

Criminalization of Netizens for Their Access to On-line Music

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Abstract

The peer-to-peer (“P2P”) technology and music file sharing have generated a steadily intensifying war of words and legal actions not only in the USA but also in Korea. Despite hot debates over the Napster decision, the American decision appears to have guided the world in the wrong direction: The music industries all over the world have been encouraged to bring lawsuits against P2P networks or software rather than to negotiate and issue licenses for on-line music distribution. And, also, despite substantial differences among domestic statutes on copyright status of sound recording producers, judicial courts in some countries including Korea have been encouraged to hold P2P network operators and their users as liable for P2P music sharing. Strengthened protection of copyright has been made possible partly by increasing and expanding criminal sanctions against copyright infringement. Too broad or severe criminal sanctions would, however, stifle appropriate level of exploiting copyright works and consequently contradict the policy goal of copyright law itself, i.e. promoting the advancement of science and useful arts. The same risk may apply to criminalization of netizens for their access to on-line music. Especially when netizens do not understand copyright law at a sophisticated level or when they do not regard internet access to music as copyright infringement, it would be difficult to punish such netizens as “willful” infringers.

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- It is the greatest of evils if the laws be written in a language which is not understood by the people and which makes them dependent upon a few individuals because they cannot judge for themselves what will become of their freedom or their life and limbs.¹⁾

I. Introduction

The peer-to-peer (“P2P”) technology and music file sharing have generated a steadily intensifying war of words and legal actions not only in the USA but also in Korea. The U.S. Court of Appeals for the Ninth Circuit has ordered that Napster could not resume its free online file-sharing service,²⁾ upholding the district court’s original order that Napster remain offline until it could fully comply with the injunction to remove all infringing material from its site.³⁾ Despite hot debates over the Napster decision, the American decision appears to have guided the world in the wrong direction: The music industries all over the world have been encouraged to bring lawsuits against P2P networks or software rather than to negotiate and issue licenses for on-line music distribution. And, also, despite substantial differences among domestic statutes on copyright status of sound recording producers, judicial courts in some countries including Korea have been encouraged to hold P2P network operators and their users as liable for P2P music sharing.

The music industry of Korea including the Korean Association of Phonogram Producers (“KAPP”) outstepped the Recording Industry Association of America (“RIAA”) in its attacks against P2P music sharing. Not only have sound recording producers brought civil lawsuits⁴⁾ against on-line music distributors including

1) Beccaria, *On Crimes and Punishments and Other Writings* (Edited By-Richard Bellamy, University of Cambridge), p.50.

2) *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002).

3) *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D. Cal. 2000).

4) Suwon District Court Decision 2002kahap280 held on June 25, 2003; Seoul District Court Decision

“Soribada” or “Ocean of Sounds,”⁵⁾ a Korean version of Napster, but they have also lodged with the Public Prosecutor’s Office criminal complaints as well. With the criminal complaints, the prosecutors have filed criminal charges against Soribada.⁶⁾ Criminal prosecution and consequent possible punishment of Soribada theoretically lead to a serious question whether it is possible to criminalize not only P2P network operators who post thousands of pirated MP3 files for profits⁷⁾ but also individual users who simply enjoy music over the internet.⁸⁾

Actually, the music industry’s attacks have been expanded in their targets to millions of netizens or network citizens. The RIAA has already filed civil lawsuit against 261 individuals who allegedly traded copyrighted music over the Internet.⁹⁾ Just as the music industry in Korea asked for both civil and criminal remedies against P2P network operators, it will also bring criminal complaints as well as civil suits against individual users in Korea. This means that millions of young netizens might be criminalized and, also, that criminal punishment of any netizens might be made possible by the will of the music industry in Korea. This article starts with questions on the possible criminalization of netizens. Is the policy goal of the copyright law, i.e., the promotion of science and useful arts, facilitated by possible punishment of millions of netizens for the benefit of a few phonogram producers? Is

2003kahap2151 held on September 30, 2003; Seoul District Court Decision *2003kahap2114* held on September 30, 2003; Seoul District Court Decision *2003kahap2660* held on September 30, 2003; Suwon District Court Decision *2002kahap284* held on Feb. 14, 2003.

5) “ Soribada” meaning “Ocean of Sounds” in Korean is a name of a website which Yang brothers had developed for a music file sharing service that started running in May 2000. Soribada distributes the program to the members, and works as a medium for sharing of MP3 files through the server. Basically, Soribada is similar to Napster except for the fact that Napster keeps the list of MP3 files in the server and allows the users to search among the list. By contrast, when Soribada users are logged in, they are provided with the list of users connected to Soribada at the time, and then they are able to communicate with other Soribada users, search for music files and share them with other users without relying on the Soribada server.

6) Seoul District Court Decision *2001godan8336* held on May 15, 2003.

7) Kevin M. Kelly, Comment, The MP3 Challenge: Has Congress Effectively Shielded the Music Recording Industry from Internet Copyright Piracy?, *18 Temp. Envtl. L. & Tech. J.* 163, 176 (2000).

8) There have been similar fears in the U.S. as well. See Hearings on S. 893 before the Subcomm. On Intellectual Property and Judicial Administration of the House Comm. On the Judiciary, 102d Cong. 65 (1992) (statement of Edward J. Black, General Counsel, Computer & Industry Association).

9) John Borland, RIAA Sues 261 File Swappers, CNET News.com, at [http:// news.com.com/2100-1023_3-5072564.html](http://news.com.com/2100-1023_3-5072564.html) (Sept. 8, 2003).

it efficient or desirable that each and every copyright infringement shall be subject to criminal liability? These questions gave enough impetus to write this article.

In Part II, this article identifies which rights of copyright matter most in cases of on-line music sharing. Copyright is a bundle of rights, including neighboring rights granted to sound recording producers. Specific types and scope of rights of a copyright owner differ widely from country to country. The rights granted to sound recording producers in particular face extremely various approaches depending on jurisdictions. In this context, it is essential first to make a list of rights alleged to have been infringed and then check out one by one separately: the right of reproduction, distribution, transmission, public performance, display, broadcasting...? Part III continues the discussion by attempting to distinguish the right of transmission from distribution. The right of transmission has been granted to authors under the Copyright Act of Korea amended in 2000 but not to sound recording producers.¹⁰⁾ Given the lack of the transmission rights on the part of sound recording producers, it must be academically worthwhile to see whether or not most of the civil and criminal litigation initiated by the producers in Korea could end up with different results than their American counterparts' results. Unfortunately, however, despite the difference in the statutory provisions, judicial courts of Korea appear to simply follow the precedents of the Federal court of the U.S.A. Part IV raises the fear or possibility that judicial interpretations in parallel with the American precedents may result in a country full of young criminals. The language of the statutory provision on copyright crimes was so broad¹¹⁾ that minor offenders or ordinary netizens simply enjoying music might all be criminalized under the Copyright Act of Korea. Having pointed out some problems with statutory provisions criminalizing all the copyright infringements, Part V puts focus on the mens rea requirement of copyright crimes. The most relevant question in this context is whether the defendant is required merely to know that he is making copies or whether he is required to be aware of the fact that his making of unauthorized copies constitutes copyright infringement.

10) Section 18-2 of the Copyright Act amended on January 12, 2000 (Statute No. 6134).

11) Similar concern was raised by Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 *Washington University Law Quarterly* 835, 871 (1999).

II. Copyright as a bundle of rights

Copyright is not a single right but a bundle of numerous rights: Rights of reproduction, distribution, digital transmission, broadcasting, public display,¹²⁾ public performance,¹³⁾ and making derivative works are granted to authors under the Copyright Act of Korea.¹⁴⁾ In discussing whether netizens are infringing copyright during their access to on-line music, however, it might be tempting for an overworked judge to conclude that “some kind of infringement must have happened, so it doesn’t really matter which.” And that may be literally true with respect to the Korean courts which eventually came, despite substantial differences between statutory provisions of the two countries, to the same conclusion as the U.S. courts did.

Since netizens make either temporary or permanent copies of music, the right of reproduction matters first and most. In cases of music streaming service, there is no permanent copy remaining in the netizens’ computer and, thus, the only and difficult issue will be whether temporary copies made during the course of streaming constitute unauthorized reproduction under the current statute. In cases of music sharing via P2P technology, permanent copies are made by netizens downloading music files and, accordingly, hot debates center on the extent to which netizens are allowed to make permanent copies for personal uses.

1. Temporary copies and the reproduction right

Although temporary copies are dealt with partially under the relevant statutes, the right of reproduction is basically interpreted as not including temporary copies under the Copyright Act of Korea.¹⁵⁾ The first and most important statutory provision is

12) The right of public display is granted to authors of visual arts, architectural works, and photographic works only.

13) Public performance means the expression of a work by acting, musical playing, singing, reciting, screening or by other artistic means. As far as netizens enjoy music at home or other personal places, the right of public performance does not really matter to on-line music sharing.

14) Sections 11 through 13 and 16 through 21 of the Copyright Act of Korea.

15) Chanhyun Hwang, Comments on MAI Systems. v. Peak Computer, Inc.: RAM Copies of Computer Programs, Practitioners’ Forum (Seoul District Court, 1997), p. 527.

found in a statutory section on infringement of computer program copyright: A person who has acquired, with the knowledge of the fact, any reproduction of a program made by an act infringing the program copyright and uses it in a computer for his business is regarded as having infringed the program copyright.¹⁶⁾ According to the statutory provision, making a temporary copy of a computer program in RAM¹⁷⁾ of a computer to use the program may constitute copyright infringement even if there is no permanent copy made in the computer. The statutory provision on business uses of infringing copies implies basically that making temporary copies of a computer program other than infringing programs does not constitute copyright infringement under the Act.¹⁸⁾

Legal implications of temporary copies under the Copyright Act are the same as under the Computer Program Protection Act. Since the Copyright Act of Korea provides that authors of visual art are granted the right of public display,¹⁹⁾ enjoying or making available visual art via internet without authorization of the copyright owner may constitute infringement of the public display right. Actually, the Supreme Court of Korea has held that a person who has made links to a good list of pornographic websites and thus made their pornographic pictures available to the general public should be regarded as having exploited the pornographic pictures and thus as publicly displaying the pictures themselves.²⁰⁾ It does not matter to the Supreme Court whether the website operator or a netizen has a permanent copy of pornographic pictures or not. The Supreme Court's decision indicates that temporary copies are enough to display pornographic pictures which are to be punished under the Act concerning Encouragement of Access to Information Network and Protection of Personal Information.²¹⁾ Beyond the extent to which temporary copies are made to display visual works publicly, it is fair to say basically that merely making temporary copies does not constitute copyright infringement. In cases of streaming music files via the internet, the district courts of Korea have held that the

16) Section 29 (4)(b) of the Computer Program Protection Act of Korea.

17) Random Access Memory.

18) Chanhyun Hwang, *Op. cit.*, p. 543.

19) Section 19 of the Copyright Act.

20) Supreme Court Decision 2001do1335 held on July 8, 2003.

21) Section 65 of the Act concerning Encouragement of Access to Information Network and Protection of Personal Information.

streaming service provider made permanent copies of music in its server computer, not mentioning its possible liability for facilitating netizens to make temporary copies.²²⁾

2. Personal uses and the reproduction right

It is beyond doubt that netizens downloading music files via P2P networks do make permanent copies. Having made P2P copies for personal uses and not for sales, however, the netizens may raise a question whether they can rely on the fair use doctrine. A thorough analysis of the fair use doctrine suggests that P2P copying by netizens is fair use. The personal use exception, one of the illustrated exceptions for fair use under the Copyright Act of Korea, provides that it shall be permissible for a user to reproduce a work already being made public either for personal purposes and not for profit or for other uses in a residential house or other similarly limited circle.²³⁾ The Copyright Act clearly sets out two factors courts are to consider in determining whether a particular use is fair personal use: (a) the purpose and character of the use and (b) the amount copied or the effect of the use on the market.

The first factor is clear from the statutory provision that the use should be for personal and not-for-profit purpose. The copying that takes place by a netizen via a P2P network looks personal and not commercial. Some may argue, and the courts have actually held, that persons downloading music save the expense of purchasing copies.²⁴⁾ While some P2P service providers or other on-line music websites may profit from netizens music sharing activities, netizens download music files merely to enjoy music by themselves and not for profit. In addition, saving some expenses happens in most of home copying for personal use which has been regarded as legitimate personal use: A personal use copy of a video or MP3 file made at home or a similarly limited space also saves the expense of going to a film theatre or purchasing a CD, but does not thereby become “commercial.” The most significant difference between P2P copying and Video Cassette Recorder (VCR) copying rests

22) Seoul District Court Decision *2003kahap2151* held on September 30, 2003.

23) Section 27 of the Copyright Act of Korea.

24) Suwon District Court Decision *2002kahap284* held on Feb. 14, 2003; Suwon District Court Decision *2003gahap857* held on 2003. 10. 24.

on the fact that, while P2P netizens are able to make those copies available again to other netizens, VCR consumers are mostly not. The courts of Korea have held P2P downloading as “commercial” on the grounds that netizens are able to have access to what they want by making P2P copies available to other netizens.²⁵⁾ The psychology relating to the barter-like-system of P2P networks may increase the amount of music downloaded but does not change the nature or character of P2P downloading itself. The difference does not make any impact upon the nature and character of the personal use but it may only affect the next issue of infringing the transmission right which will be discussed later.²⁶⁾

The second factor, i.e., the amount copied or the effect of the use on the market, derives from the statutory requirement that personal uses must be made at home or similarly limited circle to be qualified as legitimate under the Copyright Act of Korea. It is the consequent rule of thumb that, the more copies of the work are made, the less likely the use is to be personal.²⁷⁾ The second factor is extremely difficult to discuss, however, in the case of P2P copies: On the one hand, a substantial number of copies are made and become available over the P2P network in general, and on the other, only one copy of each and every much file is needed and downloaded by netizens individually. Having presumed that “some kind of infringement must have happened,” courts may find that a substantial number of netizens logged on to the same P2P network have been able to make a substantial number of copies over the network. For example, given the fact that “Soribada” or “Ocean of Sounds,” one of the most popular P2P network service providers have had 4.5 million subscribers, with an average of 300,000 users logged on the Soribada network everyday, and an average 5,000 concurrent users logged at the same time,²⁸⁾ the courts came to the conclusion that thousands of copies were possible to be made by anonymous netizens beyond home and beyond a limited circle.²⁹⁾

25) It was held that netizens profited financially by bartering what they had in their computers for having access to music that they wanted: Suwon District Court Decision 2002kahap284 held on Feb. 14, 2003; Suwon District Court Decision 2003gahap857 held on 2003. 10. 24.

26) See Chapter III on “The right of transmission.”

27) Supreme Court Decision 89do702 held on August 27, 1991.

28) National Computerization Agency, Whitepaper on Internet Korea (http://www.nca.or.kr/data_pdf/Whitepaper/Main.html).

29) Suwon District Court Decision 2002kahap284 held on Feb. 14, 2003; Suwon District Court Decision 2003gahap857 held on 2003. 10. 24.

Again, the courts' findings on the amount copied are totally derived from their confusion between reproduction and transmission of music files over P2P networks. It is undeniable that thousands of music files are downloaded and reproduced in netizens' computers with the aid of speedy and interactive transmission of music files over P2P networks. It is also clear, however, that netizens individually make a single copy only and that thousands of copies are made possible by "transmission" over the network. The total amount of photocopies made at the library or video copies made at home may also reach thousands or more. The major difference between digital copies over P2P networks and photocopies at the library or video copies at home is that, while netizens are not only reproducing copies but also transmitting them over P2P networks, consumers of analogue machines at the library or at home may not transmit copies. It is academically and practically worthwhile to discuss whether netizens have infringed upon the transmission right by sharing music over P2P networks. By contrast, as far as the reproduction right is concerned, the personal use exception applies to P2P copies exactly the same way as to photocopies or analogue video copies. Legal implications for P2P copies or MP3 files downloaded to an MP3 player/phone³⁰⁾ are quite similar to those for video copies made by a VCR at home.³¹⁾

With regard to the effect of the use on the market for the copied work, the Copyright Act of Korea does not explicitly mention the market effect as an element. Considering the policy goal of copyright law in providing economic incentives to authors and facilitating wide access to copyright works, however, the Copyright Act is interpreted to presuppose that copying at home or at another similarly limited circle does not harm the market. If home copying did harm the market, the courts would hold such copying as having been done either for profit or beyond home limits. The evidence of market effect in P2P copying is in conflict.³²⁾ Even if some decrease in CD sales is due to the increase in music sharing over P2P networks, the

30) MP3 phones are cellular phones with built-in MP3 player (http://www.kbs.co.kr/1tv/sisa/4321/vod/1316325_1108.html).

31) Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1079 (9th Cir. 1999).

32) CD sales fluctuate: 416 billion won (roughly 350 million dollars) in 1997, 353 billion won in 1998, 380 billion won in 1999, 410 billion won in 2000, 373 billion won in 2001, and 286 billion won in 2002. It is not clear whether the fluctuation is due to copyright infringement or other economic elements.

gist of music sharing subsists not in reproduction of music files but in their transmission over P2P networks. Accordingly, reduced CD sales do not make P2P reproduction illegal but may do P2P transmission which will be discussed in the next chapter.

III. The right of transmission

1. The right of transmission distinguished from distribution

Presuming that personal reproduction of music files by netizens in their computers may be regarded as fair and legal, what matters most to music copyright owners then is transmission of music files over P2P networks, which makes P2P transaction different from photocopying at the library or VCR copying at home. Since the concept of digital transmission is a new one which has appeared in the age of digital technology and internet, it is worthwhile first to see how “digital transmission” is distinguished from distribution or broadcasting under the Copyright Act.

Distribution under the Copyright Act means delivery of tangible copies such as phonorecords or CDs by sale or rental.³³⁾ Clearly, this is not what happens when a work is transmitted over the Internet to a netizen,³⁴⁾ which may rather be regarded as similar to broadcasting.³⁵⁾ Thus, the Supreme Court of Korea has held that, unless there is a right of digital communication separate from the right of broadcasting, transmitting copyright works on a server computer and making them available to the general public by internet communication intended for reception or use at the time and place chosen individually by the public falls into the concept of broadcasting.³⁶⁾ In this context, a new concept of transmission as distinguished from distribution or

33) Section 2, Paragraph 15 of the Copyright Act of Korea.

34) Despite the distinction between distribution and transmission, some courts are still confused and treat them as the same: Suwon District Court Decision 2002kahap284 held on Feb. 14, 2003.

35) “Broadcasting” shall mean the transmission of sounds and images by wire or wireless communication intended for direct reception by the public: Section 2, Paragraph 8 of the Copyright Act of Korea.

36) Supreme Court Decision 2002da66946 held on March 25, 2003.

broadcasting was introduced to the Copyright Act of Korea amended in 2000. “Transmission” under the amended Act of 2000 means the transmitting or making available copyrighted works to the general public by wire or wireless communication intended for reception or use at the time and place chosen individually by the public.³⁷⁾ However, the right of transmission has been granted to authors only and not to sound recording producers nor to performers like popular singers.³⁸⁾

2. The transmission right granted to authors

Given the transmission right granted to authors, it is clear that music copyright owners or their assignees such as Korean Music Copyright Association (“KOMCA”) may prohibit P2P service providers and netizens from transmitting music files. It is worth noting, however, that sound recording producers and performers are not authors but merely neighboring right owners under the Copyright Act of Korea.³⁹⁾ Thus questions arise whether sound recording producers or performers are entitled or not to bring lawsuits against netizens who make personal use of music via P2P transmission. Once personal reproduction of music over P2P network is regarded as fair and legal,⁴⁰⁾ sound recording producers or performers who are not granted the transmission right do not have any further right nor any remedy to prohibit netizens transmitting music. It is also awkward to hold P2P service provider like Soribada as having infringed upon the distribution right granted to sound recording producers and performers.⁴¹⁾ This is simply to distort the concept and balance of the distribution right to satisfy the demands of sound recording producers and performers who, despite the status quo under the current Copyright Act, want to expand their neighboring rights to profit from a new market built up by streaming and P2P technologies. The economic interests of sound recording

37) Section 2, Paragraph 9^{bis} of the Copyright Act of Korea.

38) Section 18^{bis} of the Copyright Act of Korea.

39) Sections 61 through 68 of the Copyright Act of Korea.

40) See the section 2 on “Personal uses and the reproduction right” of the previous chapter II on “Copyright as a bundle of rights.”

41) Suwon District Court Decision 2002kahap284 held on Feb. 14, 2003.

producers and performers in a newly emerging market transformed by new technologies⁴²⁾ must be met, if necessary, not by distorting interpretation of the current statute but by legislation on the transmission right and its limits relating to neighboring right owners.⁴³⁾ The demands for new legislation⁴⁴⁾ are enough to raise doubts about civil liability of netizens for their access to on-line music and, moreover, clearly disprove their criminal liability under the current statute, which will be discussed further in the next chapter. When the legal standard on music transmission is evolving,⁴⁵⁾ criminalization of netizens offends notions of due process and fairness.⁴⁶⁾

IV. A country full of criminals?

1. Netizens subject to criminal liability

Criminal prosecution and consequent possible punishment of Soribada⁴⁷⁾ theoretically means that millions of young netizens might be criminalized too: Once Soribada, a contributory infringer, is punished, it is presupposed under the Criminal Code of Korea that most of the young netizens, direct infringers, are also subject to criminal liability.⁴⁸⁾ Criminalization of both on-line music providers and netizens may

42) Matthew Green, *Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 Ohio St. L.J. 799, at 817 (2002).

43) For a similar view in the US jurisdiction, see Alfred C. Yen, *A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining*, 26 U. Dayton L. Rev. 247, 274-77 (2001).

44) Matthew James Fantaci, *Digital Dilemma: Could the Digital Millennium Copyright Act Have Inadvertently Exempted Napster And Its Progeny From Liability?*, 62 La. L. Rev. 643.

45) See Section 2 on "the transmission right granted to authors" of the Chapter III on "the right of transmission."

46) Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 Boston University Law Review 731, 777 (2003).

47) The criminal prosecution was found as void especially because the public prosecutor failed to make clear who among 4.5 million Soribada users, when, and how, downloaded what music files via Soribada network: Seoul District Court Decision 2001godan8336 held on May 15, 2003.

48) Section 32 of the Criminal Code provides that those who aid and abet the commission of a crime by another

be possible especially because, unlike in the U.S.,⁴⁹⁾ all of the copyright infringers are subject to criminal liability under the Copyright Act of Korea⁵⁰⁾ which makes not only reproduction and distribution but also performance, display, and translation into a punishable crime.⁵¹⁾ For the past half century, criminal sanctions against copyright infringement have dramatically increased and expanded.⁵²⁾ Now, the statutory provision is so broad that millions of minor offenders or innocent netizens⁵³⁾ could be criminalized. Accordingly, copyright protection granting civil remedies for the sound recording industry may also make Korea a country full of young criminals or criminal consumers.⁵⁴⁾ The cost of criminalizing millions of netizens may, however, outweigh its utility value such as deterring copyright infringement for the benefit of the music

person shall be punished.

49) Criminal punishment is limited to reproducing or distributing copyrighted work within a 180-day period whose total value is more than \$1000: 17 U.S.C. § 506(a)(2), 18 U.S.C. § 2319. And, prosecutions under the criminal copyright statute have been relatively infrequent and are usually reserved for the most egregious violations in the U.S.A.: Sharon B. Soffer, *Criminal Copyright Infringement*, 24 *Am. Crim. L. Rev.* 491, 491 (1987).

50) Section 97^{quinqies} of the Copyright Act of Korea provides that any person who has infringed the author's property rights or other property rights protected under the Copyright Act by means of reproduction, distribution, transmission, performance, broadcasting, display, or making a derivative work shall be punishable by imprisonment for a term of not more than five years or a fine of not more than fifty million won, or shall be punishable by both imprisonment and a fine.

51) The extremely broad coverage by the criminal provision of the Copyright Act of Korea was well demonstrated in Supreme Court Decision *95do1288* held on March 22, 1996 where a Karaoche operator purchased a Karaoche machine which had stored hundreds of pop songs "with" authorization of the pop song copyright owners and allowed its customers to sing along with the aid of the Karaoche machine, and the Supreme Court of Korea held the Karaoche operator as having had committed a crime of copyright infringement by performing or making available the pop songs to the general public via Karaoche machines.

52) In 1957 when the first Copyright Act of Korea became effective, unauthorized publication was punishable up to one year of imprisonment (Section 71 of the Copyright Act 1957). Now, under the current statute, copyright infringement is punishable by imprisonment for up to five years (Section 97^{quinqies} of the Copyright Act 2003). Since the Supreme Court held in its Decision *97do1769* held on March 26, 1999 that unauthorized distribution was not included in the punishable infringement under the then effective statute, there was made an amendment to the statute to the effect that unauthorized distribution as well as reproduction, performance, display, transmission, and broadcasting now constitutes infringement.

53) Just to illustrate the number of subscribers of the most popular music sites, a P2P service provider, Soribada, has 4 million and a streaming service provider, BugsMusic, has 5.5 million subscribers: National Computerization Agency, *Whitepaper on Internet Korea* (http://www.nca.or.kr/data_pdf/Whitepaper/Main.html).

54) Similar views are presented with regard to the U.S. See, for example, Aaron M. Bailey, *A Nation of Felons?: Napster, the Net Act, and the Criminal Prosecution of File-Sharing*, 50 *Am. U. L. Rev.* 473, 481 (2000).

industry, especially because of the potential for overdeterrence: Using the criminal law to combat internet piracy would present a real risk of chilling important, socially beneficial activity of enjoying music over the internet.⁵⁵⁾

It has already been submitted in the previous chapters that sound recording producers should not be granted civil remedies against netizens under the current copyright statute unless there is a legislative change to the neighboring rights.⁵⁶⁾ Unless and until some legislative changes are made to reflect the difference between civil and criminal remedies and the difference between commercial P2P service providers and netizens,⁵⁷⁾ doubts will be raised against criminalization of netizens too. This chapter and the next one will show that, even if netizens are interpreted as infringing upon copyright and neighboring rights, criminalization of netizens is not desirable nor efficient to achieve the policy goal of the copyright statute, i.e., promoting the advancement of science and the arts.

2. Efficacy of retribution

The vast majority of people believe that murder and theft are morally wrong and that the government is justified in making them criminal. Is the same true to netizens having access to on-line music? The netizens who commit copyright infringement without a commercial motive often believe that what they are doing is not theft.⁵⁸⁾ When netizens do not regard music sharing via P2P or streaming network as morally wrong,⁵⁹⁾ it is doubtful whether criminalization of netizens is justified.⁶⁰⁾ Moreover,

55) Adverse effects of too broad a criminalization were also raised in the field of corporate crimes: Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *J. Legal. Stud.* 833 (1994); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 *N.Y.U. L. Rev.* 687 (1997).

56) See Chapter II on “Copyright as a bundle of rights” and Chapter III on “the right of transmission.”

57) While criminalization of the self-enriching facilitation of copying by file sharing services may be justified, the moral consensus that would condemn personal use is far from robust and the harm rationale provides only an equivocal basis for criminalization: Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 *Boston University Law Review* 731 (2003).

58) Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 *Washington University Law Quarterly* 835, 856 (1999).

59) Surveys indicate that well over half of those polled do not view downloading music as immoral and over

considering that the netizen who copies a copyrighted work for free never would have purchased a copy anyway, criminalization of netizens may not be justified.

Criminalization of consumers for their access to music runs into opposition, particularly regarding internet access, which many feel is ruled by libertarian ideals.⁶¹⁾ Criminal sanctions against internet access are also in conflict with the existing criminal penalties against property crimes in Korea: While theft of a tangible property like ordinary chattel is a punishable crime, Supreme Court of Korea has held that mere access to information does not constitute any crime under the current Criminal Code.⁶²⁾ There may be a legislative proposal to the effect that digital property or information should be treated equally as tangible property in dealing with theft under the criminal statute. It is also clear, however, that, unless and until such a legislative proposal turns into an effective statute, merely having access to digital property or information does not constitute theft under the current law. Likewise, netizens' access to digital music files may not be punishable until and unless the distribution right is granted to sound recording producers in the amended copyright statute.

Criminal sanctions or threat thereof may also motivate otherwise law-abiding netizens to circumvent copyright enforcement or at least to feel increasing sympathy for copyright infringers.⁶³⁾ The antipathy against criminal sanctions, especially when

40% of those polled believe that downloading music through Napster and other services should be legal: Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 *Boston University Law Review* 731, 767 (2003). See also Grace J. Berge, *The Napster Case: The Whole World is Listening*, 15 *Transnat'l Law* 259 (2002).

60) Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 *Hastings L.J.* 167, at 238 (2002). See also a research paper made by the Program Deliberation & Mediation Committee of Korea at <http://www.pdmc.or.kr/webzine/200312/research.htm>.

61) Assaf Hamdani, *Who's Liable For Cyberwrongs?*, 87 *Cornell L. Rev.* 901 (2002) at 909; Jessica Litman, *Convergence of Paradigms and Cultures: War Stories*, 20 *Cardozo Arts & Ent LJ* 337 (2002).

62) It was held in Supreme Court Decision 2002do745 held on July 12, 2002 that an employee who had access to his company's computer and printed out some industrial designs for the benefit of the company's competitor was not punishable for his theft of information under the Criminal Code although his activity may be punishable for trade secret infringement if the information falls into "trade secret" under the Unfair Competition Prevention and Trade Secret Protection Act of Korea.

63) Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More like a Book*, 48 *Vill. L. Rev.* 13 (2003) at 18.

merged with anti-US sentiments, invalidates the efficacy of retribution.⁶⁴⁾ Historically, since intellectual property reforms in Korea were made partly in accordance with trade negotiations between Korea and the U.S., intellectual property protection and criminal sanctions in particular had faced harsh resistance.⁶⁵⁾ Actually, copyright reforms in the middle of the 1980s have led to a substantial increase in criminal sanctions against copyright infringement,⁶⁶⁾ which raised concerns about the abuses of criminal procedure.⁶⁷⁾ In this context, the music industry, foreign as well as domestic, must pay close attention to the psychological backlash caused by suing netizens or labeling them as criminals.⁶⁸⁾ Eventually, criminalization of netizens may be undermining the perceived legitimacy of the copyright law itself among the copyrighted work consuming populace. One way to assure that the criminal provisions are not overly broad is to employ the heightened standard of willfulness or a mens rea requirement.⁶⁹⁾

V. The mens rea requirement of copyright crimes

A criminal sanction is imposed only because the offender deserves it or because she/he is blameworthy. Thus, criminalization requires both a guilty mind as well as a bad act. Historically, as the distinction between tort and crime appeared, that is, as

64) Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West, Intellectual Property and Ethics* (London, Sweet & Maxwell, 1998), p.198.

65) James D. Thayer, *Market Based Anti-American Sentiment: A Study of Non-Resident Copyright Protection*, 3 *Journal of Korean Law* 193 (2003).

66) The number of cases where defendants were punished changed from almost none to 15 since the copyright reforms in the 1980s as the following statistics on the Supreme Court Decisions show:

		Year								Total
		65-70	71-75	76-80	81-85	86-90	91-95	96-2000		
Copyright Infringement	Cases where defendants are punished	0	0	1	0	0	7	8	16	
	Cases where defendants are not punished	0	0	1	0	1	1	7	10	

67) For example, 1807 criminal complaints were filed by copyright owners with the Public Prosecutor's Office in 2002 and only 204 cases were indicted.

68) Grace J. Bergen, *The Napster Case: The Whole World is Listening*, 15 *Transnat'l Law.* 259, at 273 (2002); Fred von Lohmann, "New music rules are needed" at <http://www.dailyprincetonian.com/archives/2003/04/14/opinion/7930.shtml>.

69) Note, *Criminalization of Copyright Infringement in the Digital Era*, 112 *Harv. L. Rev.* 1705 (1999).

the function of compensating victims became distinguished from the function of imposing punishment, the requirement of *mens rea* took on increasing importance.⁷⁰⁾ Although the Copyright Act of Korea simply provides what the bad act is in criminal punishment,⁷¹⁾ the Criminal Code of Korea, which applies to all crimes including the crime of copyright infringement, clearly states that an act performed through ignorance of the facts which comprise the constituent elements of a crime shall not be punishable but only punishable when prescribed by law.⁷²⁾ Accordingly, under the Copyright Act in conjunction with the Criminal Code, netizens are free from criminalization unless they have infringed with criminal knowledge or willfulness.⁷³⁾ Yet, what it means to be a willful infringer is not defined in the Copyright Act. Perhaps due to this lack of definition, willfulness, as interpreted by the courts, seems to mean different things. Judicial decisions on copyright crimes will first have to be reviewed and, then, the importance of the *mens rea* requirement will be discussed in light of netizens' access to on-line music.

1. Willfulness in practice

Basically, the Supreme Court and other lower courts of Korea do not seriously discuss the *mens rea* requirement of copyright crimes but simply see if there was copyright infringement or not.⁷⁴⁾ The lack of concern over the *mens rea* requirement,

70) Encyclopedia of Crime & Justice, 2nd Edition, Vol. 3 (Gale Group, 2002), p.996.

71) Sections 97 ^{quinquies} and 98 of the Copyright Act of Korea.

72) Sections 13 and 14 of the Criminal Code of Korea.

73) The *mens rea* requirement is explicitly prescribed in Section 98 (6) of the Copyright Act of Korea exempting from criminal liability those who negligently did not know his activity contributed to or aided copyright infringement. Similar provisions are also found in Section 107 of the Copyright, Designs and Patents Act 1988 of the United Kingdom and Section 506 of the Copyright Act of the U.S.A. (17 U.S.C. § 506) as confirmed in United States v. Moran, 757 F. Supp. 1046, 1049-51 (D. Neb. 1991).

74) Supreme Court Decision 91do2101 held on June 23, 1992; Supreme Court Decision 95do1288 held on March 22, 1996. Although the Supreme Court discussed *mens rea* requirement and denied criminal complaints in Decision 82do1799 held on December 26, 1984, the factual finding in the case clearly showed that there was no copyright infringement at all and, thus, discussion of the *mens rea* requirement was not necessary nor worthwhile in the case. When a co-owner of a design right exploited his design without having his co-ownership registered with the Korean Industrial Property Office, although the unregistered co-owner was not able to "own" a share of the design right under the Designs Act of Korea, the unregistered co-owner had at least an implied license to exploit the design in accordance with his share and, accordingly, no infringement at all.

in conjunction with the extremely broad coverage by the criminal provision of the Copyright Act of Korea, has led the courts to hold innocent people as having committed “copyright crimes” even though they were not aware of anything wrong or of any crime in the course of their ordinary business. For example, where a Karaoche operator purchased a Karaoche machine in which hundreds of pop songs had been fixed “with” authorization of the pop song copyright owners and simply provided its customers with the machine to enable them to sing along with the aid of the machine, the Supreme Court of Korea did not pay any attention at all to the issue of whether the Karaoche operator was aware and willful of copyright infringement but simply held that playing the machine to help customers to sing constituted a crime of unauthorized performance under the statute.⁷⁵⁾ It did not matter to the Supreme Court whether ordinary Karaoche operators did not know and could not know copyright infringement at all. It only mattered, and was enough, to the Supreme Court that enabling pop songs to be perceived or otherwise communicated to its customers with the aid of the machine was interpreted as “performance” under the statute. Even if so, was not the copyright owners able to enforce their civil remedies against Karaoche operators? Just as the tax authority or other Government agency may seize a tax payer’s property such as automobile for auction in cases of non-payment of tax,⁷⁶⁾ copyright owners may also petition to the court for seizure of Karaoche machines to enforce their civil remedies. When civil remedies work perfectly well for copyright owners, why does the copyright statute allow copyright owners to bring criminal complaints as well against innocent non-payment of royalties? As long as copyright owners are able to rely on efficient civil remedies against on-line music service providers who are alleged to make profits from copyright infringement, criminalization of innocent netizens could certainly provide copyright owners with much more than copyright owners need. If the infringers are innocent, how could criminalization of innocent infringers contribute to the policy goal of either deterrence or retribution under the criminal law? For the lay person or netizen, knowing whether an internet access constitutes infringement can be extremely difficult. Given the fact that, there is no requirement of financial gain⁷⁷⁾ or

75) Supreme Court Decision 95do1288 held on March 22, 1996.

76) Sections 28 and 196^{ter} of Local Tax Act of Korea.

77) The “financial gain” requirement for a finding of criminal copyright liability has been deleted from the US

minimum value for copyright crime⁷⁸⁾ under the Copyright Act of Korea, the standard of willfulness must be regarded as high.

2. Confusion with mistake of law

The mens rea requirement becomes extremely difficult to discuss when lack of willfulness is confused with mistake of law. Since criminal knowledge of copyright infringement presupposes understanding the basic concept of copyright law, the lack of willfulness in copyright crimes is sometimes confused with mistake of law. For example, when the defendant made single copies of validly purchased videocassettes, and rented out copies instead of originals, to insure against vandalism, it was clear that the defendant did not know of copyright infringement, that making unauthorized copies was copyright infringement, and that the defendant's lack of criminal willfulness was due to his ignorance of law or mistake of law.⁷⁹⁾ Does criminal law presume generally that every person knows the law and, thus, that ignorance of law or mistake of law is no defense to criminal sanctions?

Under the Copyright Act of Korea, when a person commits a crime through the misunderstanding that his act does not constitute a crime under existing law, he shall not be punishable only when the misunderstanding is based on reasonable grounds.⁸⁰⁾ The Supreme Court of Korea interprets the concept of misunderstanding very narrowly and, thus, does not excuse the offender on the grounds of the lack of willfulness derived from ignorance of law or mistake of law.⁸¹⁾ It is highly likely, therefore, that the Supreme Court will not change its view on the willfulness of netizens even if netizens view their access to on-line music as a fair use contrary to

Copyright Act. See 17 U.S.C. § 506(a)(2).

78) 17 U.S.C. § 506(a)(2) .

79) In *United States v. Moran*, 757 F. Supp. 1046, 1049-51 (D. Neb. 1991), the District Court held that the defendant did not act willfully within the meaning of statute.

80) Section 16 of the Criminal Code of Korea.

81) Although not in a copyright case, where an offender consulted a lawyer over the descriptiveness of the disputed trademark "Bio Tank" registered for water bottles and used a similar mark in accordance with the lawyer's approval, the Supreme Court of Korea held that, despite the fact that the offender did not know trademark infringement due to the lawyer's opinion, the offender's misunderstanding of trademark law was not capable of excusing the offender: Supreme Court Decision 95do702 held on July 28, 1995.

the court's view. Given the fact that most netizens are not acquainted with copyright law at a sophisticated level⁸²⁾ and that even copyright lawyers are divided in their views on netizens's access to on-line music, questions may arise whether it is possible to blame netizens for their innocent use of music despite the alleged misunderstanding of law by netizens.⁸³⁾ When netizens are not sure what their legal duties are during the course of internet access, criminal sanctions may not be efficient to deter any violation of such duties. Moreover, since netizens have little experience with the complexities of copyright law such as legal implications of RAM copies made by streaming technology, criminalization of such ignorant and innocent netizens would impose unreasonably high duties upon netizens and thus present a real risk of chilling socially beneficial activity of enjoying music over the internet.

VI. Conclusion

Strengthened protection of copyright has been made possible partly by increasing and expanding criminal sanctions against copyright infringement. Too broad or severe criminal sanctions would, however, stifle appropriate level of exploiting copyright works and consequently contradict the policy goal of copyright law itself, i.e. promoting the advancement of science and useful arts. The same risk may apply to criminalization of netizens for their access to on-line music. Especially when netizens do not understand copyright law at a sophisticated level or when they do not regard internet access to music as copyright infringement, it would be difficult to punish such netizens as "willful" infringers. Making a mistake in analyzing legal implications of internet access may be blameworthy for a lawyer but it should not turn an ignorant netizen into a criminal. And, also, in contrast to self-enriching facilitation of copying by file sharing or streaming services, innocent netizens' access to music files over the internet should not be subject to criminal liability. In

82) It is partly because of the lack of criminal intent or ignorance of law that, while courts tried and eradicated Soribada and Napster, millions of netizens still have access to some newer, better file sharing technology like Soribada II and Morpheus.

83) Hoon Jo, "Strafrechtliche Bedeutung von File Sharing via Internet," SNU Center for Law & Technology Monthly Workshop Paper 2003-4, at 123 (2003).

this context, the courts should pay close attention to a defendant's intent to infringe as well as his intent to copy or transmit music files and, also, to the distinction between a lack of willfulness and a mistake of law.

Criminalization of netizens presupposes that there is infringement of copyright, that in turn requires discussion on which among a bundle of rights matters in netizens' access to music. As far as the reproduction right is concerned, the personal use exception under the copyright statute may apply to downloading or RAM copies of music files in a computer similar to reproducing music files in MP3 players. What makes downloading music files in a computer distinguishable from reproducing music files in MP3 players is the potential for subsequent transmission to other computers in the former. The Copyright Act of Korea has explicitly granted the transmission right to authors like music composers but not to sound recording producers or singers. It appears that, despite the difference between the Korean and the U.S. statute on the transmission right, judicial courts of Korea have made wrong decisions in Soribada and BugsMusic by following the U.S. court decisions on Napster.

Despite the sound recording producers' battle with on-line music, it is clear that internet technologies like streaming and P2P are poised to transform the music industry from off-line into on-line irreversibly. It is extremely difficult to figure out how to maximize the sum of interests of relevant parties in the newly emerging on-line music market. Starting from legal battles, sound recording producers and on-line service providers will have to search for contractual and technological solutions. When contractual approaches fail, which is highly probable, copyright statutes will have to be amended to provide for a new statutory license on reasonable terms. Criminalization of netizens under the current statute would only derail otherwise successful efforts to search for contractual or legislative solutions.