

THE “THREE STRIKES” POLICY IN KOREAN COPYRIGHT  
ACT 2009: SAFE OR OUT?

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ABSTRACT

*Korea has grown to be one of the Internet powers in a short period. Because of insufficient copyright protection, Korea recently revised the Korean Copyright Act to reinforce protection of copyright and promote sound distribution of copyrighted works. The new law allows the Minister of Culture, Sports and Tourism to issue orders and the Korea Copyright Commission to issue recommendations. Orders and recommendations are distinguished by the subject of the issuance and the legal force. Orders and recommendations enable online service providers to delete or stop transmission of illegal reproductions, give warning notices to infringers, or suspend the account of repetitive infringers. The “three strikes” policy is controversial and has raised several constitutional concerns. First, the suspension of the repeat infringer’s account may be an unconstitutional violation of the infringer’s freedom of speech. Second, an executive agency’s decision to issue a correction order could be an unconstitutional violation of the separation of powers. The final concern is that the policy violates the principles of due process. This Article examines the “three strikes” policy, the constitutional concerns regarding the policy, and possible policy revisions for more effective copyright protection.*

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## INTRODUCTION

Since the advent of the Internet, modern society has drastically changed from print-based to digitally powered. Just as the printing press revolutionized its era, the Internet has exponentially become the most interactive, yet inexpensive, communication medium in history. On one hand, it is undeniable that the Internet has enlarged the extent of freedom of speech with unprecedented characteristics of interaction, diversity, and openness. On the other hand, the Internet facilitated the distribution of unauthorized copyright reproduction. Such copyright infringements have become easier and more frequent, further worsening the self-inflicting and self-perpetuating damages from such violations.

Korea is now one of the Internet powerhouses with a high rate of Internet utilization. 77.2 percent of the Korean population over age

three currently use the Internet as of 2009.<sup>1</sup> Illegal reproduction and transmission of copyrighted works have become serious problems in Korea with the rise of new digital technologies such as peer-to-peer ("P2P") and Web-disc services. For prompt and efficient prevention of unlawful online reproductions and transmissions, revision of the Korean Copyright Act was inevitable. The revised bill allows the Minister of Culture, Sports and Tourism ("MCST") to issue correction orders to online service providers ("OSPs").<sup>2</sup> The law enables (1) deletion of illegal reproduction; (2) discontinuance of transmission; (3) warning notices to infringers; (4) suspension of an infringer's account; (5) suspension of an online bulletin board; and (6) granting of correction recommendation powers to the Korea Copyright Commission ("KCC") for OSP self-regulation.

Among the policies mentioned above, suspensions of accounts and online bulletin boards are carried out only if copyright infringements continue after three warnings of such violations. As the name accordingly implies, a so-called "three strikes" policy is carried out before any suspensions are enforced. Countries such as France, Taiwan, and New Zealand have also adopted "three strikes" policies, although the details of each policy may vary. Regardless of such adoptions, Korea's policy remains controversial. For example, critics note that the policy is biased towards protecting copyrights while violating users' fundamental right to freedom of speech.<sup>3</sup>

The validity and constitutionality of the policy are also controversial in Korea. This Article will provide an overview of the "three strikes" policy that was adopted to reinforce protection of copyright and to promote sound distribution of copyrighted works.

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<sup>1</sup> Korea Internet & Security Agency, *Korea Internet White Paper*, KOREA COMMC'NS COMM'N 349 (2010), available at <http://isis.kisa.or.kr/eng/ebook/ebook.html>.

<sup>2</sup> Jeojakkwonbeop [Korean Copyright Act], Act No. 9785, July 31, 2009, art. 133-2 (S. Kor.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=190144](http://www.wipo.int/wipolex/en/text.jsp?file_id=190144).

<sup>3</sup> See Kim Tong-hyung, *New Copyrights Law Alerts Bloggers*, KOREA TIMES, July 26, 2009, [http://www.koreatimes.co.kr/www/news/tech/2009/07/129\\_49084.html](http://www.koreatimes.co.kr/www/news/tech/2009/07/129_49084.html); Kim Tong-hyung, *Upload A Song, Lose Your Internet Connection; New Copyright Law Causes Uproar Among Bloggers, Internet Companies*, KOREA TIMES, April 5, 2009, [http://www.koreatimes.co.kr/www/news/tech/2009/04/133\\_42594.html](http://www.koreatimes.co.kr/www/news/tech/2009/04/133_42594.html).

Furthermore, this Article will explore the significance of the policy within the Korean Copyright Act and several arising issues, including constitutionality.

#### I. MAJOR REVISIONS OF KOREAN COPYRIGHT ACT TO PREVENT ILLEGAL ONLINE REPRODUCTION

The main point of the new Korean Copyright Act is to synthesize and integrate the Computer Protection Act within the Korean Copyright Act, and to introduce correction orders and recommendations on online illegal reproductions. The Korean Copyright Act has been revised several times, keeping pace with global standards.<sup>4</sup> The revision in 1995 was essential for Korea to prepare for the World Trade Organization and the Bern convention and to protect copyright according to international standards.

The World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)<sup>5</sup> and WIPO Performances and Phonograms Treaty (WPPT)<sup>6</sup> were established in 1996 to reinforce copyright infringement protection in response to the rising influence of digital distribution and the Internet. These treaties led to Japan's revision of

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<sup>4</sup> Korea invented the world's first bronze-type printing technology in 1235. Because the government controlled printing, copyright as a private right was not established until 1908 when the Japanese copyright act was adopted. The first Korean Copyright Act was passed in 1957, and there have been seventeen revisions so far. The first revision, in 1986, was designed to meet global standards, as Korea joined the Universal Copyright Convention, by extending copyright protection up to fifty years after death and modifying copyright protection of foreigners. In 1994, changes in domestic and international conditions due to Korea-U.S. intellectual property negotiations and the Uruguay round negotiations resulted in the sixth revision protecting databases as compilation works and extending neighboring copyright protection to 50 years. The eighth revision in 1995 met global standards by reflecting WTO trade-related aspects of intellectual property rights ("WTO TRIPS") and retroactively protecting foreigner's copyright. The latest revision in 2009 provides for the "three strikes" policy.

<sup>5</sup> WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 65 (1997), [http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf).

<sup>6</sup> WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 76 (1997), [http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs\\_wo034.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf).

its copyright statutes in 1997 and 1999 and passage of the Digital Millennium Copyright Act (DMCA) in the United States in 1998.

Korea revised its copyright act in 2000 to comply with this trend, granting a right of transmission to copyright owners and excluding reproduction by public copy machines from immunity for private use reproduction. In preparation for joining the WCT and WPPT, a broad revision in 2006 imposed technical protection obligations for special OSPs (i.e., P2P service providers) and reinforced protection of neighboring rights. The most recent revision in 2009 provides power to delete illegal reproductions, give warning to the infringer, and suspend the infringer’s account and bulletin board to the MCST.

*A. Order to Delete and Stop Transmission of the Pirated Material and Warning Notice*

When the circulation of an illegal reproduction or data-protection-destroying program, or Internet protocol address of an infringer, is detected online, the MCST may take one of three actions: order the OSP to delete the illegal works, stop the transmission, or give a warning notice to the infringer by virtue of its own authority or by report of a relevant claimant.<sup>7</sup>

Prior to issuing such orders, preconsultation with the KCC is required. The purpose of these preconsultations is to prevent the potential for abusive orders and to ensure an order’s legitimacy and adequacy. Moreover, the OSP, as the recipient of such orders, may submit a statement regarding the order. Within five days after receipt of an MCST order, the OSP must report the result of action taken to the MCST. If the OSP does not execute the order, a fine up to ten million won (approximately \$9,000 USD) will be imposed.

*B. Account Suspension Order*

If an infringer receives three warning notices, the MCST may issue an order to suspend the infringer’s account for up to six months.<sup>8</sup> Unlike the “three strikes” policy in France and Britain, the

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<sup>7</sup> Jeojakkwonbeop [Korean Copyright Act], Act No. 9785, July 31, 2009, art. 133-2(1) (S. Kor.).

<sup>8</sup> Jeojakkwonbeop [Korean Copyright Act], Act No. 9785, July 31, 2009, art.

account suspension order in the new Korean Copyright Act does not terminate Internet access itself; instead, it suspends only the violator's account with the OSP. As such, a violator can technically bypass such suspension by creating other OSP accounts. It is important to note that e-mail service of the suspended account is excluded from the target of the order.

Preconsultation with the KCC is also required to issue the order, and the MCST must provide the OSP and the user an opportunity to submit a statement. The OSP must take action within ten days from receipt and also report the result to the MCST. When an account is suspended, the OSP is required to notify the infringer of the account suspension seven days before execution, providing time to secure materials pertaining to the illegal reproduction or transmission. When the OSP does not execute the order or notify the infringer of the account suspension, a fine up to ten million won will be imposed.

### *C. Online Bulletin Board Service Suspension Order*

Various types of online bulletin boards exist within Web ports and Web-disc services (e.g., forums, blogs, and databases). If an entire OSP were shut down because of a copyright infringement on only one bulletin board, this would be over-regulation. Therefore, a balancing test must be conducted to suspend bulletin board services. On the other hand, it is nearly impossible to police every bulletin board to search out and delete every illegal reproduction posted online. Because of these competing concerns, the revised Korean Copyright Act calls for a temporary suspension of the bulletin board up to six months when there is clear intent to distribute illegal reproductions.<sup>9</sup>

Bulletin board service suspension orders are issued only for bulletin boards with commercial interests or distributions. General bulletin boards, such as those for an association or community, are excluded from the order's scope. If the intent of the posting is to distribute an illegal reproduction, the MCST may order suspension after consultation with KCC. Just as with an account suspension

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133-2(2) (S. Kor.).

<sup>9</sup> Jeojakkwonbeop [Korean Copyright Act], Act No. 9785, July 31, 2009, art. 133-2(4) (S. Kor.).

order, the OSP and the bulletin board operator have an opportunity to submit a statement. The OSP receiving a bulletin board suspension order must notify the OSP and the relevant bulletin board ten days before suspension to provide time for non-infringing users to secure relevant materials. If the OSP does not execute the bulletin board suspension order or notify the infringer of the suspension, a fine of up to ten million won will be imposed.

*D. Correction Recommendations For Transmitters of Pirated Material*

The most desirable way of reducing illegal online reproductions is for all OSPs and users to respect copyright and utilize copyrighted works in a legal and self-regulating manner. As correction orders impose compulsory obligations and remedies in case of breach, it is impossible to establish copyright orders in a voluntary and productive manner. The revised act provides "correction recommendations" power to the KCC and the OSP to take self-regulating measures before the administration issues a coercive correction order.<sup>10</sup>

When the KCC detects any distribution of illegal reproduction while monitoring an OSP's digital network, the KCC may recommend the OSP to (1) give a warning notice to the infringer, (2) delete or stop transmission of illegal reproduction, or (3) suspend the account of a repetitive infringer. To issue the KCC's correction recommendation, preconsultation with a subcommittee is required. An OSP that received a correction recommendation must report the result of execution to the KCC within five days from the reception in cases (1) and (2), above, and within ten days in case (3).

Because the correction recommendation is literally a recommendation, there is no direct sanction if the OSP fails to take action pursuant to the recommendation. The KCC may ask the MCST to issue a correction order, which does not require KCC preconsultation.

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<sup>10</sup> Jeojakkwonbeop [Korean Copyright Act], Act No. 9785, July 31, 2009, art. 133-3 (S. Kor.).

## II. CONTROVERSY OVER THE CONSTITUTIONALITY OF THE “THREE STRIKES” POLICY

While Korea grew to become one of the Internet powers, copyright infringement became worse due to illegal online reproduction. P2P services, including Soribada<sup>11</sup> (similar to Napster<sup>12</sup> and Grokster<sup>13</sup> in the United States), and other Web-disc services enabled music, television dramas, and movies to be broadly distributed. Such distributions spoiled cultural enterprises and dampened copyright owners’ appetite for creativity. In response, civil and criminal penalties have been imposed in Korea for distribution of illegal reproductions and Web site operators.<sup>14</sup>

Government and Internet enterprises are striving to protect copyright in Korea to foster a fair Internet environment and to create a sound Internet space where rights and responsibilities are balanced. Adoption of the “three strikes” policy in the revised Korean Copyright Act is also an expression of Korea’s strong will and determination to eradicate illegal reproductions. However, the constitutionality of suspension orders for accounts and bulletin boards, based on the “three strikes” policy, has been controversial. Therefore, an examination of whether the “three strikes” policy is constitutional in Korea is useful when considering the adequacy and operational direction of the policy and deciding the aim of copyright protection.

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<sup>11</sup> Soribada, which is referred to as the Korean version of Napster, is a free MP3 sharing P2P program and the name of a free MP3 sharing website. Copyright owners sued Soribada for infringement of copyright because Soribada enabled users to illegally download MP3 files for free. The Korean Supreme Court recognized Soribada’s civil and criminal liability. *See* Supreme Court [S. Ct.], 2005Da11626, Jan. 25, 2007 (S. Kor.); Supreme Court [S. Ct.], 2005Do872, Dec. 14, 2007 (S. Kor.)

<sup>12</sup> *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

<sup>13</sup> *See* MGM Studios, Inc. v. Grokster Ltd., 545 U.S. 913 (2005).

<sup>14</sup> Cases that found P2Ps and Web-disc service providers civilly and criminally liable include: Supreme Court [S. Ct.], 2005Da11626, Jan. 25, 2007 (S. Kor.); Supreme Court [S. Ct.], 2005Do872, Dec. 14, 2007 (S. Kor.); Seoul High Court [Seoul High Ct.], 2006La1245, Oct. 10, 2007 (S. Kor.); Seoul Central District Court [Dist. Ct.], 2008Kahap968, Aug. 5, 2008 (S. Kor.); Seoul Central District Ct. [Dist. Ct.], 2008Godan3683, Feb. 12, 2009 (S. Kor.).



*A. Freedom of Speech*

The key issue of the constitutionality of the “three strikes” policy is whether the suspension of an Internet account or bulletin board service causes excessive infringement on freedom of speech.<sup>15</sup> Since Internet access in a digital society is within the area of freedom of speech, is it then reasonable to restrict Internet access to protect copyright owners?

The revised Korean Copyright Act is the mediated result between competing forces of free speech and copyright protection. The main purpose of the correction order under the Korean Copyright Act is to discontinue infringement by heavy uploaders; it does not target casual infringers. Regulating account and bulletin board suspensions objectively within the maximum time frame precludes potential abuses. An account suspension order can be imposed for up to six months after three warnings or receipt of a discontinuance order. A maximum suspension of one month occurs for a first offense, up to three months for a second offense, and from three to six months for a third offense.<sup>16</sup> Thus, given the current number of deletion or suspension orders issued, there should be at least three times the number of warnings.

The goal of account suspension under the revised Korean Copyright Act is not to stop Internet usage, but to regulate a particular OSP’s account (excluding e-mail service) and conduct targeted enforcement. An infringer can still create new accounts on the same or other OSPs and may still conduct Internet searches and receive and send e-mails, as long as a user login is not necessary.<sup>17</sup>

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<sup>15</sup> 1987 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21 (S. Kor.) (stating that “[a]ll citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.”); 1987 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21 (S. Kor.) (providing that “[I]ncensing or censorship of speech and the press, and licensing of assembly and association shall not be recognized.”).

<sup>16</sup> Jeojakkwonbeop Sihaengnyeong [Copyright Act Enforcement Decree], Presidential Decree No. 22003, Jan. 27, 2010, art. 72-3 to -4 (S. Kor.).

<sup>17</sup> Jeojakkwonbeop [Korean Copyright Act], Act No. 9785, July 31, 2009, art. 133-2(4) (S. Kor.); MINISTRY OF CULTURE, SPORTS AND TOURISM, COMMENTARY ON NEW COPYRIGHT ACT 75 (2009), <http://www.mcst.go.kr/web/notifyCourt/notice/mctNoticeView.jsp?pCurrentPage=1&pSeq=4834> (then follow “copyright.

Bulletin suspension orders are not targeted at general bulletin boards; instead, they are focused on bulletin boards with commercial interests and those that promote illegal infringement, such as Web sites promoting illegal downloads and P2P service. General Internet portal sites such as forums, blogs, and personal homepages are not affected by an order. This limitation on targets is also a measure to balance copyright and freedom of speech.<sup>18</sup>

In sum, correction orders based on the “three strikes” policy properly balance the copyright act and freedom of speech, thereby hindering an unconstitutional finding. The new law is essentially constitutional despite some opposition.

### *B. Separation of Powers Between Branches of Government*

A second issue regarding the constitutionality of the “three strikes” policy is whether giving power to an executive agency, instead of to the judiciary, to determine the presence of copyright infringement and issue corrective orders violates the separation of powers between the two branches.

Issuing judgment and relief from illegality are roles of the judiciary, but in Korea the MCST and KCC decide whether particular conduct violates copyright and whether to issue correction orders or recommendations.<sup>19</sup> To preserve the separation of powers, the new law imposes an administrative fine rather than a retributive sanction. This avoids over-extending the power of the executive and, therefore, preserves the constitutionality of the “three strikes” policy.

### *C. The Principle of Due Process*

Before issuing account and bulletin board suspension orders, the revised law provides procedural protections to safeguard the consti-

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pdf” hyperlink).

<sup>18</sup> Dae-Hee Lee, *Copyright Protection and Promotion of Fair Use Under the Amended Copyright Act*, 23 COPYRIGHT Q. 45, 50 (2009) (on file with author and Dae-Hee Lee, Korea University College of Law, it-law@korea.ac.kr).

<sup>19</sup> Copyrights are enforced by a judicial copyright police force established on September 14, 2008.

tutionally guaranteed principle of due process.<sup>20</sup> In particular, the new law imposes notice and hearing requirements to protect procedural due process.

First, the revised law provides the KCC with a consultation phase and gives each substantial party an opportunity to submit a response and documentation before issuance of any order. In addition, when issuing a correction order, the enforcement agency must consider recidivism of the infringer’s identity, amount of reproduction, type of illegally reproduced work, and availability of substitutions.<sup>21</sup>

When issuing a bulletin suspension order, the KCC must also consider: the purpose of the bulletin (i.e., whether it is profit-making), the function and utilization of the bulletin, the number of bulletin board users, and the component ratio of illegal reproduction.<sup>22</sup> The OSP and bulletin board operator must have an opportunity to submit a statement. And the OSP receiving a bulletin board suspension order must notify the OSP and the relevant bulletin board ten days before suspension to provide time for non-infringing users to secure relevant documentation and respond.

These multiple phases—notice, consideration of factors, and opportunities to respond—indicate that the revised law complies with the principle of due process.

### III. SUGGESTIONS FOR THE APPLICATION OF THE “THREE STRIKES” POLICY

Even though the “three strikes” policy may be considered constitutional, some reforms are suggested for making copyright

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<sup>20</sup> 1987 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 12 (S. Kor.) (“All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized, or interrogated except as provided by Act. No person shall be punished, placed, under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedure.”); 1987 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art 12 (S. Kor.) (“Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search.”).

<sup>21</sup> Jeojakkwonbeop Sihaengnyeong [Copyright Act Enforcement Decree], Presidential Decree No. 22003, Jan. 27, 2010, art. 72-3 (S. Kor.).

<sup>22</sup> Jeojakkwonbeop Sihaengnyeong [Copyright Act Enforcement Decree], Presidential Decree No. 22003, Jan. 27, 2010, art. 72-4 (S. Kor.).

protection more effective. These reforms are an effort to intervene early with known infringers, rather than wait for the “third strike,” before taking action.

First, preventive education about the cost of copyright infringement and the lawful alternatives to infringement could be provided rather than correction orders for those who have received warnings. The goal would be to intervene early to prevent future repetitive infringement. It is still always an option to issue a correction order if an infringer continues to commit violations in the face of these preventative measures. But with the pressure of past warnings and the threat of future retribution, coerced education and training could expose bad actors to lawful alternatives to infringement.

Furthermore, it is recommended that the prosecution in-service considers dismissal of accusations against minor first offenders and stays of prosecution of infringers who complete copyright education and training. Such training and education opportunities are currently available for minor copyright infringers who are not involved in commercial activity. Such programs have been developed in Korea in response to concerns about indiscreet enforcement. For example, reckless accusations of infringement have been attributed to several suicides amongst Korean youth. In this context, preventive education and training and measured enforcement copyright laws are necessary for a rational and effective “three strikes” policy.

In sum, the government’s enforcement activities should focus on those repetitive and habitual cases that have the greatest negative effect on copyright rights. The participation of a judicial official should be considered during the judgment process. The threat of future sanctions can be leveraged to prod repeat infringers into a preventative education and training program designed to strike at the underlying reasons such infringers violate Korean law.

#### CONCLUSION

To date, no correction orders have been issued under Korea’s new “Three Strikes” policy. Instead, KCC has issued correction recommendations to P2P and Web-disc service providers. Those providers have accepted the KCC’s recommendations and have voluntarily deleted illegal copyrighted materials to avoid the issuance of correction orders. In the case of Internet portal companies, only

one Internet forum received a correction recommendation. In accordance with the policy considerations underlying the executive enforcement decrees, correction orders have not been recklessly issued despite initial concerns about constitutional violations. Nevertheless, there continues to be controversy regarding the constitutionality of correction orders. Left-leaning civil organizations have publicly expressed an interest in filing a constitutional complaint when a relevant case arises. Therefore, only the constitutional court may decide whether the "three strikes" policy is ultimately constitutional or not.

Meanwhile, copyright law remains a basic fence of protection for creators and an engine for freedom of speech. The new Korean Copyright Act is the result of the effort to balance these rights and freedoms. While this act has been effective, there is room for improvement. For example, administrative bodies must not issue reckless correction orders for the sake of convenience or efficiency. Instead, such orders should be used to prod infringers to take corrective action before multiple cases of infringement occur. To do otherwise risks suppressing Korea's inalienable right to freedom of speech. The "three strikes" policy on repetitive copyright infringement should therefore be enforced carefully and thoughtfully, and should be supplemented with user training and education, technical protection, and control of infringed materials.