

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY¹

Special 301 recommendation: IIPA recommends that South Korea be placed on the Priority Watch List for 2003, and that an out-of-cycle review be held during the year to consider whether sufficient progress has been made to justify a change in this ranking.

Overview of key problems: Korea leads the world in broadband penetration, and its citizens are among the most Internet-savvy in the world; yet its digital marketplace in copyrighted works is plagued by piracy and much of its legal infrastructure is outmoded for a world of e-commerce. In addition, piracy levels are excessively high across the board, causing an estimated \$572 million of losses to U.S. copyright owners in 2002. Korea made incremental progress during the year in its enforcement efforts against piracy of business software applications by corporate and institutional end-users, but this progress must be sustained, and greater transparency achieved. An old form of audio-visual piracy, enabled by the submission of false licensing documentation to censorship authorities, re-emerged in 2002 after Korea unilaterally abandoned the effective preventive system it had put in place almost a decade earlier. In the absence of strong government leadership, the book piracy situation continues to deteriorate, and video piracy continues unabated despite vigorous enforcement efforts by the government.

Actions to be taken in 2003:

- Enact Copyright Act amendments to align the law with global minimum standards contained in the WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT) (this requires substantial revision to the amendments now pending before the National Assembly);
- Continue to improve the Computer Program Protection Act, and its implementing decree, to achieve WCT compliance, and a workable framework for getting the cooperation of service providers in fighting online piracy;
- Enact new laws to restore the effectiveness of Korea's efforts to prevent pirates from entering the audio-visual market using false licensing documentation;
- Build on recent progress in enforcement against end-user piracy of business software applications, by sustaining a high volume of criminal actions against corporate end-user piracy, improving transparency and cooperation with industry, and enacting legislation to give police powers to the Standing Inspection Team;
- Speak out at the ministerial level against widespread book piracy, especially on and around the nation's university campuses, and revive enforcement efforts against this perennial problem;
- Phase out the screen quotas that unjustifiably constrain the access of U.S. producers to the theatrical exhibition market.

¹ 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: 1998 – 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Motion Pictures	27.0	25%	25.0	25%	20.0	20%	20.0	20%	20.0	20%
Records & Music	6.9	20%	4.0	14%	7.0	19%	10.0	20%	10.0	15%
Business Software Applications ³	121.4	50%	100.4	48%	177.2	56%	118.9	50%	115.7	64%
Entertainment Software	381.0	36%	487.7	63%	157.0	90%	119.0	63%	122.1	65%
Books	36.0	NA	35.0	NA	39.0	NA	39.0	NA	35.0	NA
TOTALS	572.3		652.1		400.2		306.9		302.8	

KOREA MUST RESPOND TO THE CHALLENGES OF DIGITAL AND ONLINE PIRACY

Korea's society and economy continue to embrace the Internet at a record-setting pace. More than 25 million Koreans—some 58 percent of the total population—regularly surf the Web.⁴ Even more remarkable is the rapidly increasing level of access by Korean homes and businesses to high-speed, broadband Internet connections, the huge digital pipes that facilitate transfer of big files containing copyrighted works such as software, videogames, sound recordings and audio-visual material. Broadband access, unknown in Korea until 1998, last year surpassed 10 million subscribers.⁵ According to the OECD, as of mid-2002 there were 19 broadband subscribers per 100 inhabitants in Korea, nearly double the broadband penetration rate of any other country in the world.⁶ In 2001, 55 percent of Korean households enjoyed broadband access, a figure that has undoubtedly increased since then.⁷ Furthermore, as a rule

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$134.2 million at 47% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁴ Seoul Now!, "Korea leads Broadband Internet service market," Nov. 18, 2002, viewed at http://www.onnuryet.co.kr/SITE/data/html_dir/2002/11/18/20021118005.php on January 20, 2003.

⁵ Id.

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

⁷ Yi, "A Critical Look at Cyber Korea: Quantity v. Quality," in Korea Economic Institute, *Cooperation and Reform on the Korean Peninsula* (Washington, D.C.: 2002), at 62.

Koreans use this technology to consume copyrighted materials far more avidly than most other Internet users. For example, while 20-30% of online Americans use the Internet for games and entertainment, almost 80% of Korean Internet users report online consumption of audio and video, almost 53% play games on line, and 41% are engaged in file transfer.⁸

Based on these statistics, Korea should be leading the way as an online marketplace for materials protected by copyright. Unfortunately, the reality is otherwise. The bulk of the traffic in copyrighted works online in Korea is unauthorized. Indicative of the volume of online piracy in Korea is the fact that its leading peer-to-peer service for infringing transfer of music files, Soribada (the so-called “Korean Napster”) claimed 8 million subscribers before it was shut down last year, a figure roughly equal to the number of Korean households with broadband access.⁹ Online piracy is a growing feature of the rapidly changing landscape of Korean piracy, which is becoming more predominantly digital, moving online, and migrating to dispersed production formats such as CD-Recordable (CD-R). 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. Korea must respond.

The experience of the recording industry may be instructive. Audiocassette piracy remains a huge problem: Over 600,000 pirate cassettes were seized in 2002, according to the Recording Industry Association of America (RIAA). But nearly all of these involved local Korean repertoire. Pirate international recordings make up a much higher percentage of the 143,000 units seized in digital formats: conventional CD and CD-R. Indeed, beginning in 2001, commercially produced pirate CD-Rs have overtaken CDs and now account for 70% of digital product seized. This is driven in part by the declining prices of CD-R equipment and hence of pirate product: Typical street prices for pirate CD-Rs are around 6000 Won (US\$5.00). Many CD-R pirates employ small, dispersed operations, and many of these are fed by peer-to-peer (P2P) online networks, or by high-speed links to a wide array of online sites offering pirate sound recordings in MP3 format.¹⁰ 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. Government enforcement efforts fall far short of grappling with the problem: The Ministry of Culture and Tourism (MOCT) set up an online enforcement team in 2002, but it lacks the resources and the legal tools to take effective action. Unauthorized home production of CD-Rs is also on the rise. The RIAA-estimated piracy rate in Korea of 20%, and its estimate of \$6.9 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.

The entertainment software sector provides further evidence of these piracy trends. Internet downloading is the source for the most widespread form of piracy of games in formats to be played on personal computers. Online pirate games are accessed via broadband

⁸ Id. Conversely, while 94% of online Americans use the Internet for e-mail, the comparable figure for Koreans is 12%.

⁹ Russell, “Korean Labels Force File-Sharing Service to Close,” *Billboard* (Aug. 17, 2002), at 43; Yi, *op. cit.*

¹⁰ Even after the shutdown of Soribada, some 1000 P2P sites in Korea reportedly traffic in pirate sound recordings. Yang, “Music-sharing Web site faces shutdown,” *Korea Herald* (July 13, 2002).

connections, and the downloaded material is used as masters for “burn-to-order” operations using CD-R writers. These “burn-to-order” operations, usually carried out by small businesses, are now widespread throughout the country. 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. The unauthorized use of entertainment software by some Internet cafes (called “PC baannngs”) is also becoming a significant problem. Overall, the Interactive Digital Software Association (IDSA) estimates the value of pirate product in the market (valued at pirate retail prices) at \$381 million, based on an estimated piracy rate of 36%.¹¹

An effective response to the challenge faced by the changing nature of digital copyright piracy in Korea will require both new legal tools and substantial improvements in enforcement practices. Korea made some important progress on the enforcement front in 2002, with more active and more transparent enforcement against the piracy of business software applications, but it will need to increase its efforts in order to respond comprehensively to the enforcement challenge. But major aspects of Korea’s copyright law structure have failed to keep pace with the transformation of its market resulting from digitization and high-speed access to the Internet. Overhauling these outmoded laws should be a top priority for Korea in its efforts to integrate more closely into the global e-commerce marketplace.

LAW REFORM: MORE MODERNIZATION OF LEGAL TOOLS IS NEEDED

Efforts continue to be made, of course, to deal with the changing nature of digital copyright piracy within the confines of current Korean law. The shutdown of Soribada was significant, but it required more than a year of litigation; the precedential impact of the court’s decision to issue an injunction against Soribada is uncertain; and neither the infringement case brought by Korean record labels nor the criminal case against Soribada’s operators have yet been finally resolved. Furthermore, a “Soribada 2” service is now up and running, apparently because it falls outside the scope of the injunction issued in the original case. Thus, further time-consuming and expensive litigation will evidently be required. The Soribada situation provides further evidence that the current legal framework is inadequate to deal effectively with new forms of piracy and provides an insufficient basis for enforcement either by the government or private parties.

Under Korea’s unusual bifurcated statutory system, to make the needed updates will require amendments to both the Copyright Act of Korea (CAK) and to the Computer Program Protection Act (CPPA). In 2002, Korea continued to modernize the CPPA but made no forward progress toward bringing the CAK into line with current international minimum standards.

Copyright Act Amendments and Implementation

Throughout the past year, extensive amendments to the CAK were pending before Korea’s National Assembly, which did not act on the proposal. In the version of the legislation reviewed by IIPA in late 2001, the CAK amendments lacked key elements that Korea must include in its law in order to respond comprehensively to the challenges that face it. The most glaring of these omissions is the failure to accord to the producers of sound recordings

¹¹ IDSA’s estimate of 2002 piracy levels reflects more comprehensive data collection than in previous years. Its estimate of the 2002 value of pirate product in the market reflects the relatively high street prices for pirate entertainment software in Korea.

exclusive rights over the online dissemination of their recorded music. As the world's leader in broadband penetration, and as a market in which online piracy of sound recordings is already widespread and growing, Korea should have been among the first countries in the world to implement this critical feature of the WIPO Performances and Phonograms Treaty (WPPT). Instead, it now lags behind its neighbors, as well as its peers in global e-commerce, in providing the legal tools needed to promote the healthy growth of the digital marketplace.

The Korean government should be strongly encouraged to move now to modify the CAK amendments to provide that the exclusive transmission right accorded to works under Article 18-2 of the CAK also applies to sound recordings. Additionally, Article 67 should be amended to recognize that sound recording producers have an exclusive right of transmission with respect to their recordings. These steps would underscore Korea's commitment to combat the worsening problem of online piracy of sound recordings and to give the legitimate market for digital delivery of sound recordings 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.

The lack of exclusive rights for record producers to control digital transmissions, and the current discriminatory regime under which U.S. record producers and performers are denied any rights under Korean law with respect to broadcasting or other communications, are also creating other problems. MOCT has already taken one action under the existing CAK that gives rise to concern: it has approved the establishment of a new collecting society for remuneration paid by broadcasters to record producers, and there are indications that this society may be empowered to handle licensing for online distribution of recordings. Foreign producers do not participate in the society currently (since they are not entitled to remuneration from broadcasters), so any expansion of the society's authority to cover on-line transmissions would be unacceptable and highly prejudicial to U.S. entities. This situation also increases the urgency of establishing by law the producer's exclusive right to control transmission of their sound recordings, free of any requirement for compulsory licensing or collective management.

The current amendments do address two important topics for the first time in the CAK. 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 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 before enactment.

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. Until these changes are made, Korea will not have brought its TPM provisions into compliance with the global minimum standards embodied in the WIPO Copyright Treaty (WCT) and the WPPT.

With regard to service provider liability, the proposed amendments leave unclear the consequences (in terms of liability for infringement) for a service provider who fails to promptly take down an infringing site after receiving notice. The amendments also 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.

The service provider liability statutory provisions should be redrafted before the CAK amendments are enacted, and should conform to the greatest extent possible with those recently enacted in amendments to the CPPA (see discussion below). While the CPPA provisions also need further clarification, they still provide a useful model for a coherent and consistent statutory system for giving service providers incentives to cooperate with copyright owners in dealing with online piracy of all kinds of materials protected by copyright. If the redrafting cannot be achieved before enactment, then the ambiguities surrounding these critical provisions should be resolved in implementing regulations: the Korean government should be urged to do so and to dramatically increase the openness of the process by which it drafts such regulations.

Other provisions that should be incorporated into a modified CAK amendment package include the following:

- 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, the United States, and other countries, 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.
- 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 1953-56, and to other works from WTO member countries whose authors died in 1953-56. These steps should be taken without excessive transition periods,¹² and without disturbing other, noncopyright laws and regulations that are used to combat piracy of this older subject matter.¹³

- 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.

¹² 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.)

¹³ 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.

CPPA Amendments

The modernization of the CPPA to meet current challenges as well as to comply with new global norms continued on an incremental basis in 2002. A CPPA amendment was signed into law on December 30, 2002 and will take effect on July 1, 2003.

Until now, no provision of the CPPA specifically addressed the problem of service provider liability for infringement of copyright in computer programs taking place over their networks. The new amendments fill this gap by adding two new articles to the statute. Article 34-2 provides the basic framework for a “notice and takedown” system apparently similar to that created under U.S. law in 1998. New Article 34-3 provides that a service provider that “prohibits or stops the reproduction or transmission of a program with the knowledge that the rights of the program copyright owner . . . are being infringed” can have its liability “reduced or exempted.” This provision contains a number of significant ambiguities which need to be clarified. These include, how far will the liability be “reduced,” and in what circumstances it would be “exempted”? will injunctive relief remain available, even in cases in which the “reduction or exemption” applies? and, most fundamentally, what liability will an uncooperative service provider face if it fails to take action after receiving notice of infringement.

The implementing decree for the CPPA amendments could be crucial in resolving these questions, as well as in fleshing out the notice and takedown system created in skeletal form by the new provisions. The implementing decree should also make it clear that the newly created administrative procedure under which the Korean Ministry of Information and Communications (MOIC) or its delegate can order a service provider to take down infringing material is a voluntary supplement to, not a substitute for, copyright enforcement against online piracy, and that it is distinct from the notice and takedown procedure created by the statute. The U.S. should urge MOIC to adopt a transparent process for crafting this decree, and to give serious consideration to the extensive experience of the United States, in which a notice and takedown statute has been in place for over four years.

Unlike the CAK, the CPPA contains provisions (enacted in 1999 and 2000) on protection of TPMs used in connection with computer programs. While these provisions avoid several of the pitfalls found in the CAK amendments, 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. IIPA is pleased to report that proposed amendments that would have weakened the CPPA’s TPM provisions were omitted from the bill that ultimately passed the National Assembly.

Despite the incremental progress toward improvement of the CPPA, significant gaps remain. One of the most critical involves Korea’s continued failure to provide specifically for the copyright owner’s control over temporary copying of a computer program. Unless the copyright 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 within the CPPA a regime of exclusive rights and exceptions regarding computer programs that is within the mainstream of world intellectual property law trends, as exemplified by the European Union’s computer programs directive. Finally, and perhaps most important, clarification of this point is needed to

bring the CPPA in line with the requirements of Article 9.1 of the Berne Convention (incorporated into the TRIPS Agreement). Korea should be urged to plug this gaping loophole in the CPPA as promptly as possible. The “use right” recognized under the CPPA, while a valuable contribution to the bundle of rights granted to copyright owners, is not a fully adequate substitute for an appropriately comprehensive reproduction right.

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

- Elimination or relaxation of the formal criminal complaint requirement (i.e., piracy should be treated as a “public offense”);
- 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 to right holders;
- The requirement for registration of exclusive licenses should be eliminated.

As noted above, prompt enactment of the CAK and CPPA amendments outlined above would also have the benefit of bringing Korea into compliance with the WCT and WPPT and thus of facilitating Korea’s speedy accession to these two treaties, both of which have already come into force without Korea’s membership. It is ironic, to say the least, that such a technologically advanced nation, which seeks to participate more actively in global electronic commerce, lags so far behind in committing itself to the fulfillment of these benchmarks of an advanced legal regime for e-commerce. While Korea should be commended for taking the first steps, it should also be encouraged to dedicate itself to completing the task of implementation of the WCT and WPPT during 2003, and to depositing its instruments of accession to both treaties with WIPO as soon as possible.

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

Last year saw a resurgence of a serious piracy problem in Korea which had been under control for years: Pirates asked for, and received, censorship approvals and classification ratings for audio-visual works in which they had no rights, but for which they submitted fraudulent licensing documentation. The result has been significant losses in licensing revenues to U.S. audio-visual producers and the disruption of the legitimate Korean audio-visual market.

The fraudulent licensing problem for imported audio-visual titles is not a new problem in Korea. In the mid-1980s, it was so prevalent that it became one of the reasons for the initiation of a Section 301 action against Korea by the U.S. government. In the 1986 settlement of that case, the Korean government explicitly promised to deny permission for the exploitation of audio-visual (and other) works in Korea “in the absence of a valid license or contract which establishes that the [exploitation] would not infringe a U.S. copyright.” It took several years, but

by the early 1990s an effective system to fulfill this bilateral obligation had been put into operation. Under this system, representatives of the U.S. motion picture industry had ready access to the documentation submitted by purported Korean licensees in support of ratings requests for U.S. titles. Where the underlying licensing documentation appeared fraudulent, the censorship and ratings agency—the Performance Ethics Committee—would withhold further action on the application. As a result, by 1995 IIPA was able to report that the problem of audio-visual piracy based on false licensing documentation had been “virtually eliminated.”

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

Not surprisingly, this change has led to a resurgence of this form of audio-visual piracy in the Korean market. Over the past year, numerous U.S. titles were submitted to the KMRB for classification by parties having no legitimate rights to distribute them in Korea. DVDs and VHS tapes of a number of these titles are now being distributed in the Korean market without any compensation to the legitimate right holders, whose only recourse is lengthy and expensive litigation. Not only have these titles become unmarketable by legitimate distributors, but such competition from pirates is also driving down the license fees that other U.S. titles can command in the Korean market, to the detriment of major studios and independent U.S. producers alike.

After urgent consultations with the U.S. government throughout 2002, the KMRB has agreed to institute some interim reforms, such as making data on submissions of audio-visual titles available online in the original language of the film as well as in Korean, and formalizing the process by which the legitimate right holder can obtain at least a temporary stay of KMRB processing based on false licenses. IIPA urges the U.S. government to monitor the situation closely and to insist on the full and timely implementation of these interim measures. More significantly, however, the Korean government has acknowledged that the system needs to be fixed and has committed to introducing legislation by mid-2003 to make the necessary changes. The U.S. government should hold the Koreans strictly to this deadline, and should also insist that the system created by the new legislation (and any non-legislative change required under Korean law) contain the following features:

- Empower the KMRB or another entity to effectively reject an application for classification of a title whenever the applicant is unable to demonstrate its standing as a licensed distributor, including when challenged by the relevant industry representative, as outlined below;
- Ensure that a U.S. producer (or its licensee) is able to learn in a timely manner complete details about submitted applications, including the name and contact information of the applicant;
- Enable U.S. right holders to quickly and efficiently (and without imposing unnecessary formalities or documentation requirements) freeze processing on

the suspect application and shift the burden of proof to the applicant to demonstrate its *bona fides*;

- Empower KMRB or another agency to de-register audio-visual titles that are later discovered to have been classified based on false licensing documentation, and to effectively clear the market of these pirate copies.

The U.S. government should use appropriate means to encourage rapid enactment of new legislation and prompt implementation of the new system meeting these criteria. Only in this fashion can the Korean government remedy what is currently a clear and unjustified violation of its 1986 bilateral obligation to the U.S.

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

The Business Software Alliance (BSA) estimates that piracy of business software applications in Korea inflicted losses totaling \$121.4 million on U.S. companies in 2002, reflecting a piracy rate of 50%. 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.

Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years. In early 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." Within weeks, the government began a massive crackdown on piracy in government agencies, educational institutions, and corporations. But after conducting more than 2000 investigations during an eight-week "special enforcement period," enforcement activity subsided rapidly, and the software industry was left largely in the dark about the results of the campaign. A second special enforcement period promised for the fall of 2001 never materialized. A lack of cooperation with industry, and resistance to calls for transparency, undermined the practical value of the enforcement effort, as did its episodic nature.

In its 2002 Special 301 submission, IIPA called for a "fundamental revamping" of Korea's enforcement system against end-user piracy. There has been some progress toward that end. Notably, the Korean government maintained a steadier, more consistent level of enforcement, with a total of about 1200 criminal end user raids carried out during the first ten months of the year by police (about 980) and prosecutors (about 220), an average of 120 per month. However, most of these raids were carried out against small businesses. More attention should be paid to larger targets. The government also established a "Standing Inspection Team" (SIT) under the direction of the MOIC in which the Software Property-Rights Council (SPC), the local software industry association, participates. In recent months, the SIT conducted an average of 20-30 investigations per week and found evidence of piracy in about 60% of them. SIT searches for unauthorized copies of around 1000 different programs, including those of BSA member companies. However, the SIT system still lacks adequate transparency, and it is very difficult to determine the fate of cases referred by SIT to prosecutors. Moreover, the SIT investigations are carried out with prior notice to the targets, which limits their effectiveness.

BOOK PIRACY: GOVERNMENT LEADERSHIP NEEDED TO PREVENT FURTHER MARKET DETERIORATION

The deteriorating piracy situation faced by U.S. book publishers over the past few years continued in 2002. The losses to U.S. publishers inflicted by book piracy in the Korean market in 2002 are estimated by the Association of American Publishers (AAP) at \$36 million.

The 2001 Han Shin case, which began with one of the largest anti-piracy raids in book publishing history, led to a nationally publicized prosecution, and culminated in a one-year prison sentence for the principal pirate, increasingly appears to have been an aberration. While the trade book piracy in the Han Shin case was flagrant, it was also atypical. The more usual target of Korean book piracy is a scientific, technical or medical text that is reprinted in a counterfeit version, or a college textbook subject to massive unauthorized photocopying and binding on or near a college campus. All too often, Korean police and prosecutors react to such cases with indifference, and very few cases appear even to reach the stage of active prosecution, much less to result in the imposition of deterrent sentences.

Pirated editions of U.S. books reference books, 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. Enforcement outside the Seoul area is virtually non-existent, and in Seoul it is becoming increasingly rare.

The chronic problem of unauthorized mass photocopying and binding of college textbooks continues to sharply reduce legitimate sales by U.S. publishers in Korea. Around the start of the academic terms (i.e., March and September), when students acquire their course materials, areas around many college campuses become hotbeds of piracy. 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. Indeed, chancellors of some campuses refuse entry to the publishers' copyright investigators. Student unions openly endorse pirate copy shops, silence professors who try to discourage use of pirated texts, and issue threats against copyright owners who seek to assert their rights. On- and off-campus pirate copy shops have formed networks which share intelligence about enforcement activities and circulate instructional materials on avoiding detection.

It is long past time for the Minister of Education to speak out against this widespread and well-entrenched lawlessness on Korean university campuses. The ministry should issue a directive to chancellors to cooperate in copyright enforcement activities on campus and to speak out against piracy.

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 a reliable 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.

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.

In August 2002, the National Assembly enacted the Publication and Printing Business Promotion Act, which comes into force in February 2003. The legislation gives MOCT administrative authority to inspect any business establishment, order any “illegally copied publications” to be disposed of, and levy fines of up to KW 3 million (US\$2500) for disobedience of such an order. The law also provides for the involvement of private sector entities in the enforcement process. Whether this new law will provide any practical benefit to U.S. publishers remains to be seen. The act also revises the procedure for obtaining censorship approval of foreign publications. The U.S. government should monitor implementation of this new law, including the impact of these censorship provisions on the access of U.S. publishers to the Korean market.

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 2002 are estimated by the Motion Picture Association (MPA) to have increased to \$27 million, reflecting a video piracy rate of 25%, about double the rate observed five years earlier.

The VHS videocassette remains the locus of video piracy in South Korea. 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 smaller pirate duplication facilities detected in earlier years seem to be expanding, although recently there is evidence that large-scale duplicators are dispersing their facilities to evade detection.

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.

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

For 37 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 continue to do well at the box office and enjoyed a healthy share of the Korean theatrical market in 2002, approaching 50% according to Korean government estimates and press reports.¹⁴ 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

¹⁴ See Soh, “Despite Losses, Domestic Films Take 47 Pct. Of Box Offices Last Year,” *Korea Herald*, January 14, 2003.

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.

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