

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

SOUTH KOREA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that South Korea remain on the Special 301 Watch List for 2008.

Key Actions to be Taken in 2008:

Ratify and Implement the Korea-US Free Trade Agreement: The U.S. and South Korea successfully negotiated one of the most comprehensive and progressive Free Trade Agreements ever, from the standpoint of improvements in copyright law and enforcement. To redeem the promise of this path-breaking pact, both countries should ratify the KORUS FTA this year. Korean legislation to implement its obligations – already largely drafted – should be revised to fill the remaining gaps (notably with respect to the rights of sound recording producers, and regarding liability of Internet Service Providers (ISPs)), and should be enacted and brought into force.

Step Up the Fight Against Internet Piracy: Although licensed online delivery of copyright material is beginning to claim a foothold in Korea, the country's advanced digital networks remain rife with pirate materials of all kinds. Besides improving and modernizing its laws in the course of implementing its FTA obligations, Korea must ensure that its Copyright Protection Center (CPC) consistently enforces against the online piracy of works of foreign right holders. Korea should begin now to deliver on its FTA commitment to make enforcement against Internet piracy a law enforcement priority, and to target not only direct infringers but also those who profit from services that induce infringement.

Keep Up Pressure Against Book Piracy: The CPC and other enforcement authorities should cooperate with international book publishers to help ferret out underground photocopy and print operations, and the Ministry of Education must follow up on its work to assure that universities deliver and implement action plans to achieve greater legalized use of published materials. Here too, Korea should begin to deliver on the assurances it made in the FTA process.

SOUTH KOREA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007¹

| INDUSTRY | 2007 | | 2006 | | 2005 | | 2004 | | 2003 | |
|---|--------------|-------|--------------|-------|--------------|-------|--------------|-------|--------------|-------|
| | Loss | Level |
| Business Software² | 247.0 | 44% | 220.0 | 45% | 200.0 | 46% | 276.0 | 46% | 275.0 | 48% |
| Entertainment Software³ | 461.9 | 66% | 353.5 | 68% | 415.1 | 55% | 349.0 | 43% | 248.4 | 36% |
| Books | 44.0 | NA | 45.0 | NA | 43.0 | NA | 42.0 | NA | 38.0 | NA |
| Records & Music | NA | NA | 0.3 | 7% | 1.3 | 13% | 2.3 | 16% | 3.5 | 20% |
| Motion Pictures⁴ | NA | NA | NA | NA | 9.0 | 7% | 40.0 | 20% | 40.0 | 20% |
| TOTALS | 752.9 | | 618.8 | | 668.4 | | 709.3 | | 604.9 | |

RATIFICATION AND IMPLEMENTATION OF THE KORUS FTA

On June 30, 2007, the U.S. and South Korea signed the Korea-US Free Trade Agreement (KORUS FTA). On the issues of copyright law reform and copyright enforcement, the KORUS FTA is one of the strongest and most progressive trade agreements ever negotiated. It also includes important steps to further open the Korean market to U.S. copyright industries. If these copyright and market access provisions of the FTA come into force, and if they are fully implemented by the Korean government, the positive impact on U.S. copyright industries will be significant. Thus, ratification of the KORUS FTA by both parties, and full implementation of its provisions in Korean law, should be a top priority for 2008.

From IIPA's perspective, some of the critical provisions of the KORUS FTA include:

- Protection of temporary copies. Korea today stands almost alone among nations in refusing to apply the copyright owner's exclusive right of reproduction to cover the making of temporary copies, such as those made in the Random Access Memory of a personal computer. In light of the ever-increasing economic importance of such copies in the digital networked environment, in which the making and use of such temporary copies is rapidly becoming the primary means by which many copyright works are consumed by the public, this is a significant gap in current law. IIPA is pleased that, in Article 18.4.1 of the FTA, Korea has committed to closing this gap by giving the reproduction right a scope that accords with world copyright standards.
- Technological protection measures. Article 18.4.7 commits Korea to repairing the deficiencies in its current legal framework for safeguarding the technologies that right holders use to control access to and use of their works. Such protections are a critical aspect of global minimum standards for copyright protection, as embodied in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Online service provider liability. By agreeing to the detailed regime set forth in Article 18.10.30 of the FTA, including the critical undertaking to provide legal incentives for service

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at <http://www.iipa.com/pdf/2008spec301methodology.pdf>. For information on the history of South Korea under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in South Korea, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), 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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

³ ESA's reported dollar figures reflect the value of pirated 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 losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA report.

providers to cooperate with right holders in deterring piracy, Korea has taken a significant step forward toward a more effective system for combating the high levels of online copyright infringement that prevail in that market.

- Exclusive rights for sound recordings. Korea will be obligated, under Article 18.6.3 of the FTA, to bring all means of digital dissemination of sound recordings to the public – including webcasting, streaming and digital broadcasting – within the scope of the exclusive rights of recording producers. Implementation of this FTA commitment should help to dispel uncertainty about the reach of current law, and promote a robust legitimate market in licensed use of these new media to disseminate sound recordings.
- Extension of term of copyright protection. Article 18.4.4 of the FTA, when implemented, will bring Korea in line with the unmistakable global trend toward extending the term of copyright protection, thus removing the potential irritant to international trade that results from divergent terms among trading partners.
- Contractual rights. Under Article 18.4.6 of the FTA, Korea is obligated to allow all right holders to exercise economic rights in their own names. This could provide a strong legal counterweight to provisions of current Korean law that mandate collective administration of exclusive rights or rights to remuneration.
- Protection for encrypted signals. Article 18.7 of the FTA commits Korea to providing both civil and criminal remedies against those who decode program-carrying satellite signals without authorization, an important new legal tool to be wielded against signal theft.
- Statutory damages. In a major step forward, Korea agreed in Article 18.10.6 of the FTA to supplement its system of civil damages for copyright infringement with a regime of pre-set statutory damages, a reform that will encourage civil enforcement by providing a predictable and deterrent remedy against infringers.
- Other civil remedial provisions. A number of provisions in paragraphs 7-10 of Article 18.10 of the FTA will enhance the remedies available to right holders in civil litigation in Korea, including seizure and destruction of infringing copies and the materials and implements used to make them; requirements for defendants to identify third parties in the production or distribution chain of pirated products; and the award of costs and attorneys' fees to prevailing parties.
- Outlawing "camcording." Implementation of Article 18.10.29 of the FTA will help to ensure that Korea does not become a source for unauthorized master digital copies of motion pictures through illicit in-theater camcording.
- Ancillary offenses. Korea agreed in Article 18.10.28 of the FTA to provide criminal remedies against trafficking in counterfeit or illicit labels, documentation or packaging associated with pirate product.
- Enforcement against book piracy. In a side letter, Korea agreed "as soon as possible" to take specific steps to increase its efforts against book piracy and other copyright infringements on university campuses, ranging from stronger institutional copyright policies to enhanced training and public education campaigns, and to step up law enforcement training and enforcement activities against underground book piracy operations.
- Enforcement against Internet piracy. In a particularly significant commitment, contained in another side letter to the FTA, Korea agreed to make internet piracy a law enforcement priority, with specific references to cooperation with the private sector and to the need to prosecute not only direct infringers, but also those who "profit from developing and maintaining services that effectively induce infringement." This commitment, which surpasses what is found in other free trade agreements the U.S. has negotiated, is especially appropriate given the ubiquity of online infringement throughout Korea's highly networked digital marketplace.

PIRACY AND ENFORCEMENT UPDATES IN KOREA

Online Piracy

In the Internet-savvy environment of the Korean market, copyright industries face extraordinary enforcement challenges because of the prevalence of all kinds of pirated materials online. Korea continued to make some progress in combating online copyright piracy in 2007, but much more remains to be done.

Statistics compiled by the OECD show that in June 2007, 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., Japan and Germany, and that, with nearly 30 broadband subscribers per 100 inhabitants, broadband penetration in Korea far exceeds that of any other market of comparable size.⁵ The level of Internet access through mobile devices is, if anything, even more striking. Although legitimate services for online distribution of copyright works are beginning to gain a foothold, Koreans still use their ubiquitous and high-bandwidth access to the Internet to consume unrivalled amounts of infringing copyrighted materials of all kinds. The ongoing challenge is to legitimize the use of these materials by Korea's huge online population.

While every sector of the copyright industry is impacted by online piracy in Korea, the specific problems vary, and specific means of piracy constantly change with technological advances and enforcement pressures. 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 2007, however, the locus of online music piracy had fully shifted from P2P and unauthorized streaming to "web-hard services" and portal services or forum sites.

"Web-hards" or "cyberlockers" are 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. (A few sites provide free downloads, but at slow speeds.) 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. (The movie industry also reports widespread use for the Internet as a marketing mechanism for sales of pirate physical product.) The web-hard systems are also extremely problematic for the video game and recording industries, and other software applications also show up on web-hard services.

2007 statistics from the government's Copyright Protection Center indicate that web-hards now account for up to 70% of all online piracy cases, up from about 53% a year earlier. Most of the remaining cases reported by the CPC involve portal sites, which offer links to pirated copyright material along with many other services. Many of these portal sites provide user forums within which pirate material is widely promoted, linked to and traded.

P2P piracy also remains a major problem in the country. While some services have begun to legitimize their operations, unauthorized file sharing of music, videogames and movies remain widespread. On file sharing services monitored in 2007, the Motion Picture Association identified over 1.7 million illegal movie files being shared. While letters were sent to all of the file sharing services concerned and there was a 96.7% compliance rate, the files in question invariably resurfaced on the same, or different, file sharing services within weeks or sometimes days. These sites are affecting other industries as well, including the book publishing industry. Sites offering scanned versions of books and journals are growing in number, threatening legitimate markets.

⁵ See <http://www.oecd.org/dataoecd/21/35/39574709.xls> and <http://www.oecd.org/dataoecd/22/15/39574806.xls>.

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 has been increasingly active in the online arena. By now, all pre-existing enforcement teams in the online environment have been merged into the CPC. Its efforts certainly 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 nonexistent. CPC has recognized this problem and promised to take more actions against pirating of foreign repertoire and titles, but so far there is little evidence that this is happening. Further, the CPC does not have any investigative or judicial powers and has to rely on the police and prosecutors to investigate and prosecute infringing activities. IIPA continues to urge the Korean government to correct these problems 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 this regard, Korea's pledge in the FTA side letter to carry out online enforcement activities on behalf of U.S. works, and to do so in a transparent manner, is warmly welcomed. Korea should begin to fulfill this pledge, in the words of the side letter, "as soon as possible."

Some favorable court decisions against online piracy were rendered in 2007, including affirmations of liability for the operators of the original Soribada P2P service on both civil and criminal grounds. While these decisions are welcomed, they must be viewed in context. Soribada 1 featured a technology that is now obsolete, and even the more distributed P2P technology featured in later versions of Soribada is of declining importance in the Korean online piracy environment. Further progress against online piracy in Korea will depend on vigorous and sustained enforcement, adequately resourced, adaptable to new technologies and tactics, and directed squarely against piracy of foreign as well as domestic works. In this regard, the commitment contained in the side letter to the KORUS FTA is of particular importance, and the fulfillment of that commitment should be among the ROK government's top copyright priorities in the year ahead.

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 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

⁶ Examples of these entities include the Korean Association of the Phonographic Industry for sound recording producers, and KRTRC for book publishers.

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

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.

Over the past few years, the Korean Government has taken some important steps to recognize and start to address the serious book piracy issues. The CPC’s supposed assumption of duties related to enforcement against commercial photocopy centers from the Korea Reprographic Transmission and Rights Center (KRTRC) should have eliminated the “conflict of interest” that plagued KRTRC enforcement efforts, since licensing and enforcement functions were separated. As noted above, however, CPC’s main focus is online, and its willingness to act on behalf of foreign right holders (who do not participate in KRTRC) is still questionable. KRTRC remains in charge of enforcement against “offline” infringement, such as unauthorized photocopying. Regarding pirate printing, the publishing industry had some success in 2007 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 2008, and to act more boldly by initiating its own enforcement actions.

Unfortunately, after significant signs of engagement in 2005-6, the Ministry of Education showed little interest during 2007 in promoting the legal use of published materials at higher educational institutions. This is a disappointing turn of events, as South Korea had been on track to be a regional leader in this type of initiative. The March 2005 issuance by the Minister of Education of a letter requesting every university to devise an action plan for reducing book piracy on campus resulted in several positive responses from universities. Other failed to respond, though, and several responses lacked significant substantive measures. The March 2005 letter was followed by other MOE-issued letters regarding campus crackdowns in March and September 2006, but it is unclear what action, if any, followed these letters. While the letters were a good start, steps toward implementation of the initiatives they signaled have been utterly lacking during 2007, with no evidence of concrete implementation of the action plans or meaningful follow-up by the Ministry. From all that appears, universities’ reporting deadlines have gone unheeded and unenforced. Measures such as adoption of strong pro-copyright policies, monitoring on-campus photocopy shops, and crafting educational campaigns remain words on paper, at best. 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 conditioning certain funding decisions on full cooperation. 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 the Ministry of Education to revive its efforts ahead of the upcoming term. 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 English language teaching materials by language institutes, and to put into place educational initiatives aimed at these schools/institutes, students and parents.

IIPA commends the Korean government for the commitments contained in the KORUS FTA side letter regarding book piracy, and the publishing industry looks forward to working with Korean authorities to achieve real gains in the year ahead.

Burned Optical Media: The motion picture and entertainment software sectors suffer losses due to sales of “burned” optical media (DVD-Rs or CDRs) with their copyright product on them. Street vendors continue to hawk these products, and they are also sold over the Internet. Retail hard-goods piracy is a low priority for Korean enforcement authorities, and the vendors are rarely caught with much pirate product (only catalogs and empty cases). Increasingly, Korean authorities show a willingness to take action against the dispersed underground labs where the discs are burned to order to supply the vendors, and against warehouses and similar sites. 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 2007, the police and prosecutors conducted over 1300 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.

Entertainment Software: The availability of circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in video game consoles, is extremely problematic. These devices are widely available for sale on the Internet as well as at retail. Nine shipments of the game copiers known as R4 devices, which allow users to download and play unauthorized copies of Nintendo video game software, were detained by the Korean Customs in the last five months alone. Although such devices are clearly prohibited under the Computer Programs Protection Act, no indictments have been brought by Customs or local prosecutors against the importers or the sellers of these illicit devices.

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). As IIPA noted in last year's submission, while the new act contains some significant improvements, in many other ways it represented a missed opportunity for Korea to bring its laws into closer compliance with 21st century global minimum standards.

To some extent, however, the revised CAK (which entered into force in mid-2007) may have been overtaken by events. Following negotiation of the KORUS FTA, the Korean government released an extensive draft amendment to the CAK, intended to implement the significant obligations that the ROK agreed to take on in the FTA. To a considerable extent, the draft amendment achieves this objective. However, as IIPA noted in comments submitted in October 2007⁸, in some areas the implementation proposed in the draft needed improvement.

A revised version of the amendment was submitted to the National Assembly at the end of December 2007, and could be considered in a plenary session as early as February 2008, though consideration may be delayed. Based on a preliminary review of an unofficial translation of the revised amendment, most of the shortfalls of the earlier draft remain.⁹ Some of the most significant problems include:

- While the draft explicitly recognizes the copyright owner's exclusive right to make temporary copies (article 2(22)), a broader and more flexible formulation, more closely tracking the FTA language (FTA Art. 18(4)(1)) and expressly covering reproduction "in any manner or form", would be preferable.
- The exception to protection for temporary copies in proposed Article 35-2 should be narrowed to exclude copies made in the course of a transaction not authorized by the right holder (independent of any knowledge requirement of the infringing nature of the copied work), and to make the exception subject to the internationally recognized "three-step test" for permissible limitations on copyright.¹⁰

⁸ See <http://www.iipa.com/pdf/IIPASubmissionreCAKAmendments100307.pdf>.

⁹ Additionally, some provisions of the earlier draft that were necessary to achieve FTA compliance may have been omitted from the December version. For instance, under Art. 18.10.29 of the FTA, Korea must make it a criminal offense to attempt to camcord a film in a theater without authorization from the right holder. Proposed Art. 138-4 of the earlier draft amendment covered attempts, but the corresponding provision of the amendment bill submitted to the National Assembly (proposed Art. 104-6) does not – at least in the unofficial translation IIPA has reviewed.

¹⁰ The bill also includes an exception (proposed Article 35-3) modeled on the four-factor fair use exception in U.S. law. Fair use is a creature of the U.S. common law legal system, and was not codified until 1976. Since Korea is a civil law system which generally lacks the precedential background against which the U.S. fair use exception has developed, its implementation of any new "fair use" statutory provision must be closely monitored to ensure that a balanced and predictable approach is applied.

- The draft leaves unchanged provisions of current law (Art. 83) that deny sound recording producers an exclusive right to control webcasting, subscription digital broadcasting, and other “digital sound transmission services.” This is inconsistent with Korea’s FTA obligations (art. 18.6(a)), since it represents an exception to rights that both conflicts with the normal exploitation of sound recordings, and creates unreasonable prejudice to the legitimate interests of sound recording producers and performers.¹¹
- Significant gaps remain in the amendment’s treatment of liability of Internet service providers. To comply with the FTA obligations, availability of injunctive relief against ISPs should be confirmed, and it should be clarified that the new safe harbors against monetary damages do not provide a blanket exemption from all liability of the ISP. The circumstances under which an ISP should “take down” infringing content in order to benefit from liability limitations should be further detailed and, in particular, the knowledge standard should not only include situations where the ISP has actual knowledge, but also when it is aware of facts or circumstances from which infringement is apparent. In order to qualify for the safe harbor, an ISP should be required to designate publicly (not just to its users) an agent to receive claims of infringing activity. The criteria for the “mere conduit” and caching safe harbors, as well as the limitations on injunctive relief against ISPs that fall within a safe harbor, should be adjusted to track the FTA, and the discussion of monitoring requirements (which may legitimately be imposed under other provisions of Korean law) should be clarified.
- Statutory damages against those found liable for trafficking in tools for circumventing technological protection measures should be based on the number of devices or services involved, rather than on the number of works affected.¹²
- Criminal penalties – particularly for trafficking in devices or services to circumvent technological protection measures or to decrypt broadcast signals, or for unauthorized commercial distribution of encrypted signals – should be reviewed to ensure that they provide the needed deterrence.

In addition, IIPA remains concerned about a number of provisions of the CAK that are not addressed by the draft FTA implementation legislation. These include:

- Educational exceptions under Art. 25, as expanded by the 2006 amendments to include allowing students as well as teachers at any level to “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, and without any compensation to the right holder for such transmissions on the secondary school level.
- Mandatory collective administration of rights of remuneration created under several provisions, including for “digital sound transmission” and conventional broadcasting with respect to sound recordings¹³; reproduction or transmission by libraries; or use of copyrighted material in school textbooks, or online by post-secondary educational institutions. To improve transparency and forestall 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.¹⁴

¹¹ As a policy matter, 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 a 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.

¹² The December version of the amendment now provides that statutory damages provisions should apply to violations of the TPM provisions *mutatis mutandis* to their application against acts of infringement. It should be clarified that using a different metric than the number of works involved fits within the *mutatis mutandis* criterion.

¹³ Although Article 82 of the new law for the first time allows foreign sound recording producers to claim remuneration payments for conventional broadcasting, 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 and must be changed.

¹⁴ 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, which discriminates against foreign music publishers and composers. Foreign music publishers should be accorded a

- Sweeping exceptions that allow 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.
- The private copying 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. 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.
- Finally, a number of provisions of the CAK that confer policymaking and other powers on the Ministry of Culture and Tourism (MOCT) and other government bodies require clarification. These include MOCT authority to “designate certification agencies to ensure the safety and reliability of transactions of copyrighted works” (Art. 56); 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); to “promote fair use of works such as [by] making public notification of works upon which copyrights have lapsed” (Art. 134.1); and to “draw up and implement policies on rights management information and technical protection measures” (Art. 134.2), a responsibility apparently shared with the new Copyright Commission (see Art. 112).¹⁵ While some of these new authorities could prove beneficial, there is also a substantial risk of abuse, which should be reined in through implementing decrees, as well as careful monitoring of how these new powers are exercised.

As IIPA noted in its 2007 Special 301 submission on South Korea, the revised CAK “leaves many key issues to implementing decrees.” An Enforcement Decree for the CAK took effect simultaneously with the coming into force of the new law in June. IIPA was able to review an unofficial translation of the text of the Decree. We note that the Enforcement Decree provides procedures for rights holders to invoke Article 104 of the CAK, which requires “online service providers that mainly enable people to transmit [copyright works] among themselves” to “take necessary measures such as blocking illegal transmission of [works] when requested by the right holder.” This is potentially a valuable new tool against online piracy, although it is essential that right holders be able to request blocking without excessive formalities or burdensome documentation requirements. IIPA has also reviewed a draft public notification in which MOCT provided a broad definition of service providers subject to Article 104, including not only peer-to-peer services but also other business models prevalent in the online pirate marketplace in Korea, such as web-hard services that use a point system or “cybermoney” as payment for illegal downloads or streaming. We urge USTR to monitor closely developments in the implementation of Article 104, to ensure that the provision lives up to its potential for serving as an effective tool against online piracy in Korea.

nondiscriminatory opportunity to qualify for “trust licenses” under Article 78 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.

¹⁵ The new Enforcement Decree to the CAK (discussed below) provides somewhat more detail on how MOCT and its delegates would exercise some of these powers, and in some cases seems to expand them. We note, for example, that under Article 66(3) of the Decree, MOCT’s Copyright Information Center is instructed to “ensure interoperability of technical protective measures.” The Center’s exercise of this authority must be carefully scrutinized to ensure that it does not interfere with the healthy development of markets in copyrighted materials, including those protected by such measures.

Computer Programs Protection Act (CPPA) Amendments

Under Korea's unique copyright law regime, fulfilling the requirements of the KORUS FTA will require amendments not only to the CAK, but also to the CPPA, which governs computer program copyrights and which is administered by the Ministry of Information and Communications (MOIC). A draft amendment to the CPPA was issued in August 2007, and an amendment bill was submitted to the National Assembly in mid-December. IIPA's preliminary review of an unofficial translation of this legislation indicates that its handling of several issues needs improvement, including the following:

- Temporary copies and exceptions. While the amendment bill explicitly includes temporary reproduction within the copyright owner's exclusive rights, it also provides an exception whenever temporary reproduction "incidentally occur[s] as an essential part of the technical process which uses programs" (proposed Art. 12(2)(2)). This exception is too broad. For example, even though the government has stated that one purpose of the change to recognize temporary copying is to reflect the move toward accessing software on the servers of application service providers rather than physically possessing a copy, this exception could allow the customer of an illegitimate ASP to escape infringement liability, since the temporary copy made by the customer could fall within the scope of the exception. Although the exception does not by its terms apply when the end-user knew or had reason to know that the source of the temporary copy was itself infringing, that limitation does not fully address the ASP scenario. IIPA urges that the provision be amended so that the exception does not apply in a transaction that has not been authorized by the right holder. Similarly, the blanket exception for temporary reproductions made in the course of transmitting or receiving a computer program (proposed Art. 12(2)(1)) should also be narrowed to exclude its application in the case of an unauthorized transmission.¹⁶
- Statutory damages. Proposed Art. 32-2(1) appears to impose two conditions on the availability of pre-set statutory damages. First, this option seems to be available only when the right holder "cannot easily provide the amount of damages involved." Second, statutory damages are only available for infringement of a work that has been registered with MOIC prior to infringement. It should be made clear that statutory damages are available "on the election of the right holder" (per KORUS FTA Art. 18.10.6), and the prior registration requirement should be reviewed. Additionally, it is questionable whether the maximum statutory damage amounts provided (KRW 30M/ USD 31,500, and KRW 100M/ USD 105,000 for intentional for-profit infringement) are sufficient to provide the needed deterrence. These caps should be reviewed.
- Online service providers. Although proposed Articles 34-4 et seq. largely implement the applicable FTA provisions, a few important adjustments are needed. First, the text should be reviewed to ensure that it consistently reflects the fact that qualification for the safe harbor is a shield only against award of monetary damages, not a complete exemption from liability (see, e.g. proposed Art. 34-4(2)). Also, ISPs providing storage services should explicitly be required to take action against infringements when they are aware of facts or circumstances from which infringement is apparent, as required under FTA article 18.10.30(b)(v). Further, a copyright owner should be potentially liable under proposed Art. 34-5(5) only if it makes a knowing material misrepresentation in its takedown notice (see FTA Art. 18.10.30.b.ix), not on the broader ground of acting "without any proper legal basis." Proposed Art. 34-7 should also be reviewed to ensure that the procedure it creates for applying to the Minister for an order to disclose the identity of an online infringer is in fact "expeditious," as required by FTA Art. 18.10.30.b.xi. Proposed Art. 34-4(1)(1) needs to more closely track the FTA definition of a provider that transmits, routes, or provides connections for copyright material (see FTA Art. 18.10.30.b.i.A), rather than one that "provides access" to such material.
- Technological protection measures. Here again, the CPPA amendment largely implements the relevant FTA provisions. However, proposed Art. 34-9 (2)(4) needs adjustment, since the exception stated there should not apply if circumvention of an access control enables any unauthorized party to access the program in question (or any other copyright work), including the party that is carrying out the circumvention (see FTA Art. 18.4.7.d.v).

¹⁶ As noted above with respect to the CAK, the proposed "fair use" exception in the CPPA (see proposed Art. 12-4) also requires careful monitoring.

- **Criminal penalties.** Korean authorities should be encouraged to consider whether all the criminal penalties in the amendment are sufficiently stringent to provide deterrence. For example, one who traffics in forged labels for computer programs, or who intentionally removes copyright management information for profit, would face under proposed Art. 46(1)(3)(4) and (6) a penalty of no more than one year in prison or a fine of KRW 10 million (USD 10,500).

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.

MARKET ACCESS ISSUES

The KORUS FTA contains commitments that will improve access to the Korean market to producers and distributors of audio-visual products and services. Although the structure of the existing foreign content quotas applicable to broadcast, cable, related media and theatrical exhibition has not been changed, the screen quota has been halved, and the other quotas would be locked in at the least restrictive level allowed under current law. Two commercially meaningful liberalizations are the decreased domestic content quotas for animation and film broadcasting, and the increased quota for single-country sources of foreign broadcast content. Some important foreign investment restrictions would also be phased out, leading ultimately to 100% foreign ownership of many program providers (channel operators), and investment in delivery of television via Internet Protocol (IPTV). Disappointingly, however, Korea has retained the right (though subject to some procedural and substantive conditions) to impose foreign content restrictions on new services and delivery platforms, ranging from video on demand (VOD) to IPTV and other forms of streaming and downloading via the Internet. IIPA hopes that these issues will be re-examined in the near future, with the goal of phasing out quotas in favor of letting market forces determine the content presented to Korean consumers.

As noted by IIPA in last year’s submission, 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 gave foreign producers a more level playing field in the Korean market. However, in 2007, a new element of discrimination against foreign producers was introduced, when censorship fees for foreign titles were increased by over 70%. This sharp increase in costs for foreign producers should be re-examined.