

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY

Special 301 Recommendation: The U.S. and Korea are nearing the end of negotiations for a Korea-US Free Trade Agreement (KORUS FTA), which, if successfully concluded, will have major implications for Korean copyright law and enforcement policy. IIPA recommends that South Korea remain on the Watch List, with an out-of-cycle review in the second half of the calendar year, focused primarily on (1) the outcome of the KORUS FTA negotiations; (2) the content of decrees implementing the recently revised Copyright Act of Korea; (3) implementation of university action plans against on-campus book piracy; and (4) the extent to which the ROK is investigating and prosecuting entities involved with illegal Internet sites, servers, storage services and file sharing services.

Key Actions to be Taken in 2007:

Step Up the Fight Against Internet Piracy: Korea's advanced digital networks remain rife with pirate materials of all kinds. To sustain the progress it has begun to make in developing legitimate online markets in copyrighted materials, Korea needs to improve its copyright laws to provide better tools for online enforcement and to strengthen incentives for cooperation by network providers in the fight against piracy. The government's Copyright Protection Center (CPC) must redouble its efforts and begin to enforce consistently against the online piracy of the works of foreign right holders. The Korean government must begin investigating and prosecuting entities involved with illegal Internet sites, servers, storage services and file sharing services.

- **Take Effective Action Against Illegal Photocopying and Printing of Published Materials:** Despite some positive steps 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 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.
- **Further Modernize Laws for the Digital Networked Environment:** While the just-enacted revision of the Copyright Act of Korea indicates some progress, Korean law still falls short of full compliance with the WIPO Internet Treaties that set the global minimum standard for copyright law in the digital networked age. Korea's advanced digital economy demands a world-class copyright law which includes: (1) full legal back-up for technological protection measures used by copyright owners; (2) providing all copyright owners, including sound recording producers, exclusive rights over all forms of Internet dissemination; (3) clarifying

liability of Internet service providers and providing effective notice and takedown; (4) recognizing protection for temporary copies and narrowing the private copying exception in the digital realm; (5) conforming copyright exceptions for schools and libraries to international norms; (6) clarifying and strengthening criminal prohibitions on “camcording” (use of a video camera to illicitly record a movie at a movie theater); and (7) updating enforcement and remedial provisions, including providing for statutory damages in civil actions for infringement. Korea should also extend the term of copyright, in line with the growing international trend.

- **Implement the Revised Copyright Act Responsibly and Transparently:** The revised law leaves many key issues to implementing decrees, ranging from new regulation of the providers of peer-to-peer file sharing services, to mandatory collective administration of several programs for payment of remuneration to right holders for uses of their works. The decrees will also flesh out many new responsibilities allocated to the Ministry of Culture and Tourism. Korea should use a transparent process for drafting these decrees before the June 2007 deadline, and should ensure that they provide the best possible protection for right holders consistent with the new law.

SOUTH KOREA										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2002-2006¹										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Business Software ²	NA	45%	200.0	46%	276.0	46%	275.0	48%	285.9	50%
Entertainment Software ³	353.5	68%	415.1	55%	349.0	43%	248.4	36%	381.0	36%
Books	45.0	NA	43.0	NA	42.0	NA	38.0	NA	36.0	NA
Records & Music	0.3	7%	1.3	13%	2.3	16%	3.5	20%	6.9	20%
Motion Pictures ⁴	9.0	7%	NA	7%	40.0	20%	40.0	20%	27.0	25%
TOTALS	407.8		659.4		709.3		604.9		736.8	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at <http://www.iipa.com/pdf/2007spec301methodology.pdf>. For information on the history of South Korea under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in South Korea, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

³ 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.

⁴ MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>

PIRACY AND ENFORCEMENT UPDATES IN KOREA

Online Piracy

South Korea is one of the most Internet-savvy countries in the world. It is thus not surprising that the copyright industries face extraordinary enforcement challenges in Korea because of the prevalence of all kinds of pirated materials online. Korea made some progress in combating online copyright piracy in 2006, but much more remains to be done.

Statistics compiled by the OECD show that in June 2006, there were more subscribers to broadband access to the Internet in South Korea than in any other developed country, save the much larger markets of the U.S. and Japan. With more than 26 broadband subscribers per 100 inhabitants,⁵ Korea's broadband market is nearly saturated, and the Koreans use this access to consume unrivalled amounts of infringing copyrighted materials of all kinds. The challenge is to legitimize the use of these materials by Korea's huge online population. While there are encouraging signs, the pirates remain one step ahead.

While every sector of the copyright industry is impacted by online piracy in Korea, the specific problems vary. The music industry has long felt the brunt of the impact, from illegal streaming, download and peer-to-peer (P2P) services. Intensive enforcement efforts have made a dent in the problem, and legitimate online music services have grown to the point that Korea has become the world's first market where the sale of physical product in CD format is far outstripped by legitimate digital delivery over networks. By 2006, however, the locus of online music piracy had begun to shift from P2P to "web-hard services," a form of closed file sharing system in which pirates store their unauthorized files online and distribute passwords to the storage facilities to would-be downloaders. The downloaders usually "pay" for access through "cybercash" credits administered by the web-hard operator. (Some sites provide free downloads, but at slow speeds.) According to Korean music industry statistics, nearly half of the almost 6 million infringing music files identified by anti-piracy investigators in the first nine months of last year resided on web-hards. This probably understates the scope of the problem, since these closed systems are harder for investigators to locate and penetrate than the mass file-sharing services that were the principal problem in earlier years.

Web-hards are also popular with audio-visual pirates, since they make it easy to store even the very large files that digitized movies demand. Software applications also show up on web-hard services. In 2006, 53% of CPC's enforcement actions were against web-hard files, 27% against P2P services and 20% were against portal services.

P2P piracy also remains a major problem. While some services have begun to legitimize their operations, unauthorized file sharing remains widespread. In 2006, an estimated 100 to 120 sites provided P2P file-sharing. From only 20-30 file sharing services monitored in 2005, the Motion Picture Association identified over 9,500 Korean uploaders engaged in audiovisual piracy. While cease & desist letters were sent to all of 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. P2P sites are affecting other

⁵ See http://www.oecd.org/document/9/0,2340,en_2649_201185_37529673_1_1_1_1,00.html.

industries as well, including the book publishing industry. Sites offering scanned versions of books and journals are growing in number, threatening legitimate markets.

The realization that Internet-based piracy posed a threat to all copyright industry sectors was one of the motivations for consolidating several separate enforcement agencies into the Copyright Protection Center (CPC) within Korea's Ministry of Culture and Tourism (MOCT). CPC was assigned to deal with online piracy in September 2005, and was much more active in the online arena last year. Its efforts seem to have enhanced public awareness of the problem. But CPC's progress is limited by its exclusive identification with the established "copyright trust and management" entities.⁶ Major foreign rights holders do not belong to these agencies, and thus online enforcement activities by CPC on behalf of foreign rightholders are limited or non-existent. IIPA urges the Korean government to correct this problem as soon as possible and to undertake aggressive enforcement against online piracy of foreign works. Otherwise, Korea's commitments in the TRIPS Agreement to national treatment in enforcement activities could be questioned.

In a setback to the prospects for using civil litigation to combat illegal file-sharing, the Seoul Central District Court in August 2006 denied an application by the four major international record labels for a preliminary injunction against a fifth version of the Soribada P2P service, despite evidence that widespread unauthorized file sharing was continuing for titles for which the operators of Soribada 5 had not sought a license. The decision marked an overbroad application of the immunity granted to online service providers (under Article 77-2 of the Copyright Act of Korea) based on a claim by the provider that action to cease infringement is "technically impossible." The decision is being appealed but in the meantime may pose a roadblock to effective enforcement efforts.

Offline Piracy

Piracy problems in Korea are by no means limited to the Internet.

Book Piracy: This problem continues at unacceptable levels in Korea. The chief problems facing book publishers in Korea include massive illegal photocopying in and around university campuses, and more sophisticated pirate print operations. The problem of pirate printing (targeting mostly high level scientific, technical and medical text and reference books) 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 of both pirate printing and illegal photocopying have been exacerbated in recent years by the fact that illegal operatives have developed increasingly evasive practices, moving operations underground where they are quite difficult for authorities to track. The quality of the pirate prints is becoming so high as to make detection increasingly difficult, hence, cooperation with right holders is key to distinguishing pirate (unlicensed) production from legitimate.

The problem of photocopying of educational materials in Korea, in addition to plaguing universities and traditional primary and secondary schools, also permeates Korea's many thriving English language institutes. These for-profit institutions reportedly use massive numbers

⁶ Examples of these entities include KAPP for sound recording producers, and KRTRC for book publishers.

of unauthorized copies of U.S. publishers' English Language Teaching (ELT) materials in their programs, competing for students based on the asserted quality of their illicit copies.

While most Korean students prefer to go to a copyshop to get a hard copy of a book rather 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,⁷ and copyshops using scanned versions of texts to speed up the generation of new pirate "copies on demand." Furthermore, leading international academic journal publishers complain about copies of their articles being illegally accessed and offered on pay-for-download or P2P sites. This problem is sure to grow unless checked now.

Beginning in 2005, the Korean Government has taken some important steps to recognize and start to address the serious book piracy issues. When the CPC took over the enforcement functions of the Korea Reprographic Transmission and Rights Center (KRTRC), this should have eliminated the "conflict of interest" that plagued KRTRC enforcement efforts, since licensing and enforcement functions are now separate. It appears, however, that CPC's main focus is online; KRTRC remains in charge of enforcement against "offline" infringement, such as unauthorized photocopying. Moreover, even in the online sphere CPC's commitment to act on behalf of foreign right holders (who do not participate in KRTRC) is still quite suspect. Regarding pirate printing, the publishing industry, with some government cooperation, had continued success in 2006 in tracking down massive underground printing operations, leading to significant seizures. However, the burden of initiating, investigating and carrying through enforcement actions remains on right holders. IIPA urges the Korean government to commit more resources to fighting book piracy in 2007, and to act more boldly by initiating its own enforcement actions.

There was further progress in 2006 in promoting the legal use of published materials at higher educational institutions, but close monitoring of this effort is needed. Following the issuance by the Minister of Education of a letter in March 2005 requesting every university to devise an action plan for reducing book piracy on campus, some campuses responded positively. However, many more failed to respond at all, and several responses lacked significant substantive measures. The March 2005 letter has been followed by other MOE-issued letters regarding campus crackdowns in March and September 2006, but it is unclear what action followed these letters. While the letters are a good start, real progress requires concrete implementation of the action plans and sustained follow-up. Universities were supposed to report to the Ministry at the end of 2006 on implementation of their action plans, which include adoption of strong pro-copyright policies, monitoring on-campus photocopy shops, and crafting educational campaigns; but as of November, the majority had not done so. The Ministry has committed to an ongoing effort, and it should use the tools at its disposal to encourage universities to fulfill their plans, including by reflecting implementation of the action plans in its positive or negative evaluation of institutions, and by withholding some of its funding of the least cooperative universities. Since on-campus infringements tend to spike around the beginning of academic terms – March and September – those periods will be critical for the success of the Ministry's pro-copyright initiative, and IIPA urges USTR to schedule its Out of Cycle review for maximum effect during these time frames. IIPA also hopes the CPC will work with industry to devise an appropriate response to raise public awareness about illegal use of

⁷ Kim and Lim, *Cell phone users using their cameras to copy textbooks*, Joong-Ang Ilbo, August 12, 2004.

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.

Burned Optical Media: The motion picture, entertainment software, and music and sound recording sectors all suffer losses due to sales of “burned” optical media (DVD-Rs or CD-Rs) with their copyright product on them. Street vendors continue to hawk these products, despite a number of raids carried out over the past two years. Such retail piracy is a low priority for Korean enforcement authorities, and the vendors are rarely caught with much pirate product (only catalogs and empty cases). While street sweeps must continue, a more effective strategy would target the dispersed underground labs where the discs are burned to order to supply the vendors. While the individual labs are hard to find and neutralize, cumulatively they amount to a significant force, particularly in the audio-visual marketplace. More investigative and enforcement resources should be devoted to identifying shops and offsite facilities engaged in illegal disc burning.

End-User Piracy of Business Software: Although counterfeit software CDs are starting to show up in the market, unauthorized use of software by businesses still causes the greatest losses to the business software industry in Korea. The Korean government continues to work actively to fight corporate end user piracy through its enforcement programs and its efforts to promote public awareness about the benefits of respecting copyrights. In 2006, the police and prosecutors conducted 1,305 end user actions. It is important that the Government maintain this level of enforcement activity. The continuing effectiveness of Korea's enforcement efforts also depends on the willingness of police and prosecutors to seek warrants in end user piracy cases, and on the willingness of courts to issue them, taking into account the fact that first-hand evidence of piracy is not always available at that stage of the case.

There is also unauthorized use of copyright materials, particularly entertainment software products, by some of the more than 20,000 Internet cafés (called PC baangs) in Korea, of which about 40% have now been legitimately licensed by game publishers.

UPDATE ON LAW REFORM

Revision of the Copyright Act of Korea

In December 2006, Korea adopted the first comprehensive rewrite since 1986 of its main copyright law, the Copyright Act of Korea (CAK). The new act contains some significant improvements. For example, it provides a new point of attachment for protection under Korean law for sound recordings produced by citizens of countries with whom Korea has treaty relations, regardless of where fixation occurs. It also conforms the term of protection for sound recordings with provisions applicable to e.g., cinematographic works (in both cases the 50-year term would run from date of publication unless the work remains unpublished within 50 years after fixation). Another positive feature is that the statutory license for use of works whose authors cannot be identified or located is made inapplicable to foreigners' works.

However, in many other ways the copyright law reform is a disappointment, and a missed opportunity for Korea to bring its laws into closer compliance with 21st century global minimum standards. Furthermore, the real impact of a number of critical provisions depends on how they are treated in implementing decrees, which are due to take effect in June 2007, six months after enactment. IIPA calls upon the Korean government to adopt over the next few

months as transparent a process as practicable for the drafting of these key implementing decrees. We also urge USTR to monitor the process carefully and to evaluate the content of these decrees as an important factor in the out-of-cycle review that we recommend it undertake.

In some ways, IIPA believes the changes made by the CAK reform have made the law worse. Some of IIPA's major concerns are the following:⁸

- **Rights of sound recording producers:** The exclusive right accorded to phonogram producers – the transmission right under new Article 81 – covers only “on-demand” or “interactive” services. All other means of digital dissemination of sound recordings to the public, including webcasting, are covered only by new Article 83, “digital sound transmission service” over which the producer does not have an exclusive right, but only a right of remuneration from service providers. This distinction, based on whether or not a service is classified as “on demand” or “interactive,” is not meaningful in light of rapidly changing technologies for delivery of sound recordings, and in light of marketplace realities. 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, especially in Korea. 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. Thus, producers need exclusive rights over all forms of Internet or other digital transmission of their phonograms. The old law appeared to provide this, according to the interpretation posted by the Ministry of Culture and Tourism (MOCT) on its website in January 2005, which stated that “regardless of the format or methods, any unauthorized use of music files on the Internet constitutes an illegal act.” The new law may thus be a significant step backward that will be counterproductive to Korea's efforts to foster the healthy development of the information society.
- **Expansion of educational exceptions:** The new law expands educational exceptions to copyright in ways that create real questions about Korea's compliance with applicable international standards. For example, under the new Article 25, students as well as teachers at any level could “transmit” complete works (i.e., disseminate them online) “when deemed necessary for classroom teaching,” without any consideration of the availability of licenses to authorize such use. There would be no compensation to the right holder for such transmissions on the secondary school level. The impact of this expanded exception may turn in part on how the Korean government exercises its authority under Article 25.10 to set standards for “anti-pirating measures” that schools must adopt in order to take advantage of the expanded exception.
- **Mandatory Collective Management:** The new law sets out procedures for mandatory collective administration of rights of remuneration created under several provisions, including those noted immediately above: “digital sound transmission” with respect to sound recordings; reproduction or transmission by libraries; or use of copyrighted material in school textbooks, or online by post-secondary educational institutions.⁹ Under these procedures, codified in Article

⁸ The following is based on an unofficial translation of the CAK reform legislation as presented to the National Assembly on December 1, 2006. IIPA will update its analysis as it resolves what appear to be translation differences between the accessible texts of the old and new law, and to the extent that it learns of any changes that were made by the National Assembly before enactment.

⁹ Mandatory collective administration also applies to the remuneration right for conventional broadcasting of sound recordings under Article 82. Although the new law for the first time allows foreign sound recording producers to claim (...continued)

25, it appears that only one collective administration organization can be recognized by the Minister of Culture and Tourism for each remuneration right; that the organization can collect remuneration payments even for non-members who may not even be aware of the organization; and that the organization can spend “for the public interest” any collected payments that it has been unable to distribute in three years. The copyright industries have had enough experience with existing collecting societies in Korea to know that such a system lacks transparency and presents numerous opportunities for formal or informal discrimination against foreign right holders. Korean law should allow recognition of more than one organization to collect and distribute remuneration payments, 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. The implementing decree should be closely scrutinized to ensure that it provides the maximum degree of flexibility possible under the new law.¹⁰

The new CAK also fails to address sufficiently (or at all) a number of areas where Korea’s copyright law needs to be updated for the challenges of the global digital networked economy, where Korean law should be playing a leadership role, not struggling to catch up. These missed opportunities include:

- **Technological protection measures.** Providing strong legal back-up for technologies that copyright owners use to protect their works in the digital networked environment is a key mandate in the ten-year-old WIPO Internet Treaties, but one which Korea has only partially implemented. The revised CAK seems to take a small step forward in the definition of technical protection measures (TPMs) (Article 2-28), by extending protecting to technologies that “inhibit” copyright infringement, as well as those that “prevent” it altogether. However, the next step is long overdue: Korea must also protect technologies (such as encryption and password controls) that are used to manage access to a work. In order to come into full compliance with the WIPO treaties’ requirement for an adequate and effective regime to protect TPMs, Korea must also define prohibited circumvention devices and services to include those that have only a limited commercially significant purpose or use other than to circumvent TPMs, and must prohibit the act of circumvention itself.
- **Online Service Provider liability.** The new CAK makes a slight modification to previous law in this area,¹¹ but still fails to provide a solid foundation of appropriate legal incentives for network operators to cooperate effectively with right holders to combat online infringement. Besides spelling out more clearly the potential liability that network operators face if they contribute to, profit from, or encourage infringing activity on their systems, the law should also make it clear that in all cases, the courts retain the authority to issue appropriate injunctions against OSPs; that there is no liability limitation when the OSP has the right and ability to control

(...continued)

these payments, it still denies them to U.S. producers, because U.S. law contains no corresponding provision. Thus, Korea’s long-standing and unjustified discrimination against U.S. producers remains in place.

¹⁰ The new law also does nothing to make MOCT 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.

¹¹ When a network operator receives notice from a right holder about infringing activity on the network, the operator is now obligated to cut off access to it “immediately,” rather than “without delay.” IIPA hopes that this change, reflected in new Article 103.2, will improve the efficiency and responsiveness of the “notice and takedown” system under the CAK.

infringing activities on its network from which it derives a direct financial benefit; and that infringement carried out by an employee or agent of the OSP, or by any other affiliated party, does not benefit from any liability limitation. Another needed feature of Korean law is a speedy and simple procedure whereby right holders can obtain contact information on subscribers or customers who commit infringements online. Such information would also reduce the number of legal claims brought against network operators for their participation, since it would enable right holders to pursue the primary infringer directly.

Article 104 of the new CAK appears to be targeted at the operators of peer-to-peer file sharing services, and obligates them to “take necessary measures such as blocking illegal transmission ... when requested by the right holders.” Potentially this is a valuable new tool against online piracy, although much will depend upon the contents of the implementing decrees applicable to this new provision.

- **Temporary reproductions.** Almost alone among nations, Korea still denies copyright owners exclusive rights over temporary reproductions of their works, even though the use of temporary copies of all kinds of works is of dramatically increased economic significance in the digital networked environment.¹² Although it missed an opportunity to do so in its recent CAK reform, Korea should clarify that the reproduction right under its copyright law includes: (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.

- **Library exceptions.** The new CAK retains unchanged the sweeping exception allowing 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 sold in a digital format. This exception clearly threatens markets in many works – notably including textbooks, English language instructional material, and scientific, technical and medical journals – that are actively sold in the market far longer than five years after first publication. To ensure compliance with international standards for copyright exceptions (i.e., the three-step test in Article 13 of TRIPS), Korea should at a minimum narrow this exception so that implementation of technological safeguards is a pre-condition to exercise of the exception; allow networking of works only beginning ten years after the material is first published in Korea; require libraries to notify publishers of their intention to digitize works in their collection that the publisher has not chosen to distribute digitally; and provide a more robust compensation mechanism that is, as a practical matter, more accessible to foreign right holders.

- **Copyright term extension.** In line with the international trend in over 80 countries to exceed the minima provided in the Berne Convention and TRIPS Agreement, 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

¹² Such models continue to grow in Korea’s technologically sophisticated marketplace. For instance, Korean companies now provide technology to enable up to ten users to share one PC and simultaneously use all the software running on it; virtual partitions are temporarily created for storing each copy of the operating system and the application programs running under it. These copies disappear when the user disconnects from the PC. Under such a scenario, whether the copyright owner has the exclusive right to authorize the making of temporary copies in RAM is a very concrete question, not a philosophical abstraction. The copyright owner’s exclusive right of transmission does not fully address this scenario.

countries. Inaction on this issue also undermines Korea's cultural heritage, as classic films, sound recordings and other titles from the 1950's and 60's pass into the public domain and become less attractive subjects for investment in preservation, repurposing and re-release.

- **Private copying exception.** The new CAK retains unchanged the exceptions in Articles 30 and 87 allowing copying of complete works for “non-profit private purposes” or within the home. Proposals to narrow these exceptions in light of technological and market changes were presented to the National Assembly but ultimately were not adopted. It is past time for Korea to recognize that the market harm threatened by the unauthorized creation of easily transmittable perfect digital copies far exceeds the harm threatened by analog personal copying. 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, and should be made inapplicable to copies made from infringing sources.
- **Statutory damages.** Korea's system for civil damages for copyright infringement lacks the deterrent impact that TRIPS requires in Articles 41 and 45. To remedy this, Korea should give right holders the option to choose pre-set statutory damages at a level sufficient to achieve the deterrence objective.
- **Ex parte relief.** 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.

Finally, a number of provisions of the CAK reform require further explication (including, in some cases, adoption of appropriate provisions in implementing decrees) before their full impact on copyright law and enforcement can be gauged. These include:

- **“Exclusive right to use”:** Articles 57-63 create new restrictions on exclusive licensing of all copyright materials, modeled on some existing provisions of the CAK (old Articles 54-60) applicable to publications “in writing or drawing.” The extent to which these provisions impinge excessively on contractual freedom (and the extent to which they can be overridden by contract) is unclear.
- **Certification:** Article 56 empowers MOCT to “designate certification agencies to ensure the safety and reliability of transactions of copyrighted works.” A definitional provision in Article 2-33 spells out that certification means “proving the eligibility of a right holder to grant the use of literary works, etc.” The implementation of these provisions should be closely watched to ensure that these agencies do not in fact become impediments to commerce in copyrighted materials, and that certification does not become a formal pre-requisite to exercise of exclusive rights in a way that would contravene the Berne Convention.
- **Copyright Commission:** Article 112 would greatly expand the role of today's Copyright Conciliation and Deliberation Committee. The new Copyright Commission would have jurisdiction over such matters as “formulation of policies on technical protection measures and rights management information,” as well as “projects to establish order in the use of works and maximize fairness in the use of works.” While this charter is somewhat narrower than that which appeared in earlier drafts of copyright reform legislation, the Commission still seems likely to occupy an important place in the development of copyright policy in Korea. Accordingly, MOCT should take steps to ensure that its appointments to the Commission include representation of a broad cross-section of right holders, foreign as well as domestic.

- **Copyright Commission Management Business:** Articles 105-111 enhance the powers of MOCT to intervene in the marketplace for copyrighted materials in several ways, including to change the royalty rates charged users (Article 105.5 and 105.8). Recognizing that these new powers have been scaled back from what was originally proposed in this area, IIPA nevertheless urges caution and calls for implementation of these new provisions to be closely monitored.
- **“Donation” of Works:** Under Article 135, MOCT can designate an agency to receive “donations” of copyrighted works. Although the legislation provides that such works cannot be used for commercial purposes or against the will of the right holder, there remains a danger that third parties will “donate” works to which they do not own rights. Implementation of this provision should take this danger into account and provide safeguards against it.
- **“Environment for fair use:”** Another new job that the CAK reform gives MOCT is to “promote fair use of works such as making public notification of works upon which copyrights have lapsed.” Article 134.1. While this could be beneficial in some instances, the consequences of erroneous notifications could be severe, and the boundaries of this new authority remain undefined. The Presidential Decree that implements this provision bears close watching.
- **TPM/RMI Policies:** MOCT’s new authority under Article 134.2 to “draw up and implement policies on rights management information and technical protection measures” needs to be fleshed out in a Presidential Decree. If these new policies have the effect of bringing Korea into greater compliance with its obligations under the WIPO Internet Treaties, this authority could be a positive development, but clearly there is also a risk that it will be counter-productive. The provision should be implemented in a way that maximizes the benefits and minimizes the risks.

Other Legislative Developments

Computer Programs Protection Act Amendments: In September 2006, new amendments to the Computer Programs Protection Act (CPPA) took effect. Besides renaming and giving expanded powers to the Computer Program Protection Committee (formerly the Program Deliberation and Mediation Committee), the amendments created an administrative enforcement procedure (in addition to the statutory notice and takedown procedure) for issuance of “corrective orders” against Internet service providers who make available infringing programs or information that enables the circumvention of technological protection measures. Criminal penalties for CPPA violations were also increased. One unresolved issue is the scope of CPPC’s new authority for the CPPC to “support the establishment and enforcement of policy necessary for the development and standardization of technology related to TPM and RMI.”

We can anticipate that there will be further CPPA amendments in the near future to keep this statute in conformance with the revised CAK. It will be important to monitor this process to ensure that the new CAK provisions eliminating the need for a formal complaint pre-requisite for prosecution of repeat infringers for profit (Article 140) are transposed to the CPPA in a way that preserves the ability of right holders to control the progress of cases against corporate end users of infringing business software applications.

- **Presidential Decree to Amend Enforcement Regulations of the Copyright Act of Korea:** These amendments, which took effect in 2006, made it an infringement to screen films within the first six months of their release in government buildings, community centers, libraries, museums, public baths, and the like. This should facilitate enforcement against unauthorized

public performance of videos licensed for home use only. Other amendments specified that e-mail can be used by copyright management services to deliver takedown notices to ISPs under the CAK.

Music Industry Promotion Act: Entry into force of this legislation in October 2006 eliminated one tier of review required by the Korea Media Rating Board (KMRB) before importation of foreign sound recordings (although not for music videos). The legislation also introduced regulation of “[o]nline service providers for phonograms,” who:

- are required to obtain copyright licenses and to “take technical measures to prevent illegal reproduction (Article 25.1);
- can have their license to operate such a business revoked or suspended by local or regional officials (Article 32), and can have their servers confiscated if operations continue after revocation (Article 35);
- can have pirate recordings confiscated and destroyed by MOCT or local officials if technological protection measures (TPMs) have been removed (Article 35.3);
- can have criminal penalties imposed (probably fines only) for operating such services in defiance of a revocation order (Article 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 which succeeds it not result in weakening of enforcement against piracy of recorded music. For example, Article 37 provides that enforcement activities can be contracted out to an association or similar organization. This is intended to expand the resources available for enforcement against piracy; but if foreign right holders are not able to participate in the designated enforcement organization, the current problem with CPC failing to enforce on behalf of foreign right holders will be re-created.

- **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 has been identified as a source of camcorded masters for pirate video production. Korea should take whatever legislative steps are necessary to criminalize use of a video camera to illicitly record a movie at a movie theater.

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. Foreign content limits under the same law on programming in cable and satellite services should also be phased out in favor of letting market forces determine the content presented to Korean consumers.

Amendments to the Movie Promotion Law that took effect in October 2006 eliminated the “import review” procedure previously imposed against foreign films by the KMRB (a secondary review over and above the “content review” required for all films distributed in Korea). This change has sped up the process of censorship clearance for foreign film titles, reduced costs, and given foreign producers a more level playing field in the Korean market. As noted above, a similar discriminatory import review for sound recordings was also eliminated.

The Korean National Intelligence Service is in the process of implementing a requirement that all vendors of security software (defined broadly) to any entity of the Korean government and certain segments of the private sector must undergo a security review, even if the software has been certified under the Common Criteria. Although the original proposal was modified so that disclosure of source code is no longer a requirement, software vendors would still be required to disclose confidential proprietary information about their products that goes beyond what is required by any other parties to the Common Criteria Recognition Agreement. This requirement is not justified by the legitimate security concerns of the Korean government, and erects a substantial barrier to an important segment of the Korean market for the business software industry. The requirement for disclosure of confidential proprietary information should be abandoned.