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PROTECTION OF ARTISTS' RIGHTS UNDER THE KOREAN COPYRIGHT LAW

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Translated by Minsu Kyeong

I. INTRODUCTION

The term “artists” includes film, television (“TV”), stage, and musical actors and actresses (“actors”), pop singers and musicians, dancers, fashion models, and classical musicians. Although the same analysis can be applied to all of the categories above mentioned, this article solely focuses on pop singers and actors. The Copyright Act of Korea (“Copyright Act”) defines *Siryun*¹ (“public performance”) as the entertainment activities of artists, and uses *Siryunja*² (“performer”) instead of “entertainer” as a legal term for artists.

Until very recently in Korea, being an artist was not exactly a noble career choice. Artists defamed as *Tantara*³ were looked down upon and considered a hotbed of scandals, and were viewed as belonging to society’s dark side. It was unimaginable for a teenager from a mainstream family to pursue a career as an artist. Lately, the social status of artists has been elevated.

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¹ “Public performance” shall mean the expression of a literary work by acting, musical playing, singing, reciting, screening, or by other artistic means, and shall include the expression of a non-literary work by a similar method. Copyright Act, art. 2(4) (1986) (amended 2000) (S. Korea).

² “Performers” shall mean the persons who actually perform on stage, as well as those who would conduct, direct, or supervise performances off stage. *Id.* art. 2(5). During the discussion of the Standing Committee on Copyright and Neighboring Rights of the World Intellectual Property Organization (“WIPO”), several countries including the United States, India, and Israel argued that “those who are considered as supporting performers by professional practices” should be excluded from the definition of “performer,” and thus extras and background performers should be excluded from the definition. Chang-Hwan Shin, *International Protection of Audio-Visual Performance*, 48 Q. COPYRIGHT 21 (1999).

³ [Translator’s Note] The term *Tantara* has its root in the early twentieth century Japanese colonization period. *Tantara* generally means musical bands, and specifically musicians who play Japanese notes. In the early twentieth century, musicians were considered part of the lowest class. The term *Tantara* still carries a connotation of the “lower class.”

Artists have begun to receive the attention they deserve for their talents,⁴ and they have replaced political or military heroes as teenage idols.⁵

The heightened social status of artists can partially be attributed to the increased recognition that artists are receiving, and partially to a changed social environment, but the major reason is the remarkable expansion of the entertainment industry and the public recognition of its importance. In the past, the media that connected entertainment producers and consumers were limited to movie, radio, TV, LP, and audiocassette. Now, VCR, CATV, satellite TV, the Internet, CD, CD-ROM, Mini Disc ("MD"), Laser Disc ("LD"), Video CD, Digital Video Disc ("DVD"), MP3, and various other media have emerged, and the number of traditional movie theaters and broadcasting stations has rapidly increased.⁶ As more and more new media emerge, more content is required to fill the media capacity. Among other things, entertainment products are the core content and artists are the main elements of the entertainment products.

Looking back on the history of the copyright law, in its infancy the rights of artists were completely ignored. While there was a social consensus that protecting authors' rights would reward creativity and promote the "science and arts" of society, such consensus did not exist with regard to artists. Artists were considered clowns,⁷ and they were rewarded with a small portion of entrance fees, or through the support of sponsors.⁸

The lack of copyright protection for performers partly reflected the lack of appreciation for their artistic contributions and partly reflected the lack of technology by which a performance could be enhanced for reproduction and distribution. Since performances ceased to exist the moment they were created, there was no need for protection.⁹

⁴ In 1997, more than 5000 teenage fans occupied Kimpo airport to greet Taeji Suh (a Korean rock superstar). DONG-A ILBO, Sept. 13, 1997. The same thing happened in 2000 when Seungjun Yu (a popular singer) returned to Korea from the U.S.A. DONG-A ILBO, Aug. 30, 2000. In fact, huge crowds of teenage fans following pop stars are too common to be newsworthy.

⁵ The record industry calls the group generating the biggest demand, teenagers between the ages of thirteen and eighteen, the "1318 generation."

⁶ [Translator's Note] Minidisc (MD) is a disc type storage device with dimensions of 7 cm (2.75") x 6.75 cm (2 21/32") x 0.5 cm (3/16"). The disc inside is 64 mm in diameter. It can store up to 74 minutes in Audio Mode and 140MB in Data Mode. LaserDisc (LD) is the industry-wide term for consumer laser video. During its life, the format has also been known as LV (LaserVision) and CDV (Compact Disc Video). LD has better video and sound quality than VHS. Since LD used the same storing mechanism as CD, it had nonperishable storage capacity. However, LD has not become as popular as CD or VHS.

⁷ [Translator's Note] *Kwang-Dae* (a Korean word for clown) was the lowest class of people in the Chosun Dynasty (1492-1910). Such low social recognition has only recently begun to change.

⁸ Kyung-Jick Kwak, *Protection of Neighboring Rights*, 32 Q. COPYRIGHT 67 (1995).

⁹ In England, prior to the Copyright, Designs, and Patents Act of 1988, only criminal charges were permitted for infringement of an artist's right and neither injunction nor compensation for damages was allowed. Sang-Jo Jung, *Reconsideration of Neighboring Rights in Light of the Development of Information Technology*,

However, with the advancement of technology, performances can now be recorded and accessed by the public, and however excellent the original work of authorship may be, without actors or singers who will play or perform the work in an artistically perfect way, the value of the original work will decline. Therefore, performances have become as valuable as original works of authorship, and hence performances are legally protected under the concept of "neighboring rights."¹⁰

Even though the social status of artists has improved and the importance of performance is valued as never before, legal protection of artists' rights has not been fully accomplished and as a transitional phenomena, artists are not enjoying legal treatment consistent with their fame or talent. In many cases, due to the lack of proper contracts or provisions, artists are at a disadvantage in exercising their rights. The number of lawsuits involving artists is increasing, too. For example, in 1999, there were more than fifty lawsuits involving artists.¹¹

The subject of protecting the rights of performers touches on various areas of law, including rights to appearance or right of publicity,¹² protection of honor,¹³ and protection of rights under contract. However, this Article focuses on the protection given to artists under the Copyright Act, and the kinds of rights artists have as owners of neighboring rights.

SEOUL NAT'L U.L.J. 207 (1996) (Special Issue for Retirement of Prof. Won-Woo Suh and Prof. Byung-Ho Park). In the United States, the copyright law does not protect a performance unless it satisfies the fixation requirement. *Id.* Limited protection is given under the privacy protection law or the antitrust law in cases where an infringer imitates the voice or peculiar images of a famous person. *Id.*

¹⁰ The basic principle of the neighboring right concept is to promote the distribution of work of authorship by providing limited rights to the person who transfers or distributes works of authorship between authors and the general public. Kyung-Su Choi, *Reconsideration of Neighboring Rights*, 49 Q. COPYRIGHTS 43 (2000).

¹¹ CHOSUN ILBO, Feb. 8, 2000.

¹² For the protection of artists' moral rights, see Hui-Sung Hur, *Requirements for Infringement of Moral Rights of Public Figures*, 32 Q. COPYRIGHTS (1995); Won-Sun Sohn, *Limitations on Agreement to the Infringement of Moral Rights*, PRESS ARB. (Winter 1998); Jong-Yul Park, *Legal Problems of Moral Rights in Journalism and Advertisement*, 254 LEGIS. RES. (1998); Dong-Sup Uhm, *Moral Rights Infringement in Newspaper and Broadcasting*, PRESS ARB. (Summer 1998).

¹³ For the protection of honor, see Kyu-Ho Yum, *Public Figures and Defamation*, PRESS ARB. (Spring 2000), available at http://www.pac.or.kr/webzine/20_summer/index.htm; Min-Joong Kim, *Social Position of Plaintiff and the Application of Doctrine of Defamation*, PRESS ARB. (Summer 2000), available at http://www.pac.or.kr/webzine/20_summer/index.htm (last visited Jan. 18, 2003); Woo-Shik Shin, *Realities and Problems of Entertainment News*, PRESS ARB. (Summer 1994); Nak-In Sung, *Reporting of Public Record and the Protection of Privacy*, PRESS ARB. (Summer 1999); Eun-Young Lee, *Legal Issues on the Allowance of Compensation of Damages in Defamation Action*, PRESS ARB. (Summer 2000); Nak-In Sung, *Reporting and Defamation—Focusing on the Recent Cases*, NORM OF CONSTITUTION AND THE REALITIES OF CONSTITUTIONAL LAW (Commemorative Issue for Prof. Young-Sung Kwon's Retirement), Bup Moon Sa (1999); Hyung-Jin Kim, *Press Reporting and the Right of Publicity—Especially on Defamation*, INFO. LAW 3d (1999).

II. ARTISTS' RIGHTS UNDER THE COPYRIGHT ACT

A. *Protection Under the Principle of Neighboring Rights*

The Copyright Act protects performers' rights as neighboring rights,¹⁴ and artists, as performers, are protected under the rubric of neighboring rights. The rights of performers under the Copyright Act consist of the Right of Reproduction (Article 63), Right of Broadcasting of Performers (Article 64), Right to Compensation by Broadcasting Organizations to Performers (Article 65), and Authorization of Performers of Rental of Phonograms (Article 65-2). These rights extend fifty years from the date of performance (Article 70). Among these, the right of reproduction and the right to receive compensation from broadcasters apply both to actors and singers, but the right to authorize rental of phonograms, by its musical nature, does not apply to actors and the like.

B. *Right of Reproduction*

Artists have the right to reproduce their performances. It is illegal to record a performance by any means without the artist's permission. Moreover, even when permission is obtained, it is illegal to record beyond the scope of permission. When artists contract to appear in movies and TV soap operas, or to make sound recordings, they give moviemakers, broadcasting organizations,

¹⁴ The protection of neighboring rights is a relatively new concept. Only in the twentieth century have neighboring rights been recognized. The first international discussion of neighboring rights was held in the Rome Revision Conference of the Berne Convention in 1928. However, it was not until October 1961 that a diplomatic conference on the neighboring rights concept in Rome recognized the first international agreement on the protection of neighboring rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Korea was not a signatory to the Convention but the Copyright Act of 1986 (the current law) adopted the Convention and recognized neighboring rights. Afterwards, the Trade Related Aspects of Intellectual Property Rights ("TRIPs") agreement provided:

A performer shall have the right to prevent fixation of his or her unfixed performances on a phonogram and reproduction of such fixation without the performer's consent. A performer shall have the right to prevent broadcasting by wireless means and the communication to the public of his or her live performance without the performer's consent.

Agreement on Trade Related Aspects of International Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. XIV, sec. 1, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. The WIPO Performances and Phonograms Treaty protects performers and record producers, but its scope is limited to performances that are fixed on phonograms. For international treaties on the neighboring rights, see Kyung-Soo Choi, *The Conclusion of WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty and Their Meanings*, 6 Q. CREATION AND RIGHTS (Spring 1997).

and record companies permission to record their performances, or to reproduce these recordings. Therefore, an artist must make sure that the contract clearly states both the conditions and the purposes for reproduction. But in reality, either because artists are not aware of their rights or because they are in weaker bargaining positions, they often enter into unfair contracts. Frequent contractual disputes arise where the scope of permission is either unclear or too broad.

1. Right to Royalties from the Reproduction of Phonograms

Singers have the right to request royalties in return for permission to copy their performances. Singers can request royalties for copying and selling phonograms and for synchronization royalties. Singers can request royalties in return for granting permission to the record company to record their performances, make phonograms of their performances, and sell the phonograms. They can also request a synchronization royalty when a song is copied and used on TV or in movies. However, singers, unlike copyright owners such as composers or lyricists, have limited rights to broadcasting (Article 64 of the Copyright Act), and do not have separate performance rights. Furthermore, unlike the various mechanisms¹⁵ available to composers and lyricists for collecting royalties, singers, in most cases, make royalty agreements within their individual contractual relationships with record companies and get their royalties under the name of “Artist’s royalty.”

Singers are under-compensated, however, because record companies have greater bargaining power. For example, new singers usually participate in the production of phonograms with minimal royalties or none at all.¹⁶ Even popular singers do not get appropriate royalties for their contributions to the production of phonograms. In Korea, there is no mechanism for accurately assessing the sales of phonograms and, thus, singers cannot verify whether the royalties they receive are fair. They are forced to rely on record company data

¹⁵ Composers and lyricists get mechanical royalties from record companies for sales of phonograms. Oftentimes, they delegate sales auditing and royalty collection to an agency like the Harry Fox Agency. In regard to the performance of phonograms, copyright collection organizations—e.g., Korea Music Copyright Association (“KOMCA”), BMI, ASCAP—collect broadcasting royalties, and music publishing companies, with the authorization from copyright owners, give permission for synchronization and collect synchronization royalties.

¹⁶ New singers prioritize the production and marketing of their phonograms regardless of the amount of royalties. Record companies desire guaranteed returns on their investment. In order to meet their individual needs, new singers and record companies do not compromise royalties or minimum royalties. New singers typically get 100 Korean Won (USD 0.08) per copy. Recently, there have been many contracts made with new singers being paid no royalties on their first and second albums.

and accept the royalties set by the companies. In order to solve this problem, Korea needs record sales assessment organizations similar to the Harry Fox Agency. Also, singers' organizations need to acquire data on record companies' income and cost structures relative to the sales of phonograms and need to ensure, through collective negotiation, that proper royalties are paid to singers.

2. *Production of Compilation Albums*

Recently, record companies have begun making "Compilation Albums" containing old hit songs of one popular singer or of various singers. Many of these albums are edited and made without the permission of singers and, subsequently, result in disputes. These disputes arise because the contracts of performers usually do not contain explicit provisions on the reproduction of songs for compilations. Producers usually argue that they have neighboring rights, including the right to make compilation albums freely. Singers argue that they only granted permission to make specific albums, not permission to make compilations.¹⁷

Although producers have the right to reproduce and distribute phonograms, it is proper to interpret the term "album" as specific albums that were contracted between the producers and singers. Hence, in order to make compilation albums, producers must get separate permissions from singers. This interpretation is consistent with the Article 50 provision on compulsory licensing. Under Article 50, after three years from the first sale of a phonogram, a person wanting to copy songs from a record for the purpose of making other phonograms must get permission from the copyright owner. Article 50 also provides that, in case it is impossible to procure permission from the copyright owner, the person can make phonograms after paying compensation to the

¹⁷ In a case where two singers, Tae-Choon Jung and Eun-Ok Park, brought a suit against Jigu Records, Inc., requesting compensation for damages on the production of a compilation album without their permission, the court ruled for the record company, stating:

Plaintiffs granted defendant company the right to use their singing for phonograms and other recorded products. Plaintiffs did not limit the duration of the granted right and the number of uses of their singing. Plaintiffs gave permission for the purpose of production and distribution of phonograms and recorded products. Under these circumstances, there is not enough evidence to support the conclusion that plaintiffs only gave permission to use their singing for one time [B]y so ruling, the court held that the scope of permission for use of their singing included the production of compilation albums.

copyright owner or depositing it with the Minister of Culture and Tourism.¹⁸ Under this interpretation of Article 50, it can be argued that it is necessary to get permission from all copyright owners—e.g., composers and lyricists, as well as singers and musicians—before making a compilation.

However, the court has ruled against Yong-Pil Cho, a popular singer, when he sought royalties from a record company that had made a compilation without his permission. The basic solution to the problem is that singers must make it clear in their contracts whether they are allowing the production of compilation albums and, if so, what the royalty scheme will be.

3. *Production of Remix Albums*

Remixing music changes existing songs by first separating out voice and music tracks from original songs, and then applying various changes to the tracks, such as inserting sound tracks from different songs, inserting samples from a different song, and changing tempos. The modified tracks are recombined with other tracks to make a remix. The remix technique is used by disc jockeys (“DJs”) at nightclubs to create a unique atmosphere by transforming an existing song into dance music or mixing in “scratch” sounds. Recently, remix albums of popular songs have become remarkably popular. In order to make remix albums, the producer must acquire permission to make a derivative work from the author of the original work, as well as permission from the record company. There is an ongoing debate about whether it is necessary to get permission from the singers of the songs. Since singers have the reproduction right on their performance, permission from the singers is, in principle, necessary. However, the current practice of the music industry is that the producers of remix albums only get permission from the producers of the original albums, and do not get separate permission from the singers. Hence, in

¹⁸ [Translator's Note] Article 50 of the Copyright Act (Production of Commercial Phonograms) states:

If a commercial phonogram is being sold for the first time in this country and after the expiration of a period of three years from the date of the first sale and if any person who intends to produce a commercial phonogram by recording works already recorded on such phonogram has negotiated with the copyright owner but failed to reach an agreement, he may produce the phonogram with the approval of the Minister of Culture and Tourism as prescribed by the Presidential Decree and by paying to the copyright owner or depositing a sum of compensation money fixed by the Minister of Culture and Tourism according to the criteria for compensation as prescribed under Subparagraph 1 of Article 82.

the making of remix albums, producers pay a reproduction fee to the original producers and do not pay a separate reward to the singers. Consequently, singers are displeased with the remix industry. When there are no provisions in the contract between the original producers and the singers regarding the making of remix albums, it should be considered an infringement of singers' neighboring rights when a third party makes an unauthorized remix.

4. *The Emergence of New Media*

The emergence of new media, including CD-ROM ("CD-R") and MD, has diversified the distribution channels of music. Additionally, digital music technologies on the Internet, including MP3 technology, have radically altered the map of the music market.

The most pressing issue is whether artists can request royalties on the reproduction of their work in these new media. Most of the current contracts were written without contemplating these new technologies because neither artists nor record companies could have predicted their development. This issue becomes more problematic when a particular singer was paid a lump sum in advance rather than a royalty. That is, when a singer is paid a lump sum amount for the production and distribution of limited type of media, the issue is whether the singer can subsequently request royalties when the music is reproduced and distributed in a new medium. The courts, in interpreting artists' contracts, have acknowledged record companies' rights to distribute phonograms via any media, regardless of the expiration of the contract period.¹⁹ These decisions failed to consider the imbalance of bargaining power between singers and record companies, and the intent of the parties at the time of the

¹⁹ When the composer of popular songs like "Bulssie" and "Yuribuk" brought a suit against SKC, Inc. requesting compensation for damages on the reproduction of his songs on compact discs, the court rejected the request, holding that:

The difference between phonorecords and compact discs lies only in the mechanism of recording and reproducing sound, but both are basically similar in mechanically recording and reproducing sound. Compact discs can be considered a substitutive medium for phonorecords. In addition, if we consider the fact that plaintiff gave permission to use all of his recorded matters and did not limit the scope of media, we cannot conclude that the distribution by the defendant is out of the scope of permission.

Seoul High Court, the 2d Section for Civil Cases, 11/28/1997, Pronouncement 96 Na 5256 Decision. In a similar case where singer Mi-Bae Lee claimed compensation of damages against Jigu Record, Inc. for making compact discs with her songs that were only permitted for phonorecords, the court also rejected plaintiff's claim. Seoul Local Court, Eastern Branch, the 4th Section for Civil Cases, 5/13/1994, Pronouncement 93 Ka Hap 8632 Decision.

agreement. These courts also failed to consider the unfair practices of the music industry.²⁰

The distribution of digital music in MP3 form is another hotly debated problem. In deciding whether MP3-type albums can be distributed, the courts must consider: (1) whether the MP3 technology was known at the time of agreement; (2) whether the terms of contract under-compensate the performers; and, (3) the economic effect of the new media on the use of traditional media.²¹ Hence, provided that MP3 technology was unforeseeable at the time of the agreement, and that the payment to the singer is seriously low compared to the profit from MP3 distribution, the producer must pay additional royalties to the singer.²²

²⁰ The German Copyright Act provides "limited interpretation of the scope of permission" as a statutory provision. German Copyright Act, art. 31, §§ 4, 5. See Sang-Jo Jung, *supra* note 10, at 206. The provision nullifies a contract provision that gives permission to an unknown method of use and provides that the scope of use permission in a contract that does not specifically state the method of use is interpreted in light of the "intended purpose of the use permission contract." *Id.*

²¹ See Supreme Court 7/30/1996, Pronouncement 95 Da 29130 Decision.

²² In an action brought by singer and actor Yeon-Sil Yu against Seoul Record, Inc. requesting compensation for damages from making and selling LD and CD format music videos in which she appeared, even though the contract specified Video (VHS) format as the permitted media, the court ruled in favor of the record company. Seoul Local Court, the 12th Section for Civil Cases, 2/14/1997, Pronouncement 95 Ka Hap 77875 Decision. The court based its decision on whether the media at issue was commercialized at the time of contract. *Id.* The court stated:

Video recording media is not limited to VHS tape; there are also LDs and CDs. At the time of contract, LDs and CDs were already commercialized . . . VHS tape, LD, and CD are only different in the process of recording and playing sound and visual images and are the same in the sense that they fix visual images and sound in a tangible media . . . [C]onsidering these circumstances, we find it appropriate that plaintiff gave in the contract an example of the permitted type of media, instead of limiting the use of the music video only for broadcasting, movie, and VHS tape.

Id.

Similarly, in the Tae-Choon Jung and Eun-Ok Park case, cited *supra* note 18, the plaintiffs argued that they could not anticipate the use of CD as a phonogram media, and thus making phonograms in CDs went beyond the scope of the permission. *Id.* The court, adding to the holding that LP and CD are the same in that they replay sound, used the commercialization standard as one of the criteria for deciding anticipation of new media. *Id.* The court stated:

Compact Disc was developed in 1984 and was rapidly spread internationally. In light of these circumstances, the mere fact that at the time of contract CD could not be manufactured and distributed does not force the conclusion that plaintiffs and defendant could not anticipate the use of CD as phonogram media or that CD was excluded from the comprehensive permission clause of the contract.

Seoul High Court, the 11th Section for Civil Cases, 3/21/1995, Pronouncement 94 Na 6668 Decision.

The biggest issue regarding MP3 technology is how to protect digital music on the Internet and how to structure the legal framework for the nascent Music On Demand (“MOD”) industry. A variety of illegally copied digital files are available on the Internet. Until 1999, even the websites of Internet Service Providers (“ISPs”) carried illegal MP3 files. But since the illegality of the unauthorized distribution of MP3 files has been established, most of the illegal MP3 files have disappeared from commercial sites. However, many private websites still contain MP3 files of newly released music. Recently, Soribada, an Internet site similar to Napster, has allowed individual users to search and exchange MP3 files on users’ hard drives, thus aiding the illegal distribution of MP3 files. As illegal copies of MP3 files are actively distributed, producers experience a significant reduction in the sales of albums and consequently singers receive insufficient royalties from album sales. Since the distribution of music in the form of MP3 files is clearly reproduction under the copyright law, the distributor should be required to get permission from the singer, producer, and other copyright owners, and also pay the appropriate fee.

The emerging MOD services exist in two forms. First, there are Internet broadcast services where the users do not get to choose songs but can only listen to music transmitted by the providers. Second, there are services where users can request songs and download the MP3 files to their hard drives. While there is debate about whether these acts constitute broadcasting or reproduction under the Copyright Act, Internet broadcasting should be considered as the broadcasting of a performance, and digital downloading should be considered as the reproduction and distribution of a performance. Hence, in cases of Internet broadcasting, the broadcast providers should be required to pay compensation to the artists under Article 65 of the Copyright Act, and in cases of digital downloading, service providers should be required to obtain permission from the artists regarding the reproduction of the performance and pay reproduction royalties to the artists under Article 63 of the Copyright Act.

In reality, the providers are not paying such fees to the artists, and it is urgent that a systematic method for facilitating negotiation and contracting between service providers and artists regarding consent and fees be established.

5. *The Scope of the Special Provision on Cinematographic Works and Its Application to Artists*

Article 75 (3) of the Copyright Act provides that, regarding the rights on cinematographic works:

The right of reproduction under Article 63 and the right of broadcasting of performances under Article 64 of a performer who has agreed to cooperate in the production of a cinematographic work shall be considered to have been transferred by assignment to the producer of the cinematographic work, unless otherwise stipulated.²³

The reasoning behind this special provision is that requiring movie companies to get individual consent from each actor or actress in a movie is too burdensome for the movie companies. Thus, when actors and actresses agree to appear in a movie, they are considered to have agreed to the reproduction, distribution, and broadcasting of the movie.

This special provision has brought about a number of disputes between movie companies and actors. Movie companies have argued that under Article 75(3) all rights are transferred to the movie companies that, therefore, have the unfettered right to the scenes from a movie. Legal disputes have arisen when a movie company allows an advertising company to use scenes from a movie for commercials, or when the movie company makes photo albums, posters, character goods, or other goods without permission from actors.

The scope of Article 75(3) was first litigated when a maker of Karaoke Laser Discs ("LDs") used scenes from a movie without the actors' permission.²⁴ The Supreme Court interpreted Article 75(3) as limiting the scope of neighboring rights transferred to a movie company to those rights that are necessary for using a cinematographic work for the original purpose. The court held:

Making Karaoke LDs by collecting certain scenes from a movie is not using the cinematographic work for the original purpose, but is using it to make a new cinematographic work. The right to reproduce the performances of actors on LDs in this way is not within the scope of the rights transferred to a movie company under Article 75(3).²⁵

²³ Copyright Act of Korea 2000, art. 75(3).

²⁴ In this case, actors Jong-Ok Bae, Bo-Suk Jung, Hak-Pyo Hong, Hye-Young Lee, and Minsoo Choi brought a criminal action against Shinsegye Record Company for using scenes from a movie that appeared as background scenes for Karaoke LDs. The defendant argued that since it got permission to use scenes in the movie from the movie company, it was not criminally liable. Both the trial court and the appeals court found infringement of neighboring copyright. Seoul Local Court, the 5th Section for Criminal Cases, 10/9/1996, Pronouncement 96 No 2800 Decision.

²⁵ Supreme Court, 6/10/1997, Pronouncement 96 Do 2856 Decision.

This decision properly clarified the scope of rights on cinematographic works. If the Supreme Court had interpreted the provision otherwise, in such a way that all the rights of actors are transferred to a movie company, an actor would have no neighboring rights at all regarding his performance. That is, if a movie company can use an actor's performance in a movie for whatever commercial purposes it chooses, the movie company can make character goods and bromide photographs and use movie scenes for TV commercials as well as magazine and newspaper ads, or allow a third party to use the scenes.²⁶

Hence, when a movie company possesses the copyright to a movie, barring a specific agreement to the contrary, the rights assigned to the producer are limited to the use of the movie for the original purpose; for example, showing in theaters, video distribution, TV broadcasting, or Internet broadcasting (Video On Demand). Using the movie for other purposes would infringe the actors' neighboring rights.

In relation to this point, it has recently become an issue whether product tie-ins violate the rights of actors.²⁷ Tie-in advertisements promote a movie and an ordinary product simultaneously by combining the two advertisements together. This technique becomes an issue when the scene performed by an actor was provided for an ordinary product advertisement, and a movie advertisement was inserted in a product advertisement. However, since using a scene performed by an actor without permission exceeds the usual scope of the contract, this use should be construed as an infringement on the actor's neighboring rights. Though there is no case on this issue in Korea, a Japanese court has held that tie-in advertisements infringe actors' rights.²⁸

6. *Imitation of Performance*

There are entertainers who specialize in imitating popular singers or actors. These imitators are popular on TV as well as in nightclubs. The managers of nightclubs prefer imitators because they cost less than the real

²⁶ For example, simply because a movie company made a movie, it can allow a third party to advertise its products with scenes from the movie containing performances of famous actors like Jin-Sil Choi, Su-Yun Kang, Sung-Ki Ahn, or Joong-Hoon Park, and make huge profits. On the other hand, popular actors and singers who could otherwise make tens of thousands of dollars by independently contracting with the third party for advertising purposes cannot get any fees from such a transaction.

²⁷ Currently, a case for an injunction is proceeding where movie scenes from "Peace Era," in which the popular musical group H.O.T. made an appearance, were used to advertise an Internet gift certificate. At issue is whether such use of movie scenes for tie-in advertisements is permissible. Seoul Local Court, 2000 Ka Hap 2065 Sa-Gun.

²⁸ Tokyo Local Court, Sho-Wa Year 51 Month 6 Day 29 Decision.

artists. Can real artists bar imitators on the basis that they infringe on the reproduction right of the real artists?

The fact that performers have reproduction rights does not necessarily mean that performers have a personal right to prohibit others from imitating their live performances. Also, since artists' reproduction rights are limited to the recording and reproduction of performance itself,²⁹ it is hard to assert infringement of reproduction right against mere imitators.³⁰ However, when a third party imitates a performance by a popular artist, the artist may obtain an injunction or monetary damages on the basis of infringement on the right of publicity by showing that the economic interest in his image or character has been damaged.³¹

C. Performance Broadcasting Rights

Performers shall have the right to broadcast their performances.³² Here, broadcasting means the transmission of sound and visual images by wire or wireless communication intended for direct reception by the public, and does not include mere amplification of sound within the same uninterrupted area.³³

Broadcasting may either be live or recorded. In order to broadcast an artist's live performance (for example, a singer's concert performance, play, etc.), it is necessary to get permission from the artist. Re-broadcasting by either the original or another broadcaster is a difficult issue. It is generally accepted that Article 64's conditional clause³⁴ allows repeat broadcasting without

²⁹ Sang-Jo Jung, *supra* note 10, at 232.

³⁰ The court rejected a neighboring rights infringement action by a popular musical group, DJ. DOC, requesting compensation for damages against Samyang Food, Inc., where Samyang Food had a singer sing DJ. DOC's song "Murphy's Rule" and used it as a background song for a commercial. Seoul Local Court, 2/20/1997, Pronouncement 96 Ka Dan 188973 Decision. The court stated:

The song "Murphy's Rule" was not performed by the original singer DJ. DOC, but was sung by a third party. Unless there is a significant similarity between the original song and the third party's singing so that there might be confusion about who sang the song, it is hard to find that plaintiff's neighboring rights have been infringed only on the basis that the song was sung.

Id.

³¹ In the United States, the court awarded damages where Ford Motor Co. used Bette Midler's song "Do You Want To Dance?" sung by an imitator as background music in an advertisement. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

³² Copyright Act of Korea 2000, art. 64.

³³ *Id.* art. 2.

³⁴ Article 64 of the Copyright Act of Korea 2000 provides that performers shall have the right to broadcast their performances, except those recorded with the authorization of performers.

permission from the artist.³⁵ However, re-broadcasting by anyone other than the original broadcaster should be considered outside the scope of the conditional clause of Article 64 because providing recorded material to another broadcaster is not within the scope of the artist's original consent.³⁶

D. Right to Compensation for Broadcasting of Commercial Phonograms

When broadcasters³⁷ use commercial phonograms, they do not have to get permission from every individual artist, but are required to pay reasonable compensation to each artist.³⁸ However, it is practically impossible for individual artists to claim compensation directly from broadcasters. Instead, Article 65(2) provides that artists must exercise their rights collectively through a collecting society.³⁹

These provisions reflect the policy that, with the remarkable development of recording and replay technology, broadcasting has largely displaced live performance, and thus it is necessary to provide compensation for the artists'

³⁵ See Kyung-Su Choi, *supra* note 11 at 47.

³⁶ Broadcasting organizations may make ephemeral sound or visual recordings of a work for the purpose of their own broadcasting and by the means of their own facilities, provided that it is not contrary to the intention of the owner of the right of broadcasting. Copyright Act of Korea 2000, art. 31(1). However, when the broadcasting organization uses the record or visual recordings for purposes other than broadcasting, or provides the record or visual recordings to other broadcasting organizations for broadcasting purposes, the acts may infringe upon the performer's right to the recording of sound or visual images or the right to broadcasting of performance. JUNG-SUL KIM, ISSUES IN INTELLECTUAL PROPERTY RIGHTS 322, Administrative Department of the Judicial Branch.

³⁷ The legal term for the use of commercial phonograms for broadcasting or the playing of commercial phonograms in commercial hotels or restaurants is "Secondary Use." Compensation for such use is called "Secondary Use Fees."

³⁸ The compensation right under Article 65(1) is created (1) with a performer whose performance is recorded on a phonogram, or (2) when a broadcasting organization makes a broadcast using a commercial phonogram containing that performance. Sung-Ho Park, *Performer's Compensation Right on the Use of Commercial Phonograms for Broadcasting*, 34 Q. COPYRIGHTS 30-31 (1996). Article 12 of the Rome Convention provides that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, art. XII [hereinafter Rome Convention]. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration. *Id.*

³⁹ Broadcasting organizations broadcast many performers' performances. If broadcasting organizations must negotiate with individual performers for the use of performance and the compensation for the use, both broadcasting organizations and performers will incur huge costs. Jung-Sul Kim, *supra* 36, at 324. In addition, since the compensation to individual performers will be small, performers will not be able to easily negotiate with broadcasting organizations. *Id.* Therefore, the law requires performers to set up an organization for collectively exercising their rights. *Id.*

technological unemployment. Also, broadcasters must share part of their profits made from using phonograms.⁴⁰

1. *Broadcasting of Music Videos*

With the advent of the multimedia era, the production of music videos that mix songs and visual images has increased. In the past, singers used music videos to promote their albums. Now, music videos are a separate genre of entertainment. Along with this change, the cost of making a music video has increased from U.S. \$20,000-\$30,000 to over U.S. \$100,000. Many music videos feature popular actors in them.⁴¹ Also, specialized music video broadcasting channels now exist such as KMTV or m-net. Public broadcasting channels also show more music videos than before. Consequently, the issue arises as to whether, under the Copyright Act's compensation clause, broadcasters can show music videos without obtaining consent from and paying royalties to singers.

Korean copyright law defines phonograms as the medium in which sound is fixed and excludes those media in which sound is fixed together with visual image.⁴² It also distinguishes between sound recordings and visual recordings.⁴³ Strictly interpreting the definitions, Article 64's exception clause for broadcasting organizations only applies to sound recordings, and Article 65's compensation provision only applies to sound recordings. Hence, music videos are treated differently than phonograms. Thus, a broadcaster needs only the permission of the producer of the music video since the producer of the music video is the copyright owner.

Even though this interpretation is inevitable under the current copyright law, music videos should be treated in the same way as phonograms because the current Copyright Act was enacted at a time when the multimedia era was unforeseeable and, further, because there is no legal reason to differentiate music videos from phonograms. Therefore, broadcasting organizations should

⁴⁰ Seoul Local Court, the 12th Section for Civil Cases, 7/30/1999, Pronouncement 97 Ka Hap 44527 Decision.

⁴¹ For example, Sung-Mo Cho, a singer, made a music video showing Byung-Hun Lee, a popular actor, and sold two million copies of his album.

⁴² Copyright Act of Korea 1986, art. 2-6.

⁴³ *Id.* arts. 2-3, 2-14.

be allowed to broadcast music videos without permission as long as they pay compensation.⁴⁴

2. *Distribution of Compensation*

According to Article 65, a performer has the right to request compensation, but only through an organization designated by the Ministry of Culture and Tourism. The legislators were concerned that if each individual artist requested compensation, the transaction costs would be complex and inefficient. Following this provision, the Korea Art Performance Association (“KAPA”) was established by the Minister on October 14, 1988, and has been exercising compensation rights ever since. In light of the purpose of Article 65, it seems reasonable to designate a performers’ association for exercising compensation rights.

The real problem is how KAPA distributes the compensation. Article 24 of the Enforcement Ordinance of the Copyright Law requires that the designated performers organization establish a mechanism for distributing compensation that should be subject to the approval of the Ministry of Culture and Tourism. In reality, KAPA does not distribute compensation⁴⁵ from broadcasting organizations directly to the performers. Instead, it distributes the compensation to the member organizations,⁴⁶ and the member organizations subsequently use the money to cover operation expenses.⁴⁷

⁴⁴ For compensation for performance of visual images, see Yukio Shimizu, *Eizou Jitsuen no Hogo to Nijiryō ni Kansuru Mondai* [Issues Regarding Protection of Performance and Secondary Use], 1132 JURISUTO 45 (1998).

⁴⁵ As of 1999, KAPA received from each broadcasting organization compensation for performance in the amount equal to 8.9% of the royalty paid to Korea Music Copyright Association (“KOMCA”). The total compensation amounts to 560 million Korean Won (about U.S. \$500,000). This breaks down to 130 million Korean Won (about U.S. \$100,000) from MBC, 200 million Korean Won (U.S. \$160,000) from KBS, 60 million Korean Won (U.S. \$50,000) from SBS, with the remainder from radio stations. [Translator’s Note] MBC, KBS, and SBS are three public TV stations.

⁴⁶ In 1999, KAPA took 36% of the compensation (200 million Korean Won or about U.S. \$160,000) as commission and distributed the remaining 280 million Korean Won (about U.S. \$230,000) to pop songs organizations (instrument 22.65%, musician 22.65%, singers 34.70%), classic music organizations (vocal 1.8%, instrument 3.2%, conductor 0.56%, winds 1.0%), and traditional music organizations (2.24% each for vocal, folk music, instrument, folk song, and lyrics). 1999 Accounting Report of KAPA.

⁴⁷ In Japan, a performers’ organization designated by the Ministry of Culture deducts 20% of compensation as its commission and distributes the remainder to individual organizations representing each art genre. Sung-Ho Park, *Performers’ Right to Compensation for the Use of Commercial Phonograms for Broadcasting*, 34 Q. COPYRIGHTS 37 (1996). The individual organizations use the distributed compensation to “raise new artists, compensate performers who can no longer perform live, and promote artistic activities.” *Id.* In Germany, performers who have the right to compensation report all their profit from record sales and broadcasting appearances to a performance property right management organization (GVL) through the end of June and GVL distributes compensation according to the reports. *Id.*

However, as discussed above, since the purpose of the provision is to provide compensation for the technological unemployment of the performers, the fact that KAPA does not distribute compensation to individual performers is contrary to the legislative intent. Though KAPA claims that it is technically difficult to identify each performer in songs used by broadcasting organizations, this is not credible given that that Korea Music Copyright Association ("KOMCA") monitors broadcasting and distributes royalties to individual copyright owners. Furthermore, in light of Article 65(3), which provides that the organization must exercise the right on behalf of members and non-members alike, it is clear that the copyright law presumes that compensation will be distributed to individual performers.

Hence, the current KAPA practice of arbitrarily distributing compensation to member organizations should be changed. Korea needs a systematic mechanism that ensures, except in cases where the copyright owner is unknown or where necessary information is unavailable,⁴⁸ the distribution of compensation to individual performers. Also, performers must make an active effort to get paid their due compensation through collective negotiation.⁴⁹

E. The Right to Authorize the Rental of Phonograms

While the phonogram rental business is not active in Korea, in Japan the business is prosperous. Rental shops purchase phonograms and rent them to consumers who then record songs from the phonograms using home audio equipment. Because this type of business presents a serious threat to the existing phonogram market, and because the legislature must determine whether or not to allow the establishment of rental businesses and how to build a compensation scheme, the National Assembly added a provision on phonogram rental in the 1994 Amendment to the Copyright Law.

According to Article 65-2(1), "Performers shall have the right to authorize the rental of commercial phonograms for profit-making purposes in

⁴⁸ According to the so-called London Principle, adopted by the International Musicians League and the International Actors League, compensation for broadcasting of performance should be directly distributed. *Id.* at 36. However, when the right owner cannot be identified and the compensation cannot be directly distributed despite the collection organization's due effort, or when the compensation cannot be distributed to individual performers according to the performance time, indirect distribution is allowed. *Id.*

⁴⁹ The same opinion is presented in Sang-Jung Lee, *The Right of Performers*, 36 Q. COPYRIGHTS 4 (1996). In one case, a request from a group of musicians asking for direct distribution of compensation from KAPA was rejected. Seoul Local Court, Eastern Branch, 10/15/1997, Pronouncement 95 Ka Dan 16616 Decision. The court stated that according to the work manual of KAPA and the procedure on the distribution of compensation for the use of commercial phonograms, an individual performer cannot individually request the distribution of compensation. *Id.*

which performances are recorded.” However, as with the broadcast performance right, the right to request compensation for rental can only be exercised collectively by a designated performers organization. Hence, the distribution of compensation to performers remains a problem. Because the phonogram rental business does not yet exist, there is no designated performers organization to exercise the right.

F. Performer's Moral Right

The current copyright law recognizes the moral right for authors, but not for performers. That is, the Right to Disclose (Article 11), the Right to Indicate Author's Name (Article 12), and the Right to Preserve the Integrity (Article 13) recognize a moral right for authors, but do not mention performers.⁵⁰ The only way performers can obtain recovery for damages is under the Civil Law's general principle of Illegal Acts.⁵¹

Although countries have different statutes⁵² and there are arguments over the fairness of recognizing the performer's moral right,⁵³ the Copyright Act should be amended to provide the moral right to performers⁵⁴ because the artistic value of live performance is as valuable as the creativity of original work, and with the availability of digital technology, it has become easy to distort and modify live performances. Therefore, a performer should have the right to claim authorship of a performance and prevent others from distorting,

⁵⁰ [Translator's Note] Section 3 of the Copyright Law provides authors' moral rights. The section consists of three Articles, each corresponding to French law's right of disclosure (Article 11), the right of paternity (Article 12), and the right of integrity (Article 13). The right of withdrawal is not provided under the Korean Copyright Law.

⁵¹ [Translator's Note] Section 750 of the Civil Law specifies the General Principle of Illegal Acts stating, "A person who causes harm to others by intentional or negligent illegal act is liable for compensation." A Japanese case held that when a performer's right has been infringed in a significantly immoral way or under circumstances that cause the performer serious mental pain, even without the protection of a performer's right of publicity under the copyright law, the protection of a performer's personal interest under the Illegal Act provision cannot be denied. Case regarding Bootleg of "Record of Showa Era," (D. Tokyo, Nov. 8, 1978). See also Masashi Tanano, *Jitshuenka no Jinkakukun—Jitsumusha no Tachiba kara [Moral Right of Performers—From the Administrator's Point of View]*, 23 CHOSAKUKEN KENKYU 127 (1996).

⁵² Korea, Japan, England, the United States, and Canada do not recognize the moral right of performers. In contrast, China, Denmark, Germany, France, Italy, Spain, and Russia do recognize such a right. Chang-Hwan Shin, *supra* note 3, at 48.

⁵³ In the United States, California, New York, and Massachusetts have enacted state statutes to protect an artist's moral right. There is currently a legislative movement toward a federal law protecting an artist's moral right. Michael E. Horowitz, *Artists' Rights in the United States: Toward Federal Legislation*, HARV. J. ON LEGIS. 153-211 (1998).

⁵⁴ The WIPO Performances and Phonograms Treaty, adopted in December 1996, first recognized a performer's moral right even if its scope is limited to the performance of sound recording fixed in phonograms. See Kyung-Su Choi, *supra* note 11, at 34.

damaging, or otherwise changing the performance.⁵⁵ In cases where a live performance is distributed regardless of the performer's intention (for example, when a sex scene in a movie is published in a pornographic magazine), where a live performance is introduced with a different performer's name (for example, when a movie actor's play is depicted as another actor's play), or where a secondary user changes the performance absurdly (for example, where a remix album producer changes the singing for comical effect), it is proper to grant an injunction on the basis of infringement of the moral right, as well as the infringement of the neighboring rights. The World Intellectual Property Organization ("WIPO") Performances and Phonograms Treaty also recognizes a performer's moral right.

III. CONCLUSION

Under the Copyright Act of Korea, performing artists are within the category of live performers and thus enjoy neighboring rights. However, the Copyright Act has not gone very far beyond the traditional copyright law, which centers on the protection of authors, and falls short of protecting artists' rights in the new multimedia environment of the Internet.

When the importance of creative performance by artists or entertainers outweighs the creativity of the author, both in popular art and pure art, there needs to be a change of perspective in this area. The National Assembly should adopt a model, among the several that exist in other countries, by enacting special legislation to protect entertainers' rights.

In reality, the biggest problem in protecting entertainers' rights is the prevalence of unequal contracts in the entertainment business. Namely, where the success of an entertainer is heavily dependent on the capability of the manager, production, movie producer, and broadcasting companies, most entertainers give up or are deprived of their rights as performers through unfair contracts. A legal principle for protecting weaker parties should be introduced in this field of law in order to establish fairness in practice. Special legislation to eliminate unfair contracts in the entertainment business should also be considered. Finally, entertainers should actively assert their rights through an artists' organization.

⁵⁵ In a discussion within the Standing Committee on Copyright and Neighboring Rights of WIPO, the United States suggested that in cases where the modification of performance is within the scope of normal exploitation of audiovisual work, the moral right equivalent to the right of identity is not given. Chang-Hwan Shin, *supra* note 3, at 22.

