

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# SOUTH KOREA

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

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Progress in the fight against piracy in South Korea turns increasingly on its ability to modernize its legal framework and reform its enforcement practices to respond to a growing challenge of digital and online piracy. The steps Korea has already taken to update its two principal copyright laws are commendable, but much more is needed, notably with respect to exclusive rights for record producers in the online environment; comprehensive prohibitions on measures aimed at circumventing protective technologies; providing incentives for online service providers to cooperate in combating piracy; and clarifying the copyright owner's right to control the making of temporary copies. Despite a two-month crackdown campaign, enforcement against institutional end-user pirates of business software remains hobbled by a lack of transparency, reluctance to coordinate with the private sector, a lack of sustained effort, and ineffective public education, all of which contribute to a gap between presidential statements against corporate end user piracy and government performance in this area. Book publishers hailed a high-profile conviction and sentencing but wait to see whether this indicates a trend. While the government remains responsive and cooperative in fighting videocassette piracy, the rates of piracy remain disturbingly high. A long list of unfinished law reform business also calls out for attention. Finally, screen quotas remain as an unjustified market access barrier. 2002 may be a significant year in determining whether Korea's unquestioned progress in broadband penetration, and the proliferation of low-cost technology such as CD-R, will be used to promote legitimate e-commerce or simply to spawn new forms of piracy. Accordingly, IIPA recommends that South Korea be maintained on the Special 301 Priority Watch List for 2002.

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

**SOUTH KOREA: ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1996 - 2001**

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	25.0	25%	20.0	20%	20.0	20%	20.0	20%	16.0	13%	18.0	15%
Sound Recordings / Musical Compositions <sup>2</sup>	4.0	14%	7.0	19%	10.0	20%	10.0	15%	10.0	15%	6.0	10%
Business Software Applications <sup>3</sup>	134.2	47%	177.2	56%	118.9	50%	115.7	64%	274.6	67%	193.2	70%
Entertainment Software	487.7	63%	157.0	90%	119.0	63%	122.1	65%	145.8	62%	186.0	65%
Books	35.0	NA	39.0	NA	39.0	NA	35.0	NA	30.0	NA	30.0	NA
<b>TOTALS</b>	<b>685.9</b>		<b>325.3</b>		<b>306.9</b>		<b>302.8</b>		<b>476.4</b>		<b>433.2</b>	

## KOREA MUST RESPOND TO THE LAW REFORM AND ENFORCEMENT CHALLENGES OF DIGITAL AND ONLINE PIRACY

The shape of piracy in Korea is rapidly changing: it is becoming more predominantly digital, moving online, and migrating to dispersed production formats such as CD-Recordable (CD-R). Piracy of analog formats – audiocassettes, videocassettes, and 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.

As the OECD concluded last year, “in terms of broadband access to the Internet, Korea is by far the leading performer.” In mid-2001, an estimated 13.9% of all South Koreans were subscribers to broadband access – more than twice as high a percentage as in any other country in the world. OECD observed that this rate could reach 20% by the end of 2001. It is sure to grow: One provider alone claims to have the facilities in place to offer DSL service to 92% of all Koreans.<sup>4</sup> Such high-bandwidth connections open up an enormous market for downloads of music, audiovisual materials, videogames, and software, both legitimate and pirate. Combined with the growing penetration of low-cost CD-R technology in the Korean marketplace, new avenues for piracy abound, bringing new challenges to the Korean government.

The experience of the recording industry may be instructive. Audiocassette piracy remains a huge problem: Nearly 900,000 pirate cassettes were seized in 2001, according to the Recording Industry Association of America (RIAA). But nearly all of these involved local Korean repertoire.

<sup>2</sup> The originally reported estimated music piracy level of 23% for 2000 was adjusted during 2001 to 19%, based on additional data analysis.

<sup>3</sup> BSA loss numbers for 2001 are preliminary. In IIPA’s February 2001 Special 301 filing, BSA’s 2000 estimates of \$102.3 million at 52% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

<sup>4</sup> “The Development of Broadband Access in OECD Countries,” OECD Paper DSTI/ICCP/TISP(2001)2/FINAL, Oct. 29, 2001, at 32-33.

Pirate international recordings make up a much higher percentage of seizures in digital formats: conventional CD and CD-R. Indeed, in 2001, commercially produced pirate CD-Rs appear to have overtaken CDs in terms of seizures. 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 (U.S.\$4.50). 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 – more than 100 were located in a recent survey – offering pirate sound recordings in MP3 format. 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 and public institutions. Unauthorized home production of CD-Rs is also on the rise. The RIAA-estimated piracy rate in Korea of 14%, and its estimate of \$4.0 million in trade losses to the U.S. recording industry, do *not* include losses due to online piracy, since the estimation methodology currently in use does not capture these losses.

All the products of the entertainment software industry are digital, of course, but the trends noted above are reflected in the piracy profile for this sector as well. For games in formats to be played on personal computers, the piracy stream increasingly originates from numerous online sites, accessed via broadband, from which games are downloaded as masters for “burn-to-order” operations using CD-R writers. Factory-produced pirate products are becoming less common in the PC game sector, although still a predominant factor in products designed to play on game consoles. Overall, the Interactive Digital Software Association (IDSA) estimates piracy losses to U.S. companies at \$487.7 million, based on an estimated piracy rate of 63%.<sup>5</sup>

In another digital sector, one of Korea’s most intractable problems concerns the piracy of business software applications, which 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 \$134.2 million on U.S. companies in 2001, reflecting a piracy rate of 47%. Most 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.

In the pirate markets in Korea for the audiovisual and book publishing industries, analog formats continue to predominate. These are discussed in more detail below.

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 considerable progress on the first of these fronts in 2001, but many of the needed law reform tasks remain incomplete. On the digital enforcement side, substantial challenges remain, as exemplified by the problem of end-user piracy of business software.

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<sup>5</sup> Methodological improvements have enabled IDSA to provide a more realistic estimate of piracy losses than in prior years. The sharp increase in the 2001 estimate reflects better data both as to the high level of penetration of both PCs and game consoles in the Korean market, and as to the extraordinarily high ratio of games per platform that is applicable in this uniquely videogames-oriented market, a ratio higher than that used in any other country. The estimated piracy level for 2001 is consistent with the estimates from 1999 and earlier; the higher 2000 estimate reflects a transitional methodology and is believed to be an aberration.

## Law Reform: More Modernization of Legal Tools Is Needed

Efforts are being made, of course, to deal with the changing nature of digital copyright piracy within the confines of current Korean law. The notorious music file sharing service Soribada – the so-called “Korean Napster” – was the subject of a criminal indictment during 2001, although legal action has not yet succeeded in closing down the site.<sup>6</sup> A Seoul trial court also ordered a Website operator to pay damages for allowing infringing activity on its site, reportedly a first for the Korean legal system.<sup>7</sup> However, there remains plenty of evidence that the current legal framework is inadequate to deal effectively with new forms of piracy. For instance, in an earlier case, a different court in Seoul enjoined an internet service provider from disabling access to MP3 files identified by the rightholder as infringing, thus sending precisely the wrong message to the marketplace regarding the responsibility to cooperate to combat online piracy.

To their credit, Korean authorities have begun to move to update those parts of its copyright legal framework which have become outmoded in light of technological and market developments and the changing character of piracy in Korea. Under Korea’s unusual bifurcated statutory framework, this requires amendments to both the Copyright Act of Korea (CAK) and to the Computer Program Protection Act (CPPA).

### CAK Amendments

At this writing, extensive amendments to the CAK are pending before Korea’s National Assembly, and their enactment is expected very soon. In the version of the legislation reviewed by IIPA in late 2001, the CAK amendments contained two important features. First, a new civil and criminal prohibition is proposed on the production of, or trafficking in, devices aimed at circumventing copy control technology used by rights owners. Second, a new Article 77-2 sketches out the 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 important steps forward toward a legal regime more conducive to enforcement against online and digital piracy. However, the proposed legislation contains significant flaws in both these areas which must be corrected; and just as important, the CAK amendments lack key elements that Korea must include in its law in order to respond comprehensively to the challenges that face it.

With regard to technological protection measures (TPMs), the proposed 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.

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<sup>6</sup> “Soribada Sued for Copyright Infringement,” Korea Times, Feb. 21, 2001; Newline, Billboard, August 25, 2001, at 50.

<sup>7</sup> Kim, “Court Orders Music Web Site Operator to Pay Damages for Copyright Infringement,” Korea Herald, Aug. 27, 2001.

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 contain a huge potential loophole for those situations in which “it is difficult to reasonably expect [a takedown] for technical, time or financial reasons”; such an exception could easily swallow the rule which the amendments aim to create. Finally, issues about the definition of “service provider” and the mechanics of a “put-back” response from an accused primary infringer must also be resolved.

At least some of the ambiguities surrounding these critical provisions of the CAK amendments could be resolved in implementing regulations, and the Korean government should be urged to do so and to dramatically increase the openness of the process by which it drafts such regulations. But the omissions exhibited by these new amendments can only be corrected by new legislation. Korean authorities should be urged to turn immediately to the preparation of additional CAK amendments that contain at least the following provisions:

- The exclusive transmission right accorded to works under Article 18-2 of the CAK should also apply to sound recordings, and Article 67 should be amended to recognize that sound recording producers have an exclusive right of transmission with respect to their recordings. This is required in order for Korea to implement the WIPO Performances and Phonograms Treaty (WPPT) and would underscore Korea’s commitment to combat the worsening problem of online piracy of sound recordings. This deficiency 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 levels of Internet piracy. Additionally, all phonogram producers, regardless of nationality, should be accorded exclusive rights over digital and subscription broadcasting of their phonograms.
- 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. Korea’s law must spell out that this right is encompassed within the copyright owner’s exclusive control over reproduction.
- In line with the international trend exemplified by recent enactments in the European Union and the United States, 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 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.

## CPPA Amendments

As a result of amendments enacted in both 1999 and 2000, the CPPA contains new provisions on protection of TPMs used in connection with computer programs. These provisions avoid several of the pitfalls found in the CAK amendments, although they 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.

Furthermore, no provision of the CPPA specifically addresses the problem of service provider liability. An amendment on this topic should provide the framework for takedown after notice of sites engaged in piratical activities involving computer programs.

Perhaps the most significant gap in the CPPA is Korea's continued failure to provide specifically for the copyright owner's control over temporary copying of a computer program. 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 achieve 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. Finally, and perhaps most importantly, 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.

Prompt enactment of the further CAK and CPPA amendments outlined above would also have the benefit of bringing Korea close to full compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and thus of facilitating Korea's speedy accession to these two treaties. 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: both these treaties will come into force without Korea as a member. 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 2002, and to depositing its instruments of accession to both treaties with WIPO as soon as possible.

## **Business Software Enforcement: Deficiencies Must be Corrected**

Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years. 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 and throughout 2000, these enforcement actions dropped off precipitously. Perhaps even more troubling is the fact that during this period, the enforcement operations of the government became

entirely opaque to the U.S. and Korean software industries, and have remained virtually hidden ever since.

As 2001 opened, hopes were raised for a significant turnaround in Korea's record of enforcement against end-user business software pirates. In an on-site briefing on February 19, 2001, President Kim Dae-Jung personally instructed MOIC in no uncertain terms: "Intellectual property rights must be protected.... Where software piracy exists, creative ideas wither... For the market economy to function smoothly and outstanding creativity and ideas to be appreciated and successful, the Government needs to be firm and decisive in this matter." MOIC announced soon afterwards that the government would conduct two "special enforcement periods," in the spring and fall of 2001, to crack down on software piracy in government agencies, educational institutions, and corporations. MOIC drew up the master plan for these crackdowns, which prosecutors were responsible for executing. MOIC also pledged to establish a standing enforcement unit to respond to private sector reports of piracy on an ongoing basis, as well as to conduct publicity campaigns and public education. Both Korean and U.S. software producers, working together in the Software Property-Rights Council (SPC), were encouraged by these announcements, and hoped that a new era of cooperation and effective enforcement against end-user software piracy was beginning.

During the March 5-April 30 crackdown campaign, prosecutors investigated 2,315 companies and public offices that appeared to have been selected at random. According to data released by the Supreme Public Prosecutor's Office, a total of 99,867 PCs were inspected. Of the 359,090 software programs found on these computers, 34,181 were determined to be unauthorized, resulting in a piracy rate of 9.5%. They found that 1,024 of the offices inspected had no illegal software, which means that 56% of those inspected had at least some illegal software. 88 offices were found to have 100% pirate software, and 390 were found to have piracy levels of 50% or more.

While the software industry appreciated these efforts, the results fell far short of industry hopes. The crackdown campaign was conducted under a veil of secrecy. Prosecutors included few if any targets identified by the private sector through the SPC; industry was not called on to provide technical assistance; and copyright owners were not informed about the categories of software or the software programs covered by the inspections, which kept alive suspicions that some U.S. and other foreign-made software is excluded from inspections. Due to shortcomings in the raiding strategy, the level of piracy detected in the raids fell far short of the actual level of organizational piracy in Korea. The lack of cooperation with industry and lack of transparency also made it extremely difficult for companies to follow up the raids 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 second special enforcement period promised for the fall never materialized, and the permanent channel that MOIC said it would create for receiving and acting upon piracy reports still has not invited all representatives of the software industry to participate. It is not even clear whether this Standing Enforcement Committee has any enforcement authority beyond making "educational" visits.

Enforcement against software piracy must be conducted on a sustained basis if it is to be effective. Enforcement agencies must also be willing to act on complaints by industry. The prosecutors' reluctance to investigate industry-designated targets, either during or after last spring's special enforcement period, is particularly frustrating. The explanation given to industry is that the complaints lack sufficient evidence. Korean prosecutors are requiring, in effect, conclusive proof of infringement 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.

The software industry also turns to the police for enforcement. The results are mixed. In the first half of 2002, the police typically acted on complaints within a few weeks of filing. However, from July onward, police actions virtually ground to a halt. The police appear to be reluctant to make voluntary investigations unless there is a government-driven crackdown.

Another long-standing problem is that the penalties that are imposed on pirates are rarely publicized, thus undercutting the deterrent value of the sentence. Frequently, right holders are in the dark about the status of cases involving violations of their rights. Right holders and the public will never appreciate the government's commitment to reducing 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. The anecdotal evidence the industry has been able to compile strongly suggests that sentencing of convicted business software pirates falls far short of deterrent levels.

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. Korean authorities should be urged to:

- Conduct criminal enforcement actions against corporate end-user software pirates on a sustained basis at a rate of approximately 50 raids per month throughout the year. Fifty raids a month, every month, will be a far more effective deterrent than 3,000 inspections carried out during a brief special enforcement period, while piracy is ignored for the rest of the year.
- Provide adequate resources and training to those carrying out enforcement. Industry stands ready to provide training and to offer technical assistance during the raids.
- During the raids, computers must be checked for all categories of software, including programs produced by BSA member companies.
- Eliminate advance notice of enforcement actions and raid targets identified by industry investigators as likely sites of piracy. No institution, including government entities and Korea's powerful *chaebols*, should be immune.

- Allow industry representatives to accompany law enforcement on the raids, and provide complete reports to representatives of right holders 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 to representatives of the companies whose rights have been infringed.
  - Make a determined effort to ensure, and to demonstrate publicly, that the government is a model user of business software applications, by strictly enforcing Prime Ministerial Order No. 1997-12, which requires government agencies to use legal software.
  - Work with industry to provide software asset management training to businesses and government agencies. The public needs to understand why compliance with the law is important, and to receive the tools necessary to allow them to do so.

While structural and statutory changes 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 against institutions that pirate business software.<sup>8</sup> 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.

## **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: Will a Landmark Case Set the Tone?**

2001 was an exceptionally eventful year for the book publishing industry in its efforts to combat book piracy in Korea. It remains to be seen, however, whether the events of 2001 mark a real change in course from the deteriorating piracy situation faced by U.S. book publishers over the past few years. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2001 are estimated at \$35 million.

On February 26, 2001, in what may have been the largest anti-piracy raid in book publishing history, Korean law enforcement officials, in cooperation with the Association of

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<sup>8</sup> One “reform” promoted at the time the spring 2001 special enforcement period was announced was to give MOIC greater authority to conduct enforcement actions on its own. This will be counterproductive until more transparency is brought to the MOIC inspection system. IIPA has twice proposed to MOIC specific implementing regulations under the CPPA that would achieve this transparency, and both times these proposals were ignored.

American Publishers (AAP), seized a Seoul-area warehouse containing 600,000 counterfeit English language books, comprising some 2,000 separate titles, running the gamut from bestsellers to textbooks, to reference works. The warehouse belonged to Han Shin, one of the oldest book distributors in Korea, which evidently had operated, alongside its legitimate operations, a thriving business in counterfeit texts, some of them virtually indistinguishable from the original. In a case which attracted national media attention in Korea, Han Shin's principal ultimately pled guilty and was sentenced to one year's imprisonment without probation. This outcome sent a powerful message that book piracy would not be condoned in Korea, even when carried out by a supposedly legitimate businessman defended by a high-powered legal team.

While the Korean authorities' persistence in pursuing the Han Shin case was exemplary, developments later in the year raised questions about whether it was indicative of any positive trend. For instance, when Mr. Hong Bong-Ki was convicted of possession and distribution of pirated medical textbooks, after a raid in which pirate texts valued at hundreds of thousands of dollars were seized, his sentence included no prison time and a nominal fine of 10 million Won (US\$7540). Unfortunately, the significance of the Han Shin case risks being undermined by such "business-as-usual" verdicts in cases of serious book piracy.

Because of the high quality of the counterfeits involved, the Han Shin case required book publishers to 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 Korean 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.

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. Some photocopy shops build up stocks of infringing copies of textbooks; others make them only to order. Vans are stationed around campuses to sell pirate textbooks, especially to graduate students. The universities take no steps to prevent these piratical activities, nor does the Ministry of Education. Student unions openly endorse pirate copy shops and silence professors who try to discourage use of pirated texts. 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.

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. 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 a case like Han Shin all the more newsworthy. Combined with a 2000 case in which a convicted book pirate was sentenced to (and reportedly served) a one-year prison term for a massive piracy scheme involving raids on four different warehouses, it can be hoped that a trend toward more nearly deterrent sentences is at least beginning. If the trend continues and accelerates, 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.

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

Despite active enforcement efforts, video piracy in Korea continues to creep up to increasingly unacceptable levels. Overall, annual losses to the U.S. motion picture industry due to piracy in South Korea during 2000 are estimated by the Motion Picture Association (MPA) to have increased to \$25 million, reflecting an elevated video piracy rate of 25%.

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 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 can be found nationwide in night markets, computer outlets and retail stores. While the volume of this digital 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**

For 36 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 enjoyed an unprecedented share of the Korean theatrical market in 2001,

approaching 50% according to Korean government estimates and press reports.<sup>9</sup> 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. 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.

## Further Needed Law Reforms

In addition to the CAK and CPPA amendments outlined above as vital to deal with the increasingly digital and networked nature of piracy in Korea, other improvements in these statutes are long overdue. Korean authorities should be urged to consider at least the following further statutory reforms:

### Copyright Act

- 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 whose authors 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 1952-56, and to other works from WTO member countries whose authors died in 1952-56. These steps should be taken without excessive transition periods,<sup>10</sup> and without disturbing other, noncopyright laws and regulations that are used to combat piracy of this older subject matter.<sup>11</sup>

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<sup>9</sup> See, e.g., Kim, "Local pix leaving H'W'd in dust," *Weekly Variety*, September 24-30, 2001, at 13; Kim, "Korean Auds Seoul'd on Local Fare," *Weekly Variety*, July 16-22, 2001, at 14.

<sup>10</sup> Under the 1995 amendments to Korea's Copyright Act, 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 right holder. (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 was ever paid to a U.S. copyright owner for continued exploitation of an unauthorized translation prepared before 1995; nor is there any clearly prescribed procedure for doing so.)

<sup>11</sup> 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.

- Although the pending CAK amendments would, when enacted and fully implemented, cure a number of the problems created by the ill-considered 1999 amendment to Article 28, regarding library exceptions, the operation of the expanded exceptions for the digitization of materials in a library's collection should still be made dependent upon the certification by the appropriate governmental body that adequate technical measures are in place to prevent unauthorized dissemination of these materials outside library premises.
- Current law and practice in Korea does not make *ex parte* civil relief available to right holders on a basis expeditious enough to satisfy TRIPS Articles 41 and 50. Amendments should be adopted to make this essential enforcement tool available promptly.
- Article 91 of the CAK should be amended to clarify the availability of injunctive relief in civil enforcement against copyright infringement. Because TRIPS compliance also requires that right holders be able to enforce injunctions efficiently and expeditiously, a further amendment to Article 91 is desirable to make it clear that courts may enforce their injunctions directly, without the need to file a separate criminal action for violation of the injunction.
- Korea is obligated under Articles 41 and 45 of TRIPS to make available fully compensatory and deterrent damages in its civil enforcement system. To aid in fulfilling this obligation, Korea should give right holders the option to choose preset statutory damages at a level sufficient to achieve the deterrence objective.
- The private copy exceptions in Articles 27 and 71 of the CAK should be reexamined in light of the growth of digital technologies. The market harm threatened by the unauthorized creation of easily transmittable perfect digital copies far exceeds the harm threatened by analog personal copying. Accordingly, in the digital environment, the CAK private use exception no longer satisfies the requirements of Berne and TRIPS.

## CPPA

In addition to the changes outlined above, 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 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;
- The requirement for registration of exclusive licenses should be eliminated.