

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY¹

Special 301 recommendation: IIPA recommends that South Korea remain on the Priority Watch List for 2004.

Overview of key problems/achievements: Korea leads the world in broadband penetration, and its citizens are among the most Internet-savvy in the world; yet its digital marketplace in copyrighted works is plagued by piracy and much of its legal infrastructure is outmoded for a world of e-commerce. Piracy levels are excessively high across the board. Korea modernized its laws in 2003, but big gaps remain, especially in legal tools for fighting online music piracy and circumvention of technical protection measures. Treatment of temporary copies and exceptions for libraries are other main problem areas. Korea acknowledged resurgent piracy of audio-visual materials based on false licensing documentation, and enacted a framework for restoring an effective response to it, but the new system must be quickly and completely implemented. In the absence of strong government leadership, the book piracy situation continues to deteriorate, and video piracy continues unabated despite vigorous enforcement efforts by the government. Progress was made against piracy of business software applications by corporate and institutional end-users; these enforcement efforts should be sustained. Anachronistic screen quotas still constrain access of U.S. movie producers and distributors into the Korean market.

Actions to be taken in 2004

- Amend Copyright Act to give producers control over all digital dissemination of their sound recordings, and align Korean law with global minimum standards contained in the WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT), as well as TRIPS.
- Implement reforms empowering the Korean Media Review Board to deny applications from those who lack rights to distribute audio-visual titles in Korea and to revoke previous approvals procured by fraud, in a transparent system that is easier for foreign right holders to use.
- Crack down on widespread book piracy, enlist university leadership in the campaign, and impose deterrent sentences on book pirates.
- Continue and increase enforcement efforts against audio-visual piracy, with special emphasis on a nationwide crackdown on street vendors.
- Step up enforcement against online piracy.
- Building on recent progress, improve transparency in enforcement against end-user business software piracy.
- Phase out screen quotas.

¹ For more details on Korea's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

SOUTH KOREA
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003²

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	40.0	20%	27.0	25%	25.0	25%	20.0	20%	20.0	20%
Records & Music	3.5	20%	6.9	20%	4.0	14%	7.0	19%	10.0	20%
Business Software Applications ³	NA	NA	285.9	50%	100.4	48%	177.2	56%	118.9	50%
Entertainment Software ⁴	248.4	36%	381.0	36%	487.7	63%	157.0	90%	119.0	63%
Books	38.0	NA	36.0	NA	35.0	NA	39.0	NA	39.0	NA
TOTALS⁵	NA		736.8		652.1		400.2		306.9	

KOREA MUST RESPOND TO THE CHALLENGES OF DIGITAL AND ONLINE PIRACY

Korea's society and economy continue to embrace the Internet at a record-setting pace. More than 26 million Koreans—some 59 percent of the total population—regularly access the Internet.⁶ Even more remarkable is the rapidly increasing level of access by Korean homes and businesses to high-speed, broadband Internet connections, the huge digital pipes that facilitate transfer of big files containing copyrighted works such as entertainment and business software, sound recordings and audio-visual material. Broadband access, unknown in Korea until 1998, is now enjoyed by over 70% of Korean households, more than 10 million in all.⁷ This is more than double the comparable penetration figure for the United States.⁸ According to the OECD, as of mid-2002 there were 19 broadband subscribers per 100 inhabitants in Korea, nearly double the broadband penetration rate of any other country in the world.⁹ In addition, the number of Koreans with wireless Internet access probably exceeds the number with fixed line access.¹⁰ Furthermore, as a rule Koreans use their Internet access to consume copyrighted

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

³ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will be finalized in mid-2004 and also posted on the IIPA website. BSA's statistics for 2002 were finalized in mid-2003, and revised figures are reflected above.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in 2002 in South Korea were \$572.3 million. IIPA's revised loss figures for 2002 are reflected above.

⁶ National Computerization Agency, Ministry of Information and Communication, *White Paper Internet Korea 2003*, at 25.

⁷ *Id.*, at 20. A more recent estimate puts broadband penetration at 75% of all Korean households. Russell, "Korean Labels Target Individual Downloaders," in *Billboard*, Dec. 20, 2003, at 74 (citing "U.K.-based online research company Point-Topic").

⁸ Russell, "High-Speed Internet Has Advantages for Korea," *Billboard*, Aug. 2, 2003, at AP-1 (35.9% of U.S. web surfers have broadband access).

⁹ "Broadband Access for Business," paper of the OECD Working Party on Telecommunication and Information Services Policies, OECD Paper DSTI/ICCP/TISP(2002)3/FINAL (Dec. 4, 2002), figure 3. For comparison, the broadband penetration rate in the U.S. in June 2002 was under 6 percent, less than one-third the Korean rate. *Id.*

¹⁰ *White Paper Internet Korea 2003*, *supra*, at 27.

materials far more avidly than most other Internet users. For example, while 20-30% of online Americans use the Internet for games and entertainment, almost 80% of Korean Internet users report online consumption of audio and video, almost 53% play games on line, and 41% are engaged in file transfer.¹¹

Based on these statistics, Korea should be leading the way as an online marketplace for materials protected by copyright. Unfortunately, the reality is too often otherwise. Much of the traffic in copyrighted works online in Korea is unauthorized. Indicative of the volume of online piracy in Korea is the fact that its leading peer-to-peer service for infringing transfer of music files, Soribada (the so-called “Korean Napster”) claimed 8 million subscribers before it was shut down, roughly one-sixth of the entire Korean population.¹² Online piracy is a growing feature of the rapidly changing landscape of Korean piracy, which is becoming more predominantly digital, moving online, and migrating to dispersed production formats such as CD-Recordable (CD-R) and DVD-Recordable (DVD-R). Piracy of analog formats—especially books and other printed materials—remains a serious, and in some instances a worsening, problem. But technological and market trends are clearly pushing piracy in a new direction.

Simply put, technological advances are increasing the opportunities for piracy, and pirates are taking full advantage of them. Korea must respond. If it cannot do so more effectively than it has done in the past, then its national strategy to promote the growth of legitimate “digital content/software solutions” as one of its “10 Next-Generation Growth Engines” will be jeopardized.¹³

The experience of the recording industry may be instructive. Audiocassette piracy remains a huge problem: Over 650,000 pirate cassettes were seized in 2003, according to the Recording Industry Association of America (RIAA). But nearly all of these involved local Korean repertoire. Pirate international recordings make up a much higher percentage of the 70,000 units seized in digital formats: conventional CD and CD-R. Commercially produced pirate CD-Rs have overtaken CDs and now account for 70% of digital product seized. This is driven in part by the declining prices of CD-R equipment and hence of pirate product: Typical street prices for pirate CD-Rs are around 6000 Won (US\$5.00). Many CD-R pirates employ small, dispersed operations, and many of these are fed by peer-to-peer (P2P) online networks, or by high-speed links to a wide array of online sites offering pirate sound recordings in MP3 format.

However, the online environment is no longer simply a source of material for pirate physical product. Cyberspace has become the main locus of the piracy problem plaguing the music industry in Korea, far overtaking physical product. Pirate online sites of all kinds continue to proliferate, even after the 2002 shutdown of Soribada (which itself re-opened in a new, more decentralized format.)¹⁴ Indeed, the most successful online music site, Bugs Music, boasted some 14 million subscribers (over one-quarter of the entire Korean population!) and streamed recorded music without authorization until finally partially enjoined from doing so in October 2003.¹⁵ Many of the sites that make infringing MP3 recordings available for download and/or

¹¹ Yi, “A Critical Look at Cyber Korea: Quantity v. Quality,” in Korea Economic Institute, *Cooperation and Reform on the Korean Peninsula* (Washington D.C.: 2002), at 62. Conversely, while 94% of online Americans use the Internet for e-mail, the comparable figure for Koreans is 12%.

¹² Russell, note 7 supra.

¹³ See “Korea Focuses on 10 Next-Generation Growth Engine,” in Korea International Trade Association, *Bridging the Pacific*, Issue XXVII (Oct. 2003), at 1.

¹⁴ Even after the shutdown of Soribada, some 1000 P2P sites in Korea reportedly traffic in pirate sound recordings. Yang, “Music-Sharing Web site faces shutdown,” *Korea Herald* (July 13, 2002).

¹⁵ Seo Jee-yeon, “Online Music Provider Denied Access to Latest Scores,” *The Korea Times*, October 2, 2003.

streaming are for-profit businesses which either charge users for downloading or are supported by advertising on the site. Many of the customers for these sites are college students, and IFPI has even discovered a number of sites located on the servers of Korean colleges and public institutions.

Government enforcement efforts fall far short of grappling with the problem: The Ministry of Culture and Tourism (MOCT) set up an online enforcement team in 2002, but it lacks the resources and the legal tools to take effective action. The criminal prosecution of Soribada is a case in point. After 22 months and hearings before three different judges, the case was dismissed in May 2003 on the grounds that the charges were defective (an appeal of the dismissal is pending). Private enforcement is similarly hampered. In 2003, the international recording industry group IFPI sent over 350 cease and desist notices to sites offering infringing music files, but less than half of these were taken down.

RIAA's estimated piracy rate in Korea of 20%, and its estimate of \$3.5 million in trade losses to the U.S. recording industry, present only a small part of the piracy picture. These estimates do *not* include losses due to online piracy, since the estimation methodology currently in use does not capture these losses. Indeed, the reduced loss estimate compared to 2002 results from the shrinkage of the entire market for physical product, which is being overwhelmed by online piracy. The full impact of online and offline piracy may be gauged from the dire state of the Korean recorded music industry generally: Overall, annual sales value declined nearly 45% between 2001 and 2003.

The entertainment software sector provides further evidence of these piracy trends. There is a strong market for legitimate product for the PC format, including through legitimate online delivery. However, there is also a significant level of illegal downloading and P2P trading of PC games, and of entertainment software in other formats. Pirate games are accessed online via broadband connections and downloaded, including for use as masters for "burn-to-order" operations using CD-R writers. These "burn-to-order" operations, usually carried out by small businesses, are a continuing problem. Factory-produced pirate products are rarely found in the PC game sector nowadays, although they are still a predominant factor in products designed to play on videogame consoles. Piracy of cartridge-based entertainment software remains high, primarily imports of counterfeit and pirate Game Boy products from China, with piracy rates in this format at about 80% in South Korea. The unauthorized use of entertainment software by some Internet cafes (called "PC baanngs") remains a significant problem. Finally, while there is a growing legitimate market for online gaming in Korea, there is also significant non-licensed activity relating to online games. Overall, the Entertainment Software Association (ESA) estimates the value of pirate product in the market (valued at pirate retail prices) at \$248.4 million, based on an estimated piracy rate of 36%.¹⁶

The motion picture industry is also adversely affected by the proliferation of online piracy, especially as carried out through file sharing. In 2003, MPAA identified over 6000 Korean online sites engaged in audio-visual piracy, a 67% increase over 2002.

An effective response to the challenge faced by the changing nature of digital copyright piracy in Korea will require both new legal tools and substantial improvements in enforcement practices. Korea made some important progress on the enforcement front in 2003, with more

¹⁶ This piracy rate figure is a composite across multiple formats for entertainment software. The piracy rate for hand-held games alone is estimated at 80%. The decline in estimated losses, although composite piracy rates remain unchanged, is due to adjustments in estimates of market penetration of various platforms for entertainment software.

active and more transparent enforcement against the piracy of business software applications, but it will need to increase its efforts in order to respond comprehensively to the enforcement challenge. But major aspects of Korea's copyright law structure have failed to keep pace with the transformation of its market resulting from digitization and high-speed access to the Internet. Overhauling these outmoded laws should be a top priority for Korea in its efforts to integrate more closely into the global e-commerce marketplace.

LAW REFORM: MORE MODERNIZATION OF LEGAL TOOLS IS NEEDED

Under Korea's unusual bifurcated statutory system, both the Copyright Act of Korea (CAK) and the Computer Program Protection Act (CPPA) must be updated to meet the challenge of digital and Internet piracy. In 2003, Korea continued to modernize both statutes, but fell well short of what is needed, particularly with regard to the CAK. The most glaring omission was the failure to accord to the producers of sound recordings exclusive rights over the online dissemination of their recorded music.

As the world's leader in broadband penetration, and having a market in which online piracy of sound recordings is already widespread and growing, Korea should have been among the first countries in the world to implement this critical feature of the WIPO Performances and Phonograms Treaty (WPPT). Instead, it now lags behind its neighbors, as well as its peers in global e-commerce, in providing the legal tools needed to promote the healthy growth of the digital marketplace in music. It also remains in violation of its April 2002 pledge to the U.S. government to "submit legislation providing for the full right of transmission for sound recordings."¹⁷

On the eve of the out-of-cycle review announcement, MOCT asked for public comment on proposed legislation on the rights of performers and producers of sound recordings. The proposed legislation would clearly extend to producers the right to control the making available of their recordings through means such as posting copies on websites for downloading on demand. However, it does not address the numerous other methods by which sound recordings may be digitally disseminated to the public, methods which are already in widespread use by pirates in Korea who exploit the country's advanced broadband network. These other means, such as webcasting, streaming, and digital broadcasting must be brought within the scope of the producer's exclusive rights, and must be made available to all producers, regardless of nationality. Only when these legal tools are clearly and comprehensively established in law will it be possible for Korea to begin to convert its current pirate Internet music bazaar into a legitimate marketplace for electronic commerce in sound recordings. The proposed legislation will breed further uncertainty about the scope of exclusive rights; this uncertainty must be dispelled before the National Assembly acts on this legislation. Plugging this huge gap in Korea's legal framework for e-commerce must be a top priority in 2004.

The lack of comprehensive exclusive rights for record producers to control digital transmissions, and the current discriminatory regime under which U.S. record producers and performers are denied any rights under Korean law with respect to broadcasting or other communications, are also creating other problems. MOCT has already taken actions in this area that worry U.S. record labels. It has designated as the collective management agency for the

¹⁷ See USTR Press Release 04-01, at <http://www.ustr.gov/releases/2004/01/04-01.pdf>. See also <http://www.ustr.gov/reports/2003/special301-wl.htm> - korea

licensing of online music services an association in which foreign producers do not currently participate (since the association currently handles remuneration from broadcasters, which U.S. producers are excluded from receiving under Korea's discriminatory laws). The nature and scope of this designation must be clarified, to rule out any possibility that it amounts to imposition of a compulsory license for use of recorded music on the Internet (which would violate international legal norms). This situation also increases the urgency of establishing by law the producer's exclusive right to control online dissemination of sound recordings, free of any requirement for compulsory licensing or collective management, and of stepping up enforcement efforts against Korea's pervasive online music piracy.

Although the sound recording issue was not addressed, the amendments to the CAK that were adopted in April 2003 (and that took effect in July 2003) included several important features. First, a new prohibition was imposed on the production of, or trafficking in, devices aimed at circumventing copy control technology used by rights owners. Second, a new Article 77-2 provides a framework for a "notice and takedown system" under which an Internet service provider would be given some legal incentive to respond promptly and positively to requests from copyright owners to take down or cut off access to sites where pirate activities are taking place. Both these provisions are welcome steps toward a legal regime more conducive to enforcement against online and digital piracy. However, more needs to be done in both areas.

With regard to technological protection measures (TPMs), the CAK amendments fall short by failing to clearly protect technologies (such as encryption or password controls) that manage who may have access to a work. Another insufficiency is that the amendments do not outlaw the act of circumvention itself, but only the creation or distribution of circumvention tools. Thus, a party who strips off protection and leaves the work "in the clear" for others to copy without authorization may escape liability. Other provisions regarding the scope of the prohibitions and their relationship to copyright infringement also need clarification. Until these changes are made, Korea will not have brought its TPM provisions into compliance with the global minimum standards embodied in the WIPO Copyright Treaty (WCT) and the WPPT.

With regard to service provider liability, the proposed amendments leave unclear the consequences (in terms of liability for infringement) for a service provider who fails to promptly take down an infringing site after receiving notice. The amendments also left many critical details to be resolved in an Enforcement Decree, which was issued just before the CAK amendments took effect on July 1. The Enforcement Decree's approach to the mechanics of "notice and takedown" may be too complex and formalistic to accommodate the reality of Korea's pervasive online piracy. In such an environment, a high-volume and highly automated system for sending and responding to notifications of infringement is essential. It remains to be seen whether, in practice, the Enforcement Decree is implemented in a way that accommodates the routine delivery of notifications by e-mail, for example, and how it will be applied to pirate sites offering copies of thousands or tens of thousands of works simultaneously. While the early indications are encouraging,¹⁸ IIPA urges that developments in this area be closely monitored in the year ahead.

IIPA was dismayed to learn how last year's CAK amendments handled the library exceptions contained in Art. 28 of the CAK, which had already been substantially (and in our view, unjustifiably) broadened in 2000. Although draft versions of the amendments would have

¹⁸ For instance, MPAA reported a 98% compliance rate with informal "takedown" notices it sent about Korean pirate sites in the first half of 2003. However, as noted above, the recording industry's experience has been much less positive.

closed some of the loopholes which were introduced by the 2000 amendments to Art. 28, the legislation as enacted actually re-opened some of these gaps, notably in Art. 28(3), which allows Korean libraries to digitize and to transmit to other libraries throughout the country, without permission, any material in their collections that was published more than five years ago and that is not otherwise “sold in digital format.” Some provisions of (and some gaps in) the Enforcement Decree compound this problem and make it more likely that amended Art. 28 will not pass muster under the applicable legal standards contained in the TRIPS Agreement.

For instance, the Enforcement Decree appears to expand the number of libraries in Korea that can take advantage of the exception. The Decree also fails to make the implementation of technological safeguards a meaningful pre-condition for exercise of the Art. 28 exception, and does not clarify what works are subject to the Art. 28(3) exception; how to apply the limitation that the material not be otherwise “sold in digital format”; or when the clock starts running on the requirement that the material have been published more than five years ago.¹⁹ While these shortcomings should all be fixed as quickly as possible, it remains highly questionable whether, even with these administrative corrections, Art. 28 in its current form could satisfy the TRIPS criteria for permissible exceptions to the exclusive rights of copyright owners. Many of the works most clearly targeted by Article 28(3)—including textbooks, English language instructional material, and scientific, technical and medical journals—are actively sold in the market far more than five years after first publication. Article 28(3) could cripple those markets. Korea should be urged to re-examine the expanded Article 28 exception as rapidly as possible, and to scale it back to conform to international standards.

Finally, the 2003 CAK amendments did not address other key shortcomings of the law. IIPA urges that further amendments be adopted, including but not limited to the following²⁰:

- In order to meet the international standards embodied in Article 9.1 of the TRIPS Agreement (incorporating Article 9(1) of the Berne Convention), the reproduction right accorded to works should be made clearer and more comprehensive, by including within the scope of the reproduction right (1) direct or indirect reproduction; (2) temporary or permanent reproduction; (3) reproduction by any means or in any form; and (4) reproduction in whole or in part. Parallel provisions are needed with respect to neighboring rights in order to implement the WPPT. In the networked digital environment, the right to make and use temporary copies of all kinds of works is attaining ever-increasing economic significance, and indeed in some cases will become the primary means of legitimate exploitation of copyrighted materials. Korean law, which stands nearly alone in the world in its rejection of protection for temporary copies, must spell out that this right is encompassed within the copyright owner’s exclusive control over reproduction.
- In line with the recent international trend, Korea should extend the term of copyright protection for works and sound recordings to the life of the author plus 70 years, or 95 years from date of first publication where the author is a legal entity, or in the case of the

¹⁹ For example, because of translation delays, many U.S. texts are not even made available in Korea until well after they are first published. Depending on how it is administered, the “five-year rule” could sharply diminish or even eliminate the time window within which the publisher could hope to sell that title to the Korean library market, before Article 28 becomes applicable.

²⁰ In addition to the issues listed in the text, Korea should amend the CAK to clarify the availability of injunctive relief in copyright infringement cases; make *ex parte* relief available on an expeditious basis; provide fully compensatory and deterrent damages; and make the private copying exception inapplicable to digital copying. Continued inaction on these issues has troubling implications for TRIPS compliance.

neighboring rights of a sound recording producer. In a global e-commerce marketplace, the presence of inconsistently short terms of protection invites piracy and distorts the ordinary flow of copyrighted materials in the market.

- Korea remains in violation of its obligations under Berne Article 18 and TRIPS Article 14.6 to protect pre-existing works and sound recordings for a full TRIPS-compatible term (life of the author plus 50 years, or 50 years from publication for sound recordings and for works whose term is not measured by the life of an individual author). Under amendments to the CAK adopted in 1995, sound recordings and works whose term is measured from publication are only protected back to 1957. For other works whose term is measured by the life of the author, foreign works by authors who died before 1957 are totally unprotected by copyright in South Korea. The CAK should be amended to provide a TRIPS-compatible term of protection to audiovisual works or sound recordings originating in WTO member countries but released during 1954-56, and to other works from WTO member countries whose authors died in 1954-56. These steps should be taken without excessive transition periods, and without disturbing other, noncopyright laws and regulations that are used to combat piracy of this older subject matter.²¹

CPPA Amendments

On July 1, 2003, new amendments to the CPPA took effect. An Enforcement Decree with the same effective date implemented new CPPA provisions (Articles 34-2 and 34-3) on service provider liability for infringement of copyright in computer programs taking place over their networks. Like the corresponding provisions of the CAK Enforcement Decree, the CPPA implementing regulations raise questions about how the statutory “notice and takedown” regime will work in practice, and whether it can accommodate a high volume of notices and responses by e-mail. Developments in this area should be closely monitored during 2004.

While the drafters of the CPPA have been more proactive than their counterparts for the CAK in modernizing the law, some key issues presented by advancing digital network technology still have not been adequately addressed. For example, although the CPPA has included since 1999 some provisions on protection of technological protection measures (TPMs) used in connection with computer programs, these provisions include several broadly worded exceptions (such as circumvention for the purpose of revising or updating programs, or for encryption research) that must be narrowed. Additionally, the application of the CPPA provisions to access control technologies should be clarified; the offering of services that circumvent a TPM should be explicitly outlawed; and civil enforcement of the prohibition should be explicitly provided for.

Despite the incremental progress toward improvement of the CPPA, significant gaps remain. One of the most critical involves Korea’s continued failure to provide specifically for the copyright owner’s control over temporary copying of a computer program. Unless the copyright

²¹ South Korea is already under a separate, bilateral obligation, stemming from the 1986 U.S.-South Korea “Record of Understanding,” to vigorously protect pre-existing sound recordings and audiovisual works against piracy, even if they remain unprotected under the copyright law due to inadequate fulfillment of South Korea’s obligations under Article 18 of Berne and Articles 9 and 14.6 of TRIPS. Since this bilateral agreement entered into force, South Korea has fulfilled this obligation under laws other than copyright (currently, the Audio and Video Works Act, or AVWA), and the administrative guidance issued thereunder. Any move to dismantle this essential element of the South Korean antipiracy apparatus must be swiftly and forcefully opposed by the U.S.

owner's right to control the making of these temporary copies is clearly spelled out, the economic value of the copyright in a computer program will be sharply diminished. Temporary copying must be included within the scope of the exclusive reproduction right in order to fashion within the CPPA a regime of exclusive rights and exceptions regarding computer programs that is within the mainstream of world intellectual property law trends, as exemplified by the European Union's computer programs directive. Finally, and perhaps most important, clarification of this point is needed to bring the CPPA in line with the requirements of Article 9.1 of the Berne Convention (incorporated into the TRIPS Agreement). Korea should be urged to plug this gaping loophole in the CPPA as promptly as possible. The "use right" recognized under the CPPA, while a valuable contribution to the bundle of rights granted to copyright owners, is not a fully adequate substitute for an appropriately comprehensive reproduction right.

In addition, the CPPA requires a number of other amendments in order to bring Korea into full compliance with its TRIPS obligation and otherwise to facilitate effective enforcement against software piracy. These issues, none of which were addressed in the most recent set of amendments, should be given expeditious and favorable consideration:

- Elimination or relaxation of the formal criminal complaint requirement (i.e., piracy should be treated as a "public offense");
- Pre-set statutory damages for infringement, at a level sufficient to provide an effective deterrent, should be available at the option of the right holder;
- Criminal penalties should be increased to fully deterrent levels;
- Expedited provisional remedies to prevent infringement or to preserve evidence should be made available on an *ex parte* basis;
- Administrative enforcement by MOIC should be made transparent to right holders;
- The requirement for registration of exclusive licenses should be eliminated.

As noted above, prompt enactment of the CAK and CPPA amendments outlined above would also have the benefit of bringing Korea into compliance with the WCT and WPPT and thus of facilitating Korea's speedy accession to these two treaties, both of which have already come into force without Korea's membership. It is ironic, to say the least, that such a technologically advanced nation, which seeks to participate more actively in global electronic commerce, lags so far behind in committing itself to the fulfillment of these benchmarks of an advanced legal regime for e-commerce. While Korea should be commended for taking the first steps, it should also be encouraged to dedicate itself to completing the task of implementation of the WCT and WPPT during 2004, and to depositing its instruments of accession to both treaties with WIPO as soon as possible.

THE RESURGENCE OF AUDIO-VISUAL PIRACY BY FALSE LICENSEES MUST BE STEMMED

Recent years have seen a resurgence of a serious piracy problem in Korea which had been under control for years. Pirates asked for, and received, censorship approvals and classification ratings for audio-visual works in which they had no rights, but for which they submitted fraudulent licensing documentation. The result has been millions of dollars of losses in licensing revenues to U.S. audio-visual producers and the disruption of the legitimate Korean audio-visual market. During 2003, the Korean government acknowledged the seriousness of

the problem and put in place some stop-gap measures to ameliorate it, but failed to implement the changes necessary to bring this form of piracy back under control.

Fraudulent licensing of imported audio-visual titles is not a new problem in Korea. In the mid-1980s, it was so prevalent that it became one of the reasons for the initiation of a Section 301 action against Korea by the U.S. government. In the 1986 settlement of that case, the Korean government explicitly promised to deny permission for the exploitation of audio-visual (and other) works in Korea “in the absence of a valid license or contract which establishes that the [exploitation] would not infringe a U.S. copyright.” It took several years, but by the early 1990s an effective system to fulfill this bilateral obligation had been put into operation. Under this system, representatives of the U.S. motion picture industry had ready access to the documentation submitted by purported Korean licensees in support of ratings requests for U.S. titles. Where the underlying licensing documentation appeared fraudulent, the censorship and ratings agency—the Performance Ethics Committee—would withhold further action on the application. As a result, by 1995 IIPA was able to report that the problem of audio-visual piracy based on false licensing documentation had been “virtually eliminated.”

However, in late 2001, the Korean government unilaterally and abruptly broke this well functioning system. The Performance Ethics Committee was abolished, and its duties transferred to a private sector body, the Korea Media Rating Board (KMRB). The KMRB discontinued the policy of access to documentation on titles submitted for classification. Instead, only limited information about titles submitted to the KMRB was available, only on the KMRB website, and only in Korean, even for English language titles. Furthermore, and most troubling, KMRB disclaimed any legal authority to deny approval and classification on the grounds of false licensing documentation, a power that its predecessor had exercised *de facto* for many years. Even if the legitimate copyright owner (or its licensee) submitted documentary proof that the applicant had no rights in the title, KMRB claimed it was powerless to do more than to delay issuance of its approval for a few weeks. Rights owners victimized by this practice were told they would have to initiate costly and protracted litigation to seek redress.

Not surprisingly, this change led to a brazen resurgence of this form of audio-visual piracy in the Korean market. Numerous U.S. titles were submitted to the KMRB for classification by parties having no legitimate rights to distribute them in Korea, and the KMRB has classified them as requested, enabling the pirate product to enter the Korean retail market as if it were legitimate. DVDs and VHS tapes of a number of these titles are now being distributed in the Korean market without any compensation to the legitimate right holders, whose only recourse is lengthy and expensive litigation. Not only have these titles become unmarketable by legitimate distributors, but such competition from pirates is also driving down the license fees that other U.S. titles can command in the Korean market, to the detriment of major studios and independent U.S. producers alike. Repeat offenders are becoming more common in this area of piracy. One of the more recent examples involves a company (Star Media) that falsely registered one AFMA member title in 2002, a second in July 2003, a third in October 2003, and applied to register four more titles in December 2003.²²

After urgent consultations with the U.S. government beginning in 2002, the KMRB has instituted some interim reforms, such as making data on submissions of audio-visual titles available online in English as well as in Korean, and formalizing the process by which the legitimate right holder can obtain at least a temporary stay of KMRB processing based on false

²² Other recidivists with multiple unfounded applications include Shine Pictures and Playstation Korea (no connection to Sony PlayStation®).

licenses. IIPA urges the U.S. government to continue to monitor the situation closely and to insist on the full and timely implementation of these interim measures.²³ More significantly, however, the Korean government acknowledged that the system needs to be fixed and committed to introducing legislation by mid-2003 to make the necessary changes. In order to bring this problem under control, the new system must contain the following features:

- Empower the KMRB or another entity to effectively reject an application for classification of a title whenever the applicant is unable to demonstrate its standing as a licensed distributor, including when challenged by the relevant industry representative, as outlined below;
- Ensure that a U.S. producer (or its licensee) is able to learn in a timely manner complete details about submitted applications, including the name and contact information of the applicant;
- Enable U.S. right holders to quickly and efficiently (and without imposing unnecessary formalities or documentation requirements) freeze processing on the suspect application and shift the burden of proof to the applicant to demonstrate its *bona fides*;
- Empower KMRB or another agency to de-register audio-visual titles that are later discovered to have been classified based on false licensing documentation, and to effectively clear the market of these pirate copies.

Korea's failure to fulfill its commitments on reforming the KMRB system to crack down on audio-visual piracy was a major reason why the U.S. government decided, on January 8, 2004, to elevate Korea to the Priority Watch List. Just days before that announcement, Korea's National Assembly finally passed amendatory legislation; but, at best, this legislation provides only the framework upon which a system meeting the four criteria listed above can be constructed through implementing regulations, which are due to be issued by late April. IIPA urges the U.S. government to continue its unremitting efforts to ensure that such a system is put in place as quickly as possible, both by seeking to clarify some ambiguities in the enacted legislation, and by pressing for implementing regulations that establish transparent and effective procedures to prevent further abuse of the classification system by pirates. Only in this fashion can the Korean government remedy a serious piracy problem that results from a clear and unjustified violation of its 1986 bilateral obligation to the U.S.

BOOK PIRACY: GOVERNMENT LEADERSHIP NEEDED TO PREVENT FURTHER MARKET DETERIORATION

The deteriorating piracy situation faced by U.S. book publishers over the past few years continued in 2003. Although it appears that major local publishers no longer engage in widespread piracy, illegal photocopying has seriously increased. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2003 are estimated by the Association of American Publishers (AAP) to have increased to \$38 million.

The typical target of Korean book piracy today is a scientific, technical or medical text that is reprinted in a counterfeit version, or a college textbook subject to massive unauthorized photocopying and binding on or near a college campus. All too often, Korean police and

²³ For example, it is critical that a legitimate distributor be able to obtain a rating, and thus enter the market, even if the same title has been previously rated on the application of someone falsely claiming to have rights.

prosecutors react to such cases with indifference, and very few cases appear even to reach the stage of active prosecution, much less to result in the imposition of deterrent sentences.

Pirated editions of U.S. reference books, encyclopedias, and scientific, technical and medical works appear in university bookshops in the Seoul area within a few months of their authorized publication, and are routinely sold door-to-door. The problem is worse outside Seoul. Unauthorized translation of U.S. works also remains a serious problem. Enforcement outside the Seoul area is virtually non-existent, and in Seoul it is sporadic and rare.

The chronic problem of unauthorized mass photocopying and binding of college textbooks continues to sharply reduce legitimate sales by U.S. publishers in Korea. Around the start of the academic terms (i.e., March and September), when students acquire their course materials, areas around many college campuses become hotbeds of piracy. For example, in raids carried out in March 2003, pirate copy shops were found in active operation within the campuses of Korea University (Science and Engineering Campus); AJOU University in Suwon City; and Sung Kyun Kwan University, also in Suwon City. Other pirate copy shops were in operation in the vicinity of Seoul National University of Technology and the University of Seoul. Faculty as well as students patronize the copy shops, which copy teacher's guides as well as textbooks for students. Titles seized in the March 2003 raids included many that textbook publishers had already heavily discounted for the Korean market.

The universities named (and others where pirate photocopying is rampant) do nothing to stop or even to discourage these illegal activities; nor does the Ministry of Education. Indeed, university administrators show no interest at all in stopping on-campus infringements, and police are reluctant to enter due to fear of violent reactions from student demonstrators. Student unions openly endorse pirate copy shops, silence professors who try to discourage use of pirated texts, and issue threats against copyright owners who seek to assert their rights. On- and off-campus pirate copy shops have formed networks which share intelligence about enforcement activities and circulate instructional materials on avoiding detection.

Recently, some pirate copy shops have claimed the right to make copies of textbooks because they hold licenses issued by the recently formed Korea Reprographic and Transmission Rights Center (KRTRC). This claim is unfounded because, even if the KRTRC licenses authorized copying of complete textbooks, no foreign publishers are members of or represented by KRTRC. MOCT, under whose auspices KRTRC operates, should make clear to enforcement authorities the limits of the KRTRC licenses, so that these baseless assertions can no longer impede enforcement against book pirates.

Even when book pirates are arrested, prosecuted, and convicted, the Korean judicial system is all too often unable to deliver deterrent sentencing. For example, the Korea University raids of March 2003, in which multiple copies of more than one hundred different titles from at least seven different publishers were seized, resulted in fines totaling only KRW 10 million (US\$8600).²⁴ If any jail terms are imposed in book piracy cases, they are routinely suspended, and no effort is made to supervise the activities of convicted defendants. Convicted pirates need only transfer formal ownership of their enterprises to relatives or friends in order to evade Korea's system for identifying repeat offenders, thus avoiding the consequences of being treated as a recidivist.

²⁴ Even though not enough to provide deterrence, this is the largest fine levied for book piracy in Korea in recent years.

In February 2003, the Publication and Printing Business Promotion Act came into force. The legislation gives MOCT administrative authority to inspect any business establishment, order any “illegally copied publications” to be disposed of, and levy fines of up to KW 3 million (US\$2600) for disobedience of such an order. The law also provides for the involvement of private sector entities in the enforcement process. The MOCT, however, appears to have simply passed the role of enforcement over to the KRTRC, a private entity. The KRTRC, in turn, only conducts occasional raids for titles from local publishers, and sometimes sends warning letters to University officials; it takes absolutely no action on behalf of foreign publishers. Because of its limited penalties, this law has relatively little potential to form part of an effective enforcement regime against book piracy, and even that small potential is not being realized.

In short, Korean authorities—including university officials, police, prosecutors, and judges—too often fail to take book piracy seriously as a commercial crime. U.S. publishers are likely to suffer increasing losses until this attitude is changed. Enforcement efforts must be stepped up, and deterrent penalties imposed, if further deterioration of the Korean book market is to be avoided. In addition, it is long past time for the Minister of Education to speak out against this widespread and well entrenched lawlessness on Korean university campuses. The ministry should issue a directive to chancellors to cooperate in copyright enforcement activities on campus and to speak out proactively against book piracy.

Video Piracy: Sustained Enforcement, but Persistent Piracy

Despite active enforcement efforts, video piracy in Korea continues at unacceptable levels. Overall, annual losses to the U.S. motion picture industry due to piracy in South Korea during 2003 are estimated by the Motion Picture Association (MPA) to have increased to \$40 million, reflecting the growth and maturation of the DVD market in Korea. The video piracy rate is estimated at 20%.

Optical disc piracy has now clearly established itself as the dominant form of piracy of audio-visual materials in Korea, although videocassette piracy persists as well. To evade detection and minimize the impact of equipment seizures by law enforcement, pirate optical discs are increasingly produced in dispersed facilities where a few DVD-R burners are in operation, although at least one larger lab containing more than 50 DVD-R burners and 24 CD-R burners has been discovered. High-quality unauthorized copies of U.S. motion pictures appear on the market within days after the legitimate video release of the titles in Korea.

While some pirate product from these labs vies for retail shelf space with the legitimate product, pirate DVD-R's are increasingly distributed through less conventional channels. Of particular concern are mobile vendors, which sometimes advertise with fliers, and then make home deliveries. A troubling recent trend is the alarming growth of pirate sales through itinerant street vendors, who congregate in hot spots in Seoul such as the Yong Sang Electronics Market, and who are also found in other cities such as Pusan and Taegu. As more vendors appear on the streets, the price of pirate DVD-Rs is falling to as little as US\$4 per disc. Thus far, enforcement efforts have had little impact on street vendors, since authorities appear to view retail piracy as a low priority. A high-visibility nationwide crackdown, followed by continuous raiding, may be needed to deal with street vendors. Only a sustained effort will break the organized criminal rings that supply and run these vendor operations. Such tactics have proven effective in the past against VHS retail piracy.

In general, Korean authorities continue their aggressive enforcement of the laws against video piracy. Police and prosecutors react quickly to complaints from MPA. There is little delay in the judicial process and no appreciable backlog in the court system. However, while Korean courts often issue appropriate sentences for video piracy offenses, including imprisonment for recidivists, distributors, and manufacturers, many infringers are simply assessed administrative fines, which lacks the necessary deterrent effect.

The bottom line is that enforcement efforts in Korea have not succeeded in reducing the volume of pirate product in the market over the past few years. The increased sophistication of pirate production facilities, and the more advanced packaging and distribution techniques now in use, strongly suggest a growing role of organized criminal elements in the video piracy trade. Korean authorities must respond to this trend. Intensified enforcement activity, including an increased intelligence component to track resale of duplicating equipment, will be needed to cope with the increased level of video piracy now being encountered. More aggressive use of the police's seizure powers—for example, to confiscate the vehicles used in the door-to-door distribution of pirate videos under the guise of English language education—has been helpful, and should be continued.

The U.S. motion picture industry continues to encounter some problems in enforcement of “Home Use Only” video product licenses. There are frequent free showings of “Home Use Only” videos of U.S. titles in government-run community centers and universities, which severely undercuts the ability to distribute these videos through commercial channels. Draft amendments to Korea's copyright law would have tightened up somewhat on an exception to protection that is sometimes relied upon to justify these unauthorized public performances; unfortunately, that provision did not survive the legislative process and the law remains unchanged. Korean authorities should revisit these issues and take into account the complaints of industry executives to ensure that these uncompensated public performances of copyrighted audiovisual materials do not unreasonably conflict with normal commercial exploitation of these works.

MARKET ACCESS: SCREEN QUOTAS AND OTHER BARRIERS SHOULD BE PHASED OUT

For 38 years, the U.S. motion picture industry has been frustrated by a substantial legal barrier to the theatrical exhibition market in Korea. Under Article 19 of the Motion Picture Promotion Implementing Decree, cinemas are required to show Korean films 146 days per year on each screen, which amounts to 40% of the time. While this screen quota can be lowered to 126 days if cinemas exhibit local films during four specified holiday periods, or under other circumstances if determined by the Ministry of Culture, even at this lower level the quota is an unjustified market entry obstacle which also discourages investment in modernization of Korea's screening facilities. It should be phased out quickly.

When this issue was under active negotiation as part of the US-Korea BIT negotiations, the Korean side indicated that it anticipated reducing the quotas as soon as the Korean film industry started to recover from its deep slump. That recovery has happened: Korean titles generate five times the box office sales, and claim twice the share of the market—approaching 50%—that they did in 1996.²⁵ This far exceeds the 40% box office share that Korean officials informally indicated that domestic films must achieve before the screen quota could be relaxed.

²⁵ See Park, “Coming to a Theater Near You?,” *Wall Street Journal*, Oct. 31, 2003, at A10.

The time to begin sharply reducing the screen quota is now, so that U.S. motion picture producers will finally begin to enjoy fairer and more equitable market access in Korea.

Other quotas impede access for U.S. audio-visual product in the Korean market and should be dismantled. A Presidential Decree issued pursuant to the Korean Broadcast Law 2000 sets local content requirements for specific categories of content carried by cable and satellite services, including movie channels (which have a 30% local content requirement), animation channels (40%), music channels (60%), and other categories (50%). The same legislation also set content quotas for terrestrial broadcasting, limiting total foreign programming to 20% of total air time, with subquotas that effectively limit U.S. programming to 45% of all air time allocated to movie broadcasts. Both the intent and the effect of the sub-quota are to discriminate against U.S. programming by artificially providing preferences to products from third countries, raising serious concerns as a restriction on trade in services that violates GATS. It may also violate GATT most-favored-nation and non-discrimination obligations, since U.S. television programming is typically exported to Korea on magnetic tape.

BUSINESS SOFTWARE ENFORCEMENT: PROGRESS NEEDS TO BE SUSTAINED AND TRANSPARENCY IMPROVED

The Business Software Alliance (BSA) estimates that most of the losses inflicted by piracy of business software applications in Korea are due to end-user piracy in businesses, government agencies, and other institutions. Such piracy remains the greatest impediment to the development of the Korean software industry and to Korea's goal of becoming a worldwide software power.

Although Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years, 2003 was a year of significant forward steps. The enactment in mid-year of legislation to provide police powers to the Standing Inspection Team (SIT) of the Ministry of Information and Communications (MOIC) has provided Korean authorities with a new tool with potential to make the enforcement effort more consistent, sustained, and effective. More needs to be done, however, to realize that potential. In particular, the SIT should more consistently use its authority to include private sector experts in their inspection activities. It is also important that SIT maintain its current practice of conducting inspections without advance notice.

The SIT mechanism is only part of the enforcement picture, however. The efforts of police and prosecutors remain essential if Korea is to further reduce end-user software piracy. There was significant progress on this front as well in 2003, with a satisfactory volume of raids, many of them based on industry leads. We understand that a memorandum was issued by the Supreme Prosecutor's Office in June 2003 mandating greater responsiveness to and better communication with right holders (including about raids that do not result in prosecution); it is important that this directive be fully implemented to improve transparency. IIPA believes it is essential that the USTR continue to stress to the Korean government that sustained and comprehensive enforcement efforts against end-user software piracy are needed to reduce the rate of software piracy, and that it is essential to continue to act on leads from industry and to keep industry informed about enforcement activities.

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