

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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October 27, 2003

VIA EMAIL TO: FR0100@USTR.GOV

Ms. Sybia Harrison
Special Assistant to the Section 301 Committee
Office of the United States Trade Representative
1724 F Street, NW
Washington, DC 20508

Re: Request for public comments for countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection in South Korea, 68 Fed. Reg. 57503 (October 3, 2003).

Dear Ms. Harrison:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the Out-of-Cycle Review (OCR) of South Korea's status under Special 301.

The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. The IIPA is comprised of six trade associations: the Association of American Publishers (AAP), AFMA, the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA). These member associations represent over 1,300 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). Since its inception, IIPA has been actively engaged in efforts to improve copyright protection and enforcement in Korea, and to dismantle market access barriers affecting the U.S. copyright industries. IIPA has filed a report on Korea in the Special 301 process annually since the Special 301 program began.

When USTR announced, on May 1, 2003, that it would conduct an OCR on Korea, it identified five key issues for consideration, as follows:

"The United States' decision on whether Korea should remain on the Watch List or be moved to Priority Watch List will be based on Korea's taking action in all of the following areas. As it agreed in 2002, the Government of Korea should: 1) Take all actions necessary to ensure that the Standing Inspection Team (SIT) is granted police powers at the earliest opportunity; 2) Draft and submit legislation to the National Assembly that establishes the exclusive right of transmission for sound recordings, including both the full right of making available and the full right of communication to the public, and seek its enactment by the end of 2003; 3) Provide additional, new data on the ROKG's enforcement efforts that is sufficient to more fully evaluate the full range of its enforcement activities, including the imposition of deterrent penalties, and sufficient to allow right holders to have the opportunity to take action against infringers who are not convicted. In addition, in order to resolve the film distribution issues, the Government of Korea should: 4) Draft and submit legislation to the National Assembly to grant the Korea Media Review Board (KMRB) all authority necessary to stop film piracy. This legislation and/or the implementing regulations must: a) clearly provide the KMRB the authority to reject false applications; b) clearly provide the KMRB the authority to cancel existing ratings which were approved on the basis of a false application; and c) not place undue burdens on legitimate rights holders to prove their rightful ownership; 5) Fully and faithfully implement its agreement on the "WIPI" intellectual property issue."

See <http://www.ustr.gov/reports/2003/special301-wl.htm#korea>

The first four of these issues are of particular concern to the IIPA and its member associations. The verdict on Korea's progress on these issues over the past six months is decidedly mixed.

On the positive side, Korea has adopted legislation to give police powers to the Standing Inspection Team of the Ministry of Information and Communications, and the SIT appears to be functioning more effectively (Issue #1). In addition, Korean police and prosecutors are conducting raids against end-user pirates of business software on a more consistent basis and at a higher volume than in previous years, and on some occasions have initiated raids based on leads provided by the software industry. However, the Korean government has not provided reports on its software enforcement activities with the requisite regularity or level of detail. IIPA believes it is essential that the USTR continue to stress to the Korean government that sustained and comprehensive enforcement efforts against all forms of piracy, culminating in the imposition of deterrent penalties, are required (Issue #3).

On the negative side, Korea has thus far completely failed to meet its commitments on issue #2 as identified by USTR: to our knowledge, there has been no legislation introduced into

the National Assembly to grant sound recording producers the exclusive right to control the communication to the public of their recordings. Worse, we understand that there is no intention to do so: any legislation introduced will be restricted to giving producers controls over only a narrower subset of online activities. This response, which has not yet even taken the form of an actual legislative proposal from the Ministry of Culture and Tourism, must be rejected as insufficient, particularly in light of the widespread problem of online music piracy in Korea. It is deeply disappointing that Korea, which has built an unsurpassed technological infrastructure for the online dissemination of music, continues to refuse to provide the corresponding legal infrastructure to promote investment in legitimate online music ventures. Such a shortsighted stance can only lead to pirate domination of the online market, which is the status quo in Korea today.

The final issue (#4) concerns the need for Korea to rapidly fix the system for preventing pirate distribution of audio-visual product under the cover of false licensing documentation, a system which it unilaterally chose to break in 2001. Pirates who submit false registration documents to the Korea Media and Ratings Board (KMRB) continue to receive ratings on unauthorized product which is then distributed in the market with an air of legitimacy. The KMRB needs broader legal authority to deny applications that are based on false documents, and to revoke registrations later discovered to have been fraudulently obtained. We are pleased to see that legislation has been introduced in the National Assembly that could enable the necessary repairs, but are concerned that the proposal has not progressed through the legislative process. Furthermore, under the path chosen by the Korean government to address this issue, the criteria specified by USTR for a long-term solution can only be achieved in implementing regulations, and these have not even been drafted yet. In other words, stasis in the legislative process is pushing the ultimate resolution of this issue further and further into the future. The interim arrangements that the Korean government has put into place, while welcomed, suffer from a number of shortcomings, and must be replaced by a revamped system as soon as possible. We encourage USTR to press the Korean government to translate their expressions of good will on this issue into concrete solutions as rapidly as possible.

IIPA believes that other issues are also relevant to the OCR decision on Korea's status. These include, but are not limited to:

- The ongoing prevalence of book piracy, especially on and around the country's university campuses, which has still not met with an effective response from Korean authorities;
- Continuing gaps (even aside from the sound recording issue discussed above) between Korean law and the global consensus standard embodied in the WIPO Internet Treaties;
- A disturbing increase in the availability in the Korean market (notably from street vendors and itinerant stalls) of pirate audio-visual materials in DVD-R format, representing the most significant incursion of digital piracy in this sector to date, and indicative of a growing problem that must be addressed head-on;
- Discriminatory screen quotas on U.S. motion pictures remain a blatant market access barrier. In light of the continued strong performance of Korean films at the local box office, and the revived interest among the wider US and Korean business communities in

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resolving this problem to facilitate progress toward concluding a Bilateral Investment Treaty, the screen quota must be reduced to around 70 days a year.

IIPA believes that, overall, these developments suggest that USTR should seriously consider placing Korea back on the Priority Watch List (PWL) in Special 301. Given the mixed picture of progress and backsliding summarized above, we believe that the next few weeks offer Korean authorities a critical opportunity to tip the balance against the PWL outcome. IIPA plans to closely monitor developments during this critical period, and stands ready to offer any further information or assistance that USTR may require in making this decision.

Respectfully submitted,

Steven J. Metalitz
Senior Vice President
International Intellectual Property Alliance