

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# SOUTH KOREA

### EXECUTIVE SUMMARY<sup>1</sup>

The crisis that has gripped enforcement against business software piracy in Korea over the past two years shows little sign of easing. Both administrative enforcement as carried out through the Ministry of Information and Communications (MOIC) and criminal enforcement through prosecutors are hobbled by a complete lack of transparency, refusal to coordinate with the private sector, lack of sustained effort, and disturbing evidence of bias against foreign copyright owners. The current system lacks all deterrent value and must be significantly revamped in order to become effective. The same is true of efforts to promote good software asset management practices in government. Internet-based piracy is a growing problem, especially for the recording industry, in this second largest Asian online market, and the government should mobilize to meet this challenge. The overall enforcement picture is mixed; authorities often do not pay enough attention to widespread and increasingly sophisticated book piracy, and U.S. sound recording copyright owners are largely excluded from the enforcement process; but the government remains responsive and cooperative in fighting videocassette piracy, although there is little concrete evidence that it is making much progress recently. While some of the problems created by the January 2000 amendments to the Computer Program Protection Act (CPPA) have been addressed, this legislation still needs to be strengthened in order to meet world standards, as does the Copyright Act, both with respect to old norms (TRIPS) and new ones (the WIPO Copyright Treaty). Finally, screen quotas remain as an unjustified market access barrier for theatrical exhibition of films. The failure to achieve significant progress on a number of these critical enforcement and law reform issues justifies maintaining South Korea on the Special 301 Priority Watch List for 2001.

#### ESTIMATED TRADE LOSSES DUE TO PIRACY (in millions of U.S. dollars) and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	20.0	20%	20.0	20%	20.0	20%	16.0	13%	18.0	15%	17.0	15%
Sound Recordings / Musical Compositions	7.0	23%	10.0	20%	10.0	15%	10.0	15%	6.0	10%	6.0	18%
Business Software Applications <sup>2</sup>	102.3	52%	118.9	50%	115.7	64%	274.6	67%	193.2	70%	294.0	76%
Entertainment Software <sup>3</sup>	157.0	90%	119.0	63%	122.1	65%	145.8	62%	186.0	65%	173.6	66%
Books	39.0	NA	39.0	NA	35.0	NA	30.0	NA	30.0	NA	25.0	NA
<b>TOTALS</b>	<b>325.3</b>		<b>306.9</b>		<b>302.8</b>		<b>476.4</b>		<b>433.2</b>		<b>515.6</b>	

<sup>1</sup>For more details on Korea's Special 301 history, see "History" Appendix to filing.

<sup>2</sup>BSA loss numbers for 2000 are preliminary.

<sup>3</sup> IDSA estimates for 2000 are preliminary. Changes from previous years reflect in part changes in methodology, aimed at obtaining a more accurate estimate.

# COPYRIGHT PROTECTION FOR BUSINESS SOFTWARE APPLICATIONS IN KOREA: THE CRISIS CONTINUES

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As IIPA reported last year, piracy of business software applications remains a serious threat to the ability of the software industry to survive and prosper in the Korean market. The Business Software Alliance (BSA) estimates that piracy inflicted losses totaling \$102.3 million on U.S. companies in 2000. The majority of these losses 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.

## Enforcement: Deficiencies Must be Corrected

Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years. In 1997, Korean law enforcement responded aggressively to business software piracy with raids and prosecutions. By contrast, in 1998, enforcement was extremely disappointing, with far fewer raids, most of them targeted on very small companies of little economic significance. Pursuant to President Kim's March 1999 call for increased efforts against copyright piracy, Korean police and prosecutors stepped up their efforts against corporate end-user pirates during the first half of 1999. Unfortunately, beginning in the middle of 1999, these enforcement actions dropped off precipitously, and enforcement against end-user piracy has never recovered. Perhaps even more troubling is the fact that the enforcement operations of the government agency most directly responsible for enforcing the Computer Program Protection Act against end-users – the Ministry of Information and Communications MOIC – became entirely opaque to the U.S. and Korean software industries, and have remained virtually hidden ever since.

MOIC's enforcement activities since mid-1999 have been flawed in a number of ways that significantly undercut their effectiveness. Some examples:

- First, certain types of software primarily produced by U.S. and other non-Korean companies (e.g., operating systems, design software, and spreadsheets) are deliberately excluded from the inspections carried out by some enforcement teams.
- Second, in a break with past practice in Korea, representatives of the software industry (through the Software Property Council, or SPC), who used to accompany the raiding parties in order to provide technical assistance, are now excluded. Korean officials claim that private sector participation is no longer needed because enough government investigators have now been trained to carry out the raids – or, as MOIC now prefers to call them, “inspections.” However, this policy has eliminated transparency from the enforcement process and raised serious doubts about whether the inspections are really thorough and comprehensive.
- Third, no efforts are made to consult with industry concerning optimal targets for the inspections. Generally, the most promising targets, where industry sources may have gathered some evidence of piracy, are ignored. At the same time, MOIC provides advance notice of inspections to the companies and government institutions concerned, so they have ample opportunity to purge their systems of unauthorized copies of programs, which can then be reinstalled afterwards.

- Fourth, instead of a sustained, continuous enforcement program, MOIC concentrates its efforts in preannounced campaigns of limited duration; this greatly undercuts the deterrent impact of the raids, since pirates know that enforcement efforts are likely to lie dormant for several months. Companies that place orders for legitimate software during enforcement periods withdraw them when the danger of enforcement is past.
- Finally, MOIC refuses to communicate to industry any information about the results of the raids, or even what targets were raided. This lack of transparency makes it extremely difficult for companies to follow up raiding with the formal complaints that are necessary, under the Korean system, to initiate criminal prosecutions, or to file civil actions based on the results of the raids.

The 1999 amendments to the Computer Program Protection Act (CPPA), which took effect July 1, 2000, gave MOIC statutory authority to take administrative enforcement actions against end-user software pirates. IIPA proposed specific provisions for inclusion in implementing regulations to make sure that this new enforcement authority would be exercised in a transparent manner, and that the outcome of inspections would be made available to Korean and U.S. copyright owners so that civil or criminal enforcement actions could be initiated. These proposals were all rejected. The MOIC inspection system remains not only entirely ineffective, but counterproductive. Due to its shortcomings, it generates evidence of microscopic levels of end-user piracy. These do not match up with the reality of widespread infringement within Korean businesses and government, and when Korean officials trumpet them, they undermine their own efforts to promote respect for intellectual property rights.

The software industry's experience with Korean prosecutors has been similarly frustrating. Indeed, virtually all the shortcomings in MOIC enforcement policies identified above apply as well to prosecutors.<sup>4</sup> In addition, Korean prosecutors are now requiring much stronger evidence of copyright infringement – in effect, conclusive proof -- before they will even investigate corporate end-user software piracy. Since complete proof of infringement is rarely available until after raids have been carried out, this new policy has had the effect of significantly slowing the pace of enforcement action against institutional end-user pirates. While the Korean government claims that nearly 1,500 enforcement actions were carried out for software piracy in 2000, resulting in some 37 arrests, the software industry played no role in any of these cases. Indeed, neither the Business Software Alliance nor its Korean local counterpart group, the SPC, and was even advised of raids that had occurred. This made it impossible for them to file the formal complaints that are the pre-requisite to criminal prosecution under the CPPA. By contrast, to BSA and SPC's knowledge, not one of the hundreds of complaints they filed in 2000 was acted upon by prosecutors until December, 2000, when two significant targets were raided.

In addition, the long-standing shortcomings of the Korean enforcement effort against software piracy have not been satisfactorily addressed. Enforcement continues to be hampered by a lack of transparency in the system, which makes it difficult, for example, to track the outcomes of prosecutions. Penalties that are imposed on pirates are rarely publicized, thus undercutting the deterrent value of the sentence. Indeed, prosecutors actively discourage SPC from publicizing enforcement results. Rightholders and the public will never appreciate the government's commitment to reduce software piracy, and the penalties associated with such piracy, unless Korea's criminal justice system is fundamentally altered to increase transparency substantially. Concerns about the privacy of convicted criminals should not be a barrier to releasing information about judgments.

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<sup>4</sup> The sole exception is that prosecutors do not give advance notice to targets before launching a raid. However, leaks of targeting information from the police have often occurred.

In these circumstances, software industry organizations have been reduced to asking individual police stations to carry out raids, with no real expectation that prosecution or punishment will follow. Some of these raids have produced dramatic evidence of the scope of software piracy in Korea. For example, police actions in the Techno Mart and Yongsan electronics markets in Seoul in October showed that 96 percent of the 390 vendors inspected were illegally loading operating systems on computers they sold, and that 80 percent of them were doing the same with applications programs.<sup>5</sup> However, these ad hoc enforcement efforts are no substitute for a sustained and coordinated national effort to enforce the CPPA against end-user piracy.

Enforcement also suffers from shortcomings in Korea's civil procedure laws and practices that make it difficult to obtain *ex parte* provisional relief, a key enforcement tool against end-user piracy and one whose availability is required under articles 41 and 50 of the TRIPS Agreement. It typically takes three to seven months to obtain a preliminary injunction in an IPR case in Korea, and *ex parte* injunctions are considered a highly unusual form of relief (in part because the judge actually supervises them in person) and are rarely granted. When it takes months to obtain *ex parte* relief against ongoing end-user piracy, while the pirate can destroy all evidence of that piracy at the touch of a button, the compatibility of the Korean system with the requirements of the TRIPS Agreement is open to serious question.

In short, the Korean enforcement system against end-user piracy needs to be fundamentally revamped. Some of the needed fixes would restore more effective past practices that have been abandoned in the past few years; others would be new. Korean authorities should be urged to resume an active level of inspection and raiding of institutions suspected of end-user piracy; quantitative targets for raiding activity should be set and met. Such enforcement should be given high priority, and adequate resources should be devoted to the campaign. Enforcement should take place year round, rather than sporadically or seasonally, as has been the case over the past several years; if a special enforcement period is declared, it should have no set expiration date. Raiding should be based on targeting information supplied by industry investigators. No institution, including government entities and Korea's powerful *chaebols*, should be immune from raids, and advance notice must not be provided. Enforcement officials should resume allowing industry representatives to accompany law enforcement on the raids, or else should provide complete reports to representatives of rightholders immediately after raids are completed. If the requirement of a formal complaint for a criminal prosecution is not abolished, then the threshold level of evidence needed to file such a complaint should be specified as "reasonable suspicion." The prosecutorial and judicial process following the raid must also be made more transparent, with information on case status, disposition, imprisonment and fine payment all readily available.

While structural and statutory changes, outlined below, are also needed to the CPPA and its implementing regulations, the menu summarized above, if adopted, would represent a significant improvement in the deficient enforcement policies that Korea currently employs. A consistently higher level of enforcement, targeted against economically significant players, is needed if Korea is to make headway against its persistent end-user software piracy problem, and thereby increase tax revenue, promote investment and technology transfer and, most important, improve the prospects for its struggling domestic software industry, which piracy has driven to the brink of extinction.

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<sup>5</sup> "Software Piracy Costs Developers 2 Billion Won," Korea Herald, November 22, 2000.

## The CPPA Must Be Strengthened to Meet Global Standards

In last year's Special 301 filing, IIPA summarized the serious problems with the amendments to the CPPA that were enacted by Korea's National Assembly and signed into law in January 2000, without any public debate or meaningful opportunity for industry input. After extensive dialogue with Korean government officials, some of these problems were ameliorated through implementing regulations that took effect in July 2000. Others appear to have been at least partially corrected in legislation that was approved by the National Assembly on December 15, 2000 and that will come into force on July 17, 2001. However, a number of other serious shortcomings in the CPPA remain to be addressed.

First, the January 2000 amendments created a broad new exception to copyright protection for computer programs, allowing programs to be copied without authorization when "necessary" for "the verification, analysis, research and education of the program algorithm or other particular elements." In effect, these amendments gave Korean law one of the most sweeping decompilation exceptions of any copyright law in the world, one that was not limited to reproductions that are needed in order to achieve interoperability. Fortunately, between the implementing regulations and the new set of amendments, the limited scope of this exception was somewhat clarified. However, the stated goal of the Korean government – to fashion 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 – has not yet been achieved.

The most significant gap is Korea's continued failure to provide specifically for the copyright owner's control over temporary copying of a computer program, an increasingly common mode of commercial exploitation of these copyrighted works. Unless the copyright 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. Additionally, temporary copying must be included within the scope of the exclusive reproduction right in order to bring the CPPA in line with Article 4(a) of the EU Directive, as well as 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 second main area of concern with the new CPPA amendments was their treatment of circumvention of technological protection measures (TPMs), such as encryption, that are applied to computer programs. While it is commendable that Korea has sought to implement this aspect of the WIPO Copyright Treaty with respect to computer programs (it has not yet even proposed to do so with respect to other kinds of copyrighted works), this particular implementation raised many questions. Once again, the amendments approved by the National Assembly in December 2000 have resolved some of these, but others remain. Korea should be encouraged to make the following changes to the TPM provisions of the CPPA, as well as to extend similar protections (with these changes) to all other copyrighted works:

- The provision should specifically apply to TPMs that control access to a computer program;
- The exception that allows circumvention for the purpose of "revising or updating" a program must be eliminated, and the scope of the exception for encryption research activities (newly introduced in the December 2000 amendments) should be narrowed to require, among other things, a good faith attempt to obtain the authorization of the copyright owner;
- The provision should specifically outlaw the offering of services that circumvent a TPM;

- Civil enforcement of the prohibition should be explicitly provided for.

Finally, 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”);
- Preset statutory damages for infringement, at a level sufficient to provide an effective deterrent, should be available at the option of the rightholder;
- 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;
- The requirement for registration of exclusive licenses should be eliminated.

## Government Software Asset Management

It is critically important that the Korean government act as a role model for the private sector in terms of the importance of using only authorized copies of software and the adoption of proper software asset management practices. Although the government has taken steps in this regard, much remains to be done. The announcement by the Ministry of Information and Communication in mid-1999 that it would inspect the software usage in government departments, agencies and government-owned companies was welcomed by the entire software industry in Korea. However, the industry was disappointed when it learned that the government would not reveal which entities were inspected, the extent of the illegal software usage discovered, or the steps that would be taken to legalize underlicensed entities. This has necessarily called into question the thoroughness of the inspections and the incredible claims that piracy has been brought down to about four percent in these entities. While the stated government policies on use of legal software are welcome, they mean nothing unless enforced and carried out in a transparent manner. The Korean government should set up an internal monitoring system; make the procurement process far more transparent; and extend the ban on use of unauthorized software to government contractors, as has been done in the United States. In addition, software asset management practices adopted by the government should be made public and, wherever possible, included on government entities' Websites. MOIC has thus far spurned SPC's offer to provide agencies with training in software asset management; it should accept this offer. The government can and must act as a leader in the adoption of software asset management practices throughout Korean society.

## THE INTERNET PRESENTS A NEW CHALLENGE IN FIGHTING PIRACY

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Korea is the second biggest Internet market in all of Asia, with some 16 million Koreans online. It is not surprising, therefore, that the use of the Internet to disseminate copyrighted materials is more advanced in Korea than in many other markets. Unfortunately, the increase in legitimate e-commerce in copyrighted materials in Korea has been more than matched by a burgeoning level of Internet-based piracy, which Korean law and enforcement practices are not well situated to combat. Technological advances are increasing the opportunities for piracy, and pirates are taking advantage of them.

A remarkable number of Internet sites hosted in Korea are engaged in the unauthorized distribution of sound recordings in the MP3 format without the authorization of the record producer. Many of the sites that make infringing MP3 recordings available for download 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. Internet-based music piracy can be expected to worsen unless the government devotes more attention to enforcement actions in the online environment, as well as to the education of network users in respect for intellectual property.

Korea must also strengthen its legal protections against Internet piracy. For example, although recent legislation gives owners of copyright the exclusive right to control the making available of their works online (through the new "right of transmission"), the same level of control is denied to the producers of sound recordings. This inequity must be corrected as rapidly as possible if the legitimate market for digital delivery of sound recordings is to have a chance of holding its own against surging level of Internet piracy.

A particularly troubling question involves the responsibility of Korea's 60 or so Internet Service Providers (ISPs) to cooperate with rightholders to detect and deal with piracy online. The few court decisions that have touched on this question so far are disturbing. In one, the Seoul district court enjoined an ISP from disabling access to MP3 files identified by the rightholder as infringing, ruling that such a "takedown" breached the contract between the ISP and its customers. By discouraging ISPs from taking down sites even if they know them to be infringing, this ruling sends exactly the wrong signal about Korea's commitment to the healthy growth of e-commerce in copyrighted materials. Korea's government should move promptly to take whatever steps are needed to clarify an ISP's legal responsibilities and to provide the proper incentives for cooperation in anti-piracy efforts. It should also clarify that the act of uploading copyrighted materials to an Internet site without authorization constitutes infringement. Such moves would demonstrate a commitment by the Korean government to fighting Internet-based piracy.

## **COPYRIGHT ENFORCEMENT: A MIXED PICTURE**

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Apart from the problems experienced by the business software sector and the shortcomings regarding Internet enforcement, the rest of the enforcement picture for U.S. copyright industries in Korea is decidedly mixed.

### **Book Piracy: Enforcement Still Does Not Measure Up to the Problem**

The situation faced by U.S. book publishers continues to deteriorate, as we have reported for the past few years. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2000 are estimated at \$39 million, unchanged from 1999 but a 56% increase from 1995. In only two other Pacific Rim countries (the Philippines and China) do publishers report greater losses.

One alarming new trend involves the appearance in the market of unusually high quality counterfeit copies of trade (i.e., mass market) U.S. books. Increasingly, book publishers must call in forensic experts to perform technical analyses on ink and paper in order to demonstrate the pirate character of these books. In this context, the rule invalidating any formal complaint filed

more than six months after sale of the pirate product presents a significant obstacle to criminal enforcement, since the results of the forensic analysis need to be included to meet the standards for a formal complaint, and these studies take time to complete.

This growing incidence of trade book piracy adds to the chronic problem of unauthorized mass photocopying and binding of college textbooks, which sharply reduces legitimate sales by U.S. publishers in Korea. There are more than 30 universities in Seoul, concentrated into three main areas. Around the start of the academic terms (i.e., March and September), when students acquire their course materials, these areas become hotbeds of piracy. Photocopies are made in photocopy shops, and in some cases in vans which station themselves around campuses. Sometimes the copier builds up stocks of infringing copies; others make them only to order. The universities take no steps to prevent these piratical activities, nor does the Ministry of Education. During 2000, publishers found evidence that these pirate textbooks were being sold, not only on Korean college campuses, but also on U.S. military bases in Korea, to service members and their families. In addition, pirated editions of other U.S. books -- especially reference books and encyclopedias, and scientific, technical and medical works -- appear in shops in the Seoul area within a few months of their authorized publication. The problem is worse outside Seoul. Unauthorized translation of U.S. works also remains a serious problem.

The response of Korean enforcement authorities to this resurgent piracy problem leaves much to be desired. Piracy is carried out by a decentralized network of small, independent shops which do not make attractive enforcement targets. Stocks of pirate copies are generally low, since books are often copied to order. When a raid turns up few pirate copies at these shops, authorities tend to treat the infraction as minor. Enforcement scarcely occurs outside the Seoul area.

Even when book pirates are arrested, prosecuted, and convicted, the Korean judicial system is all too often unable to deliver deterrent sentencing. Jail terms are routinely suspended, and no effort is made to supervise the activities of convicted defendants. Thus, even if a pirate who receives a suspended sentence commits another piracy offense, this does not cause the earlier jail term to take effect. Korea's courts also lack any system for identifying repeat offenders, so pirates can expect to receive repeated suspended sentences for multiple crimes. These problems make it all the more newsworthy when, as in June 2000, a convicted book pirate was actually sentenced to a one-year prison term, which he is reportedly serving. This case involved three weeks of surveillance and a raid that confiscated twelve tons of pirate books from four different warehouses. While it is far from clear that this sentence will be sufficient to deter other pirates, it is the heaviest penalty handed down in a book piracy case in recent years. If it is followed by similar sentences in future cases, and if these results are widely publicized by the government, the likelihood of deterrence will certainly increase.

In short, Korean authorities -- including 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. In addition, the education ministry and other agencies must take a proactive role in discouraging book piracy within the educational institutions for which they are responsible. Enforcement efforts must be stepped up, and deterrent penalties imposed, if further deterioration of the Korean book market is to be avoided.

## **Music Piracy: Fairness and Transparency in Enforcement Are Needed**

Enforcement against music piracy in Korea is hampered chiefly by three problems. First, U.S. and other foreign record producers are largely excluded from participating effectively in the enforcement process. The Ministry of Culture recognizes only one industry association as authorized to assist in raids and seizures, and this grouping is limited to Korean recording companies. U.S. and multinational producers must work on their own with individual prosecutors' offices in order to obtain raids and seizures or to give their targeting advice. This discriminatory treatment of foreign rightholders is inconsistent with TRIPS and must end.

Second, as with most other copyright industries, recording companies find the Korean prosecutorial and court systems extremely opaque. It is very difficult to learn the status of an investigation. There were over 200 raids against music pirates during 2000, but only 26 indictments; it is nearly impossible to find out why nearly 90% of the cases did not make it to court. Rightholders are virtually never advised of court dates in these cases, and only with difficulty can they learn of the outcome of a prosecution.

Finally, based on the evidence that the recording industry has been able to accumulate, sentencing practices fall far short of deterrent levels. The average fine imposed on pirate music retailers in criminal cases was less than US\$1000, and it does not appear that any of them were sentenced to jail. Under these circumstances, even though official Korean government statistics indicate that there have been a high number of raids, it is not surprising that there has been little concrete progress against music piracy of international repertoire in the Korean market. The estimated rate of piracy increased from 20% in 1999 to 23% in 2000, with estimated trade losses totaling \$7 million.<sup>6</sup>

## **Video Piracy: Sustained Enforcement, but Persistent Piracy**

Video piracy in Korea remains at the relatively elevated level noted in last year's submission. Overall, annual losses to the U.S. motion picture industry due to piracy in South Korea during 2000 are estimated at \$20 million, reflecting a video piracy level of 20%.

Unlike most other Asian markets, the home video medium of choice in Korea remains the VHS videocassette, and this is the locus of video piracy in the country. High-quality unauthorized VHS copies of U.S. motion pictures appear on the market within days after the legitimate video release of the titles in Korea. The producers of pirate product seem to have broken up the huge underground video labs detected in 1999 into smaller units, consisting of only 25-40 linked VCRs, which are harder to detect and represent a smaller risk for the pirate manufacturer. Much of the pirate product from these labs takes the form of well produced counterfeits, which vie for retail shelf space with the legitimate product. Other pirate production is distributed through less conventional means, notably door-to-door sales of English language "educational packages." Sales of pirate product through all distribution channels have increased.

Korean authorities continue their aggressive enforcement of the laws against video piracy. Police and prosecutors react quickly to complaints from MPA, and Korean courts generally issue appropriate sentences for video piracy offenses. Imprisonment is not uncommon

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<sup>6</sup> The decrease in estimated losses from \$10 million in 1999 is due in part to a drop in the unit price of pirate CDs.

for recidivists, distributors and manufacturers. MPA has encountered little delay in the judicial process and there is no appreciable backlog in the court system.

None of this has 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. And more enforcement resources must be devoted to pirate audiovisual products in the optical disc formats (VCDs and DVDs), which are beginning to appear nationwide in night markets, computer outlets and retail stores. While the volume of this piracy is low at present, authorities should be vigilant to ensure that it does not grow into a major problem, as has occurred in other Asian countries.

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.

The Korean Ministry of Culture and Tourism monitors a very successful system of import title screening. As a result, the former practice of submitting authentic-looking documentation to support fraudulent registration and importation of MPA member company titles has all but disappeared. However, independent film studios have sometimes found it difficult to obtain deregistration of a title whose Korean distributor has defaulted on its license obligations. This delay in deregistration allows the defaulting distributor to continue to profit, while obstructing the producer's efforts to arrange for distribution through other channels.

## **MARKET ACCESS: SCREEN QUOTAS SHOULD BE PHASED OUT**

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For many 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 is in full swing; Korean titles are doing well at the box office and have a fast-growing share of the Korean theatrical market. The time to begin sharply reducing the screen quota is now, so that U.S. motion picture producers will begin to enjoy fairer and more equitable market access in Korea.

## **COPYRIGHT LAW AMENDMENTS CREATE NEW TRIPS PROBLEMS AND FAIL TO ADDRESS OLD ONES**

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### **Library Exception**

New amendments to Korea's Copyright Act took effect on July 1, 2000. They include an extremely problematic provision that dramatically expands the scope of exceptions pertaining to libraries and similar institutions.

Article 28(1) allows libraries and similar institutions to digitize entire works or sound recordings without permission, and to give copies to patrons who may remove them from the premises. Even worse, Article 28(2) allows libraries and similar institutions to transmit the works they have digitized over networks, not only within their own premises, but also over interlibrary networks. Furthermore, a proviso in the 1999 draft amendments which forbade the use of such a transmitted copy outside the library (thus preventing libraries from carrying out unauthorized dissemination of protected materials by linking their internal networks to the Internet or other extramural networks) was dropped in the final text as enacted. These extraordinary exceptions for unauthorized digitization and networked distribution by libraries apply without regard to whether digitized copies, or licenses for networked distribution, are available in the legitimate commercial marketplace. The exceptions also remain in force regardless of the impact of unauthorized digitization and networked distribution on the "normal exploitation" of the protected subject matter. With the expansion of the exception to cover interlibrary digital networks, an intolerable impact is highly likely. Such a sweeping exception cannot satisfy the well established international standards governing exceptions or limitations on protection, contained in Berne Article 9(2) and TRIPS Article 13.

Korea had an opportunity to narrow the broad scope of this new exception in the implementing regulations which were prepared in early 2000 and which took effect on July 1, but it did not take full advantage of this chance to conform its law to international standards. Under the implementing regulations as adopted, the new exception for unauthorized digitization of works applies only to "national libraries" (we understand that about 50 public libraries throughout Korea meet this definition) and four named libraries that are specified in other statutes. However, the Ministry of Culture and Tourism apparently ignored suggestions, not only from IIPA but also from the Korean publishing association, for further narrowing interpretations, including: a) specifying more clearly the technical measures that libraries must implement in order to take advantage of the new exceptions, and requiring such implementation to be certified by the Ministry; (b) clarifying that Article 28(2) applies only to copies of works that are already in a library's collection and that are not otherwise available in digital formats; and (c) excluding all transmissions outside a library's premises, including transmissions to another library, from the scope of the exception. Until the statute or the implementing regulation is revised to incorporate such limitations, the amended Article 28 is vulnerable to attack as inconsistent with TRIPS. The implementation of the new legislation must be closely monitored.

## Protection of Existing Older Works (Retroactivity)

The copyright law amendments also did nothing to cure a clear and long-standing discrepancy between Korean law and the requirements of the TRIPS Agreement. South Korea remains in violation of its TRIPS obligations with regard to protection of pre-existing works and sound recordings (Berne Article 18 and TRIPS Article 14.6). These international standards require that existing works and sound recordings not previously protected in a WTO member country must be protected retroactively for the full term of protection (50 years, or life plus 50 years) if the work or sound recording has not fallen into the public domain in the country of origin through the expiration of the term of protection. In the Uruguay Round Agreements Act, the U.S. extended full protection to foreign works and sound recordings that fell into this class. South Korea has not properly done so, however.

Under the 1995 amendments to Korea's Copyright Act, sound recordings and works whose term is measured from publication are only protected back to 1957, rather than back to 1950, as would now be required in order to afford all affected works a full Berne/TRIPS term of protection. For other works whose term is measured by the life of the author, foreign works whose authors died before 1957 will remain totally unprotected in South Korea. South Korea's transition rules also fail to comply with TRIPS. For example, producers of pre-1995 derivative works (e.g., translations) of newly protected foreign works were allowed to reproduce and sell those works until the end of 1999 without paying any compensation to the owner of the restored work. This is incompatible with the transition rules contained in Article 18(3) of Berne, which would permit continued exploitation but only on payment of compensation to the rightholder.<sup>7</sup> (It is noteworthy that even though this TRIPS-violative transition period has now expired, there do not appear to have been any cases in which any compensation has been paid to a U.S. copyright owner for continued exploitation of an unauthorized translation prepared before 1995; nor is there any clearly prescribed submission for doing so.)

South Korea's position with regard to protection of pre-existing works and sound recordings is virtually indistinguishable from the position taken by Japan with respect to pre-1971 sound recordings, up until the time that the U.S. (later seconded by the European Union) invoked the WTO dispute settlement process to challenge this clear violation of Japan's TRIPS obligations. Japan ultimately amended its law to come into full compliance with TRIPS. South Korea should do the same, by providing a full term of protection to works and sound recordings dating from 1950 or later, and works by authors who died in 1950 or thereafter, as the case may be.

It is crucial to note here that 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

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<sup>7</sup>South Korea's full TRIPS compliance could also be questioned with regard to enforcement procedures and deterrent penalties (TRIPS Part III, specifically Articles 41, 44, 49, 50 and 61), some of which are noted in the text of this report (e.g., inadequate damages to constitute a "deterrent to further infringements" (TRIPS Article 41.1); judicial authorities do not in practice order prompt and effective provisional measures, including measures *ex parte* (TRIPS Article 50); lack of transparency in tracking criminal prosecutions (TRIPS Articles 41.3 and 61); failure to apply criminal penalties for copyright piracy on a commercial scale by refusing to treat software piracy as a "public offense" (TRIPS Article 61); etc.).

move to dismantle this essential element of the South Korean antipiracy apparatus must be swiftly and forcefully opposed by the U.S.

## **WIPO Treaties Implementation**

Korea has already taken some steps to implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), as befits a technologically advanced nation seeking to participate more actively in global electronic commerce. Significant obligations under those treaties remain unimplemented in Korean law, however, and, as noted above, the recent attempt to implement (in the CPPA) the WCT requirements regarding noncircumvention of technological measures used to control access to and use of computer programs fell short of the mark. Korea should be encouraged to dedicate itself to completing the task of implementation of the WCT and WPPT during 2001, and to depositing its instrument of accession to both treaties with WIPO this year.