

SOUTH KOREA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that South Korea remain on the Watch List in 2009.

Executive Summary: Ratification and implementation of the copyright provisions of the Korea-US Free Trade Agreement remains a top priority. But South Korea should not wait for that before taking additional steps to tackle its massive online piracy problem, and there are encouraging signs that its government understands the importance of addressing this without delay. Korea's world-leading Internet environment remains the venue for unacceptably high levels of piracy affecting every copyright sector. While there are some signs of progress, much more enforcement effort is needed before legitimate services can expand the toehold they are starting to gain in this important digital marketplace. In order to address piracy and to thereby expand the opportunities for legitimate commerce in copyright materials, Korea should be encouraged to begin to fulfill the ambitious commitments against online and book piracy that it undertook in FTA side letters. Copyright law modernization, including consolidation of copyright responsibilities in one agency and adoption of a practical regime for administrative sanctions against persistent online infringement, is another goal to be achieved in 2009.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in South Korea in order to improve protection of copyrighted:

Enforcement

- Step up the fight against Internet piracy, by devoting more resources to it; enhancing specialized training of prosecutors and police; and giving formal investigative and enforcement powers to the Copyright Protection Committee of the Ministry of Culture, Sports and Tourism.
- Ensure that investigative and prosecution resources, especially against online piracy are made fully available to foreign right holders and their representatives; and take steps to encourage Korean online service providers to take more active steps to cooperate in the fight against online piracy.
- Continue vigilant enforcement actions against business end-user piracy.
- Cooperate with international book publishers to help ferret out underground photocopy and print operations, and re-engage the Ministry of Education on the fight against piracy of academic materials, assuring that universities deliver and implement action plans to achieve greater legalized use of published materials.

Legislation

- Ratify and fully implement the copyright law and enforcement provisions of the Korea-US Free Trade Agreement.
- Complete the proposed integration of the Computer Program Protection Law into the Copyright Act, consolidating copyright responsibility in a single agency, while ensuring that the owners of copyright in computer programs are not prejudiced as a result.
- Adopt improvements to the administrative sanctions regime against online infringement.



SOUTH KOREA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2004-2008¹

INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level								
Business Software ²	284.0	40%	302.0	43%	220.0	45%	200.0	46%	276.0	46%
Entertainment Software	NA	NA	461.9	66%	353.5	68%	415.1	55%	349.0	43%
Books	NA	NA	44.0	NA	45.0	NA	43.0	NA	42.0	NA
Records & Music ³	NA	1%	NA	NA	0.3	7%	1.3	13%	2.3	16%
Motion Pictures	NA	NA	NA	NA	9.0	7%	NA	7%	40.0	20%
TOTALS	284.0		807.9		627.8		659.4		709.3	

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.

IIPA fully recognizes that some aspects of the KORUS FTA, completely unrelated to copyright, have proven highly contentious in both countries. Nonetheless, IIPA still strongly believes that ratification of the KORUS FTA by both parties, and full implementation of its provisions in Korean law, should be a top priority for 2009.

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

- Online service provider liability. Article 18.10.30 of the FTA includes a critical undertaking to provide legal incentives for service providers to cooperate with right holders in deterring piracy. Korea should be encouraged to take significant steps forward toward a more effective system for combating the high levels of online copyright infringement that prevail in that market by enhancing online accountability, and by ensuring that cooperation between rights holders and service providers extends to all forms of content delivery, including through peer-to-peer (p2p) and other services.
- Enforcement against Internet piracy. In a particularly significant commitment, contained in a 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 is especially appropriate given the ubiquity of online infringement throughout Korea's highly networked digital marketplace.
- Enforcement against book piracy. In another 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,

¹ The estimated range of collective trade losses is IIPA members' best estimate of the range of economic harm caused by copyright piracy to U.S. copyrighted materials distributed in this market. This collective estimate is a conservative one, and does not include any estimates of losses caused by internet piracy. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at <http://www.iipa.com/pdf/2009SPEC301METHODOLOGY.pdf>. For information on the history of South Korea under Special 301 review, see Appendix D at (<http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALPLACEMENT.pdf>) and Appendix E at (<http://www.iipa.com/rbc/2009/2009SPEC301HISTORICALSUMMARY.pdf>) of this submission. IIPA's prior country reports on South Korea are posted on the IIPA website at <http://www.iipa.com/countryreports.html>.

² BSA's 2008 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in South Korea, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at [ww.bsa.org](http://www.bsa.org). 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.

³ The 1% piracy rate for sound recordings applies to physical piracy. The online piracy rate for sound recordings in South Korea is approximately 70%.

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.

- 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).
- 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 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 in a globalized marketplace.
- 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. To work effectively, the level of statutory damages must be of deterrent value.
- 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.

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 2008, but much more remains to be done.

Statistics submitted by the South Korean government to the OECD show continued growth in the already high levels of a broadband penetration that have kept the country in the top ranks for this statistic globally for many years. With over 31 broadband subscribers per 100 inhabitants, broadband penetration in Korea far exceeds that of any other market of comparable size.⁴ Even more significantly, South Korea far outstrips any other market in the world in the penetration of the highest speed online connections using optical fiber or LAN technology: for every 100 South Koreans, 12.2 subscribe to such services.⁵ The level of Internet access through mobile devices is, if anything, even more striking. Although legitimate services for online distribution of copyright works continue 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.

Every sector of the copyright industry is impacted by online piracy in Korea. Although the specific means of piracy constantly change with technological advances and enforcement pressures, the overall trend is clear: online piracy continues to grow. Statistics from the government's Copyright Protection Center (CPC) show an increase in identified pirate product online across every copyright industry sector. The 52% increase in identified pirate music between 2007 and 2008 is dwarfed in the CPC statistics by jumps of over 312% for movies and nearly 276% for published materials. The Internet is also being used to distribute "look-alike" knock-off versions of popular videogames, and unlicensed Korean versions of these games, using translation patches.

Online piracy in Korea takes some characteristic forms. "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 particularly 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.

Online piracy of entertainment software remains very high, with the vast majority of infringements occurring through web-hard sites. Peer-to-peer piracy is a smaller but significant problem. From March to December 2008, the ESA detected over 626,000 infringing listings for a small group of ESA members' most popular titles in Korea. The ESA sent notice and takedown requests to the relevant service providers, demanding the expeditious removal of those infringing listings. Many, but not all, of the service providers complied with the notices, which has resulted in a reduction of listings detected by the ESA over the last few months. Nonetheless, the concern is that smaller and newer web-hard service providers that enter the market will be less willing than some of their well-established and larger counterparts to take measures against online game piracy.

While web-hard services remain the leading source of online music piracy, the recording industry reports a growing problem with community portal sites, of which Naver, Daum and Cyworld are leading examples. Participants in these online communities post infringing music files in community forums as well as on their own individual blogs. Finally, small peer-to-peer (p2p) services remain a significant source of piracy, and their growing use to swap pirate movie files and scanned books and journals is a disturbing trend.

The government's main effort to deal with the growing assault of Internet-based piracy on all copyright industry sectors was to consolidate several separate enforcement agencies into the Copyright Protection Center (CPC) within Korea's Ministry of Culture, Sports and Tourism (MCST).⁶ 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, and some copyright industry sectors, notably the music industry, report improved cooperation with CPC in 2008. But CPC's progress is limited by its exclusive identification with the established "copyright trust and management" entities.⁷ Major foreign rights holders do not belong to these agencies, and thus

⁴ See <http://www.oecd.org/dataoecd/21/35/39574709.xls>. The corresponding figure for the U.S. is 25 subscribers per 100 inhabitants, according to the OECD.

⁵ Id. The corresponding figure for the U.S. is 0.9.

⁶ In a government reorganization in early 2008, the new MCST took over the copyright portfolio formerly held by the Ministry of Culture and Tourism (MOCT).

⁷ Examples of these entities include the Korean Association of the Phonographic Industry for sound recording producers, and KRTRC for book publishers.

online enforcement activities by CPC on behalf of foreign rights holders are limited. CPC has recognized this problem, has promised to take more actions against pirating of foreign repertoire and titles, and appears to have done so in at least a few instances involving one international music label and the Korean subsidiary of an ESA member company. IIPA urges Korea to undertake aggressive enforcement against online piracy of foreign works, and to keep the concerned copyright owners fully advised of the results. 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."

MCST also established a Copyright Protection Team in 2008, to supplement the activities of CPC. But neither this new team, nor the CPC, have any formal investigative or judicial powers. They must rely on the police and prosecutors to open criminal investigations and to prosecute infringing activities. While a police cyber-crime unit has been formed and is involved in anti-piracy investigations, overall the criminal effort falls far short of what is needed to make an effective response to the huge problem of online piracy. The police lack the professional training and technical expertise to carry out complex investigations of online piracy, and Korean prosecutors have failed to take effective actions against mass online infringements occurring in release groups that host networks or clusters of high-speed computers.

Recent press reports provide encouraging news about prosecution activities against online infringement. Prosecutors have summoned some portal operators for questioning about their awareness of rampant music piracy on their community forums and blogs. IIPA understands that some 40 operators of forums and blogs were investigated, and were each fined about KRW 1-2 million (US\$710-1420). Thirty high-volume uploaders were also reportedly indicted in connection with the investigation and will be fined. More recently, in December 2008, the Seoul central district public prosecutors' office announced indictments against some major portal sites, charging that these portals neglected to act in response to take down notices against illegal music files sent by CPC and right holders. The portals are being charged with negligence, aiding and abetting. The prosecutors' office assessed KRW 30 million (US\$21,300) as a fine against each portal and the working level managers involved. It has also been reported that a few p2p and "web-hard" operators have been arrested for urging uploaders to make infringing content available. We hope that these cases are the harbingers of more vigorous efforts by police and prosecutors against serious cases of online piracy.

The services provided by Internet service providers, portal operators, and similar businesses is essential for all the various types of online piracy services to survive, much less thrive. Consequently, cooperation from such service providers is also indispensable to an effective effort to reduce the prevalence of online piracy. Unfortunately, the attitude of most Korean ISPs can best be described as passive. While most will respond to takedown notices when particular pirate files are identified, they are reluctant to take any more proactive measures. This passivity was noted by prosecutors in the criminal investigation of portal-based music piracy described above. IIPA urges the Korean government to take more active steps to encourage ISP cooperation in combating online piracy, including through the use of the administrative powers in Article 104 of the CAK to act against "special online service providers" engaged in piracy.

Offline Piracy: Piracy problems in Korea are by no means limited to the Internet, at least for most industries.⁸

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 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

⁸The negligible offline piracy rate reported by the recording industry reflects the virtual disappearance of the CD -- legitimate or pirate -- from the Korean music marketplace.

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 still prefer to go to a copyshop to get a hard copy of a book rather than use online versions, 2008 saw increasing instances of digital piracy. Copyshops are now 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.

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 continued success in 2008 in tracking down both photocopying and underground printing operations, leading to significant seizures.⁹ However, the burden of initiating, investigating and carrying through enforcement actions remains on right holders, and penalties following cases are all too often non-deterrent. Meanwhile, piracy is spreading to smaller cities outside Seoul, and pirate enterprises are constantly adapting their practices.¹⁰ IIPA urges the Korean government to commit more resources to fighting book piracy in 2009, and to act more boldly by initiating its own enforcement actions.

The Korea-U.S. FTA's side letter on book piracy contains important statements about Korea's commitment to tackle underground piracy and reduce campus-based infringements. The side letter builds on an initiative begun in 2005 with the cooperation of the Ministry of Education. Unfortunately, the Ministry's early efforts have not continued, and it has shown little interest since 2006 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 issuance of several Ministry of Education letters requesting every university to devise an action plan for reducing book piracy on campus resulted in several positive responses from universities. Others failed to respond, though, and several responses lacked significant substantive measures. While the letters were a good start, steps toward implementation of the initiatives they signaled have been utterly lacking ever since, 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 are 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.

Burned Optical Media: The motion picture sector suffers losses due to sales of "burned" optical media (DVD-Rs or CDRs) with their copyright product on them.¹¹ Street vendors continue to hawk these products, especially in (or supplied from) the Yongsan area of Seoul 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. While the authorities, including the CPC, appear to have

⁹ Late 2008 raids included action in the vicinity of a number of different campuses, including Korea, Han Yang, Kwang Woon, Choong Nam, KAIST, Gyeonggi, Aju and Wooseok Universities. One defendant in the resulting cases has been indicted, with a fine of KRW 3 million (just over US\$2000).

¹⁰ AAP recently heard of several reference and educational materials being marketed door to door at homes in major cities.

¹¹ With the complete collapse of the offline market for sound recordings, hard goods piracy in this sector has become rare, though pirate music vendors can still be found at subway stations and highway rest stops.

stepped up their efforts to address optical media piracy, 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 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 2008, the police and prosecutors conducted over 2,000 end user actions. The current enforcement system works well and it is important that the Government maintain this level of enforcement activity.

Entertainment Software: With much of the piracy problem having migrated online, video game hard goods piracy, while it still exists, has become somewhat less of a problem. However, the availability of circumvention devices, such as mod chips and game copiers that bypass the technological protection measures employed in video game consoles, remains extremely problematic. These devices are widely available for sale on the Internet (on major auction sites, including eBay Korea) as well as at retail. There are also a number of online forums that provide information as to where such devices may be purchased as well as providing instructions on how to install them. The ready availability of circumvention devices goes hand-in-hand with online piracy, specifically downloading of infringing video game software. For example, a subscriber/consumer can download a video game from a one-click hosting site (also known as a cyberlocker), and through the use of a circumvention device called a DS game copier, that infringing video game would be playable on a DS handheld device. Playing a pirated video game on a console would be impossible without the use of circumvention devices. There appears, however, to have been some progress with respect to enforcement efforts against the importation of such devices. Korean Customs authorities recently began enforcement efforts against such shipments, and have referred cases to prosecutors for further action.

UPDATE ON LAW REFORM

Revision of the Copyright Act of Korea

The status of copyright law reform in South Korea is complex, due in great part to delay in achieving ratification of the FTA with the United States.

The starting point for reform is the current Copyright Act of Korea (CAK), which was comprehensively rewritten (for the first time in 20 years) in legislation adopted in December 2006. As IIPA has noted, while the new act, which entered into force in mid-2007, 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.

Following negotiation of the KORUS FTA, the Korean government in 2007 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, in some areas it needs improvement.

In 2008, an entirely different draft amendment to the CAK was released by the Korean government. Its main goals were (1) to bring into the CAK relevant provisions of the Computer Program Protection Act (CPPA), which for more than 20 years has been the law governing computer software copyrights, under a bifurcated legal system unique to Korea; and (2) to strengthen administrative enforcement and sanctions against online copyright infringement. Two significant amendments to this draft have also been proposed on behalf of the majority and opposition political parties in Korea.

Both pieces of legislation remain pending before Korea's National Assembly. With that body in turmoil over ratification of the KORUS FTA, the timetable for action on both bills is uncertain, as is how they will be integrated upon enactment. Meanwhile, since the consolidation of the CPPA with the CAK has not yet occurred, a draft amendment to bring the CPPA into compliance with FTA standards also remains pending. We discuss each piece of legislation in turn.

FTA Implementation Amendments to CAK

IIPA noted in comments submitted in October 2007 that the FTA implementation legislation needed improvement in some areas.¹² A revised version of the amendment was submitted to the National Assembly at the end of December 2007 appears to have left most of the shortfalls of the earlier draft intact.¹³ 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.¹⁴
- 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." Some exceptions to these rights may be introduced in a manner consistent with the FTA, but a blanket compulsory license for these digital services does not comport with the requirements of the FTA. To be consistent with Korea's FTA obligations (art. 18.6(a)), any exceptions to these rights must not conflict with the normal exploitation of sound recordings, or create unreasonable prejudice to the legitimate interests of sound recording producers and performers.¹⁵
- Significant gaps remain in the amendment's treatment of liability of Internet service providers (ISPs). 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.¹⁶

¹² See <http://www.iipa.com/pdf/IIPASubmissionreCAKAmendments100307.pdf>.

¹³ Additionally, some provisions of the earlier draft that were necessary to achieve FTA compliance may have been omitted from the December 2007 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.

¹⁴ 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, implementation of any new "fair use" statutory provision will be extremely difficult and is likely to increase sharply the unpredictability of Korean copyright law. This issue must be closely monitored to ensure that a balanced and predictable approach is applied.

¹⁵ As a policy matter, statutory distinctions based on whether or not a service is classified as "on demand" or "interactive" are 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.

¹⁶ The revised 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.

- 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.

2008 Proposed Amendments to CAK

Integration of CPPA Provisions

The decision to centralize copyright law in one statute, under the direction of one ministry, would bring Korea's legal regime into the world mainstream, and could help to minimize inconsistencies with regard to different categories of copyright works. It appears that the proposed amendments accomplish the goal of melding the CPPA with the CAK, for the most part. However, when the two laws are integrated, a provision along the lines of current Article 30(1) of the CPPA should be included, so that the act of circumvention of technological measures that control access to any type of copyright work will be explicitly prohibited.

The interests of computer program copyright owners would also be affected adversely by the change with regard to the complaint requirement for criminal prosecution. Article 48 of the CPPA currently requires a criminal complaint to be filed by the rights owner as a condition for prosecuting most criminal offenses under the Act. Copyright owners in computer programs have incorporated this requirement into their enforcement strategies to achieve the most efficient and effective methods of bringing end-user business software pirates into compliance with their legal obligations; nearly all such cases have resulted in settlements requiring the infringer to convert to legal software and pay damages for the violations. This has led to a steady decrease in the business software piracy rate in Korea.

However, the proposed amendment would eliminate Article 48 of the CPPA and make computer program infringement cases subject to Article 140 of the CAK, under which a formal complaint is not required for criminal prosecution in a number of situations, notably cases that involve "habitual" infringements "for commercial purposes." While IIPA strongly supports Article 140 within its current scope of application, applying it to computer program infringement cases would be problematic, because eliminating the complaint requirement will make it much more difficult to settle corporate end user piracy cases. The resulting increased burden on Korea's judicial system means that current high levels of enforcement activity will become unsustainable. The inevitable result would be decreased levels of enforcement. IIPA urges the drafters to exclude computer programs used in business from the exception to the complaint requirement under CAK Article 140, paragraph 1, or, at a minimum, to apply the principle of "vindication of right holder's will," whereby prosecution of cases of end user piracy will not proceed over the right holder's objection.

Administrative Enforcement Against Online Piracy

The second aspect of the legislation proposed in 2008 would have significantly enhanced the administrative sanctions that MCST could impose on those who repeatedly engage in online infringements, or upon those who encourage users to do so (such as by providing illicit p2p services, and other "online service providers of a special type" as defined under Article 104 of CAK). This was an ambitious proposal that had the potential to improve the effectiveness of enforcement against the widespread and serious problem of online copyright piracy. It included a system of escalating sanctions against online service providers that had shown by repeated violations that they were not willing to cooperate with right holders in combating online infringement. While supportive in principle, however, IIPA raised a number of questions about the proposed new Articles 133-2 and 133-3. These included a concern about whether the administrative procedures could be imposed promptly enough to have a real impact in the fast-paced environment of online piracy. IIPA also pointed out several ambiguities in the legislation and urged that these be clarified.

In November 2008, a ruling party legislator proposed significant amendments to this aspect of the legislation. The next month, an opposition legislator proposed an opposing set of amendments. Both packages of amendments would weaken the underlying legislation, including in the areas previously identified by IIPA as problematic.

For example, the majority amendment would build long waiting periods into the administrative sanctions process, thus exacerbating the problem that the administrative regime would not be nimble enough to be effective in the online arena. The November amendment would also inject greater uncertainty into the administrative sanctions available. For example, MCST's

power to order some “information and communication service providers” to block the access of the most seriously offending online businesses to their networks would be diluted to requiring service to be limited “to the minimum extent necessary.”¹⁷

The opposition party’s proposed amendment would be even more problematic. Among other things, it would recast the definition of “special OSPs” under Article 104, to add a requirement of “commercial benefit.” (Currently, MCST uses a broad administrative 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.) The re-definition could have the effect of removing many harmful services from the ambit of administrative sanctions altogether, if it could not be proven that they were offered with a commercial motive. The opposition amendment would also appear to give MCST an inappropriate role in developing and mandating the use of specific database management technology.¹⁸

At this point, it appears that the provisions of the amendment originally proposed in mid-2008, at least as to administrative enforcement against online infringement, have been superseded by the dueling amendments put forward in November and December. While both these proposals are inferior to the original language for new Articles 133-2 and 133-3, IIPA urges that any new legislation in this area be anchored in the practical reality that administrative sanctions are at best a supplement to clear, and vigorously enforced, civil and criminal copyright infringement provisions. Furthermore, any administrative sanctions regime must be readily invocable by right holders, and it must enable authorities to move swiftly and firmly, not only against online infringers, but also against service providers who repeatedly enable their activities.

Other CAK Issues

In addition, IIPA remains concerned about a number of provisions of the CAK that are not addressed by any of the draft amendments summarized above. 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 recordings¹⁹; 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.²⁰

¹⁷ Other aspects of the November amendment that require closer scrutiny include an expansion of the educational exception in Article 25(2), and a proviso to Article 141 that would relieve a corporation or principal from criminal legal responsibility from acts or omissions of its employees or agents if the corporation or principal “exercised due care and supervision.” While the latter provision may not be objectionable in principle, it carries with it a considerable risk of abuse.

¹⁸ Like the ruling party amendment, the minority party amendment includes troubling provisions on issues other than administrative sanctions. For example, a proposed amendment to Article 136 would eliminate criminal liability for infringements “if the total resale price of violated right is KRW one million [US\$710 currently] or less.” Such a provision could be especially mischievous in the online environment, e.g., in the case of high-volume uploads of single copies that may result in a much higher number of infringing downloads.

¹⁹ Although Article 82 of the 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.

²⁰ 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 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.

- 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.

Computer Programs Protection Act (CPPA) Amendments

Unless and until Korea's unique bifurcated copyright law regime is changed, 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 of that year. IIPA's 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.²¹
- 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/ US\$ 21,300 and KRW 100M/ US\$ 71,000 for intentional for-profit infringement) are sufficient to provide the needed deterrence. These caps should be reviewed.²²
- 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

²¹ 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.

²² Note that these caps have lost about one-third of their value in US dollars since they were formally proposed fourteen months ago.

“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).
- 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 (US\$7,100).

Other legislation

IIPA understands that legislation for a public performance right in sound recordings was presented to the National Assembly in November 2008, was passed by the Committee on Culture, Sports, Tourism, Broadcasting & Communications on February 5, 2009, and may be considered by the full National Assembly as soon as March. IIPA has not been able to review an English translation of the proposal, but based on press reports it is a positive development that deserves prompt and favorable consideration. Unlike the existing broadcasting right, the proposal for a public performance right grants the right to foreign producers irrespective of reciprocal protection to Koreans in the foreigner’s country. We look forward to reviewing the full text.

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 (KM RB) 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. IIPA is advised that an amended proposal on enforcement regulations was submitted in December 2008, but we have not had an opportunity to review an English translation.

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.