

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### SOUTH KOREA

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

**Special 301 Recommendation:** IIPA recommends that South Korea remain on the Priority Watch List for 2005.

**Overview of Key Achievements/Problems:** Korea leads the world in broadband penetration, and its citizens are among the most Internet-savvy in the world; yet its marketplace in every kind of copyrighted work is plagued by excessive levels of piracy, especially online, and much of its legal infrastructure is outmoded for a world of e-commerce in copyrighted materials. Korea modernized its laws in 2003, but big gaps remain. Its digital economy is at the cutting edge, but its legal system lags behind world standards in substantive and enforcement fields ranging from scope of exclusive rights to treatment of temporary copies, from copyright terms to technological protection measures. In 2004, Korea implemented long-overdue reforms to address resurgent piracy of audio-visual materials based on false licensing documentation, and acceded to the WIPO Copyright Treaty, but it made no progress in driving down piracy rates for audio-visual material; it fell farther behind in its fight against book piracy; entertainment software piracy increased; and the Korean recorded music marketplace continued its virtual collapse at the hands of pirates. Progress was made against piracy of business software applications by corporate and institutional end-users; these enforcement efforts should be sustained. Korea put in place in 2004 an inter-ministerial “master plan” for addressing many of these issues, but its effectiveness remains unproven and must be demonstrated in 2005. Anachronistic screen quotas still constrain access of U.S. movie producers and distributors to the Korean market.

#### **Actions to be Taken in 2005**

- Revise Copyright Act to: (1) give producers clear control over all digital dissemination of their sound recordings; (2) ensure that all sound recordings released in the past 50 years enjoy a full, TRIPS-compliant term of protection, and extend copyright terms for works and sound recordings to reflect global trends; (3) fully comply with WIPO Treaties standards on technological protection measures; (4) clarify liability of online service providers; (5) recognize a robust reproduction right, encompassing temporary copies and narrowing the private copying exception in the digital realm; (6) eliminate or substantially tighten recent expansions to library exceptions; (7) bring enforcement provisions up to TRIPS standards.
- Make similar changes to the Computer Programs Protection Act, as applicable.
- Continue and increase enforcement efforts against audio-visual, entertainment software, and book piracy, including imposition of deterrent penalties against pirates.
- Step up enforcement against online piracy of all categories of copyrighted materials.

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<sup>1</sup> For more details on Korea's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

- Make continued progress and improve transparency in enforcement against end-user business software piracy, and ensure that government at all levels uses only legal, licensed software.
- Significantly reduce screen quotas and dismantle other market access barriers to the film industry.

<b>SOUTH KOREA</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2000-2004<sup>2</sup></b>										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	40.0	20%	40.0	20%	27.0	25%	25.0	25%	20.0	20%
Records & Music	2.3	16%	3.5	20%	6.9	20%	4.0	14%	7.0	19%
Business Software <sup>3</sup>	263.0	46%	275.0	48%	285.9	50%	100.4	48%	177.2	56%
Entertainment Software <sup>4</sup>	349.0	43%	248.4	36%	381.0	36%	487.7	63%	157.0	90%
Books	42.0	NA	38.0	NA	36.0	NA	35.0	NA	39.0	NA
<b>TOTALS</b>	<b>696.3</b>		<b>604.9</b>		<b>736.8</b>		<b>652.1</b>		<b>400.2</b>	

## **DIGITAL AND ONLINE PIRACY CONTINUE TO PLAGUE THE KOREAN MARKET.**

Korea's society and economy continue to embrace the Internet at a record-setting pace. More than 26 million Koreans—some 59 percent of the total population—regularly access the Internet.<sup>5</sup> Even more remarkable is the rapidly increasing level of access by Korean homes and businesses to high-speed, broadband Internet connections, the huge digital pipes that facilitate transfer of big files containing copyrighted works such as entertainment and business software, sound recordings, audio-visual materials, and books. Broadband access, unknown in Korea until 1998, is now enjoyed by some 75% of Korean households, more than triple the comparable figure in the United States.<sup>6</sup> According to the OECD, as of December 2003 there were more than 23 broadband subscribers per 100 inhabitants in Korea, nearly double the broadband penetration rate of any other OECD country.<sup>7</sup> In addition, the number of Koreans with wireless Internet access probably exceeds the number with fixed line access,<sup>8</sup> and the Korean government predicts that 39.5 million Koreans—of a total population of 48.5 million—will carry

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at <http://www.iipa.com/pdf/2005spec301methodology.pdf>.

<sup>3</sup> BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in South Korea, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$462 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

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

<sup>5</sup> National Computerization Agency, Ministry of Information and Communication, *White Paper Internet Korea 2003*, at 25.

<sup>6</sup> Lewis, "Broadband Wonderland," *Fortune*, Sept. 20, 2004.

<sup>7</sup> "Broadband Access in OECD countries per 100 inhabitants," December 2003, at [http://www.oecd.org/document/31/0,2340,en\\_2649\\_34225\\_32248351\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/31/0,2340,en_2649_34225_32248351_1_1_1_1,00.html), viewed 1/30/05. The U.S figure was 9.8 compared to Korea's 23.2

<sup>8</sup> *White Paper Internet Korea 2003*, supra, at 27.

broadband-enabled handsets by 2008.<sup>9</sup> Furthermore, as a rule Koreans use their Internet access 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.<sup>10</sup>

Based on these statistics, Korea should be leading the way as an online marketplace for materials protected by copyright. Unfortunately, the reality is otherwise. Most 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 eight million subscribers before it was temporarily shut down, roughly one-sixth of the entire Korean population.<sup>11</sup> The problem is not confined to music: 58% of South Korean Internet users have reportedly downloaded movies, even though legitimate sources for such downloads are currently extremely limited.<sup>12</sup> The entertainment software industry is plagued with online piracy and unauthorized downloading of its most popular titles. Reports are beginning to surface of significant unauthorized trading of books online. In short, online piracy is a growing feature of the rapidly changing landscape of Korean piracy, which is becoming more predominantly digital, moving online, and migrating to dispersed production formats such as CD-Recordable (CD-R) and DVD-Recordable (DVD-R). Piracy of analog formats—especially books and other printed materials—remains a serious, and in some instances a worsening, problem. But technological and market trends are clearly pushing piracy in a new direction.

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

## Recording Industry

The experience of the recording industry may be instructive. Digital piracy has decimated the market for legitimate recorded music, with sales dropping from \$288 million to \$162 million between 2001 and 2003.<sup>14</sup> A further fall of at least 20% is estimated for 2004. Pirate CD-Rs and other unauthorized hard goods may be partly to blame for this catastrophic situation, but the principal engine of the downward spiral is clearly Internet piracy, which has made infringing music ubiquitously available.

Cyberspace has become the main locus of the piracy problem plaguing the music industry in Korea. Pirate online sites of all kinds continue to proliferate, even after the 2002 shutdown of Soribada (which itself re-opened in a new, more decentralized format, and which

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<sup>9</sup> Lewis, “Broadband Wonderland,” *supra*.

<sup>10</sup> Yi, “A Critical Look at Cyber Korea: Quantity v. Quality,” in Korea Economic Institute, *Cooperation and Reform on the Korean Peninsula* (Washington D.C.: 2002), at 62. Conversely, while 94% of online Americans use the Internet for e-mail, the comparable figure for Koreans is 12%.

<sup>11</sup> Russell, “High-Speed Internet Has Advantages for Korea,” *Billboard*, Aug. 2, 2003, at AP-1.

<sup>12</sup> Anthony Leong, “Behind the Boom,” *Weekly Variety*, October 4-10, 2004, at A1, A4.

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

<sup>14</sup> Russell, “South Korea Split,” *Billboard*, December 18, 2004, at 41.

now charges listeners for its service).<sup>15</sup> In 2004, the recording industry sent over 600 cease and desist notices to sites offering infringing music files. Many of the sites that make infringing MP3 recordings available for download and/or streaming are for-profit businesses which either charge users for downloading or are supported by advertising on the site. Many of the customers for these sites are college students, and recording industry investigators have even discovered a number of sites located on the servers of Korean colleges and public institutions. Similarly, although the Korean market for music services delivered to mobile phones is now estimated to be larger than the market for recordings in CD format, most of this spending goes to unlicensed providers. The first legitimate music download subscription service did not roll out in the Korean market until November 2004.<sup>16</sup>

Government enforcement efforts and existing legislation 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 lacked the resources and the legal tools to take effective action. In February 2005, the MOCT transferred this online enforcement function to the Copyright Deliberation and Conciliation Committee (CDCC), where a Joint Agency for the enforcement of online piracy of music, games, videos and publications has been set up. The CDCC is a semi-official research and mediation center and hitherto has never had any enforcement functions. Unless the CDCC is provided with the necessary expertise and resources to undertake this function, online enforcement efforts in the Korean market will remain ineffective.

The criminal prosecution of Soribada is a case in point. After 22 months and hearings before three different judges, the case was dismissed in May 2003 on the grounds that the charges were defective. In January 2005, this dismissal was upheld by an appellate court, which ruled on the merits that the Soribada providers were not guilty of aiding and abetting copyright infringement. More encouragingly, on January 27, 2005 a Seoul trial court found a representative of Bugs Music guilty of criminal copyright infringement for operating an unlicensed music streaming service that, at its peak, boasted 14 million subscribers, more than one-fourth of the entire population of South Korea.<sup>17</sup>

On the civil side, on January 12, 2005, the High Court in Suwon upheld an injunction against Soribada granted to the recording industry in July 2002. Two weeks later, a three-year civil litigation against Soribada culminated in a court order that the service operators pay 19 million Won (US\$18,500) in damages. This was a welcome verdict but hardly a deterrent penalty for the proven dissemination to potentially millions of users of 5000 unlicensed musical compositions over a two-year period. Most frustratingly, despite these judgments, Soribada continues to operate unabated, and in early 2005 began to charge fees for its services.

The estimated 2004 piracy rate in Korea of 16%, and the estimate of \$2.3 million in trade losses to the U.S. recording industry, present only a small part of the piracy picture. These estimates from the Recording Industry Association of America (RIAA) do not include losses due to online piracy, since the estimation methodology currently in use does not capture these losses. The decline in dollar losses since 2002 reflects the shrinking of the entire recorded music sector in Korea. Indeed, Internet piracy is so rampant in Korea that it has even limited the sales of *pirate* product in CD format!

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<sup>15</sup> 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).

<sup>16</sup> Russell, "South Korea Split," *supra*.

<sup>17</sup> *Korea Herald*, Economy section, Jan. 27, 2005; Seo Jee-yeon, "Online Music Provider Denied Access to Latest Scores," *The Korea Times*, October 2, 2003.

## Entertainment Software

The entertainment software sector provides further evidence of these piracy trends. There is a strong market for legitimate product for the PC format, including through legitimate online delivery and online game play. However, there is also a significant level of illegal downloading and P2P trading of PC games, and of entertainment software in other formats.

Pirate games are accessed online via broadband connections and illegally downloaded, including for use in “burn-to-order” operations, usually carried out by small businesses, using CD-R writers. Factory-produced pirate products are rarely found in the PC game sector nowadays, although they are still a predominant factor in products designed to play on videogame consoles. Piracy of cartridge-based entertainment software has increased, primarily due to imports of counterfeit and pirate Game Boy products from China, with piracy rates in this format at about 99% in South Korea. The unauthorized use of entertainment software by some Internet cafés (called “PC baanngs”) remains a problem, although in 2004 some ESA member companies succeeded in entering into licensing agreements with many of the 20,000 or so Internet cafés in the country.

Finally, while there is a growing legitimate market for online gaming in Korea, there is also significant non-licensed activity relating to online games. This includes a growing population of so-called “offline servers,” which host pirate sites that emulate a publisher’s online game site, and thereby divert traffic and potential subscribers from the legitimate site. Industry investigators identified 57,000 incidents of online entertainment software piracy in 2004, which were addressed in about 6800 notices of infringement; unfortunately, only 5-10% of these resulted in takedown of the infringing material. Overall, the Entertainment Software Association (ESA) estimates the value of pirate product in the market (valued at pirate retail prices) at \$349 million, based on an estimated piracy rate of 43%.<sup>18</sup>

## Audio-Visual Sector

The motion picture industry is also adversely affected by the proliferation of online piracy, especially as carried out through file sharing. In 2004, MPAA identified over 7700 Korean online sites engaged in audio-visual piracy, a 30% increase over 2003. In the offline environment, optical disc piracy has now clearly established itself as the dominant form of piracy of audio-visual materials in Korea, although videocassette piracy persists as well. To evade detection and minimize the impact of equipment seizures by law enforcement, pirate optical discs are increasingly produced in dispersed facilities where a few DVD-R burners are in operation, although in the aggregate these dispersed operations are big enough to compete directly with legitimate duplicators. High-quality unauthorized copies of U.S. motion pictures appear on the market within days after the legitimate video release of the titles in Korea.

While some pirate product from these labs vies for retail shelf space with the legitimate product, pirate DVD-Rs are increasingly distributed through less conventional channels. Of particular concern are mobile vendors, which sometimes advertise with fliers, and then make home deliveries. Itinerant street vendors continue to congregate in hot spots in Seoul such as the Yong Sang Electronics Market, and are also found in other cities such as Pusan and Taegu. These vendors typically have only catalogs and empty cases on display, thus making enforcement more difficult. As more vendors appear on the streets, the price of pirate DVD-Rs

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<sup>18</sup> This piracy rate figure is a composite across multiple formats for entertainment software.

is falling to as little as US\$4 per disc. Although enforcement efforts against street vendors have been stepped up, they have had little impact, and authorities still appear to view retail piracy as a low priority. A high-visibility nationwide crackdown, followed by continuous raiding, may be needed to deal with street vendors. Only a sustained effort will break the organized criminal rings that supply and run these vendor operations. Such tactics have proven effective in the past against VHS retail piracy.

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

The bottom line is that enforcement efforts in Korea have not succeeded in reducing the volume of pirate product in the audio-visual 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 and devote greater resources to enforcement. 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. Korean authorities should also review the criminal prohibitions that may be currently applicable to illicit camcording, and, as needed, clarify and strengthen them in order to stamp out the practice.<sup>19</sup>

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 undercut the ability to distribute these videos through commercial channels. However, in March 2004, the Korean government determined that such showings in government-run centers violate the Unfair Elections Practices Act, and enforced this ruling for the first time in Taegu City in January, 2005. Korean authorities should continue these enforcement efforts and take further actions to ensure that these uncompensated public performances of copyrighted audiovisual materials do not unreasonably conflict with normal commercial exploitation.

In sum, despite active enforcement efforts, video piracy in Korea continues at unacceptable levels. Overall, annual losses to the U.S. motion picture industry due to piracy in South Korea during 2004 are estimated by the Motion Picture Association of America (MPAA) at \$40 million, with a video piracy rate estimated at 20%.

During 2004, the long-anticipated legal and regulatory changes were finally put into place to enable the Korea Media Rating Board (KMRB) to deny rating classifications (and thus, access to the Korean audio-visual market) to audio-visual products whose submission was premised on false licensing documentation. So far the new system, designed to fill a gap which

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<sup>19</sup> Camcording piracy is use of a video camera to illicitly record a movie at a movie theater, usually at the time of or just before or after its theatrical release. The recording made by camcorder pirates becomes the master for illegal optical disc copies that then supply the pirate market—both online and offline—in Korea or overseas. A single instance of illicit camcording of a film can thus undermine the prospects for recouping the investment made in its production. Deterrent criminal penalties must be available to punish such acts.

the Korean government unilaterally opened in 2001, is functioning effectively with regard to feature films in home video formats. However, the ability and willingness of KMRB to revoke ratings improperly issued to fraudulent applicants under the old system remains untested. Furthermore, beginning in October 2004, KMRB also sought to apply the new system to imported music videos. This extension of the new system was never anticipated by U.S. producers (or by the U.S. government), is not congruent with the characteristics of the music video marketplace, and has created unjustified delays in the entry of U.S. music videos in the Korean market. KMRB should act immediately to confine the application of the new system to the market segment for which it was initially intended.

## **Business Software**

The Business Software Alliance (BSA) estimates that most of the losses inflicted by piracy of business software applications in Korea are due to end-user piracy in businesses, government agencies, and other institutions. Such piracy remains the greatest impediment to the development of the Korean software industry and to Korea's goal of becoming a worldwide software power. BSA estimates the rate of business software piracy in Korea at 46%, accounting for losses of \$263 million to U.S. companies.

Although Korea's commitment to vigorous enforcement against end-user software piracy has ebbed and flowed over the years, 2004 was a year of continued forward progress. Korean authorities began to use the police powers recently provided to the Standing Inspection Team (SIT) of the Ministry of Information and Communications (MOIC). This is a new tool with potential to make the enforcement effort more consistent, sustained, and effective. More needs to be done, however, to realize that potential. In particular, the SIT should more consistently use its authority to include private sector experts in its inspection activities. It is also important that SIT maintain its current practice of conducting inspections without advance notice and that it make its subsequent reporting process more transparent and consistent.

The SIT mechanism is only part of the enforcement picture, however. The efforts of police and prosecutors remain essential if Korea is to further reduce end-user software piracy. There was significant progress on this front as well in 2004, with a satisfactory volume of raids, many of them based on industry leads. We understand that a memorandum was issued by the Supreme Prosecutor's Office in June 2003 mandating greater responsiveness to and better communication with right holders (including about raids that do not result in prosecution); it is important that this directive be fully implemented to improve transparency. IIPA believes it is essential that the USTR continue to stress to the Korean government that sustained and comprehensive enforcement efforts against end-user software piracy are needed to reduce the rate of software piracy, and that it is essential to continue to act on leads from industry and to keep industry informed about enforcement activities. Enforcement officers also need to be better trained about software licensing practices, and to conduct more careful investigations, so that major violations can be better detected, documented and ultimately punished.

End user piracy is increasingly being reported in the offices of governmental entities in Korea. These institutions are not subject to the normal raiding and enforcement process, however, making it all the more important that the Korean government make it a higher priority to ensure through other means that government agencies at all levels use only legal, licensed software.

A recent decision of the Program Deliberation and Mediation Committee (PDMC) affiliated with MOIC gives rise to concern. Software streaming technology is being marketed in Korea as a way to evade quantitative restrictions in software licenses. When PDMC was asked to give its opinion on the legality of marketing such technology, and of its use by end users, for this purpose, it went much further and indicated that the refusal of a software copyright holder to adopt a “concurrent use” licensing policy was an unfair or abusive contracting practice. This aspect of the PDMC’s decision, while not legally binding, has caused considerable confusion in the marketplace, which MOIC should take steps to dispel. Licensing terms for computer software, including whether to require one software license for each PC or to license on the basis of the number of concurrent users, should be left to the marketplace, without interference from government or quasi-governmental entities. MOIC should make this clear through a public statement clarifying the government’s position.

## Books

The digitization of the South Korean economy and society has also affected the persistent problem of book piracy. Cell phones with high-resolution cameras and considerable digital storage capacity are common in Korea, and are being used by university students inside bookstores to copy up to 100-200 pages of textbooks rather than purchase them.<sup>20</sup> Commercial piracy is beginning to shift from high-volume photocopying operations to scanned versions of texts that are used to generate new pirate copies on demand. However, the typical scenario of Korean book piracy today remains 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.

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

The universities named (and others where pirate photocopying is rampant) do little to stop or even to discourage these illegal activities. Generally, university administrators show no interest at all in stopping on-campus infringements, and police are often reluctant to enter due to fear of violent reactions from student demonstrators. The Association of American Publishers (AAP) reports some cooperation with on-campus raids in 2004, which is a positive sign, but much more enforcement activity is needed on campuses to effectively combat the pervasive problems there. Student unions openly endorse pirate copy shops; threaten adverse evaluations of tenure-seeking 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

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<sup>20</sup> Kim and Lim, “Cell phone users using their cameras to copy textbooks,” *Joong-ang Ilbo*, August 12, 2004.

copy shops have formed networks to share intelligence about enforcement activities and circulate instructional materials on avoiding detection. We commend the Ministry of Education for its March 2004 letter urging universities to crack down on these activities, but clearly follow-up is needed to make this initiative effective, including the imposition of consequences on universities that continue to tolerate this illegal behavior.

Recently, some pirate copy shops have claimed the right to make copies of textbooks because they hold licenses issued by the 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 should make the limits of the KRTRC licenses clear to enforcement authorities and copyshop operators alike, so that these baseless assertions can no longer impede enforcement against book pirates.

Besides rampant and worsening photocopying piracy, print piracy remains a serious threat to the Korean book publishing market. Pirated editions of U.S. scientific, technical and medical works, reference books and encyclopedias appear in university bookshops in the Seoul area within a few months of their authorized publication, and are routinely sold door-to-door. These versions, printed on a press and appearing in full color, are often quite difficult to distinguish from the originals, indicating a highly organized and sophisticated piracy process. The problem is even worse outside Seoul.

Even when book pirates are arrested, prosecuted, and convicted, the Korean judicial system is all too often unable to deliver deterrent sentencing. If any jail terms are imposed in book piracy cases, they are routinely suspended.<sup>21</sup> No effort is made to supervise the activities of convicted pirates; they need only transfer formal ownership of their enterprises to relatives or friends in order to evade Korea's system for identifying repeat offenders, thus avoiding the consequences of being treated as a recidivist.

In February 2003, the Publication and Printing Business Promotion Act came into force. The legislation gives MOCT administrative authority to inspect any business establishment, order any "illegally copied publications" to be disposed of, and levy fines of up to KW 3 million (US\$2900) for disobedience of such an order. Because of its limited penalties, this law has relatively little potential to form part of an effective enforcement regime against book piracy, and even that small potential is not being realized. The law also provides for the involvement of private sector entities in the enforcement process. The MOCT, however, appears to have simply passed the role of enforcement over to the KRTRC, a private entity, giving them limited funding and personnel for the task. The KRTRC, in turn, conducts raids targeting only titles produced by local publishers, and sometimes sends warning letters to University officials; it takes little action on behalf of foreign publishers. In March 2004, for the first time, raids on illegal photocopy shops were jointly conducted by KRTRC with representatives of foreign publishers on or around 16 university campuses. AAP hopes this cooperation can continue and expand. However, KRTRC does not consult foreign publishers in the process of planning raids. With virtually no input as to the choice of targets, foreign publishers derive little benefit merely from being allowed to be present when a target dealing mostly in Korean titles is raided. In any

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<sup>21</sup> In one recent case, a defendant who operated a photocopying establishment and warehouse from which 5100 infringing copies of books were seized was sentenced to eight months in jail, but the sentence was suspended and the defendant placed on two years' probation. Thus it is unlikely that this defendant will actually be required to serve any jail time.

case, MOCT should not rely solely upon KRTRC for enforcement, given the conflicting interest of that organization in maintaining good relations with its licensees.

In short, Korean authorities—including university officials, police, prosecutors, and judges—too often fail to take book piracy seriously as a commercial crime. U.S. publishers are likely to suffer increasing losses until this attitude is changed. Enforcement efforts must be stepped up, and deterrent penalties imposed, if further deterioration of the Korean book market is to be avoided. The losses to U.S. publishers inflicted by book piracy in the Korean market continued to increase in 2004, and are estimated by AAP at \$42 million.

## **LAW REFORM: KOREA'S LEGAL TOOLS MUST BE BROUGHT INTO THE 21st CENTURY**

On May 3, 2004, the South Korean government issued a “Master Plan for IPR Protection,” with the stated goal of providing more “coordinated direction for overall IPR policy.” The Master Plan outlined 15 tasks for improving intellectual property law and enforcement within Korea, as well as better protection for Korean works in export markets, and assigned various tasks to specific ministries. The Master Plan document identifies many, though not all, of the critical issues that South Korea must address in order to bring its laws into step with the transformed environment of ubiquitous broadband access described above. It also formally recognizes that strengthened IPR protection is needed to enhance Korean competitiveness in value-added industries, including “film, music and software games,” and that to advance this goal, Korea must in some cases raise its levels of protection above those demanded by applicable international treaties.

The Master Plan holds out the promise of a coordinated, efficient approach to the challenge facing Korea: to modernize its 20th century copyright legal regime to reflect the 21st century realities of its markets and its society. However, its effectiveness remains to be demonstrated. IIPA urges the U.S. government to encourage the overall coordinated approach reflected in the Master Plan; to press for prompt action by the Korean government on key issues identified in it; and to monitor closely Korea's success in tackling the problems outlined therein.

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. Under Korea's unusual bifurcated statutory system, both the Copyright Act of Korea (CAK) and the Computer Program Protection Act (CPPA) must be updated to meet the challenge of digital and Internet piracy. The IPR Master Plan calls for amendments to both these statutes. We understand that the Ministry of Culture and Tourism (MOCT) is preparing a draft revision of the CAK that may address a wide range of issues, while the scope of anticipated amendments to the CPPA being prepared by the Ministry of Information and Communication (MOIC) may be more restricted.

### **CAK Amendments**

IIPA believes that revision of the CAK should include substantial reform in the following priority areas:

## 1. Exclusive rights of sound recording producers

Korea has amended the CAK (effective January 2005) to extend to producers of sound recordings the right to control the making available of their recordings through means such as posting copies on websites for downloading on demand. But the extent to which the law addresses the numerous other methods by which sound recordings may be digitally disseminated to the public remains unclear. Korean authorities should ensure that these other means, such as webcasting, streaming, and digital broadcasting, are clearly brought within the scope of the producer's exclusive rights.

On January 18, MOCT posted on its website a set of "Q&A Regarding Data Transmission over the Internet," which IIPA has reviewed in an unofficial translation. This document includes some encouraging interpretations of the amended law, including the statement that "regardless of the format or methods, any unauthorized use of music files on the Internet constitutes an illegal act," and specifying that "real-time transmission of music files through webcasting is illegal" unless authorized by the right holder. While this interpretation by MOCT is commendable, it still falls short of according to sound recording producers the broad exclusive rights over digital communications that are necessary in order to reclaim the Korean music market from piracy.

There must be a clear recognition in the law that transmissions themselves have become a normal form of delivery of recorded music, regardless of whether they are reproduced by the consumer, or disseminated via the Internet. Delivery of music to the consumer through a variety of means, capable of being listened to or captured by a wide variety of devices, is the emerging pattern for the marketing of recorded music, and it is essential that the record company have exclusive rights over all forms of communications that will reach the listening public. In addition, even to the extent that ownership of a copy remains important in the marketplace, it becomes increasingly difficult to predict the specific form of communication and programming most likely to lead to unauthorized copying. All digital transmissions will compete on relatively equal footing for place on the personal copier's recordable media, so all forms of the digital transmission of recorded music should require the authorization of the copyright owner, regardless of the nature of the communicating entity. This includes not only webcasting and all forms of online streaming, as the MOCT Q&A document seems to recognize, but also digital broadcasting.

Only with broader exclusive rights can investment in the creation of original recordings be sustained in the Korean market. The economics of the recording industry in Korea today make it impossible to increase or even maintain investments. The major recording companies, including Korean companies, are seeing the physical market for recorded music in Korea deteriorate rapidly, while their rights in the digital domain of the Internet and Wireless platforms are not being recognized and protected by law. That scenario cannot continue if Korea wishes to preserve a thriving and creative music industry.

Additionally, the rights accorded to producers must be made available in a non-discriminatory way, regardless of nationality. Discrimination against foreign producers in the current system of equitable remuneration for conventional analog broadcast of sound recordings [under Art. 68(1) of the CAK] must also be ended. MOCT has already taken actions in this area that worry U.S. record labels. It has designated as the collective management agency for the licensing of online music services an association in which foreign producers do not currently participate (since the association currently handles remuneration from broadcasters, which U.S.

producers are excluded from receiving under Korea's discriminatory laws). The nature and scope of this designation must be clarified, to rule out any possibility that it amounts to imposition of a compulsory license for use of recorded music on the Internet (which would violate international legal norms).

One aspect of the MOCT Q&A document makes for shocking reading: the assertion that the 50-year term of protection for sound recordings under the CAK applies only to recordings made after July 1, 1994. MOCT asserts that shorter terms apply to earlier recordings, to the extent that recordings that predate 1975 are treated by the Q&A document as having fallen into the public domain in Korea.<sup>22</sup> Such an interpretation of the CAK is totally inconsistent with Korea's obligations under TRIPS Arts. 14.5 and 14.6 to provide a full 50-year term to all recordings from WTO member countries, and flies in the face of that government's repeated assertions to its U.S. counterparts that Korea is in full compliance with these obligations. This aspect of the MOCT posting must be corrected immediately, and all necessary steps taken to confirm Korean compliance with its TRIPS obligations in this regard.<sup>23</sup>

In short, Korea should clearly establish by law the producer's exclusive right to control online dissemination of sound recordings, free of any requirement for compulsory licensing or collective management; should step up enforcement efforts against Korea's pervasive online music piracy; and should immediately confirm that it accords all sound recordings the full 50-year term of protection demanded by the TRIPS Agreement. Only then will it be possible for Korea to begin to convert its current pirate Internet music bazaar into a legitimate marketplace for electronic commerce in sound recordings.

## 2. Extension of copyright term

In line with the international trend exemplified by recent enactments in the European Union and the United States, and even more recently in jurisdictions such as Singapore and Australia, 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.<sup>24</sup> As with temporary copies (discussed below), Korean law is isolated on this issue, and provides less protection than do most other OECD member countries.<sup>25</sup>

Differences in the duration of copyright protection, especially differences among major markets for creative materials, inevitably create stresses and distortions of trade in works and other subject matter of protection. Under the CAK, these materials all enter the public domain in Korea 20 years or more before doing so in most other major markets. This situation gives

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<sup>22</sup> Specifically, the answer to question 6 in the MOCT document reads in part (in unofficial translation), "phonograms, issued or performed before June 30, 1987, whose copyright holder is an association or a legal entity, and for which 30 years have past since the publication or performance, can be made available for free usage." If a 1974 recording is protected for only 30 years, then it is now in the public domain in Korea. The answer also asserts that the term of protection for sound recordings fixed between July 1, 1987 and June 30, 1994 is 20 years from fixation.

<sup>23</sup> A companion posting on the MOCT website, entitled "Supplementary Announcement Regarding Implementation of the Revised Copyright Act," also contains a troubling contradiction: while asserting that unauthorized uploading to music or video file sharing websites was an illegal infringement of the reproduction right even before the recent amendments to the CAK, the document states that "even for such websites, there will be educational guidance periods before launching law enforcement activities." Such a lack of urgency to tackle even high-priority targets does not bode well for the success of the fight against Korea's pervasive online piracy problem.

<sup>24</sup> Of course, as discussed in the preceding subsection, confirming Korea's compliance with its current treaty obligations regarding term of protection of sound recordings is an even more urgent requirement.

<sup>25</sup> In this regard we note that Japan recently extended the term of protection for certain works by 20 years.

incentives for the unauthorized exploitation of these materials in Korea and their illicit importation into other markets where they remain under copyright protection. The situation worsens as more and more countries extend their terms of copyright protection beyond what is provided in Korea.

Today, works such as literary texts and musical compositions whose authors died in the 1950s and 1960s, and films and sound recordings first released in those decades, include many extremely valuable properties with enduring cultural significance. In the digital networked environment created by the Internet, a single act of making available can result in the immediate dissemination of a work or sound recordings in many countries simultaneously. It is very easy to carry out unauthorized worldwide dissemination online of materials that are in the public domain in the country in which the exploitation originates, but that remain protected in the countries from which the materials may be accessed and then re-disseminated. We can be sure that such dissemination will become even easier in the future, thanks to technological advances. It is obvious that this situation undermines legitimate global trade in copyrighted materials, and could place Korea in an isolated and unsound position as the source of these trade distortions. It is also evident that this risk increases the longer Korea delays in harmonizing its terms of protection with those of other major markets. Korea could virtually eliminate this risk by extending terms of protection to life of the author plus 70 years, or 95 years after publication.

For all the reasons just stated, the need for an increase in the term of protection is just as compelling for the objects of neighboring rights as it is for works. Korea should give serious consideration to harmonizing the term of protection for sound recordings with the terms that apply in the United States, i.e., in the case of a sound recording whose term of protection is not measured by the life of a person, a term of 95 years from first publication or 120 years from creation.

The heirs and successors of Korean authors and composers would be the beneficiaries of term extension for works. Longer terms of protections for sound recordings would also increase incentives for the compilation, preservation and dissemination of these cultural products throughout the Korean market, and in the growing overseas market for Korean works and recordings.<sup>26</sup>

### 3. Technological protection measures

Technological measures such as encryption and scrambling are increasingly important means used by copyright owners to control access to their works and to prevent or discourage copyright infringements. The importance of legal protection for these measures is highlighted in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA applauds Korea's accession to the WCT in 2004, and urges it to join the WPPT as soon as possible. However, although the CAK contains provisions regarding technological protection measures (TPMs), these fall short of full compliance with the WCT and WPPT in some critical respects, including:

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<sup>26</sup> 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). 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 prior to 1957, and to other works from WTO member countries whose authors died before 1957. These steps should be taken without excessive transition periods, and without disturbing other, noncopyright laws and regulations that are used to combat piracy of this older subject matter.

A. Coverage of access controls. Technologies such as encryption or password controls that are used to manage access to a work are not clearly covered by the definition appearing in Article 2-20 of the CAK. These critical tools need to have clear legal protection against circumvention.

B. Act of circumvention. The CAK currently does not currently outlaw the act of circumventing a TPM, although it does prohibit [in Art. 92(2)] certain acts of trafficking in circumvention devices or services. A party who strips off protection and leaves a work “in the clear” for others to copy should not escape liability.

#### 4. Responsibilities of Internet service providers

A. Liability. Article 77 of the CAK limits the liability of an Internet service provider (ISP) when it takes certain steps to prevent or stop infringements that are taking place on its network or on a server that it hosts. However, nothing in the CAK clearly spells out the extent to which an ISP who does *not* take such steps is liable for these infringements. In other words, the basis for indirect liability of ISPs for copyright infringement needs to be spelled out, perhaps in the form of an amendment to Article 92.

To provide the appropriate incentives for cooperation in the detection and elimination of online piracy, it should also be made clear that—

- In all cases, including cases in which liability is “exempted” under Article 77, the courts retain the authority to issue appropriate injunctions;
- No liability limitations should apply to a case in which the ISP has the right and ability to control infringing activities on its network and in which it derives a direct financial benefit from such activities;
- Any liability limitations are inapplicable when the infringement is carried out by an employee or agent of the ISP, or by any other affiliated party, or when the ISP has any other direct involvement in the infringement;
- The provision should not be applicable to an ISP who refuses to cooperate in combating online piracy, such as by refusing to terminate the accounts of subscribers or customers who repeatedly use the system to commit infringements.

B. Notice and takedown. Article 77-2 of the CAK provides authorization for a notice and takedown system, which is spelled out in more detail in a separate Enforcement Decree. This decree approaches notice and takedown in a way that may be too complex and formalistic to meet the reality of pervasive online piracy in Korea. It remains to be seen whether, in practice, the Enforcement Decree is implemented in a way that accommodates the routine delivery of notifications by e-mail, for example, and how it will be applied to pirate sites offering copies of thousands or tens of thousands of works simultaneously. Some early indications are encouraging; MPAA reports close to 100% compliance with its takedown notices. However, fewer than half of the takedown notices sent on behalf of the recording industry were favorably responded to, and, as noted above, compliance levels for notices sent by the entertainment industry were even lower. IIPA urges that developments in this area be closely monitored in the year ahead.

C. Access to information on infringers. In order to facilitate enforcement, ISPs should make available to right holders complete contact information regarding ISP subscribers or other customers who commit infringements online. A speedy and simple procedure for obtaining such information would also reduce the number of legal claims brought against ISPs for their participation, since it would enable right holders to pursue the primary infringer directly. Such a procedure should be added to the CAK.

## 5. Reproduction right

### A. Temporary copies

In order to meet the international standards embodied in Article 9.1 of the TRIPS Agreement [incorporating Article 9(1) of the Berne Convention] and referenced in footnote 1 of the WCT and footnote 9 of the WPPT, the reproduction right accorded to works and sound recordings 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. In the networked digital environment, the right to make and use temporary copies of all kinds of works is attaining ever-increasing economic significance, and indeed in some cases will become the primary means of legitimate exploitation of copyrighted materials. Korean law, which stands nearly alone in the world in its rejection of protection for temporary copies, must spell out that this right is encompassed within the copyright owner's exclusive control over reproduction.

### B. Private copying

The private copy exceptions in Articles 27 and 71 of the CAK should be re-examined 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. We are encouraged by recent Korean court decisions in the Soribada litigation (referenced above) that appear to deny the shelter of these provisions to copying in the context of illicit peer-to-peer file-swapping services; such rulings should be codified. The broader concern is whether, in the digital environment, the CAK private use exception any longer satisfies the requirements of Berne, TRIPS, and the WCT/WPPT. The exception should be made inapplicable to digital copying to the extent that it exceeds the three-step test for permissible exceptions as enshrined in these agreements. In this regard, it is an encouraging sign that bipartisan legislation was recently introduced in the National Assembly to narrow the scope of the Article 27 exception.

## 6. Library exceptions

Article 28(2)-(5) of the CAK as amended allows libraries to digitize and to transmit to other libraries throughout the country any material in their collection that was published more than five years ago and that is not otherwise available in a digital format. IIPA questions whether this provision, which undermines the development of a legitimate Korean market for new digital versions of these slightly older works, is compatible with the three-step test in Article 13 of TRIPS for permissible limitations on exclusive rights. Many of the works most clearly targeted by these exceptions—including textbooks, English language instructional material, and scientific, technical and medical journals—are actively sold in the market far more than five years after first publication. Revised Article 28 could cripple those markets.

While the only sure way to achieve compatibility with international standards may be to repeal these provisions altogether, at a minimum they should be substantially revised to—

- Make the implementation of technological safeguards a meaningful pre-condition for exercise of the Article 28 exceptions;
- Extend the five-year waiting period to ten years, apply it to library digitization for on-site access (Article 28(2)) as well as to networking with other libraries (Article 28(3)), and clarify that the ten-year clock starts running when the material is first published in Korea, not first publication anywhere in the world;
- Require that libraries provide notice to publishers of their intention to subject a specific work to the Article 28 exception, so that publishers can choose whether to make a digital version available in the market instead;
- Provide a more robust compensation mechanism and clarify other ambiguous features of the law.

## 7. **Enforcement and Remedies**

Several provisions of the CAK should be amended to bring Korea's enforcement regime against copyright infringement up to international standards, including the following:

- 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 pre-set statutory damages at a level sufficient to achieve the deterrence objective.
- 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.

## **CPPA Amendments**

The most recent amendments to the CPPA took effect on July 1, 2003. An enforcement decree with the same effective date implemented new CPPA provisions (Articles 34-2 and 34-3) on service provider liability for infringement of copyright in computer programs taking place over their networks. Like the corresponding provisions of the CAK Enforcement Decree, the CPPA implementing regulations raise questions about how the statutory “notice and takedown” regime will work in practice, and whether it can accommodate a high volume of notices and responses by e-mail. Developments in this area should be closely monitored during 2005.

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

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

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

- Pre-set statutory damages for infringement, at a level sufficient to provide an effective deterrent, should be available at the option of the right holder;
- Criminal penalties should be increased to fully deterrent levels;
- Expedited provisional remedies to prevent infringement or to preserve evidence should be made available on an *ex parte* basis;
- Administrative enforcement by MOIC should be made transparent to right holders;
- The requirement for registration of exclusive licenses should be eliminated.

## **Other Laws**

Besides the CAK and CPPA, other sector-specific laws have long played an important—and in some sectors, a predominant – role in anti-piracy efforts in Korea. In this regard, IIPA notes with interest the recent draft legislation for a Music Industry Promotion Act, intended to supplant to some extent the current Sound Recordings, Video Software, and Game Products Act. The intent of the draft legislation appears to be to regulate the music industry both offline and online. New legislation has the potential to help in fighting music piracy both on the Internet and off it. IIPA will review this initiative with that goal foremost in mind.

## **MARKET ACCESS: SCREEN QUOTAS AND OTHER BARRIERS MUST BE ADDRESSED**

For nearly 40 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 significantly reduced now.

When this issue was first under active negotiation as part of the US-Korea BIT negotiations, the Korean side indicated that it anticipated reducing the quotas as soon as the Korean film industry started to recover from its deep slump. That recovery has happened: Korean titles now claim a solid majority of box office receipts in the marketplace—58.3% of box office revenue during the first half of 2004, representing 62% of admissions during that period,<sup>27</sup> with a reported 57% market share for the entire year. 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 finally begin to enjoy fairer and more equitable market access in Korea.

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

The Korean film censorship process acts as an additional market access impediment. While local films are censored within 2-3 days after submission, foreign titles typically take 10-15 days or more, and appear to be subjected to stricter censorship standards. Although the Ministry of Culture acknowledged in 2003 that the discrepancy is “not appropriate,” it has not yet taken any steps to rectify it.

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<sup>27</sup> Anthony Leong, “Behind the Boom,” *Weekly Variety*, October 4-10, 2004 at A1; see id. at A8 (“Market Share Breakdown” graphic, attributed to Korean Film Council).