compensation by libraries and educational institutions is questionable, and limiting fair use to specifically listed uses constricts the public domain. The continued absence of free speech in Korea (through a failure to recognize parody or limit defamation law) is a factor that negatively affects all forms of art, not just music. Just as we wish the U.S. would welcome some external inspiration in its copyright laws, we would much like to see Korea follow the continental, or American, trend of recognizing the value of free speech in all its forms, including parodical and critical statements.

V. CONCLUSION

Music, whether Korean or American, is not an industry without the rights protected by copyright. Although over a century of treaties now govern copyright in the international stage, there still remain many approaches to the legal protection and licensing of music. This Article has discussed the relevant laws and practices of licensing in both the United States and South Korea so that one may be aware of the intellectual property and rights management systems of both nations, as those systems affect to musical works.

The two unique approaches reflect many factors, including widely varying histories, differing strengths of the various political lobbies surrounding music, and different cultures. The influence of European law on the Korean system can be seen in the recognition of moral and neighboring rights, and Korean cultural ideals emphasizing harmony can be seen in provisions granting moral rights against defamation and requiring negotiation as a necessary precondition to compulsory licensing. By expressing our opinions as to which nation's law is more efficient in specific sub-areas we hope to stimulate dialogue in favor of change in both nations and encourage further development of copyright law in directions that maximize benefit for society as a whole.

