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With Great Power Comes Great Responsibility: Korea's Role in the War against Online Piracy

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With Great Power Comes Great Responsibility: Korea's Role in the War Against Online Piracy

EDWARD CHOI*

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I. INTRODUCTION

South Korea is one of the most Internet-savvy countries in the world,¹ with more than 34 million Koreans over the age of five—74.8% of the total population—regularly accessing the Internet.² According to the Organisation for Economic Co-operation and Development (OECD),³ as of June 2007, South Korea has the fourth largest number of broadband subscribers⁴ at over 14.4 million, behind only Japan, Germany, and the

1. For a brief overview of South Korea’s Internet penetration and the effect it has had on the nation, not just in the technology sector but even changing the results of a presidential election by prompting people to vote in a last minute appeal, see David McNeill, *South Korea: Look East to See the Future of the Internet*, INDEPENDENT (U.K.), Nov. 20, 2006, <http://www.independent.co.uk/news/media/south-korea-look-east-to-see-the-future-of-the-internet-425001.html>.

2. NATIONAL INFORMATION SOCIETY AGENCY, 2007 INFORMATIZATION WHITE PAPER 40 (2007), http://www.nia.or.kr/open_content/board/fileDownload.jsp?tn=PU_0000100&id=53922&seq=1&fl=7 [hereinafter 2007 WHITE PAPER].

3. The OECD is a forum of thirty democratic governments, including the United States and South Korea, that collects economic and social data and monitors trends in order to help governments (both members and non-members of OECD) achieve sustainable economic growth. Organisation for Economic Co-Operation and Development, About the OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1_1,00.html (last visited Feb. 4, 2009).

4. The OECD defines broadband as including DSL Internet lines, cable modems, fiber-optics connections, broadband over power lines, and fixed wireless technologies, but does not include 3G mobile broadband technologies used on mobile phones. Organisation for Economic Co-Operation and Development, OECD Broadband Subscriber Criteria, http://www.oecd.org/document/46/0,3343,en_2649_37441_395755_98_1_1_1_37441,00.html (last visited Feb. 4, 2009). Including mobile broadband subscribers would increase Korea’s broadband subscriber rate significantly, as Korea has more mobile broadband subscribers per 100 persons than any other nation. 2007 WHITE PAPER, *supra* note 2, at 25.

United States, all of which have much higher populations.⁵ Studies show the time Koreans spend online is primarily for entertainment purposes, as almost 80% of Korean Internet users report online consumption of audio and video, almost 53% play games online, and 41% are engaged in file transfer.⁶ This is facilitated by the second fastest broadband network in the world,⁷ with a median download speed of 45 megabits per second,⁸ capable of downloading a five megabyte mp3 music file (your average four minute song) in less than one second.⁹ Internet speeds only continue to improve, as Korea is on the forefront of 4G¹⁰ technology, capable of downloading an entire DVD movie file in less than two seconds wirelessly on a cell phone.¹¹

The fast speeds and widespread penetration of the Internet in Korea, coupled with a large appetite for media and entertainment, sparks a huge potential for Internet piracy. As one of the leaders in the digital world, Korea should be leading the way as an online marketplace for materials protected by copyright.¹² Instead, Korea falls behind many other developed

5. Organisation for Economic Co-operation and Development, OECD Broadband Statistics to June 2007, http://www.oecd.org/document/60/0,3343,en_2649_201185_39574076_1_1_1_1,00.html (last visited Feb. 4, 2009).

6. Mun Y. Yi, *A Critical Look at Cyber Korea: Quality vs. Quantity*, in COOPERATION AND REFORM ON THE KOREAN PENINSULA 62, 62 (2002), available at <http://www.keia.org/2-Publications/2-4-Adhoc/AdHoc2002.pdf> (last visited Nov. 18, 2007).

7. See Leslie Cauley, *U.S. Net Access Not All That Speedy, Other Nations' Connections Are Much Faster*, USA TODAY, June 26, 2007, at 1A, available at 2007 WLNR 12005909.

8. *Id.*

9. There are eight megabits in one megabyte (MB). Therefore, a five megabyte file is equivalent to forty megabits, and the Korean network is capable of downloading up to 45 megabits in one second.

10. 4G is short for fourth generation communications systems, and is the next evolution of wireless communications technology. The majority of cellular networks currently use 3G technology. See PCMag.com, Cellular Generations Definition, http://www.pcmag.com/encyclopedia_term/0,2542,t=4G+wireless&i=55406,00.asp (last visited Feb. 4, 2009); Definition of 3G, http://searchtelecom.techtarget.com/sDefinition/0,,sid103_gci214486,00.html (last visited Feb. 4, 2009). For an in-depth look at 4G and its potential, see YOUNG KYUN KIM & RAMJEE PRASAD, 4G ROADMAP AND EMERGING COMMUNICATION TECHNOLOGIES (2006).

11. See Sun-young Lee, *Korea Develops World's Fastest Wireless Tech*, KOREA HERALD, Oct. 12, 2007, available at <http://www.asiamedia.ucla.edu/article-eastasia.asp?parentid=79752>. The numbers used for calculating the two second download are a 700 megabyte movie file and a 3.6 gigabit per second download speed.

12. See Cedric G. De La Cruz, *Intellectual Property Law Enforcement and Procurement in the Republic of Korea (South Korea)*, 91 AM. SOC'Y INT'L L. PROC. 399, 399 (1997).

nations in intellectual property protection, with a large amount of Internet traffic devoted to the unauthorized transfer of copyrighted files.¹³ Technological advances are constantly increasing the opportunities for piracy,¹⁴ and without proper government resistance, piracy is becoming firmly embedded as an everyday norm in Korea's digital economy.¹⁵

This article will examine Korea's potential as a model for copyright protection to other nations with its current copyright law and enforcement. Part I provides a brief background on the extent of piracy in Korea. Part II will look to the past, providing a background on the extent of piracy in Korea and the historical development of Korean intellectual property (IP) laws. Part III will look to the present status of Korean IP law and enforcement, economic solutions to piracy that domestic companies have used in lieu of weak IP enforcement, and the impact of the Korea-U.S. Free Trade Agreement on Korean IP law. Part IV looks to the future with proposed suggestions on how Korea can improve its enforcement of IP, and how foreign businesses can better protect their own IP within the current legal framework.

II. BACKGROUND: THE EXTENT OF PIRACY IN KOREA

Korea has been placed on either the "Priority Watch List" or the "Watch List"¹⁶ by the International Intellectual Property Alliance (IIPA)¹⁷ every year since 1989.¹⁸ Though improvements to Korean IP

13. Prior to being shut down, Soribada, the "Korean Napster," had eight million subscribers—about one sixth of the entire Korean population. Mark Russell, *High-Speed Internet Has Advantages for Korea*, BILLBOARD, Aug. 2, 2003, at AP-1. See also *Most Koreans Don't Pay for Downloaded Music—Study*, CHOSUN ILBO, Mar. 21, 2007, <http://english.chosun.com/w21data/html/news/200703/200703210028.html> (survey finding 39.4% of respondents have never paid for music downloads, and a total of 70% were reluctant to spend money on downloaded music files).

14. Don E. Tomlinson, *Intellectual Property in the Digital Age: The Piracy/Counterfeiting Problem and Antipiracy and Anticounterfeiting Measures*, CURRENTS: INT'L TRADE L.J., Summer 1999, at 3, 3.

15. See, e.g., Tae-jong Kim, *Popular Gadget Turns Users Into Movie File Thieves*, KOREA TIMES, Mar. 22, 2006, available at 2006 WLNR 21972803 (discussing a television commercial for video-capable electronics portrays a celebrity watching a movie on the product even though the film was not yet released on DVD or home video).

16. The "Priority Watch List" and "Watch List" were created by the U.S. Trade Representative under Special 301 provisions. Placement on either list indicates that country has problems with respect to intellectual property protection, enforcement, or market access for persons relying on intellectual property, with the "Priority" list indicating more severe problems. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT 17 (2007), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf.

17. The IIPA is an alliance of seven U.S. trade associations, including the Association of American Publishers, Business Software Alliance, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association

enforcement have moved Korea away from the "Priority Watch List," the IIPA estimates U.S. companies still lost at least \$752 million in 2007 to Korean piracy.¹⁹ U.S. businesses are not the only ones that suffer, however. Domestic losses from piracy are expected to account for 40% of the total revenue of the nation's film industry,²⁰ while domestic music CD sales have progressively dropped from 410 billion won in 2000 to 108 billion won in 2005.²¹

Physical media in the form of copied CDs and DVDs were the main staple of pirates in the past,²² but the Internet now provides a quicker,

of America. IIPA, IIPA FACT SHEET (2007), <http://www.iipa.com/pdf/IIPAFactSheet092007.pdf>.

18. Korea was placed on the "Priority Watch List" every year since 1989 except for 1990, 1991, 1997, 1998, 1999, 2002, 2003, 2005, 2006, 2007, and 2008, during which it was on the "Watch List." IIPA, IIPA APPENDIX E: HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS 55-56 (2006), <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>; IIPA, IIPA 2007 SPECIAL 301 REPORT: SOUTH KOREA 418 (2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHKOREA.pdf>; IIPA, IIPA 2008 SPECIAL 301 REPORT: SOUTH KOREA 334 (2008), http://www.iipa.com/rbc/2008/2008SPEC301SOUTH_KOREA.pdf.

19. IIPA, IIPA 2008 "SPECIAL 301" RECOMMENDATIONS: IIPA 2006-2007 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND 2006-2007 ESTIMATED LEVELS OF COPYRIGHT PIRACY (2008), <http://www.iipa.com/pdf/2008Spec301Asia-PacificLossLevel.pdf>.

20. *Movie Industry Heading for Crisis*, KOREA TIMES, Nov. 5, 2007, available at 2007 WLNR 21855480. Piracy affects the home video sales market for movies, as top grossing movies only manage to sell about 30,000 DVDs. By comparison, home video sales in the U.S. can amount to 250% of the revenue. See Mark Russell, *Troubled Seoul*, HOLLYWOOD REPORTER, May 15, 2007, http://www.hollywoodreporter.com/hr/content_display/film/features/e31939dbeat16d1372307290165b76f21637.

21. MUSIC INDUSTRY ASSOCIATION OF KOREA, EUMBANSIJANGGYUMO, http://www.miak.or.kr/music_data/market%20scale.htm (last visited Feb. 4, 2009). For comparison, the top selling album in 2000 sold 1,968,967 copies, whereas 2005's top selling album sold 307,954 copies. See MUSIC INDUSTRY ASSOCIATION OF KOREA, 2000 NYUN GAYO PANMAERYANG SUNWIJIPGYE, http://www.miak.or.kr/stat/kpop_2000_2h.htm (last visited Feb. 4, 2009); MUSIC INDUSTRY ASSOCIATION OF KOREA, 2005 NYUN GAYO CHONGGYEOLSAN EUMBAN PANMAERYANG, http://www.miak.or.kr/stat/kpop_2005.htm (last visited Feb. 4, 2009). Though concrete facts of piracy impacting CD sales are difficult to come across, the rapid surge of Internet usage and technology cannot be ignored, especially in light of the prevalence of music downloading on peer-to-peer networks in Korea. Compare with the music market in the United States, where estimated shipments of physical CDs were \$9.9 billion in 1996, peaked at \$13.2 billion in 2000, and dropped to \$10.5 billion in 2005. THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, 2006 YEAR-END SHIPMENT STATISTICS, <http://76.74.24.142/6BC7251F-5E09-5359-8EBD-948C37FB6AE8.pdf> (last visited Feb. 4, 2009).

22. See *Asia-Pacific Piracy Still Rampant: Shift in Operations Toughens Anti-Piracy Efforts*, SCREEN DIGEST, Nov. 2004, at 323, available at 2004 WLNR 18291652.

easier, and cheaper form of piracy. The majority of Internet piracy comes from using peer-to-peer (P2P) services.²³ P2P services allow Internet users to freely share files with one another. In a small sample of 20-30 file sharing services monitored in 2005, the Motion Picture Association²⁴ identified over 9,500 Korean uploaders engaged in audiovisual piracy.²⁵ Efforts to crack down on P2P services have been made, but pirates continue to remain one step ahead of the authorities, as the core medium for file downloads has transitioned from P2P to web-hard services, a closed file sharing system in which pirates store their unauthorized files online and then distribute passwords to the storage facilities.²⁶ The need for a password and the inability to freely browse all available files make it more difficult for investigators to locate a web-hard service and check for unauthorized files.²⁷

The constantly advancing technologies in the realm of digital transmissions and storage present increasingly difficult piracy problems. Clearly, the current laws and enforcement have not been sufficient to control the problem, but they are a vast improvement from the humble beginnings of Korean copyright law.

III. PAST: AN INTRODUCTION TO KOREAN PIRACY AND THE LAWS TO FIGHT IT

Although online piracy is rampant in Korea, the current state of piracy, as well as copyright law and enforcement in Korea, are not just results of Korea's prominent Internet connectivity, but also from a misunderstanding of the need of copyright combined with external influences of law reform.

23. See Detlef Schoder, Kai Fischbach & Christian Schmitt, *Core Concepts in Peer-to-Peer Networking*, in PEER-TO-PEER COMPUTING: THE EVOLUTION OF A DISRUPTIVE TECHNOLOGY 1, 9 (Ramesh Subramanian & Brian D. Goodman eds., 2005), available at <http://www.idea-group.com/downloads/excerpts/Subramanian01.pdf>. Generally, a P2P works by allowing users to search the files of all other users connected to the P2P service. Once a search request for a file is found, the P2P connects the users and allows file transfers to commence. For an in-depth look at how P2P works, see *id.* at 2-20.

24. The Motion Picture Association (MPA) is the international counterpart of the Motion Picture Association of America, representing the U.S. film and television industry in the global market. Initially created to establish and market American films worldwide amidst importation restrictions, the MPA now advocates strong copyright protection for creative works, fighting international copyright theft of American films. Motion Picture Association of America, About Us, <http://www.mpa.org/AboutUs.asp> (last visited Feb. 4, 2009).

25. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 420.

26. *Id.*

27. *Id.*

A. Cultural Resistance

Though laws have been enacted in Korea to protect intellectual property rights and combat piracy, Korea's neo-Confucian value system and emphasis upon education lay the foundation for a cultural resistance to IP protection.²⁸ During the Yi Dynasty (1396–1907), a rigid social hierarchy placed educated scholars and gentry in the minority noble (*yangban*) and middle (*chungin*) social classes, with the lower classes (*sangmin* and *ch'ommin*) being uneducated.²⁹ The government guided education, and publication and distribution of print material was either strictly controlled by the government or monopolized by the noble class.³⁰ Writers gained an honorable status through authorship, but making money through writing books was not acceptable, as the government was the one printing the books.³¹ Intellectual creations, like books, were viewed as public goods rather than private property, and were not to be exploited privately.³² Therefore, the copying of a scholar's book was not considered an offense, but an honor, and the copier was not immoral, but instead reflected a passion for learning, educating themselves and raising their social status.³³ These central values saw little need for protection of copyright, and explain why Korea did not traditionally adopt a rights-centered approach.³⁴

28. Yunjeong Choi, *Development of Copyright Protection in Korea: Its History, Inherent Limits, and Suggested Solutions*, 28 BROOK. J. INT'L L. 643, 645-46 (2003).

29. See generally LIBRARY OF CONGRESS FEDERAL RESEARCH DIVISION, SOUTH KOREA: A COUNTRY STUDY (Andrea Matles Savada & William Shaw eds., 1992), available at <http://memory.loc.gov/frd/cs/krtoc.html> (follow "Traditional Social Structure" hyperlink).

30. Sang-Hyun Song & Seong-Ki Kim, *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 118, 120 (1994); Choi, *supra* note 28.

31. Song & Kim, *supra* note 30; see also Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 UCLA PAC. BASIN L.J. 276, 279 (1999).

32. Ilhyung Lee, *Culturally-Based Copyright Systems?: The U.S. and Korea in Conflict*, 79 WASH. U. L.Q. 1103, 1121 (2001).

33. See Song & Kim, *supra* note 30.

34. Cultural values, however, are merely one factor to copyright resistance. For an in depth look at why foreign culture is not the sole reason for copyright resistance, see Lee, *supra* note 32, at 1122-31; Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127, 131-34 (2003).

B. Historical Development of Korean Intellectual Property

The Korean copyright law that exists today came about almost entirely from outside influences.³⁵ During the Japanese occupation of Korea,³⁶ the United States and Japan formed a treaty on Protection of Industrial Property in Korea in 1908.³⁷ To protect U.S. and Japanese rights, the treaty provided that the Copyright Act of Japan and other related statutes and rights would be applied in Korea.³⁸

After the Japanese occupation ended, the Korean government continued to use the Copyright Act of Japan until 1957. The first Korean copyright statute was established in 1957, modeled after the 1899 Copyright Act of Japan, to promote Korean culture by protecting the personal and property rights of authors of academic or artistic works.³⁹ Protection was offered on copyrights for thirty years in addition to the life of the author.⁴⁰ Protection for foreigners' work, however, was not included unless it was first published in Korea.⁴¹

The 1986 Amendment to the Copyright Act of Korea (CAK) was brought about by Section 301 of the U.S. Trade Act of 1974 (Section 301).⁴² Section 301 allows the United States to impose trade sanctions

35. The first known mention of copyright in Korea was in a government newspaper during the Yi dynasty in 1884. It was called "*chulpankwon*" (literally, "publishing right"), and was used to prevent others from copying books written or translated by intelligent people. Choi, *supra* note 28, at 646–47.

36. Korea was a protectorate of Japan in 1905 after signing the Japan-Korea Protection Treaty, giving Japan virtual control over Korea. In 1910, Japan annexed Korea, and during its occupation built up Korea's infrastructure. However, Japanese colonial rule, described as "cultural genocide," was harsh for the Korean people, as the Korean language was banned, Koreans were forced to take on Japanese names and religion, slavery of Koreans was promoted, buildings and homes were destroyed, and thousands were killed. During World War II, Korean men were forced to support the Japanese war effort, while Korean women were claimed to have been taken as prostitutes known as "comfort women." Japanese occupation ended in 1945, with the Japanese surrender of World War II. For more information about the Japanese occupation of Korea, see ALEXIS DUDDEN, *JAPAN'S COLONIZATION OF KOREA: DISCOURSE AND POWER* (2005); ADRIAN BUZO, *THE MAKING OF MODERN KOREA* (2002); *see also* Yuko Matsumura, "Cultural Genocide" and the Japanese Occupation of Korea, http://www.cgs.c.u-tokyo.ac.jp/workshops_e/w_2004_02_23_e.html (last visited Feb. 4, 2009).

37. Choi, *supra* note 28, at 647.

38. *Id.*

39. *Id.* at 648–49.

40. Jeojakgwonbeop [Copyright Act], Law No. 432, art. 30(1) (1957) (amended 2006) (S. Korea), available at http://www.copyright.or.kr/sub_data/law/law_b_kor_57.html, translated in *LAWS OF THE REPUBLIC OF KOREA* 806 (3d ed. 1975) [hereinafter Copyright Act (1957)].

41. *Id.* art. 46.

42. Choi, *supra* note 28, at 658–61. For a detailed analysis on the Special 301 and its influence upon South Korea and other nations, see Amy Choe, *Korea's Road Toward Respecting Intellectual Property Rights*, 25 RUTGERS COMPUTER & TECH. L.J. 341 (1999).

against foreign countries that burden or deny U.S. rights or commerce,⁴³ and in November 1985, the United States initiated a Section 301 investigation of Korean intellectual property laws.⁴⁴ The United States eventually threatened trade embargoes in order to persuade Korea to amend their copyright laws,⁴⁵ and reached a settlement in 1986 resulting in a new Copyright Act in Korea.⁴⁶ The CAK of 1986 conformed to the Universal Copyright Convention standards, bringing broader and stronger protection for copyrights.⁴⁷ The term of copyright protection was extended from thirty years to fifty years plus the life of the author,⁴⁸ and copyright protection was also extended for foreigners.⁴⁹ The CAK of 1986 established the Copyright Deliberation and Conciliation Committee (CDCC), which mediates copyright disputes involving compensation, rates, and fees of copyright agents.⁵⁰ In addition, Korea pledged strict enforcement of the law and public announcements of the rules and regulations regarding intellectual property rights.⁵¹ For a nation that originally considered copying an honor, such a drastic amendment of the CAK was triggered at the behest of the U.S. government; not necessarily so Korea could offer better copyright protection domestically, but so U.S. copyrights would have protection in foreign nations.

As Korea's international status slowly improved, Korea found the need to increase its copyright protection in accordance to world standards to influence trade, just as it had with the United States in 1986. Korea acceded to the Universal Copyright Convention and the Geneva Phonographs Convention in 1987 as part of its 1986 settlement with the United States.⁵² However, in a nod towards other countries, the CAK

43. See Trade Act of 1974 § 301, 19 U.S.C. § 2411.

44. Choi, *supra* note 28, at 659.

45. Prior to the 1986 amendments, Korean copyright law provided little protection for foreign works, and the United States believed this lack of protection was a restriction on U.S. commerce, triggering Section 301 and allowing the U.S. to impose trade sanctions. Choe, *supra* note 42, at 353.

46. Choi, *supra* note 28, at 659–60.

47. *Id.* at 660.

48. Jeojagwonbeop [Copyright Act], Law No. 3916, art. 36 (1986) (amended 2006) (S. Korea), translated in 7 STATUTES OF THE REPUBLIC OF KOREA 1091 (1997) [hereinafter Copyright Act (1986)].

49. *Id.* art. 3.

50. *Id.* art. 82.

51. Choi, *supra* note 28, at 661.

52. *Id.* at 660.

had also incorporated concepts from the Berne Convention^{53, 54}. The CAK included protections to an author's moral rights (something the United States Copyright Act does not fully recognize), focusing on the author's right to claim paternity and to protect the integrity of his work.⁵⁵

After 1986, the CAK continued to be amended as Korea grew in the international arena. The 1995 Amendment drastically increased the penal provisions for infringement of copyright.⁵⁶ The 2000 Amendment to the CAK, among other changes, integrated detailed procedures in registering copyrights⁵⁷ and stronger penal provisions.⁵⁸ In accordance with the World Intellectual Property Organization (WIPO) Copyright Treaty, the Act also provided for a right of electronic transmission.⁵⁹ The 2003 and 2004 Amendments to the CAK continued to refine the statute, strengthening the scope of copyright protection and the penalties for infringement.⁶⁰

53. The Berne Convention for the Protection of Literary and Artistic Works is the oldest international treaty for copyright law. It was adopted in 1886, but has been revised several times since. The Berne Convention provides a set of minimum standards of copyright law for countries to follow, affording protection not just to domestic works, but to foreign works of other members to the convention as well. *See generally* WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 262–68 (2d ed. 2004), available at <http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf>.

54. Choi, *supra* note 28, at 662.

55. Copyright Act (1986), *supra* note 48, arts. 11–13. The Berne Convention's full textual definition of moral rights is “[i]ndependently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” Berne Convention for the Protection of Literary and Artistic Works art. 6bis(1), July 24, 1971, 1161 U.N.T.S. 3.

56. Jeojakgwonbeop [Copyright Act], Law No. 5015, art. 98 (1995) (amended 2006) (S. Korea), *translated in* Copyright Commission for Deliberation and Conciliation, Copyright Act of Korea, http://210.95.50.105/copye/main.asp?ht=../law/law_b_koe.htm&ca=6&se=1 [hereinafter Copyright Act (1995)].

57. Jeojakgwonbeop [Copyright Act], Law No. 6134, arts. 51–53 (2000) (amended 2006) (S. Korea), available at <http://www.glin.gov/view.action?glinID=69087> (follow “Full Text 1” hyperlink) [hereinafter Copyright Act (2000)].

58. *Id.* art. 97–5.

59. “The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.” WIPO Copyright Treaty art. 1(4) n.1, Dec. 20, 1996.

60. *See generally* Jeojakgwonbeop [Copyright Act], Law No. 7233 (2004) (S. Korea), *translated in* Asian Legal Info. Inst., Copyright Act, <http://www.asianlii.org/kr/legis/laws/ca133/> [hereinafter Copyright Act (2004)].

C. Lack of Enforcement

The early life of Korea's Copyright Act was nurtured into growth by United States influence, and led Korean society, including judges, lawyers, and officers who should be enforcing the law, to perceive the Copyright Act as a law "enacted to meet the demands of foreigners."⁶¹ Such a view ignored any domestic need or purpose for copyright protection, and led to a lack of enforcement that saw piracy as commonplace when Hangul & Computer Company released their word processing software, Hangul, into the Korean market. Hangul was a hit, and though Hangul & Computer became Korea's leading software developer, immediate illegal copying of Hangul was widespread, and Hangul & Computer soon found itself in debt and on the verge of bankruptcy.⁶² Microsoft, in an attempt to capture the Korean word processing market with its Microsoft Word program,⁶³ offered to invest \$20 million in exchange for the withdrawal of Hangul software from the Korean market in 1998.⁶⁴ Public outrage ensued, as Koreans saw Hangul (which is also the name of the Korean alphabet) as a national technological treasure,⁶⁵ and viewed Microsoft's financial arrangement as a predatory attempt at foreign control.⁶⁶ A nationwide campaign to save Hangul ensued, and raised enough capital for Hangul & Computer to abandon the deal with Microsoft.⁶⁷

Domestic piracy was the cause of Hangul & Computer's near-bankruptcy, but the Korean public couldn't care less, and the Korean government refused to take action. After the Hangul & Computer

61. Song & Kim, *supra* note 30, at 121. The United States has successfully pushed stronger intellectual property provisions onto many other countries through international trade negotiations. This has led to local discontent with intellectual property laws, as well as multiple other side effects. For a detailed criticism of U.S. copyright policies being pushed onto foreign countries, see Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 690-93 (2005).

62. Calvin Sims, *How Korean Pride Rallied to Save a Software Maker*, N.Y. TIMES, Aug. 15, 1999, § 3, at 7, available at 1999 WLNR 3105692.

63. Hangul & Computer's software controlled 80% of the Hangul word processing market, while Microsoft's version held 20% of the market. Don Kirk, *Microsoft Fails to Clinch Deal with Hangul*, INT'L HERALD TRIB., July 21, 1998, § Finance, at 13, available at 1998 WLNR 3079719.

64. *Id.*

65. Sims, *supra* note 62.

66. See Sims, *supra* note 62.

67. *Id.*; see also Lee, *supra* note 32, at 1153-54.

episode, however, the Korean government announced a crackdown on software piracy.⁶⁸ The nation did not press for copyright enforcement seriously until it recognized the need to protect the works of its authors, and current and future enforcements will continue to be based upon recognition of that need.⁶⁹

IV. PRESENT: THE CURRENT STATUS OF KOREAN IP LAW AND ENFORCEMENT

The underlying Confucian culture disregarding a need for personal rights, coupled with copyright law built more out of foreign influence rather than of Korea's own volition, leaves current Korean protection for intellectual property rights at a halfway point.⁷⁰ Korea, however, is slowly beginning to realize its need for stronger IP protection, as Confucian traditions are exchanged for capitalism and economic opportunity,⁷¹ and as more of Korea's own products are potentially pirated.⁷²

A. Current Korean Enforcement of Laws

Without an understanding of a rights-centered approach to law, Korean society could not possibly embrace intellectual property rights laws.⁷³ The Korean government has taken great strides to educate the public on the concept of copyright since the U.S.-Korea agreement of 1986.⁷⁴ Korean society has made significant progress in its public perception of intellectual property rights and protection since then,⁷⁵ but increased education and awareness of the need for intellectual property

68. Sims, *supra* note 62.

69. See Chung-in Moon, *South Korea and International Compliance Behavior: The WTO and IMF in Comparative Perspective*, in INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP 61, 71 (Edward C. Luck & Michael W. Doyle eds., 2004).

70. See Lee, *supra* note 32, at 1132.

71. *Id.* at 1124.

72. "Eventually, Korea will reach a threshold where 'protecting ideas yields a greater benefit than infringing upon others,' and pirating will no longer be beneficial but could potentially weaken Korea's domestic technological capability. Choe, *supra* note 42, at 369. That time has come. "While the Korean government notes that certain unique features of the Korean culture and the legal system related to the IPR protection should be given due consideration, it has vested interest in strengthening IPR protection and demonstrated a more flexible and forward looking attitude toward a better IPR situation in Korea." European Union Chamber of Commerce in Korea, *IPR Forecast*, INFOMAG—THE 27 COUNTRY STRONG EUROPEAN BUSINESS COMMUNITY, Dec. 2006, <http://infomag.eucck.org/site/view/view.htm?num=1580>.

73. Song & Kim, *supra* note 30, at 121.

74. Sang Jo Jong, *Recent Developments in Copyright Law of Korea*, 24 KOREAN J. COMP. L. 43, 47–48 (1996).

75. *Id.* at 48.

rights is still needed as it is pitted against constantly improving Internet technology and a growing catalog of pirated material online.⁷⁶ Due to the ease, speed, and relative anonymity of the Internet, the prevalence of pirated material on the Internet has fostered a current perception of online piracy as a victimless crime.⁷⁷

1. General Enforcement

In order to enforce the Copyright Act of Korea, Korea has established the Copyright Commission for Deliberation and Conciliation for general copyright issues,⁷⁸ and the Copyright Protection Center to deal with online piracy specifically.⁷⁹ The Copyright Protection Center regularly monitors the activities of P2P and other Internet sites that allow free unauthorized file sharing, and distributes the accumulated data to the appropriate organizations for future litigation purposes.⁸⁰ Some companies have independently made efforts to get citizens involved by offering incentives in exchange for information about online movie pirates, after which 60,000 reports were received within the first month.⁸¹ Courts have become more adamant about protecting IP as well, and have been sending a strong message of upholding intellectual property rights with their rulings and decisions.⁸² There is a clearer understanding that enforcement measures will be taken in Korea, but the effects of this message have not been entirely successful. For example, although cease and desist letters sent to numerous file sharing service providers in 2005 had a 100% compliance rate, the unauthorized files in question

76. In a 2007 survey of 10,000 Koreans, only 47% thought online downloads were illegal. When asked who is most responsible for illegal downloads, 55.3% said it was no one's fault but a natural result of technology development. To end illegal downloads, 42.7% of respondents replied a change of awareness, indicating consumer mindset has more effect on online piracy than government control and regulation. *Downloads Beat Cinemas for Movie Fans*, CHOSUN ILBO, Aug. 24, 2007, <http://english.chosun.com/w21data/html/news/200708/200708240017.html>.

77. *Id.*; *Korean Movie Pirates Named and Shamed*, SCREEN DIGEST, Mar. 1, 2006, at 87, available at 2006 WLNR 5272575.

78. See Copyright Act (1995), *supra* note 56, arts. 81–90.

79. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 421.

80. Tong-hyung Kim, *Record Labels to Sue Internet Users*, KOREA TIMES, July 26, 2006, available at 2006 WLNR 22043183.

81. *Korean Movie Pirates Named and Shamed*, *supra* note 77.

82. *E.g.*, *Soribada Shuts Down P2P Site After Court Verdict*, CHOSUN ILBO, Nov. 7, 2005, <http://english.chosun.com/w21data/html/news/200511/200511070017.html>.

resurfaced just days later on other file sharing services, qualifying the need for greater enforcement measures than those already in place.⁸³

2. Soribada

Korean courts have been doing their part defending copyrights against file sharing. Soribada, literally “sea of sound,” was the first P2P file sharing service in Korea, and is commonly known as the “Korean Napster.”⁸⁴ Soribada catalyzed online piracy in Korea into what it is today, but it has also helped define digital copyright law in Korea, as its history goes back and forth with multiple lawsuits and eventual software revisions in order to comply with the law.

In a civil trial in July 2002, the Suwon District Court⁸⁵ held that Soribada had violated copyright law, issuing an injunction against Soribada and shutting down the site.⁸⁶ On appeal, in January 2005, the Seoul High Court upheld the injunction, ruling that Soribada’s operators infringed copyrights and must pay 19.1 million won in compensation.⁸⁷ In the same month, but in a separate trial, the Seoul Central District Court acquitted Soribada’s operators of criminal charges for aiding and abetting copyright infringement, ruling that though the users of Soribada who downloaded songs violated copyrights, Soribada and its operators could not be held responsible because the service only allowed users to download files *through* the server and exchange files.⁸⁸ The District Court determined because the files were stored on Soribada’s users’

83. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 420.

84. Alan C. Chen, *Copy Locally, Share Globally: A Survey of P2P Litigation Around the World and the Effect on the Technology Behind Unauthorized File Sharing*, INTELL. PROP. & TECH. L.J., Sept. 2007, at 1, 2.

85. The South Korean court system is split into three tiers. The Supreme Court sits at the top, the High Courts serve as intermediate appellate courts, and the District Courts can exercise both original (a panel of one or three judges) and appellate jurisdiction (a panel of three judges taking on a case in which a single judge rendered the decision). Introduction: Overview of the Korean Courts, <http://eng.scourt.go.kr/eng/judiciary/introduction.jsp#03> (last visited Feb. 4, 2009).

86. Christopher Heath & Peter Ganeva, *Korea, COPYRIGHT LAW AND THE INFORMATION SOCIETY IN ASIA* 258 n.95 (Christopher Heath & Kung-Chung Liu eds., 2007).

87. *Soribada Operators to Pay Compensation*, KOREA TIMES, Jan. 26, 2005, available at 2005 WLNR 1050075.

88. *Soribada Cleared of Copyright Violation Charges*, KOREA TIMES, Jan. 13, 2005, available at 2005 WLNR 438447; *Operators of File-Sharing Site Acquitted*, SAN JOSE MERCURY NEWS, Jan. 13, 2005, available at 2005 WLNR 23103988. Compare with Bugs Music, a similar P2P service that delivered free streaming music as opposed to file swapping on Soribada, where Soribada merely acted as a conduit and files were exchanged between users. The Seoul District Court found Bugs Music’s CEO guilty of criminal copyright infringement. *Korean File Sharer Given Jail Sentence*, ONLINE REPORTER (U.S.), Feb. 5, 2005, available at 2005 WLNR 2167880.

computers and Soribada was only a server allowing file exchanges between the users, the file sharing was not a distribution, but a transmission.⁸⁹

During the course of litigation, Soribada was brought back online with a new version that avoided the injunction issued by the courts, and in a subsequent case, the Seoul Central District Court ordered Soribada to shut down the service again in August 2005. The court found Soribada's operators had aided and abetted copyright infringement,⁹⁰ and ordered Soribada to scrap its free service model and instead charge subscribers for downloading copyrighted music.⁹¹ August 2006 saw the Seoul Central District Court denying an application for a preliminary injunction against the newly updated Soribada version 5.⁹² Though the court was presented with evidence that widespread unauthorized file sharing was continuing for files Soribada did not have a license for, Soribada's operators claimed the action to cease infringement was "technically impossible," invoking the CAK's online service provider immunity.⁹³

In January 2007, the Korean Supreme Court affirmed the Seoul High Court's decision (from January 2005) that Soribada had violated civil copyright law, finding that although Soribada's operators did not infringe copyrights themselves, the fact that the operators consciously knew Soribada's users were downloading illegally and still continued to release and support Soribada, held the operators contributorily liable.⁹⁴ The latest, but surely not the last, decision on Soribada came from the

89. *Soribada Cleared of Copyright Violation Charges*, *supra* note 88. The right of distribution is one of the core property rights granted to copyright owners, as the owner is free to distribute the original or any reproductions of his work. Jeojakgwonbeop [Copyright Act], Law No. 8101, art. 20 (S. Korea), available at http://www.copyright.or.kr/sub_data/law/law_b_kor.html [hereinafter Copyright Act (2006)]. Transmission, however, is not under the complete control of the copyright owner. Here, the distinction lies in the fact that in a Soribada was not distributing the files itself (the files were not located on a server with Soribada), but rather that Soribada was a conduit that allowed transmissions of data between users, and the data happened to be an unauthorized copy.

90. Chen, *supra* note 84 (finding Soribada had knowledge of infringing activities of its users, profited from the infringing activities, and failed to implement filters to limit the infringing activities); *Soribada Shuts Down P2P Site After Court Verdict*, *supra* note 82.

91. Kim, *supra* note 80.

92. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 421.

93. Soribada began charging a fee for its services, and was no longer a free P2P, claiming it cannot possibly control all the content its users provide. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 421.

94. *Shinchon Music, Inc. v. Jung-hwan Yang*, 2005Da11626 (Jan. 25, 2007), available at http://library.scourt.go.kr/jsp/html/decision/2_85.2005Da11626.htm (last visited Nov. 18, 2007).

Seoul High Court in October 2007, when the court issued an injunction against the latest iteration of Soribada, Soribada 5. Although Soribada 5 incorporated a legal pay-per-download scheme and had legal agreements with many local music companies, the court ordered Soribada to shut down its servers, due to several users uploading unauthorized files in addition to authorized files.⁹⁵ Soribada has since continued to comply with the government and with record companies in order to secure legal licenses and gain approval for a completely legal P2P service with their newest revision, version 6.⁹⁶

P2P service providers like Soribada provide a service that allows their members to search for and download specific media files through the P2P service. Most of these media files exchanged through a P2P service are unauthorized, and when the P2P service provider provides their service knowing this, the provider is held liable for contributory copyright infringement.⁹⁷ However, the 2004 Copyright Act of Korea limits liabilities for online service providers.⁹⁸ An online service provider is defined as “the one who provides the service that allows the copying and transmitting of works, performances, records, broadcasting, or databases of others through wire or wireless communications.”⁹⁹ Soribada falls under this definition and can be exempted from liability even when its owners know of infringing activity if they either prevent the transmission¹⁰⁰ or try to prevent the transmission but it is impossible in a technical way^{101 102}.

B. Alternative Solutions Around Weak IP Laws and Enforcement by Utilizing Fast Broadband Speeds

Although the advent of broadband Internet has increased online piracy, local companies in Korea have taken advantage of Korea’s broadband capabilities to work around lackluster IP enforcement. Fast broadband speeds make streaming technology practical, avoiding the downloading and storage of files on computers altogether by keeping

95. See Ji-sook Bae, *P2P Industry Frowns as Court Bans Its Service*, KOREA TIMES, Oct. 14, 2007, available at 2007 WLNR 20204045.

96. Mark Russell, *Soribada Gets OK for Legal P2P Service*, BILLBOARD, Mar. 13, 2008, http://www.billboard.biz/bbbiz/content_display/industry/e3i276690244f41c8186be5e51e3a031b19.

97. Heath & Ganea, *supra* note 86, at 259.

98. Copyright Act (2004), *supra* note 60, art. 77.

99. *Id.* art. 2(22).

100. *Id.* art. 77(1).

101. *Id.* art. 77(2).

102. Also, the copyright holder must affirmatively assert infringement of his copyright exists before online service providers have a responsibility of suspending transmissions. *Id.* art. 77-2.

audio and video on a centralized server.¹⁰³ Legal online downloads have also been gaining popularity, where companies charge about thirty to fifty cents for licensed music files that are virus free and of a guaranteed quality.¹⁰⁴ Subscription services, sometimes referred to as MOD and VOD (music-on-demand and video-on-demand), work more like an all-you-can-eat buffet, where users are charged a monthly fee of around three to five dollars and are allowed unlimited downloads.¹⁰⁵

Though physical music sales (CDs and cassettes) continue to decline year after year, Korea's digital music market, including mobile phone ringtones and online music subscription services, is growing quickly.¹⁰⁶ Korea is the first nation in the world to have its digital music sales exceed physical media sales.¹⁰⁷ In 2005, revenue from digital music sales were two and a half times their physical counterpart.¹⁰⁸ Though sales had stumbled a bit in the past, the Korean music industry is on the cusp of a full recovery, with an estimated revenue of 440 billion won in 2006—the same as it once was at its peak.¹⁰⁹ The digital music market is flourishing, and Soribada,¹¹⁰ along with other online music stores,¹¹¹ have found success with their now-legal paid download services by offering an additional legal alternative to purchasing CDs and cassettes—instant accessibility, even from their mobile phones, with low prices, and virus-free downloads not found on P2P networks.¹¹²

Korean software companies have also taken advantage of Korea's broadband network by introducing a new business model for entertainment software—microtransactions. The base software is made available

103. Though streaming avoids the illegal downloading of music and other media files, it is not legal unless if the person hosting the stream has the right or license to broadcast.

104. *How to Get Your Music Downloads Cheaper*, CHOSUN ILBO, Oct. 21, 2005, <http://english.chosun.com/w21data/html/news/200510/200510210012.html>.

105. *Id.*

106. 2007 WHITE PAPER, *supra* note 2 at 43.

107. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 420.

108. 2007 WHITE PAPER, *supra* note 2 at 43.

109. *Id.*

110. Jin-seo Cho, *Online Music Sharing Flourishes*, KOREA TIMES, Aug. 30, 2006, available at 2006 WLNR 22054253 (Soribada's paid subscribers exceeded 500,000).

111. Cyworld became the second online music store in the world, after iTunes, to sell more than 200 million songs. Jin-seo Cho, *Cyworld Becomes 2nd Online Store to Sell 200 Million Songs*, KOREA TIMES, May 22, 2007, available at 2007 WLNR 10876302; see also *How to Get Your Music Downloads Cheaper*, *supra* note 104 (MelOn, an online music download service, has more than 3,000,000 subscribers).

112. See *How to Get Your Music Downloads Cheaper*, *supra* note 104.

for free online, so there is nothing that can be illegally downloaded.¹¹³ Users are given full access to all the basic functions of the software or game, and profit is made by charging small fees for minor upgrades, such as new clothes or items, the majority of which only serve an aesthetic purpose.¹¹⁴ Smaller fees encourage multiple legitimate purchases, providing a constant stream of revenue that has proven to be extremely successful in Korea.¹¹⁵ In addition, because the games are online, they require authentication with company-owned servers. This constant connectivity prevents cheating and piracy of the purchasable items. Microtransactions have already made their way overseas to the United States through both Korean online games and domestic efforts, and as broadband technology improves, the business model will only continue to grow stronger.¹¹⁶

Heavy utilization of Korea's broadband technology to deliver video, audio, and gaming entertainment has a number of benefits. Electronic transmissions of data cuts costs on packaging and retail shelf space. Online authentication for games and streaming media prevents illegal use. But most importantly, the Korean consumer has shown a willingness to embrace online access to everything. An online survey of 10,000 Koreans reveals that the most important thing for the average Korean Internet user is not having free pirated files, but rather instant accessibility¹¹⁷—being able to watch a movie at any time and any place, as opposed to only when a movie theater is open and nearby. Hence, the thriving digital markets for legally downloaded music, the access-anywhere free online games stored on company servers, and the rampant unauthorized movie downloads that have no viable legal alternative.

C. 2006 Amendment to the Copyright Act of Korea

Korea is slowly beginning to develop a need for stronger copyright protection in order to protect its domestic goods, and the result is stronger laws. Unlike the 1986 Amendments to the CAK, which were brought about by potential trade embargoes by the United States, the latest amendments to the Copyright Act of Korea came by way of

113. E.g., Kenneth Hein, *KartRider Gasses Up New Gaming Revenue Model: Korean Fave KartRider Launches Here for Free, but There's a Catch*, BRANDWEEK, Sept. 24, 2007, available at 2007 WLNR 19075900.

114. *Id.*

115. *Id.*

116. See David Kushner, *The Future of the Biz; The DL on Digital Distribution, Rising Game Prices, and the Next Big Contender in the Hardware Wars*, ELECTRONIC GAMING MONTHLY, May 2007, available at 2007 WLNR 9096540.

117. *Downloads Beat Cinemas for Movie Fans*, *supra* note 76.

continual adherence to international treaties (WIPO Internet Treaties) and increased efforts to protect domestic creations.

The 2006 Copyright Act of Korea was the first comprehensive rewrite of the copyright law since 1986.¹¹⁸ The 2006 Copyright Act came at a peculiar time, as it was adopted in December 2006, during negotiations for the Korea-U.S. Free Trade Agreement (KORUS FTA), and was enacted into law on June 29, 2007,¹¹⁹ right before the KORUS FTA was signed.¹²⁰ The most significant amendments to the Copyright Act include the addition of public transmission rights, digital voice transmission rights, and the inclusion of provisions regarding the reproduction of articles and editorials in print and digital newspapers.¹²¹ The public transmission right is defined “to transmit or provide for use works, etc. by wire or wireless communications for the public to receive or access them.”¹²² The right of digital voice transmission, a type of public transmission, means “public transmission of voices in a digital mode through an information and communications network to be commenced at the request of members of the public (other than general transmission).”¹²³

As Korea is a signatory to the World Intellectual Property Organization’s Performances and Phonograms Treaty (WPPT), the Copyright Act has added protection for performers’ moral rights in accordance with the treaty.¹²⁴ Korea has also implemented anti-circumvention provisions to prohibit tampering with technological protection measures¹²⁵ designed to thwart piracy and unauthorized distribution over the Internet.¹²⁶ Providing strong legal backup for technologies that copyright owners use to protect their works in the digital networked environment is a key component of the WIPO Internet treaties, and the 2006 Amendments brings the Copyright Act more in line with international treaties.

118. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 423.

119. Eui In Hwang et al., *South Korea: Revisions to South Korea’s IP Laws in 2007*, Apr. 25, 2007, <http://www.mondaq.com/article.asp?articleid=47832>.

120. Press Release, Office of the U.S. Trade Representative, United States and the Republic of Korea Sign Landmark Free Trade Agreement (June 30, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/June/United_States_the_Republic_of_Korea_Sign_Lmark_Free_Trade_Agreement.html.

121. Copyright Act (2006), *supra* note 89, art. 27.

122. *Id.* art. 2(7).

123. *Id.* art. 2(11).

124. *Id.* arts. 66, 67.

125. *Id.* art. 2(28).

126. *Id.* art. 104-2.

In a greater effort to combat Internet piracy, online service provider immunity has been amended to include specific provisions for P2P service providers. The Copyright Act now requires service providers primarily engaged in services intended for P2P transmissions to apply technical measures to intercept and block illegal transmissions and distribution of copyrighted works on their networks, when requested by relevant rights holders.¹²⁷ In addition, if any person whose copyrights are infringed has requested the infringing online service provider, through proving the infringement, to suspend the reproduction or transmission of his works, the online service provider is required to suspend the reproduction or transmission “immediately” instead of “without delay.”¹²⁸ These provisions reflect the growing standard of intolerance towards unauthorized file sharing in Korea, and provide opportunities to enforce copyright protections outside of court. Combined with provisions already in place for foreigners’ works,¹²⁹ the 2006 Copyright Act of Korea offers much better protection in the digital online marketplace to both foreign and domestic copyright holders.

Numerous other amendments have been made, as the 2006 Amendments are the first major revision of the Copyright Act since 1986, but even this significantly improved law does not fully comply with current global standards.¹³⁰ In particular, safe harbor provisions for online service providers are too strong. They offer complete immunity even if the service provider has the right and ability to control any infringing activities, and they do not allow court-issued injunctions,¹³¹ giving online service providers less of a legal incentive to combat online copyright infringement. Instead, the safe harbor provisions seem to encourage online service providers to remain unknowing of their network activities and not take any actions, preventive or otherwise, until they are compelled to take measures at the request of a copyright holder that has proof of infringement.¹³² Although marked improvements have been made, the Copyright Act of Korea still has a few kinks to work out in order to offer world-class copyright protections.

127. *Id.* art. 104.

128. *Id.* art. 103(2).

129. *Id.* art. 3. Generally, copyright protection is offered to nationals of the Republic of Korea, foreigners that permanently reside in Korea, foreigners’ works that are first published in Korea (or published within 30 days of another country), and foreign countries that are in accordance with international treaties that Korea acceded to or ratified. However, countries that do not offer reciprocal protection to Korean works are not guaranteed protection.

130. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 423.

131. Copyright Act (2006), *supra* note 89, art. 123.

132. *Id.* art. 104.

D. Korea-U.S. Free Trade Agreement

Launched in February of 2006, the KORUS FTA is one of the largest, most commercially significant free trade agreements in recent history.¹³³ Numerous topics of trade were covered and large compromises made.¹³⁴ A heavy emphasis in the KORUS FTA was placed on intellectual property rights protection in Korea, with both sides agreeing on the need to prioritize countering Internet piracy.¹³⁵ After finishing negotiations, the KORUS FTA was signed on June 30, 2007,¹³⁶ and is currently making its way through Congress and Korean legislature.¹³⁷ Though the KORUS FTA has not been ratified yet in either the United States or Korea, a draft of amendments to the Copyright Act of Korea, in line with the KORUS FTA provisions, has already been prepared for submission to Korean legislature.¹³⁸

The KORUS FTA's provisions concerning digital copyright protection help bring Korea's copyright law in line with U.S. and global standards.¹³⁹ The proposed draft amendments to the Copyright Act, however, currently

133. Press Release, Office of the U.S. Trade Representative, United States and Korea Conclude Historic Trade Agreement (Apr. 2, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/April/United_States_Korea_Conclude_Historic_Trade_Agreement.html.

134. See S.K.-U.S. Free Trade Deal Would Violate 169 Korean Laws: Critics, HANKYOREH, Jan. 17, 2007, available at http://english.hani.co.kr/arti/english_edition/e_business/184691.html. For a brief look at the KORUS FTA and its pros, cons, and reasons for domestic resistance, see Youngbae Kim, *The South Korea-U.S. FTA: What Does it Truly Mean?*, HANKYOREH, Aug. 1, 2006, at 21 (Lee Seong Hyon trans.), available at http://www.hani.co.kr/arti/english_edition/e_business/144965.html.

135. Letter from Hyun Chong Kim, Minister for Trade, S. Korea, to Susan C. Schwab, U.S. Trade Representative (June 30, 2007), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/asset_upload_file939_12739.pdf.

136. Sang-Hun Choe, *Congressional Leaders Skeptical of South Korea Trade Deal*, N.Y. TIMES, July 1, 2007, at A3, available at 2007 WLNR 12403076.

137. The full text of the KORUS FTA is available online at http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html.

138. Letter from Steven J. Metalitz, IIPA, to Dong-sup Shim, Director, Copyright Division, Ministry of Culture and Tourism (Oct. 3, 2007), <http://www.iipa.com/pdf/IIPASubmissionreCAKAamendments100307.pdf>.

139. Although the KORUS FTA is an agreement between South Korea and the United States and contains special agreements and protections between the two parties, the FTA also seeks to amend the Copyright Act of Korea so as to increase protection for foreign works of all nations by requiring that it apply international treaties that Korea should have already acceded to. Korea-United States Free Trade Agreement, U.S.-S. Korea, art. 18.1.3, June 30, 2007, 46 I.L.M. 642, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html [hereinafter KORUS FTA].

fail to encapsulate all of the promised provisions of the KORUS FTA, and therefore will prevent the Copyright Act of Korea from complete compliance with international treaties and standards. For example, the KORUS FTA provides safe harbor provisions¹⁴⁰ for online service providers that limit the scope of remedies available¹⁴¹ by “preclud[ing] monetary relief and provid[ing] reasonable restrictions on court-ordered relief to compel or restrain certain actions.”¹⁴² As long as requirements for the safe harbor provisions are met, however, the proposed amendments to the Copyright Act state “online service providers shall not assume any liability.”¹⁴³ The proposed amendments are unclear as to the scope of liability and exceptions for online service providers,¹⁴⁴ and without further clarification, appear to issue a broad immunity against both monetary relief and injunctions just as it does in the 2006 Amendments,¹⁴⁵ instead of providing reasonable restrictions as per the KORUS FTA.

Another specific area of copyright protection that fails to meet the KORUS FTA is protection for sound recording producers for digital sound transmission services like webcasts and digital broadcasts, as the proposed amendment did not make any changes to the 2006 Copyright Act in this area. The 2006 Copyright Act draws a fine line between “on-demand”¹⁴⁶ or “interactive” services, which are considered transmissions and are afforded exclusive rights,¹⁴⁷ and “non-interactive transmissions,” which encompass all other means of digital transmissions. The Copyright Act denies sound recording producers exclusive rights to digital sound transmission services entirely, as they are considered “non-interactive transmissions.”¹⁴⁸ Although the KORUS FTA also limits exclusive rights for “non-interactive transmissions,”¹⁴⁹ the KORUS FTA provides that such limitations can only apply where they “do not conflict with a normal exploitation of the work . . . and do not unreasonably prejudice the legitimate interests of the right holder,”¹⁵⁰ with a separate provision for television signals. In other words, limitations only apply if the transmission does not substitute physical sales or unfairly compete with interactive services. In a market where online consumption of media is

140. *Id.* art. 18.10.30(b).

141. *Id.*

142. *Id.* art. 18.10.30(b)(i).

143. Copyright Act (2006), *supra* note 89, art. 102(1).

144. Metalitz, *supra* note 138.

145. The provision for injunctive relief, Article 123, does not mention online service providers. Copyright Act (2006), *supra* note 89, art. 123.

146. *E.g.*, Music-on-demand services.

147. Copyright Act (2006), *supra* note 89, art. 81.

148. *Id.* art. 83.

149. KORUS FTA, *supra* note 139, art. 18.6.3(c).

150. *Id.* art. 18.4.10.

the norm, all digital transmissions compete for a place on the personal copier's recordable media (e.g., mp3 player), regardless of the format or methods, and thus all digital transmissions need to be afforded exclusive rights.¹⁵¹

An additional important area of KORUS FTA shortcomings is the term of copyright protection. The Copyright Act currently protects copyrighted works for the life of the author plus fifty years after the author's death, but the KORUS FTA provides a term of "not less than the life of the author and 70 years after the author's death."¹⁵² Though fifty years meets the requirements of all the international Internet treaties,¹⁵³ the international trend has been to exceed the minima provided in the Berne Convention,¹⁵⁴ making the KORUS FTA provision a necessary step to bringing Korean copyright law to the forefront of global standards.

In its current state, the 2006 Copyright Act of Korea, along with the proposed amendments currently submitted to Korean legislature, still falls short of being a leader in digital copyright law. Failure to meet all the standards of international treaties, cultural values dictating provisions with lesser protection,¹⁵⁵ and criminal and civil penalties that fail to have a deterrent effect¹⁵⁶ all eschew Korea's ability to lead as an online marketplace for materials protected by copyright. But the tides are changing, and Korea is beginning to recognize its need for stronger IP protection.¹⁵⁷ The KORUS FTA's provisions on copyright law and enforcement are a step in the right direction, portraying a future where Korea will not only meet global standards, but with additional efforts, potentially become a leader in both Internet technology and digital copyright protection.

151. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 424.

152. KORUS FTA, *supra* note 139, art. 18.4.4(a).

153. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works art. 7(1), July 24, 1971.

154. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 426.

155. For example, Korea's high value on education even today translates to a desire for wide dissemination of knowledge. Though textbook piracy remains taboo, the CAK provides a sweeping exception allowing libraries to digitize and to transmit to other libraries throughout the country any material in their collection that was published more than five years ago and that is not sold in a digital format. The CAK does not require, however, any implementation of technological safeguards, and simply allows free transfer of all materials. IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 426.

156. *See* IIPA 2007 SPECIAL 301 REPORT, *supra* note 18, at 427; Metalitz, *supra* note 138.

157. European Union Chamber of Commerce in Korea, *supra* note 72.

IV. FUTURE: SUGGESTED AMENDMENTS TO KOREAN LAW AND
ENFORCEMENT, AND ECONOMIC STRATEGIES OF
FOREIGN BUSINESSES AFFECTED BY
ONLINE PIRACY

Where do we go from here? Is there anything that can be done besides waiting? How, if at all, can Korea jump to the forefront of digital copyright protection? Probably the best way to answer these questions is to look through the history of a nation that is currently at the forefront of digital copyright protection.

A. How the United States Handled Digital Copyright

“There is considerable irony in the U.S. role at the forefront of advocating enhanced global copyright protection and enforcement.”¹⁵⁸ The United States, like many other countries, gave copyright protections to domestic authors, but gave zero protection for foreign works for more than a century after its independence.¹⁵⁹ This lack of protection for foreign authors allowed U.S. publishers to freely pirate and publish works from famous authors such as Charles Dickens and William Woodsworth.¹⁶⁰

It was not until 1891 that the United States began offering copyright protections to foreign works, but only on a reciprocal basis to countries that offered the same protection to the United States, or to member countries of an international agreement that the United States had joined.¹⁶¹ The Copyright Act of 1891 still did not offer complete protection, however. In fact, one of the conditions for foreign authors, known as the Manufacturing Clause, was that the work must have been published in the United States, otherwise it was granted zero protection.¹⁶² This not only made it difficult for foreign authors to get protection, but also brought business for domestic publishers. The Manufacturing Clause continued to remain in force until its removal in 1986.¹⁶³

Although the United States was willing to offer reciprocal protections to countries that were parties to an international agreement with the United States, the United States refused to join the Berne Convention for the Protection of Literary and Artistic Works, the preeminent international

158. JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 33 (2d ed. 2006).

159. *Id.* at 34.

160. *Id.*

161. International Copyright Act of 1891, ch. 565, § 13, 26 Stat. 1106, 1110 (1891); see also Marshall Leaffer, *International Copyright from an American Perspective*, 43 *ARK. L. REV.* 373, 375 (1990).

162. § 3, 26 Stat. at 1107.

163. COHEN ET AL., *supra* note 158, at 34.

copyright treaty of the time.¹⁶⁴ The United States did not want to accede to all of the provisions of the Berne Convention, such as moral rights protection and an obligation to provide all foreign works with a uniformly high standard of protection (the Manufacturing Clause would have been invalid).¹⁶⁵

Acceptance of the Berne Convention did not arrive until over 100 years after the convention came into being, and only because international intellectual property became a high priority for the United States.¹⁶⁶ Until its adherence in 1989, the United States was the only major western country not a member of the Berne Convention.¹⁶⁷ Even after signing the treaty, the United States adopted a minimalist approach in selecting and enacting into law only those provisions absolutely required to qualify for membership to the Berne Convention.¹⁶⁸ Areas such as moral rights protection and formalities, which would offer more protection than the United States was willing to give, were left out of the U.S.'s enacting legislation.¹⁶⁹

“The driving force behind the development of foreign copyright protection in the United States was the U.S. domestic market.”¹⁷⁰ As the United States economy grew and its status as a nation changed from a net-importer to a net-exporter, the United States began losing billions of dollars due to intellectual property infringement abroad.¹⁷¹ While the policy of the United States on international copyright protection changed drastically over the years, the underlying reason of economic self interest has not.¹⁷² Today, the United States continues to lose billions of dollars annually to copyright infringement, and it has slowly risen from rampant pirater (copying foreign books) to holdout of international agreements (refusing to join the Berne Convention) to worldwide enforcer of international copyright protection, advocating accession to

164. *Id.* at 35.

165. *Id.* at 35–36; William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUS. L. REV. 749, 751–52 (2003).

166. COHEN ET AL., *supra* note 158, at 35–36.

167. Leaffer, *supra* note 161, at 379.

168. *Id.* at 384.

169. COHEN ET AL., *supra* note 158, at 36.

170. James D. Thayer, *Market Based Anti-American Sentiment: A Study of Non-Resident Copyright Protection*, J. KOREAN L., Vol. 3, No. 2, at 193, 198 (2003), available at <http://www.snjkl.org/archives> (follow “Journal of Korean Law Vol.3 No.2” hyperlink; then follow “Vol3No2.pdf” hyperlink).

171. *Id.*

172. *Id.*

international treaties and using its Special 301 Reports and bilateral agreements to induce other countries to improve their copyright laws.¹⁷³

B. Suggested Amendments to Laws

The most difficult part of enacting legislation is to figure out how broad the scope will be. Too little protection, and the law will not do much to deter noncompliance. Too much protection, however, and distribution is restricted so much that the law goes counter to the goal of copyright law in the first place—to promote progress.¹⁷⁴

1. General Amendments to Legislation

First and foremost, Korea needs to adhere to all acceded international treaties and agreements. As voluntary signatories to most international copyright treaties,¹⁷⁵ Korea needs to uphold its responsibilities to meet minimum global standards. Although the United States sought only to meet minimal standards in applying the Berne Convention, it was also met with some skepticism as to whether the United States had really acceded or not.¹⁷⁶ Eventual compliance with all other treaties, however, increased trade relations between the United States and the rest of the world, further strengthening its economy. Though it may dramatically increase copyright protection beyond what Korea is ready to enforce, adhering to all global minimum standards will encourage improved trade and relations between other member nations of international agreements, which in turn boost Korea's economy. KORUS FTA is a very good starting point, as it meets most international requirements, and in some areas goes beyond global standards. Korea will also need to increase its statutory damages provisions for copyright infringement enough so that these provisions can be considered deterrents.¹⁷⁷

173. See Zorina Khan, *IP Rights and Economic Development: A Historical Perspective*, WIPO MAG., June 2007, at 11, available at http://www.wipo.int/wipo_magazine/en/2007/03/article_0006.html (stating “copyright piracy benefited the U.S. initially when the country was a net debtor. But once the balance of trade moved in its favor, America had an incentive to adopt stronger laws to protect its authors internationally”); LEE WILSON, *FAIR USE, FREE USE AND USE BY PERMISSION 18-19 (2005)* (explaining international U.S. copyright protection is provided through international treaties with most industrialized nations and bilateral treaties, when possible, with any other nations).

174. Copyright Act (2006), *supra* note 89, art. 1.

175. A list of treaties concerning copyright is offered by the Copyright Commission for Deliberation and Conciliation at http://eng.copyright.or.kr/law_02.html (last visited Feb. 4, 2009).

176. COHEN ET AL., *supra* note 158, at 36.

177. Statutory damages are promised in the KORUS FTA, but the exact amount is left undetermined. KORUS FTA, *supra* note 139, art. 18.10.6. Prior to the KORUS

In setting minimum standards for copyright, multiple international treaties have acknowledged narrow limitations and exceptions as long as these limitations fall within the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) Three-Step Test in Article 13.¹⁷⁸ The Copyright Act of Korea does not need to be a carbon copy of other nations' laws, and should incorporate cultural influences into specific provisions and exclusions. The Korean value on education spurred a strong library exception for copyright, allowing libraries to digitize and archive any material in their collection and transmit copies to other libraries in the country, as long as it was published more than five years ago and is not sold in a digital format.¹⁷⁹ While this exception definitely progresses furtherance of knowledge, the transmissions are not protected in any way, making it very easy for digital materials to be distributed. Also, the five year publication requirement may be too short, as certain materials such as textbooks and scientific and medical journals continue to hold their value within five years. Applying the Three-Step Test, the library exception could potentially conflict with normal exploitation of textbooks and journals, failing the second prong of the test. The library exception is a great way to distribute knowledge, but in compliance with international treaties, the publication requirement should be lengthened beyond five years, and additional technological measures should be required to secure the transmission of digital copies from one library to another.¹⁸⁰

Additional amendments to the Copyright Act of Korea outside of meeting global standards are not recommended at this time, as the current Copyright Act is not the bottleneck of copyright enforcement in Korea. Stronger laws can always offer better protection, but without

FTA, only compensatory damages were awarded for copyright infringement. See Copyright Act (2004), *supra* note 60, arts. 91–97.

178. The Three-Step Test is applied in order to prevent any nations from limiting the scope of their own country's copyright law too much, at which point the World Trade Organization has the authority to impose trade sanctions. The full text of Article 13 is as follows: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder." Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, 33 I.L.M. 1197, available at http://www.wipo.int/ctia/docs_new/pdf/en/zz/zz007en.pdf.

179. Copyright Act (2006), *supra* note 89, art. 31.

180. *Cf.* 17 U.S.C. § 108. The U.S. Copyright Act offers library exceptions as well, but digital copies are limited to works in the last 20 years of their copyright term as long as the work is not subject to normal commercial exploitation.

government mobilization to properly enforce the laws, or constant infringement due to lack of public understanding,¹⁸¹ additional laws would be a wasted effort. If users already think it is morally okay to download, then harsher litigation may even make them more antagonistic. In addition, once the scope of copyright law becomes too broad, the exploitation rights in the right holder disrupt the ultimate purpose of copyright law itself by severely limiting those who have access to copyrighted work, instead of promoting the advancement of science and useful arts. Overprotection shifts the purpose of copyright from protecting artists to protecting the publishers.¹⁸²

2. *Alternative Legislation*

It is without question that copyright laws across the globe have struggled to catch up with increasing digital piracy. New technologies, used in the hands of pirates, seem to pull farther and farther away from the scope of copyright, which is designed to protect expression and not function. As new technologies continue to arise, copyright is constantly on the defensive, but commentators have begun looking at utilizing patent protection of the new technologies in order to control the channels through which consumers can gain access to pirated material.¹⁸³ Although it would be difficult to implement such protections now, the idea may hold more weight as newer technologies are developed.¹⁸⁴

C. *Suggested Changes to Enforcement*

“Enforcement, which is inherently a national concern, is only possible when the leadership of a particular country decides it is in the nation’s

181. *Downloads Beat Cinemas for Movie Fans*, *supra* note 76.

182. Joseph A. Sifferd, *The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology*, 4 VAND. J. ENT. L. & PRAC. 92, 109 (2002).

183. Mengfei Huang & Dennis Fernandez, *A New Hero in Hollywood: Patent Protection Against Piracy of Electronic Media and Creative Digital Rights*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 808 (2005).

184. Although software patent protection is currently available in Korea, the difficulty of utilizing such protections now would be an enforcement issue. Korea is having difficulty with copyright enforcement on its own, and bringing in new avenues of infringement upon current technologies would only bring about more litigation, and no incentive for additional enforcement. However, as new technologies are developed, careful usage of software patents throughout the life of the technology can assist copyright owners in controlling unauthorized usage of the technology to assist piracy. For example, if a new way of data transmission for media was developed that completely surpassed current methods, patents would ensure the new tech stays in the hands of the patent owner, who could license its usage to businesses and websites that would be responsible about piracy.

interest to pursue such a cause.”¹⁸⁵ The United States initially offered domestic protection for copyrights, and was quick to capitalize on a lack of protection for foreign works. As the U.S. economy began to grow through bilateral agreements with other nations, and domestic creative works were being exported in large numbers, the United States saw its need to offer protection for foreign works, so that it could receive the same.¹⁸⁶ Whether or not changes are made to enforcement now, as more and more Korean products develop a need for copyright protection, the Korean government will rally itself to provide the appropriate enforcement needed, just as every other industrialized nation has done with their copyright laws and enforcement. The only concern then is for this natural progression to not be stifled by overly belligerent enforcement.¹⁸⁷

1. Government Enforcement

Before any enforcement of laws are carried out, continual education and awareness of intellectual property rights is of the utmost importance, as citizens who do not understand the law do not even have a chance to obey it. Studies and surveys have shown that though awareness of the potentially illegal nature of digital downloads is increasing, it still is not understood by the majority of Korean citizens.¹⁸⁸ Increases in criminal and civil penalties and damages can increase deterrence. Increased delegation of powers and authority to the Copyright Protection Center (created to specifically combat online piracy) would increase the effectiveness of efforts to actively locate and dismantle infringing websites and online service providers. Careful enforcement of the

185. Hyun Kim, *Korea's Experience with Intellectual Property Protection and Membership to the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 32 KOREAN J. INT'L & COMP. L. 111, 138 (2004).

186. Khan, *supra* note 173.

187. See Law of the Game, <http://www.joystiq.com/tag/law-of-the-game/> (June 11, 2008, 20:00) (detailing the balancing act between enforcement, piracy, and public relations issues). Although not “overly belligerent,” one method of enforcement that has not won the hearts of consumers is Digital Rights Management (DRM), which has taken a preventive stance on piracy but at the cost of implementing the same limitations against normal buying customers. The problem lies in the fact that for a preventive stance to work, it must actually succeed, but DRM-restricted media is still easily pirated, thereby leaving only forced restrictions upon honest consumers, and thus backlash. Compare ELECTRONIC FRONTIER FOUNDATION, DIGITAL RIGHTS MANAGEMENT: A FAILURE IN THE DEVELOPED WORLD, A DANGER TO THE DEVELOPING WORLD 25 (2005), http://w2.eff.org/IP/DRM/ITU_DRM_paper.pdf, with Law of the Game, <http://www.joystiq.com/tag/law-of-the-game/> (Sept. 19, 2008, 19:00).

188. *Downloads Beat Cinemas for Movie Fans*, *supra* note 76.

numerous educational exceptions in the Copyright Act is needed to prevent abuse of unauthorized distribution under the guise of education. Direct enforcement of all laws, however, can have a negative effect as widespread online infringement would lead to criminalization of a large portion of Korean society, some of who do not even understand they are performing illegal acts.¹⁸⁹ In addition, filing so many direct infringement claims could alienate potential customers (by nabbing the wrong person), infuriate the public (bad public image), and be extremely costly and time consuming in order to find the user.¹⁹⁰ Thus, the importance of increased awareness of intellectual property rights cannot be denied. Enforcement at this stage should not be focused so much on punishment to infringers, but destruction of the “free, easy, and legal” public mindset of digital downloads.

2. *Alternative Enforcement: Lowering Price Barriers*

Though Korea’s economy has had massive growth over the years, it has only recently been considered among the ranks of developed countries in the world.¹⁹¹ Compared to a developed country like the United States, however, Korea has limited resources,¹⁹² weaker currency, a lower standard of living,¹⁹³ and in effect, less developed laws. Korean consumption of Western goods is extremely high, but imported items from richer industrialized nations like the United States are accordingly priced high relative to their income and to domestic alternatives. The huge demand for U.S. popular culture in the form of music, movies, and software cannot match the financial standing of Korean citizens to purchase these products at a premium price. Pirated copies become the

189. Sang Jo Jong, *Criminalization of Netizens for Their Access to On-line Music*, 4 J. KOREAN L. 51 (2004).

190. All of these negative side effects were prominent consequences of the RIAA’s crackdown on Internet file sharing when they sent out massive numbers of subpoenas and lawsuits and accidentally hit families with no computer or Internet access, or old grandmothers that the RIAA claimed shared over 700 files. Lawsuits were naturally rescinded, but the public image of the RIAA had already been damaged. For a comprehensive look at the RIAA’s legal campaign against file sharing, see ELECTRONIC FRONTIER FOUNDATION, *RIAA V. THE PEOPLE: FIVE YEARS LATER* (2008), <http://www.eff.org/files/eff-riaa-whitepaper.pdf>.

191. International Monetary Fund, *World Economic Outlook Database* April 2007, <http://www.imf.org/external/pubs/ft/weo/2007/01/data/groups.htm#niae>; Central Intelligence Agency, *The World Factbook*, Appendix B, <https://www.cia.gov/library/publications/the-world-factbook/appendix-b.html> (last visited Feb. 5, 2009).

192. Kim, *supra* note 185, at 135.

193. Quality of life is lower in South Korea than the United States, and the GDP per person of South Korea is less than half that of the United States. THE ECONOMIST INTELLIGENCE UNIT’S QUALITY-OF-LIFE INDEX (2005), available at http://www.economist.com/media/pdf/QUALITY_OF_LIFE.pdf.

solution, offering the same material at a much lower price point, and possibly even free on the Internet.¹⁹⁴

This is the kind of market global businesses deal with, and sometimes businesses of the richer industrialized nations seem to forget this perspective. Differential pricing schemes for foreign markets can offer a lower price point that is more accessible to the average Korean consumer and can induce more legitimate purchases. Although a higher price can more easily cover research and development costs, it also limits access to the wealthy that could afford it, and encourages piracy among the rest.¹⁹⁵

Domestic products in Korea are not excluded from the benefits of a lower price barrier. A lack of awareness among Korean citizens of Internet piracy being illegal has led to complacency and habit in receiving goods for free. When given the choice to pay money or get something for free, anybody would choose to keep their wallet closed. Coupled with continual education on copyrights, however, a low price point can be effective in breaking the habit of piracy. Success has already been seen in the Korean music industry, as relatively cheap offerings have helped digital music sales to thrive by guaranteeing good quality, quick speeds, and virus-free downloads, all for a low price the consumer is willing to spend.¹⁹⁶ Though profit margins may be smaller at the lower price point, the Korean music industry's revenue has been matching its all-time high with dramatically increased sales numbers. Although unable to match to lower prices of music, the movie industry has seen some success as well with cheaper rental offerings, and hopes to continue that trend.¹⁹⁷

3. *Alternative Enforcement: Spoofing*

In an effort to debunk the "easy-to-get" nature of media online, several companies in the United States have turned to a method known as "spoofing."¹⁹⁸ P2P networks are flooded with fake files that look

194. Kim, *supra* note 185, at 136.

195. *Id.*

196. *How to Get Your Music Downloads Cheaper*, *supra* note 104.

197. See, e.g., Posting by Sault Hansell to New York Times: Bits Blog, <http://bits.blogs.nytimes.com/> (Nov. 14, 2008, 14:36 EST) [hereinafter Internet Video in Korea Eclipses the DVD].

198. Hillary M. Kowalski, *Peer-to-Peer File Sharing & Technological Sabotage Tactics: No Legislation Required*, 8 MARQ. INTELL. PROP. L. REV. 297, 302 (2004).

similar to a real music file or movie file in an effort to frustrate the downloader in their attempts to find a working copy of the media file they are looking for.¹⁹⁹ Files can be empty, of bad quality, or even directly promote the user to purchase a legal copy, sometimes even directing their Internet browser immediately to an online shopping store. The idea is that with enough bad experiences and wasted time spent finding the desired file, a downloader may be turned off from illegal downloads forever.²⁰⁰ Combined with a low price point for legal purchases, and the dangers of viruses on file-sharing networks, spoofing can be a very effective tool in getting the Internet user to instead view the legal purchase as the easy-to-get method of acquiring desired media.

4. *Alternative Enforcement: Streaming Technology*

Another method of combating the public impression of digital downloads as being free and easy is to provide a legal version of the media for free, easily. Broadband technology in Korea is at the level where music, videos, and even games can be protected on a secure server owned by a copyright holder and can be distributed over the Internet to consumers easily and at a relatively low cost. The idea of a legal, safe (i.e., virus-free), and secure location to obtain media comes as very appealing to otherwise would-be pirates.

In order to turn a profit, companies offering media and software over the Internet have generally resorted to advertisements. Internet television is gaining popularity, and commercial advertisements are not anymore obtrusive than commercials found in regular television. Music and video streaming websites also feature advertisements to offset costs, although some feature payment schemes.

Streaming technology is not limited to the personal computer, but in Korea it also extends to mobile phones. Korea's mobile phone network is one of the strongest and fastest mobile networks in the world, capable of download speeds faster than landline speeds in the United States. The mobile phone in Korea is a veritable "do-it-all" gadget, with access to Digital Multimedia Broadcasting (DMB) that offers television channels, radio channels, and data channels, as part of the mobile subscription plan.²⁰¹

199. Dan Pontes, *Rewinding Sony: Can the Supreme Court and Big Media Grok P2P?*, 9 INTELL. PROP. L. BULL. 159, 169 (2005).

200. Kowalski, *supra* note 198.

201. Subscription services are also available that increase the number of accessible channels.

5. *Alternative Enforcement: Offering Something Better than “Free”*

With Korean consumers already expecting to get any media they need for free online, the prospect of paying money for the content lacks the allure needed to induce legitimate sales. In order to compete against a price tag of zero, companies must offer extra content not found anywhere else. Contests, extras, behind-the-scenes footage, weblogs, interactive games—this nonexclusive list gives enough incentive to users to visit a company’s webpage, and possibly access a legal copy of media, whether through free streaming or digital purchase. Though the concept is still in its infancy and data on its effects are still unknown, a clear example of this business model is television station NBC’s webpage.²⁰² NBC’s site offers numerous extra content in addition to free streaming television shows that brought in enough advertisement revenue to be a major issue in the hotly debated Writer’s Guild of America strike.²⁰³

6. *Alternative Enforcement: Online Services and Online Verification Schemes*

Business models that require online access are not practical in most situations and countries, but due to Korea’s large Internet broadband attachment rate, a constant online verification scheme may be a viable solution in Korea. By subjecting software to continual verification checks over the Internet, and licensing usage of the software on the condition of passing these verification checks, copyright holders are afforded the utmost security and guarantee of legitimate usage. As digital distribution continues to grow, at least with respect to the videogame industry, this business model is beginning to stand out as the

202. NBC Official Site, <http://www.nbc.com> (last visited Mar. 8, 2009). Many other networks, including CBS and FOX, have also added streaming and internet content.

203. See Posting of Liz Gannes to NewTeeVee, <http://newteevee.com> (July 8, 2008, 11:55 PST) [hereinafter *Strike Really Over: The Office Webisodes Come Back*]; Writer’s Guild of America, *The Office is Closed*, http://www.youtube.com/watch?v=b6hqP0c0_gw (last visited Mar. 8, 2009) (video of television writers explaining reasons for the strike); Writer’s Guild of America, *Writers Strike FAQ*, http://www.wga.org/subpage_member.aspx?id=2686 (last visited Mar. 8, 2009).

clear favorite.²⁰⁴ Korea's incessant desire to be constantly connected only increases the viability of this solution.

D. Suggested Changes to Foreign Business' Perspectives of Korea

As compelling as it may be to initiate multiple lawsuits and petition the government for stronger copyright protection, the most practical solution for foreign businesses at this point is simply to wait. Korea has built up its copyright protections mostly from foreign influences, and without consideration of Korea's own market demands for copyright protection, enforcement has been weak. But Korea is becoming a strong and developed nation and is recognizing the need for stronger copyright protections not just for trade purposes, but to protect its own creative works. Korea is not unlike other major industrialized nations in that it started off accepting piracy in order to speed development, and slowly started to shun piracy once it began advancing its economy and providing creative works of its own.²⁰⁵ History tells us that these very countries ended up becoming the global leaders of intellectual property laws, and Korea will likely follow the same path if allowed to let its domestic market dictate its copyright laws and enforcement.²⁰⁶

Retaliatory measures against Korean citizens and companies can have large negative effects. Korea's nationalistic fervor is one of a kind, and multiple lawsuits can inflame relations and bring about impressions of foreign attempts at control, not unlike Microsoft's attempt to buy out Hangul & Computer Company. U.S. companies should take note that anti-American sentiments still exist in Korea, and foreign pressure to do something the Korean domestic market does not want results in increased anti-American sentiments.²⁰⁷

Instead, allowing Korea's domestic market to control its copyright policy, and taking up alternative methods of protection as recommended above is a strategy that not only avoids potentially inflamed relations, but can increase public opinion of the foreign company. Incorporation

204. Blizzard and Valve are two extremely popular game companies that continue to remain popular with gamers even amidst utilizing online verification schemes to protect their intellectual property rights. Compared to other DRM schemes, Blizzard's Battle.net and Valve's Steam services are highly successful and praised. See Earnest Cavalli, Q&A: Blizzard's Executive Vice President of Game Design Rob Pardo, *Game|Life* (Oct. 15, 2008), <http://blog.wired.com/games/2008/10/qa-blizzards-ex.html>; Brian Crecente, Steam DRM vs Spore DRM, *Kotaku* (Sept. 18, 2008), <http://kotaku.com/5051514/steam-drm-vs-spore-drm>; see also Rare Footage of the DRM in Its Natural Habitat, *supra* note 187.

205. "[D]eveloping countries today are interested in inexpensive access to intellectual goods; developed countries generally are not." COHEN ET AL., *supra* note 158, at 41.

206. See Thayer, *supra* note 170, at 207.

207. *Id.* at 193–207.

of microtransactions (a business model already in place in Korea) and other cheaper software pricing models shows honest attempts to cater to Korean consumers while allowing easier entry into legal purchase. Business models requiring online verification are probably a ways off, but establishing a subsidiary in Korea and utilizing Korea's broadband network could make online verification schemes a potential solution of the future. For the music and movie industries specifically, surveys and statistics indicated the most important feature for the average Korean consumer in a digital download is instant accessibility whenever they want it, rather than a price tag of zero. Streaming technology structures (video-on-demand and music-on-demand) and pay-to-download stores have performed extremely well domestically in Korea, with special note for the Korean music industry that used online music sales to match its highest revenues of all-time. The newest market in Korean digital downloads is over mobile phones, utilizing mobile network speeds that far exceed the rest of the world, surpassing even Internet speeds on a personal computer. Catering to the Korean market over mobile phone networks gives the Korean consumer true instant accessibility whenever and wherever they want, as long as they have their mobile phone.

All of these methods come from a culturally sensitive approach of understanding the needs and desires of the Korean citizen and exploiting the copyrighted work from that perspective. Though the overall profit margins are not the same as "copy this product and sell it over there," the extra research and development is rewarded with additional sales and an opportunity for Korea to develop its own copyright policy into that of a global leader.

V. CONCLUSION

Internet piracy has always been testing the limits of copyright policy, with its rapidly developing distribution technologies, ease of use, relative anonymity, and perfect digital copies at minimal to zero cost. South Korea, one of the global leaders in broadband and wireless technologies, has naturally been at the forefront of digital piracy as well, but its copyright policy, while no longer struggling to stay afloat, is merely treading water. A constant influx of foreign pressures to develop copyright protection schemes not for domestic Korean works but for foreign works led to minimal enforcement and a public that did not understand the concept.

But times have changed, and Korea has since recognized the effects of piracy on its own economy, and its need to offer copyright protection. Although Korea's copyright policy still falls behind global standards, recent amendments have taken great steps forward. Ratification of the Korea-U.S. Free Trade Agreement by both countries would bring an additional incremental and necessary step towards stronger copyright protections as the KORUS FTA placed a special emphasis upon intellectual property provisions in Korea. Enacting amendments that adhere to the KORUS FTA will not only strengthen Korean trade with the United States, but will also align the Copyright Act of Korea with global copyright standards, and in some cases offering protection that even surpasses international treaties. Outside of the provisions contained in the KORUS FTA, additional amendments to Korean law are not recommended at this time, as they should be dictated by Korean market forces from here on out.

Government initiated enforcement measures should continue to focus upon education and awareness of intellectual property rights, but private companies can take an active part in enforcement as well, outside of filing lawsuits. Numerous alternative methods of offering protection to copyrighted works have been developed that embrace the very technology that started this mess in the first place—broadband Internet. Increasing speeds and technology may have made it easier to obtain pirated files, but they have also made it easier to incorporate elaborate legal distribution schemes such as online sales, microtransactions, and online verification systems.

As Korean copyright law continues to grow stronger, a combination of preventive solutions such as online sales, and reactive methods incorporating stronger liabilities for online service providers and a wider scope and stronger penalties for copyright infringement will provide unmatched protections for copyright holders. Though digital piracy will probably never disappear, a continually growing copyright policy and multiple incentives to capture the average Internet consumer will help Korea to be not only a global leader in broadband technology, but the laws concerning it as well.