

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### SOUTH KOREA

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** IIPA recommends that South Korea be placed on the Watch List, with an out-of-cycle review to determine whether book publishing and music industry issues have been adequately addressed, or whether a higher designation is warranted. On February 2, 2006, U.S. Trade Representative Rob Portman announced the U.S. Government's intention to negotiate a free trade agreement (FTA) with the Republic of Korea. The negotiations are expected to commence in the coming months (after the expiration of a 90-day consultation period). Just prior to the FTA announcement, the long-standing motion picture screen quota issue was resolved, and it is hoped that an FTA with Korea will bring resolution to many other issues, including many discussed herein.

#### **Actions to be Taken in 2006**

- **Take Effective Action Against Illegal Photocopying and Printing of Published Materials:** Despite positive steps in 2005 by the Korean Government, book piracy appears to be worsening in Korea, and going underground where it is much more difficult to detect. Publishers need cooperation from the Government's Copyright Protection Center (CPC) to help ferret out massive photocopy and print operations operating in near-secrecy. In addition, since pirate textbooks and English Language Teaching (ELT) materials are used all over Korea with impunity, publishers need follow-up by the Ministry of Education on work to ensure legalized use of published materials in all learning institutions, and to ensure that universities deliver and implement action plans to achieve greater legalized use of published materials.
- **Effectively Tackle Internet Piracy:** As has been reported for several years, Internet piracy in Korea continues to cause major damage to the legitimate marketplace for copyright material, evidenced by the closure of many licensed shops and decreased sales across the motion picture and music industries. While there were some positive case results in 2005 involving online piracy, leading some online services to take the necessary steps to go "legal," enforcement generally has been lacking. IIPA thus calls upon the Copyright Protection Center (CPC), which was tasked with tackling Internet piracy in September 2005, to take effective action against illegal Internet sites and to address such piracy as a priority in 2006. To the extent CPC cannot act, the cybercrime units within the Korean police and prosecutors must do so.
- **Ensure Passage of Laws That Strengthen Protection and Comport with International Standards:** Few of the many copyright-related amendments being considered in 2005 successfully address key needs for copyright owners, including: (1) extending copyright term for works and sound recordings to reflect global trends; (2) providing sound recording producers with control over digital dissemination of their sound recordings; (3) fully complying with WIPO Treaties standards on technological protection measures; (4) clarifying liability of Internet service providers and providing effective notice and takedown; (5) recognizing protection for temporary copies and narrowing the private copying exception in the digital realm; (6) substantially tightening library exceptions; and (7) clarifying and strengthening criminal prohibitions on "camcording" (use of a video camera to illicitly record

a movie at a movie theater). These needs should be addressed, and any attempts to scale back protection in these and other areas should be abandoned.

- **Address WTO-Inconsistent Broadcast Sub-Quota:** A WTO-incompatible broadcast sub-quota limiting the availability of foreign content in Korea must be resolved.
- **Address Increasing CD-R “Burning” Problem:** Several industries report major CD-R “burning” operations in Korea, e.g., the motion picture industry suffers losses due to sales of DVD-Rs “burned” with major motion pictures titles. The Korean Government must focus on this problem by running market sweeps on shops engaging in illegal burning or sales of illegally burned discs and investigating and acting against pirate duplication labs.
- **Maintain Enforcement Efforts Against “End-User” Piracy of Business Software:** The Korean Government has done a very good job remaining focused on end-user piracy of business software, and hopefully will continue this work throughout 2006. The Government should publicize raids to ensure that the business community does not become complacent.
- **Unauthorized Public Performances:** Unauthorized public performances of motion pictures in motels, computer game rooms, and public baths and saunas remain a problem in Korea. A Presidential Decree to amend the Enforcement Regulations of the Copyright Act of Korea was approved in early 2006 by the State Council and will go into force in March 2006. This Decree partially addresses this problem, and IIPA calls for its swift implementation.
- **Piracy of Cartridge-Based Videogames:** 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 Korean Government should not let this unacceptably high level of piracy stand in 2006.

For more details on Korea’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

<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: 2001-2005<sup>1</sup></b>										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level								
<b>Business Software<sup>2</sup></b>	255.8	46%	276.0	46%	275.0	48%	285.9	50%	100.4	48%
<b>Entertainment Software<sup>3</sup></b>	415.1	55%	349.0	43%	248.4	36%	381.0	36%	487.7	63%
<b>Books</b>	43.0	NA	42.0	NA	38.0	NA	36.0	NA	35.0	NA
<b>Records &amp; Music</b>	1.3	13%	2.3	16%	3.5	20%	6.9	20%	4.0	14%
<b>Motion Pictures<sup>4</sup></b>	NA	NA	40.0	20%	40.0	20%	27.0	25%	25.0	25%
<b>TOTALS</b>	715.2		709.3		604.9		736.8		652.1	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

<sup>2</sup> BSA’s 2005 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in South Korea, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2004 piracy statistics were preliminary at the time of IIPA’s February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>3</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>4</sup> MPAA’s trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

## **PIRACY AND ENFORCEMENT UPDATES IN KOREA**

**Book Piracy:** Despite some very positive efforts by the Korean Government in 2005, piracy involving published materials has worsened, resulting in decreased sales by legitimate right holders operating in Korea. The chief problems facing book publishers in Korea include massive illegal photocopying in and around university campuses, and more sophisticated pirate offset print operations. The problem of pirate offset printing has become particularly severe, with pirates exhibiting high levels of organization, and publishers regularly noting seizure numbers in the thousands, much higher than in other Asian markets. The problems have been exacerbated in recent years by the increasingly evasive practices of pirate offset printers and even copyshops, which have moved their operations underground. The quality of the pirate offset prints is becoming so high as to make detection increasingly difficult, hence, cooperation with right holders is key to discerning pirate (unlicensed) production from legitimate.

The problem of photocopying of educational materials in Korea is unfortunately not limited to the university market; thriving English language institutes, as well as primary and secondary schools, now use massive numbers of pirate copies of U.S. publishers' English Language Teaching (ELT) materials, as well as tertiary ELT books. While it is still generally accepted in Korea that students would prefer to go to a copyshop to get a hard copy of a book than deal with online versions, there are also some reported instances of digital piracy, such as cell phones with high-resolution cameras being used by university students inside bookstores to copy up to 100-200 pages of textbooks rather than purchase them,<sup>5</sup> and copyshops using scanned versions of texts to speed up the generation of new pirate "copies on demand."

As noted, the Korean Government took some important steps in 2005 to recognize and begin to address the serious book piracy issues. These include the creation of the Copyright Protection Center (CPC) (which we understand has subsumed the enforcement functions of the Korea Reprographic Transmission and Rights Center (KRTRC)), increasing Government cooperation with foreign right holders on copyshop raids, and increasing Government cooperation on raids on pirate print warehouses. IIPA is hopeful that CPC will receive the manpower and resources necessary to reduce book piracy levels. We also hope CPC will avoid the "conflict of interest" that plagued KRTRC enforcement efforts by separating the functions of licensing and enforcement. Regarding pirate offset printing, the publishing industry, with some government cooperation, had especially notable success in 2005 in tracking down massive underground offset printing operations, leading to some of the largest seizures in the history of enforcement efforts against book piracy in Korea. However, while Korean Government cooperation is vastly improved over 2004, the burden of initiating, investigating and carrying through enforcement actions remains on right holders. In 2006, IIPA would like to see even greater activity to combat piracy, including *ex officio* actions.

One important area in need of more efforts and results in 2006 involves promoting the legal use of published materials at educational institutions. IIPA commends the Minister of Education for issuing a letter in March 2005 requesting every university to devise an action plan for reducing book piracy on campus. IIPA understands that the Ministry has received responses from nearly half the universities, regarding implementing policies, monitoring on-campus photocopy shops, and crafting educational campaigns. We look forward to the Minister's further efforts to ensure that the universities that have not yet responded do so, and to press for some highly notable universities to step up as "models" in this regard. Implementation of these plans

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<sup>5</sup> Kim and Lim, *Cell phone users using their cameras to copy textbooks*, Joong-Ang Ilbo, August 12, 2004.

in 2006 is crucial to measuring the ultimate effectiveness of the MOE letter. IIPA also hopes the CPC will work with industry to devise an appropriate response to raise public awareness about illegal use of published materials at primary and secondary schools, as well as ELT materials by language institutes, and to put into place educational initiatives aimed at these schools/institutes, students and parents.

**Internet Piracy:** With the near-saturation of the broadband market,<sup>6</sup> the challenge now is to legitimize the usage of copyright materials by Korea's online population. Unfortunately, P2P sites are on the rise in Korea, with 100 to 120 sites now providing P2P file-sharing; this number is expected to rise to 150-180 sites in 2006. From only 20-30 file sharing services monitored in 2005, the Motion Picture Association identified over 9,500 Korean uploaders engaged in audio-visual piracy, a 20% increase over 2004. While cease & desist letters were sent to all the file sharing services concerned and there was a 100% compliance rate, the files in question invariably resurfaced on the same, or different, file sharing services within weeks or sometimes days. The business and entertainment software industries are also feeling the effects of unlawful downloads of their products over the Internet. The effects of Internet piracy are felt countrywide on the legitimate market.<sup>7</sup>

Peculiar to the entertainment software industry are so-called "offline servers." The "offline server" essentially makes a publisher's online game readily available without authority from the legitimate publisher and without adherence to terms or conditions set forth in a licensing agreement. In this form of piracy, an "offline server" operator creates a "mirror" server to the legitimate servers operated by entertainment software companies to run their online games, thereby diverting traffic and subscription revenue from the legitimate site. Pirate servers also allow the play of pirated games as there is no authentication or verification process carried out at the server level (i.e., to verify that the game software being used is not a pirated copy) as there is on a legitimate game server.

There is also unauthorized use of copyright materials, including entertainment software, by some of the more than 20,000 Internet cafés (called *PC baangs*.) In 2004 some ESA member companies succeeded in entering into licensing agreements with many of the cafes, about 40% of which have now been legitimately licensed by game publishers. Entertainment software publishers also face a new form of piracy – piracy of games for play on mobile phones. Pirated entertainment software is now capable of being downloaded directly from the Internet onto mobile devices or memory cards used in such devices. The near ubiquity of mobile devices in Korea – far exceeding even fixed broadband penetration – makes this a serious concern.

The recent Soribada decisions (criminal and civil) and the case involving Bugsmusic have raised the awareness of copyright law and rights enforcement amongst Koreans (Bugsmusic is now licensed, while Soribada, which had three significant court rulings against it, closed in November 2005, although recent press reports indicate Soribada is considering the launch of a product that permits "free" file sharing without any intermediary; industry will continue to monitor this development closely). The Copyright Protection Center (CPC) (formed

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<sup>6</sup> Korea boasts a household broadband penetration rate of 79.9%, and Korea remains the only country in the world to have surpassed the threshold of 25 broadband lines per 100 people. Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

<sup>7</sup> For example, the motion picture industry reports that the number of video shops operating in Korea has decreased to about 7,000, resulting in lost employment to legitimate distributors and salesmen. The entertainment software sector reports that there is a strong market for legitimate product for the PC format, including through legitimate online delivery and online game play, but that there is also a significant level of illegal downloading and P2P trading of PC games and of entertainment software in other formats.

under the Copyright Deliberation and Conciliation Committee) was just designated as the responsible agency to address online piracy in September 2005. CPC had not previously seemed willing or able to take effective action against illegal Internet sites, leaving the cybercrime units within the Korean police and prosecutors' offices as the relevant enforcement agencies. The CPC should be given enforcement powers and must treat Internet piracy as a priority issue in 2006, and to the extent they will not act, the police and prosecutors' offices must do so.

IIPA understands that the Seoul Central District Prosecutors' Office in early January, 2006 issued internal guidelines relating to the criminal liability of individuals who upload or download infringing song files. Industry is monitoring the application of these guidelines.

**Tackling Street Piracy/CD-R and DVD-R "Burning":** Both the motion picture industry and the entertainment software industry suffer losses due to sales of "burned" optical media (DVD-Rs or CD-Rs) with their copyright product on them. The Korean Government must pay more attention to this problem by running market sweeps on shops engaging in illegal burning or sales of illegally burned discs and investigating to identify and enforce against any offsite duplication labs. A particularly encouraging investigation with the Police in January 2004 resulted in the step-by-step arrest and isolation of a street vendor selling pirated motion pictures on DVD-Rs, a truck driver delivering pirated motion pictures on DVD-Rs to the street vendor, and the DVD-R laboratory supplying the infringing motion pictures. It is also encouraging that as a result of ongoing raids by the Police in the Yongsan Electronics market in 2005, the number of pirate vendors has dropped from 28 to 18.

**End-User Piracy of Business Software:** Unauthorized use of software by businesses causes the greatest losses to the business software industry in Korea. The piracy level has plateaued, but the damage in absolute terms remains great. The problem would have been worse without the government's effective enforcement program and more widespread public awareness about the benefits of respecting copyrights. IIPA and the business software industry greatly appreciate the considerable efforts the Ministry of Information and Communication (MIC), the police and prosecutors' offices have made in recent years. At this rate, Korea is on track to have one of the lowest software piracy rates in the region. It is important, however, that the Government maintain the level of enforcement activity as in previous years (the Government is taking more than 50 criminal end-user actions a month on average in response to complaints from industry) and publicize raids to ensure that the business community does not become complacent in managing software assets.

**Unauthorized Public Performances of Motion Pictures:** 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, motels, computer game rooms, and public baths and saunas. These uses severely undercut the ability to distribute these videos through commercial channels. 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. As noted below, proposed regulations will hopefully help reduce this form of piracy in Korea.

**Cartridge-Based Videogames:** Piracy of cartridge-based entertainment software has increased, primarily due to imports of counterfeit and pirate Game Boy products from China.

## **TRAINING AND PUBLIC AWARENESS**

The copyright industries undertook or supported many training and public awareness and educational activities in 2005. For example, book publishers participated in U.S. Embassy trainings, giving presentations at Embassy-sponsored events, and allowing interactions with local government officials and personnel. One publisher headed up a highly successful direct-appeal campaign in 2005, combining educational efforts with direct appeals to convince many copyshops to refrain from engaging in illegal practices. The motion picture industry conducted periodic training for both the Korean police and prosecutors' offices. The business software industry provided software asset management seminars to businesses. The recording industry conducted training sessions for the CPC on how to tackle online piracy (since CPC, as noted, was designated as the online enforcement agency at the end of September 2005).

## **UPDATE ON LAW REFORM**

Various copyright-related pieces of legislation were under consideration in 2005.

**Copyright Act of Korea Amendments:** There are two known sets of proposed amendments to the CAK. The first set, introduced in June 2005 on behalf of the Government, raises several concerns, including:

- **Weakening of Rights for Sound Recording Producers:** The bill would result in denial of exclusive rights for producers of sound recordings for non-interactive transmissions, and a denial of remuneration for U.S. producers for broadcasting, resulting overall in a weakening of protection. MOCT posted on its website in January 2005 a set of "Q&A Regarding Data Transmission over the Internet," which included some encouraging interpretations of the 2005 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; this interpretation would unfortunately appear to be superseded by the new bill.
- **Educational Exception:** The bill proposes expansion of the education exception (ostensibly for distance learning purposes). The exception would extend to "transmission" (i.e., online dissemination), and could be invoked by a student as well as a teacher. On the other hand, the existing exception would apparently be narrowed in that it could be invoked only "for the purpose of classes" (while the current law says "for education"), and an entire work could be used only if such use is "inevitable" in light of the "character" or "exploitation purpose" of the work. The revised amendment would also authorize the implementing Presidential Decree to specify technical safeguards ("reproduction preventative measures") that schools would have to meet in order to qualify for the exception.
- **Proposed Mandatory Collective Management:** The bill would set out procedures for mandatory collective administration of rights of remuneration created under several other provisions, including broadcasting and "transmission of digital sounds" with respect to sound recordings; reproduction or transmission by libraries; or use of copyrighted material in school textbooks. It appears that only one collective administration organization can be recognized by the Minister of Culture and Tourism for each remuneration right. The statute should allow recognition of more than one organization for this purpose, and right holders should be free to choose which organization to use, or whether to by-pass collective administration

altogether and contract directly with users for payment of this remuneration. MOCT should also reverse its current policy – which is not, apparently, mandated by law – that gives a *de facto* monopoly over administration of the rights of music publishers, including foreign publishers, to KOMCA, the Korea Music Copyright Association. Foreign music publishers should be accorded a non-discriminatory opportunity to qualify for "trust licenses" that would give them an unchallenged legal basis for directly managing and enforcing within Korea all the rights applicable to musical compositions within their catalogs.

- The bill proposes an expansion of the mandate of the Copyright Commission to include promotion of "business designed for fair use of works."
- The bill proposes replacing the MOCT "Standing Enforcement Team" with a new organization charged with, *inter alia*, developing a "sound environment for exploitation of works," including establishing and enforcing standards for rights management information, as well as "promoting fair use."
- The bill provides that MOCT will be directed to designate an organization to receive and administer "donations of property rights" from authors. IIPA is concerned that without safeguards against third parties "donating" works they do not own, this provision could lead to undesired results.
- The bill summary contains an explanatory statement that MOCT is considering expanding the library networking exception in Article 28(3) to apply to schools as well. It is unclear what is contemplated or the timetable for such an expansion, but in any event, as noted below, Article 28 must be narrowed, not expanded, to comport with international standards.

The latest set of amendments to the CAK, issued in mid-November 2005, raises additional concerns,<sup>8</sup> including the following:

- The bill would, among other things, give either the MOCT or allow by Presidential Decree the authority to issue "certifications" that "prove" someone is the legitimate right holder to license all forms of exploitation (proposed Articles 52-3 and 2(23)), which could impose a formality to protection in violation of Article 5(2) of the Berne Convention.
- Proposed Article 47 would be amended to allow second-comers to a work, for which a statutory license had already been granted, to use the work without trying to locate the right holder; this would be a troubling provision but is less of a concern if, as proposed in the pending government amendments, Article 47 was made inapplicable to foreign works.

**Computer Programs Protection Act Amendments:** In September 2005, the Ministry of Information and Communication (MIC) released draft amendments to the Computer Programs Protection Act (CPPA), which contain a number of positive changes,<sup>9</sup> although there

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<sup>8</sup> There are some positive features of the latest set of amendments, including providing for: civil and criminal liability for online service providers whose service are "for the main purpose of reproduction or transmission of a work mutually between other persons" (proposed Arts. 77-3(2) and 98(4-3)); criminal liability for ISPs who, having knowledge of infringement, fail to act against it (proposed Art. 98(4-2)); and Ministry of Culture and Tourism administrative enforcement authority against online infringement, backed by fines (proposed Arts. 97-5 and 104).

<sup>9</sup> Positive changes include the following:

- Registration of a computer program can now be made more than one year after its creation, and registration now creates a presumption as to authorship of the program (amended Art. 24.2);
- The Computer Program Protection Committee (see below) can ask an ISP to take down an infringing program or TPM circumvention material, and/or suspend or terminate the account of the user in question; if the service provider fails to take the needed corrective action, the Ministry can "deny, suspend or restrict the handling of such programs or information by on-line service providers" (this administrative process supplements the existing statutory notice and takedown procedure) (see new Arts. 34-2 and 34-3);
- Potential jail terms for infringers, and fines to be imposed on ISPs that disobey orders in the administrative process described above are increased (amended Arts. 46, 47, 51);

remain some questions about how the amendments would affect existing provisions on technological protection measures (TPMs).

**Draft Presidential Decree to Amend Enforcement Regulations of the Copyright Act of Korea:** Amendments to the Enforcement Regulations and Decree would include the following improvements:

- Free cinema screenings in public baths would become infringing, as would screenings in government buildings, community centers, libraries, museums, etc. of commercial titles within the first six months after their release.
- Regarding the ISP liability provisions of the CAK, it would be specified that e-mail can be used to deliver takedown notices to ISPs.<sup>10</sup>

**Music Industry Promotion Act:** This legislation could potentially be quite useful, in that it will remove the requirement on the recording industry to apply for the KMRB's approval before the release of music videos.<sup>11</sup> Another positive feature of this legislation appears to be the regulation of "[o]nline service providers for phonograms," who:

- are required to obtain copyright licenses and to "take technical measures to prevent illegal reproduction (Art. 25.1);
- can have their license to operate such a business revoked or suspended by local or regional officials (Art. 32), and can have their servers confiscated if operations continue after revocation (Art.35);
- can have pirate recordings confiscated and destroyed by MOCT or local officials if technological protection measures (TPMs) have been removed (Art. 35.3).
- can have criminal penalties imposed (probably fines only) for operating such services in defiance of a revocation order (Art. 39.1).

Nonetheless, since the Sound Recordings, Video Software, and Game Products Act (which previously dealt with such issues as to sound recording producers) was the basis for most enforcement against music piracy in Korea, it is essential that the Music Industry Promotion Act not result in weakening of enforcement against piracy of recorded music. One example of a potential concern involves the notification and registration requirements for various music industry businesses. Notably, under draft Article 20.2, those who wish to make phonograms available online have to notify the city, county, or district governments, and much of the enforcement stemming from this notification is devolved to these sub-national levels. It is not clear how practical this is or what the role of MOCT would be. Article 37 also provides that enforcement activities can be contracted out to an association or similar organization. At the same time, MOCT has the authority under Article 31 to create a "standing inspection team" to "handle illegal phonogram cases," though the details are left to a Ministerial Decree (Article 31). It must be ensured that these notification and registration requirements, and the new enforcement mechanism, do not result in undue burdens being placed on right holders to

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• The Program Deliberation and Mediation Committee is re-named the Computer Program Protection Committee (CPPC) and given a number of new functions, including operating a "Report Center for Unjust Reproduction of Programs" to take complaints that would initiate the administrative process mentioned above.

<sup>10</sup> Unfortunately, notification requirements are lightened for "copyright trust management" services but not for copyright owners in general.

<sup>11</sup> The KMRB censorship/rating function will be taken over by a new "phonogram deliberation" entity, which will act on its own initiative or at the request of a phonogram producer/distributor to identify recordings deemed unsuitable for minors, draft Arts. 18-19, and would prohibit the importation of recordings deemed "offensive" in a number of categories, draft Art. 28.

exercise or enforce their rights, or these new provisions could run afoul of Korea's international obligations.

**Movie Promotion Law Amendments:** This law would eliminate the "import review" procedure presently imposed against foreign films by the KMRB (a secondary review over and above the "content review" required for all films distributed in Korea). IIPA supports passage of this amendment to eliminate this onerous review, which MPA views as a violation of Korea's WTO obligations under the General Agreement on Trade and Services.

**IIPA Observations on All Copyright-Related Legislation:** It is disappointing that, despite numerous interventions by the IIPA and affected right holders, the Korean Government has not addressed many of the key needs for copyright owners. Failure to do so in some instances (e.g., broad exceptions) leaves the Government open to criticism for failure to meet international obligations, and in other instances, leave Korea's laws lagging behind those of nearby trading partners, to the detriment of IIPA members' copyrights as well as those of local Korean creators' copyrights. These important issues include:

- **Extending Copyright Term:** In line with the international trend in over 80 countries to extend term past the Berne minimum terms, Korea should extend the term of copyright protection for works and sound recordings to the life of the author plus 70 years, and 95 years from date of first publication where the author is a legal entity or in the case of related rights of a sound recording producer. Korean law is becoming more isolated on this issue, and Korea now provides less protection than do most other OECD member countries.
- **Providing Exclusive Rights for Sound Recordings:** Korean authorities should ensure that means of dissemination, such as webcasting, streaming, and digital broadcasting, are clearly brought within the scope of the producer's exclusive rights. 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 producer 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 in early 2005 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. Finally, but not least of all, 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.
- **Protecting Technological Protection Measures:** Korea should fully implement the WIPO Treaties standards on technological protection measures, by, e.g., ensuring coverage of access controls, prohibiting the act of circumvention, etc. IIPA understands that an anti-hacking statute may provide broad coverage for technologies used to prevent access on a "networked" environment, but offline access controls must also be covered to provide adequate and effective protection as required by the WIPO Treaties.
- **Clarifying Liability of Internet Service Providers (ISPs):** The basis for indirect liability of ISPs for copyright infringement needs to be spelled out in Korean law, perhaps in the form

of an amendment to Article 92 of the CAK. In addition, 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. In addition, we note that while several improvements are proposed in the amendments to the CAK and the CPPA, it should in addition be expressly provided that: 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; and 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.

- **Providing Effective Notice and Takedown:** Notice and takedown in Korea still does not seem to effectively deter online infringement, although compliance rates with takedown notices are good for some industries. Article 77-2 of the CAK provides for a notice and takedown system, which is spelled out in more detail in the Enforcement Decree. It is positive that a proposed amendment to the Decree would accommodate the routine delivery of notifications by e-mail. Comparable provisions in the CPPA provide for a similar approach, and amendments to the CPPA would apparently further strengthen the regime. In order to facilitate enforcement further, 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 laws in Korea.
- **Protecting Temporary Reproductions:** 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 stands nearly alone in the world in its rejection of protection for temporary copies. In order to meet its international obligations 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.
- **Narrowing Certain Exceptions in Light of Digital Copying:** The market harm threatened by the unauthorized creation of easily transmittable perfect digital copies far exceeds the harm threatened by analog personal copying. As such, the private copy exceptions in Articles 27 and 71 of the CAK should be re-examined in light of the growth of digital technologies. We are encouraged by recent Korean court decisions in the Soribada litigation that appear to deny the shelter of the exceptions to copying in the context of illicit peer-to-peer file-swapping services. The personal copy exception should be made inapplicable to digital copying to the extent that it exceeds the three-step test for permissible exceptions as enshrined in the TRIPS Agreement and Berne Convention. In this regard, IIPA supports the bipartisan legislation that was introduced in early 2005 in the National Assembly to narrow the scope of the Article 27 exception.
- **Eliminating or Narrowing 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. This exception as codified is incompatible with the

three-step test in Article 13 of TRIPS. 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 longer than five years after first publication. The only sure way to achieve compatibility with international standards is to repeal the exception altogether. At a minimum, the Article 28 exception must be substantially narrowed, e.g.: for on-site access (Article 28(2)) or networking with other libraries (Article 28(3)) only; subject to the pre-condition that there be implementation of technological safeguards; increase the period from five to ten years, and start the ten-year clock running when the material is first published in Korea; provide a notice to publishers of the library's intent to avail itself of the exception if the publishers chooses not to make the work available on commercially reasonable terms; and provide a more robust compensation mechanism.

- **Outlawing “Camcording”:** A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to bootleg “dealers” throughout the world and over the Internet. Korea should take whatever legislative steps are necessary to criminalize camcording (use of a video camera to illicitly record a movie at a movie theater) of motion pictures.

## **MARKET ACCESS ISSUES**

A WTO-incompatible broadcast sub-quota in Korea should be resolved. The Broadcasting Act of 2000 provides that total foreign programming may not exceed 20% of total airtime allowed on terrestrial stations, with additional restrictions set by genre. Foreign movies may fill up to 75% of the time devoted to broadcasting movies, but a sub-quota instituted in 2002 limits total foreign content by any one country to 60%. This sub-quota effectively limits U.S. programming to 45% of all airtime allocated to movie broadcast on terrestrial stations. IIPA believes that this sub-quota violates Korea's WTO obligations. Both the intent and effect of this new sub-quota are to discriminate against U.S. programming, and this issue should be addressed now.

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