COLUMBIA JOURNAL OF ASIAN LAW
VOL. 22 FALL 2008 NO. 1

A LEGAL AND CULTURAL COMPARISON OF FILE-SHARING DISPUTES IN JAPAN AND THE REPUBLIC OF KOREA AND IMPLICATIONS FOR FUTURE CYBER-REGULATION

JOHN LEITNER*

* Associate at the law firm of Cravath, Swaine & Moore LLP. All opinions expressed in this article are mine alone. I wish to acknowledge some of the many individuals who assisted me. Professor Chang Hee Lee provided much research assistance to me. I thank everyone who graciously participated in interviews and surveys as well as those who provided translation assistance. Thank you to Tina Chan for her comments and support.

I. INTRODUCTION

Japan and the Republic of Korea ("Korea") are large, international markets for the entertainment industry, and both nations have experienced legal and social battles relating to the introduction and growing popularity of file-sharing technology. During the past several years, civil lawsuits and criminal charges have been brought in Japan and Korea in an effort to combat online sharing of copyrighted works. The provider of the first major Japanese file-sharing service, File Rogue, was found civilly liable for copyright infringement,[1] and the Japanese programmer of the popular Winny file-sharing software was convicted of the crime of aiding and abetting copyright violations.[2] In Korea, legal action has taken the form of civil litigation against the providers of Soribada, the "Korean Napster,"[3] and a limited number of criminal prosecutions of individual end users who shared copyrighted works.[4] While both Japanese and Korean owners of copyrighted content have aggressively litigated against providers of file-sharing services, there is reason to believe that each nation may have reached the limit of its socially acceptable legal options to combat file-sharing. Present conditions suggest that file-sharing will persist in both nations, but the frequency of file-sharing and its impact on the entertainment industry have been and will continue to be greater in Korea.

Korea and Japan present an interesting comparison because they share a number of significant similarities related to file-sharing. First, until 1957, Korean copyright law was substantively the same as Japanese copyright law.[5] The formal copyright provisions in the two nations remain quite similar.[6] The economies and legal regimes of both nations

---

[1] *See* Columbia Music Entm't K.K. v. MMO Japan K.K., 1810 HANREI JIHŌ 29 (Tokyo Dist. Ct., Jan. 29, 2003).

[2] *Winny Creator Guilty in Copyright Violations*, JAPAN TIMES, Dec. 14, 2006, *available at* http://search.japantimes.co.jp/cgi-bin/nn20061214a1.html.

[3] *South Korean Napster under Pressure*, BBC NEWS, Aug. 13, 2001, *available at* http://news.bbc.co.uk/2/hi/entertainment/1489213.stm. The nickname in this headline is apt because Soribada was Korea's first and for a time pervasive file-sharing service.

[4] *See* Ah-young Chung, *Internet Users Want Legal File-Sharing*, KOREA TIMES, Aug. 31, 2005. *See also* Ah-young Chung, *Commercial Online Music File Swappers Face Criminal Charges*, KOREA TIMES, Jan. 16, 2006, *available at* http://www.asiamedia.ucla.edu/article.asp?parentid=37126.

[5] *See* SOO-KIL CHANG ET AL., INTELLECTUAL PROPERTY LAW IN KOREA 121 (Christopher Heath ed., 2003).

[6] *See id.*; Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 UCLA PAC. BASIN L.J. 276, 280 (Fall 1999/Spring 2000); JOON K. PARK, INTELLECTUAL PROPERTY LAWS OF EAST

have largely developed (or at least re-developed) during the second half of the twentieth century,[7] so as societies in economic transition both have recently experienced challenges in the formulation of their intellectual property policies. Further, both nations are highly "wired" and have relatively high levels of internet connectivity and broadband access as compared to other nations.[8]

Despite these similarities, however, file-sharing has been more pervasive in Korea.[9] Not surprisingly, Japanese file-sharing has not been alleged to have caused the dramatic financial losses to the Japanese music industry that the Korean music industry has experienced (and blames on

---

ASIA 2337-38 (Alan S. Gutterman and Robert Brown eds., 1997); KYUNG JAE PARK, THE INTELLECTUAL PROPERTY LAWS OF KOREA 295-355 (1986).

[7] *See generally* JANG-SUP SHIN, THE ECONOMICS OF THE LATECOMERS: CATCHING-UP, TECHNOLOGY TRANSFER AND INSTITUTIONS IN GERMANY, JAPAN AND SOUTH KOREA (1996); DIRK PILAT, THE ECONOMICS OF RAPID GROWTH: THE EXPERIENCE OF JAPAN AND KOREA (1994).

[8] *See S. Korea Tops OECD in Internet Penetration*, KOREA TIMES, June 17, 2008, *available at* http://www.koreatimes.co.kr/www/news/biz/2008/06/123_26007.html. *See also* Rob Frieden, *Lessons from Broadband Development in Canada, Japan, Korea and the United States*, 29 Telecomm Pol'y 595 (2005).

[9] This proposition is supported by available statistics for the number of users of early file-sharing software as well as interviews conducted by the author with high school and university students in the two nations. Soribada had over 22 million discreet file-sharing accounts at the peak of its popularity. *See Soribada Shuts Down P2P Site After Court Verdict*, CHOSUN ILBO, Nov. 7, 2005, *available at* http://english.chosun.com/w21data/html/news/200511/200511070017.html. Korea's total population in 2006 was approximately 49 million (Korea Tourism Organization http://english.visitkorea.or.kr/enu/AK/AK_EN_1_4_3.jsp, citing the Korea National Statistical Office (*see* http://www.nso.go.kr/eng2006/emain/index.html)). While not all Soribada users were necessarily Koreans themselves, the service was provided in the Korean language only, making it likely that a significant fraction of its users were Koreans. Major Japanese programs were far less pervasive. File Rogue's registered users numbered 42,000 (*see* CHRISTOPHER HEATH, COPYRIGHT LAW AND THE INFORMATION SOCIETY IN ASIA, 257 (Christopher Heath and Kung-Chung Liu eds., 2007)), and JASRAC alleged only 70,000 infringing music files were being shared on File Rogue (*see* Press Release, JASRAC, JASRAC Applied for a Provisional Injunction Seeking to Halt a Music File Swapping Service (Jan. 29, 2002) *available at* http://www.jasrac.or.jp/ejhp/release/2002/0129.html). Relatively current estimates of Japanese file-sharing rates puts the total number of Japanese file-sharers at about 1.8 million, only a fraction of the number of users of the Soribada program alone. *See* Press Release, Recording Industry Association in Japan (July 25, 2006) *available at* http://www.riaj.or.jp/release/2006/pr060725.html; Michael Hatamoto, *Japanese ISPs to Start Policing P2P, Winny Users*, BETANEWS, Mar. 17, 2008 *available at* http://www.betanews.com/article/Japanese_ISPs_to_start_policing_P2P_Winny_users/1205768926. These statistics provide an interesting but ultimately limited picture of file-sharing within each society. For a more complete evaluation of the relative prominence of file-sharing in Korea and Japan, *see* "File-Sharing User Behaviors," Section V *infra*.

file-sharing).[10] The differences in file-sharing rates and probable effects can be partially attributed to subtle differences in the formal copyright law of Japan that have mitigated the economic effect of file-sharing and impacted the decision-making of prospective Japanese file-sharers. Notably, it has been legal provisions generally disfavored by the entertainment industry, such as permitting CD rentals, and not stronger punitive measures against file-sharers, that have lessened the impact of file-sharing on Japanese copyright owners. For Korea, where file-sharing has been and remains common and economically significant, a broader consideration of the cultural environment is necessary. While cultural issues are at play in explaining the consistent pervasiveness of file-sharing even in the face of criminal sanctions, the operative factors are not traditional Confucianist notions, as are often invoked to explain social attitudes in East Asia.[11] Rather, more recent cultural factors in Korea offer insight into the society's file-sharing activities.

To evaluate the similarities and differences between file-sharing law and practice in Japan and Korea, I will first describe the relevant law in both nations and then summarize their experiences with file-sharing. This summary includes discussion of relevant law and cases, results of interviews with file-sharers in Japan and Korea, and comment upon profit trends in the music industry. I will then evaluate the key distinctions in law and culture that have shaped the trajectory of file-sharing in both nations. Relevant legal distinctions include Japan's music rental industry and its statutory private copying exemption compensation system. These legal policies simultaneously compelled the Japanese music industry to adapt early to the challenges of the digital age and mitigated the economic

---

[10] *See* Ethan Smith, *Warner Music Dials Up Deal In South Korea*, WALL ST. J., May 10, 2006, at B1; INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT, http://www.ifpi.org/content/library/digital-music-report-2007.pdf; RECORDING INDUSTRY ASSOCIATION IN JAPAN, THE RECORDING INDUSTRY IN JAPAN 2006, *available at* http://www.riaj.or.jp/e/issue/pdf/RIAJ2006E.pdf.

[11] *See, e.g.*, WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE (1995) (China); Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J., 795, 804 (2006) (China); Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT'L & COMP. L. J., 283 (2006) (Japan); Sang-Jo Jong, *Recent Developments in Copyright Law of Korea*, 24 KOREAN J. COMP. L. 43, 47 (1996) (Korea); 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, n. 10 (1994) (Korea); ARTHUR WINEBURG, INTELLECTUAL PROPERTY PROTECTION IN ASIA §1.03, at 1-9 to 1-15 (Arthur Wineburg ed., 2d ed. 1999); Yong-sik Song, *Problems with the Current Copyright Law (I)*, 19 Pyŏnhosa 181, 182 (1989) (Korea); Sang-han Han, *Chojakkwon ui Popje wa Silmu* (Copyright Law and Practice) 25 (1988) (Korea); R. MICHAEL GADBAW, INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 272, 283 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (Korea); Arthur Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, 5 U. BALT. INTELL. PROP. L.J. 25, 26 (1997).

impact of file-sharing and other copying. Cultural issues include the differing rates of internet access between the Japanese and Korean populaces, distinctive recent historical experiences of copyright law, and the unique role of the internet in Korean social and political life. Based on these distinctions, I will explain some of the differences in file-sharing activities and legal regulation in Japan and Korea and offer predictions about the course of the file-sharing debate in both nations in the future.

The dynamics of both nations suggest that strict enforcement of present copyright law is not practical, and in any event such enforcement would not be sufficient to counter file-sharing. Innovative legal and private industry solutions are playing a growing role in protecting the economic interests of the Japanese and Korean entertainment industries and will remain necessary to balance the interests of copyright holders against the preferences and behaviors of individual consumers. While these considerations bear most directly upon the nations of Korea and Japan, it is useful for other nations, especially ones with large entertainment industries such as the United States of America (the "U.S."), to consider the legal strategies and cultural forces shaping the file-sharing debate in these highly internet-connected and heavy entertainment consuming nations.[12]

II. RELEVANT STATUTORY LAW

A. General Introduction to Japanese and Korean Copyright Law

Japan has a tradition of formal copyright law beginning in the nineteenth century that arose from endogenous forces and internal political decision-making. The Meiji Restoration of 1868, which ended the Tokugawa Shogunate and elevated the Japanese imperial family to autocratic rule,[13] began an era of rapid modernization and westernization in Japan, stimulated by the Japanese leadership's desire to transform Japan into a competitive world power through economic growth and

---

[12] For discussions of these nations as global trade players, *see generally* Suh-Yong Chung, *Is the Mediterranean Regional Cooperation Model Applicable to Northeast Asia?*, 11 GEO. INT'L ENVTL. L. REV. 363 (1999); Sang Don Lee, Essay, *United States-Japan Trade Relations: A Comment from the Korean Perspective*, 16 ARIZ. J. INT'L & COMP. L. 127 (1999).

[13] *See* WALTER WALLACE MCLAREN, A POLITICAL HISTORY OF JAPAN DURING THE MEIJI ERA: 1867-1912 (Cass 1965) (1916); PETER F. KORNICKI, MEIJI JAPAN: POLITICAL, ECONOMIC AND SOCIAL HISTORY, 1868-1912 (1998).

military exploits.[14] The early reforms of the Meiji reign included significant legal reforms,[15] most conspicuously the promulgation of the Meiji Constitution.[16] Much of the Meiji Government's initial policy focused on altering Japan's relationship with the West in order to promote Japanese prosperity, including the implementation of intellectual property law.[17] In 1869, Japan promulgated the Publishing Ordinance, which included provisions on the protection of published materials; an amendment in 1875 established a 30 year period of "monopoly right," also translated as "copyright," for publishers of books.[18] In 1887, a separate Copyright Ordinance was passed to protect authors and artists by granting direct copyright rights.[19] After Japan acceded to the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention") in 1899, it immediately implemented a copyright act (the "Copyright Act 1899"), which was fully consistent with the requirements of the Berne Convention.[20] The Copyright Act 1899 established a broadened set of protected rights for authors and artists, including exclusive rights of reproduction and public performance.[21] The Copyright Act 1899 was amended four times before World War II in order to expand its protection of authorship rights, including the granting of rights to phonogram recording producers.[22]

During World War II and in the years immediately thereafter, Japan maintained its pre-existing copyright law, but neither enforcement nor reform was a major policy priority. Enforcement became increasingly stringent in the 1950s and 1960s, and both international copyright developments and a growing base of Japanese-held valuable copyrights created an impetus for legal reform. In order to reflect changes in the Berne Convention and the evolving views of Japanese scholars and policy-makers, a new Copyright Act (the "Japanese Act") was enacted in 1971. The Japanese Act extended the term of protection to its present length of 50 years after the author's death; created neighboring rights to protect performers, phonogram producers, and broadcasters; detailed a

---

[14] *Id.*
[15] *See* THE JAPANESE LEGAL SYSTEM 179 (Hideo Tanaka ed., 1976).
[16] *See* MCLAREN, *supra* note 14.
[17] TERUO DOI, JAPANESE COPYRIGHT LAW IN THE 21ST CENTURY 2 (Dennis Campbell ed., 2001).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 17-25.
[22] *Id.*

policy for fair use exceptions to copyright infringement; and increased the penal sanctions available against infringers.[23]

Korea's experience with formal copyright law is shorter than Japan's and has largely been shaped by policies imposed by foreign powers: first by Japan through direct channels of control, and later by the U.S. through indirect but powerful influence.[24] As a result of Japan's political maneuvers, Korea became a de facto protectorate of Japan by 1905,[25] and in 1908 Japan agreed in a treaty with the U.S. to enforce Japanese intellectual property laws in Korea.[26] Later in 1908 the final Korean king, Gojong, ordered that Korea adopt the principles contained in the Copyright Act 1899.[27] The first governmental protection of copyright in Korea was thus briefly established by King Gojong's Copyright Order, Royal Order No. 200.[28] In 1910, Japan annexed Korea and repealed the Copyright Order.[29] During the Japanese occupation, Japan's formal copyright regime was administered directly, if not attentively, in Korea.[30]

After the end of the Japanese occupation of Korea in 1945, Japanese copyright law ceased to apply directly,[31] although the substance of the Japanese Copyright Act remained the effective copyright law under Ordinance No. 21 of the U.S. Army Military Government (inasmuch as Korea in this period could be said to have had copyright law[32]) until

---

[23] *Id.* at 25-45.

[24] In addition to any informal power wielded by the U.S. in its role as chief military and economic ally to Korea, formal pressure has been applied through the U.S. Trade Representative and other trade channels to promote the protection of American-held copyrights in Korea. *See, e.g.*, GENERAL ACCOUNTING OFFICE, STRENGTHENING WORLDWIDE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS, GAO/NSI AD-87-65 (1987). *See generally* David I. Wilson, *A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries*, 1 TRANSNAT'L LAW. 421, 427 (1988).

[25] KI-BAIK LEE, A NEW HISTORY OF KOREA (Edward W. Wagner trans., Harvard-Yenching Institute Publications, 1984).

[26] KIM YOUNG, WORLD INTELLECTUAL PROPERTY ORGANIZATION, PUBL'N NO. 686/KR(E), THE INTELLECTUAL PROPERTY SYSTEM OF THE REPUBLIC OF KOREA 3 (1996).

[27] SOO-KIL CHANG ET AL., *supra* note 6. To say that it was King Gojong's order is a formality; in fact, he acted under the instruction of Japan to implement the then-effective copyright law of Japan in Korea. *Id.*

[28] *Id.*

[29] *Id.*

[30] Youm, *supra* note 7, at 280.

[31] *Id.*

[32] Due to the politically and socially tumultuous events in Korea during the years immediately following the end of the Japanese occupation, including the Korean War, copyright law was not a major priority, and few formal copyright disputes were addressed by the courts. *See, e.g.*, *id.* at 276.

Korea passed its own statute.[33] The legal foundation for the present intellectual property scheme was established in 1948, when the principle of protecting the rights of authors, inventors, and artists was included in Article 21(2) of the new Korean Constitution.[34] Korea experienced considerable political tumult in the following years, but after much delay the Copyright Act of Korea was passed in 1957.[35]

The 20-year rule of military dictator Chung-Hee Park began in 1961. During Park's rule, Korea experienced rapid industrialization and significant growth in international trade, and implementation and enforcement of copyright law became a relevant though not always compelling consideration for the Korean Government.[36] Korea is a signatory to the 1973 Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, an international agreement cited in the *Soribada* cases,[37] and has tried to enforce this and other relevant international agreements, particularly in recent years. Korea joined the World Intellectual Property Organization ("WIPO") in 1979 and became party to the Paris Convention for the Protection of Industrial Property in 1980, the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs") in 1995 when it was introduced, and the Berne Convention in 1996.[38] Copyright law in Korea was almost entirely rewritten in a 1986 amendment to the Copyright Act of Korea at the urging of the U.S.[39] The Copyright Act of

---

[33] *See* KIM YOUNG, *supra* note 27.

[34] JOON K. PARK, *supra* note 7.

[35] Copyright Act of Korea, Law No. 433, Jan. 28, 1957, English translation provided by the Korean Ministry of Government Legislation *available at* http://www.moleg.go.kr/english/09/view.html?folder=_04_06_1&code=948773847171.xml. *See generally* KYUNG JAE PARK, *supra* note 7; Youm, *supra* note 7, at 281-82.

[36] *See* KIM YOUNG, *supra* note 27. Park's government was closely allied with America, and American pressure was an important consideration underlying the Park junta's growing awareness of copyright law enforcement. *See* SOO-KIL CHANG ET AL, *supra* note 6. However, occasions of legal enforcement were rare, especially relative to the large number of infringements occurring during this time. *See* Youm, *supra* note 7, at 278, 288; Song, *Legal Remedies*, *supra* note 12, at 3; William Enger, *Korean Copyright Reform*, 7 UCLA PAC. BASIN L.J. 199, 213 (1990).

[37] Seoul High Court, Jan. 12, 2005, 2002 GODAN 284.

[38] *See* KIM YOUNG, *supra* note 27, at 11-15.

[39] SOO-KIL CHANG ET AL., *supra* note 6, at 121-25. America has formally pressured Korea on intellectual property matters. *See, e.g.*, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2001 SPECIAL 301 REPORT: *available at* http://www.iipa.com/special301_TOCs/2001_SPEC301_TOC.html. The Priority Watch List is released by the Office of the U.S. Trade Representative and describes problems with enforcement of American copyrights in trade partner nations. *See* Press Release, Office of the United States Trade Representative, Special 301 Report, Apr. 30, 2007, http://www.ustr.gov/Document_Library/Press_Releases/2007/April/SPECIAL_301_Report.html. Korea has frequently been included on this list. *See, e.g.*, Press Release, Office of the

Korea (the "Korean Act") passed as Act No. 3916, formally as an amendment to the pre-existing Act, and came into force on December 30, 1989.[40]

B. *The Copyright Acts: A Closer Study*

1. Japanese Copyright Act

Under the Japanese Act, individual file-sharers can potentially face both civil and criminal liability as direct infringers.[41] As for criminal liability, two users of the WinMX file-sharing program were arrested in 2001,[42] although neither was ultimately formally prosecuted. Two users of the Winny software were arrested on suspicion of copyright infringement; one of them was eventually convicted.[43]

The Japanese Civil Code contains provisions on joint tortfeasors[44] that could form the basis for a claim for damages against a party playing a secondary role in copyright infringement, such as a provider of a file-sharing service, while injunctions may be obtained on a claim of direct copyright infringement. However, Japan has no statutory provisions on indirect copyright infringement. Under Japanese law, only direct infringement can form the basis for injunctive relief,[45] so a suit seeking to enjoin the provider of a file-sharing service must, under the current law, be framed in terms of direct copyright infringement.[46] Japan's only case addressing the question of file-sharing service provider liability, *JASRAC v. MMO Japan*, discussed *infra*, extended a judge-made doctrine to find a

---

United States Trade Representative, U.S. Elevates Korea to Priority Watch List Based on Continued Concerns Regarding Film and Music Piracy, Jan. 8, 2004, http://www.ustr.gov/Document_Library/Press_Releases/2004/January/US_Elevates_Korea_to_Priority_Watch_List_Based_on_Continued_Concerns_Regarding_Film_Music_Piracy.html.

[40] SOO-KIL CHANG ET AL., *supra* note 6, at 121-25.

[41] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 113-114, art. 119, English translation *available at* http://www.cric.or.jp.

[42] IT Jiten [IT Dictionary], "WinMX", http://kaden.yahoo.co.jp/dict/?type=detail&id=4256 (last visited Oct. 29, 2008).

[43] *See Japan Police Arrest Two for File Sharing*, CNN.COM, Dec. 8, 2003, http://www.cnn.com/2003/TECH/internet/12/08/sharing.arrests.ap/index.html; *Winny File-Sharer Gets Suspended Term*, JAPAN TIMES, Dec. 1, 2004, *available at* http://search.japantimes.co.jp/cgi-bin/nn20041201a9.html.

[44] *See* MINPŌ, art. 719 and art. 722, para. 2.

[45] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 114.

[46] This remains true in the Tokyo courts, *see, e.g.*, JASRAC v. Yugen Kaisha Nihon MMO, 1845 HANREI JIHŌ 36 (Tokyo Dist. Ct., Dec. 17, 2003). However, the Osaka courts have begun granting injunctions in cases of indirect infringement. *See* 1842 HANREI JIHŌ 120 (Osaka Dist. Ct., Feb. 12, 2003); 1911 HANREI JIHŌ 65 (Osaka Dist. Ct., Oct. 24, 2005).

file-sharing service provider defendant liable as a direct infringer.[47] A working group appointed by the Japanese Government to study copyright law reform (the "Japanese Working Group") has issued a set of suggestions on the possibility of amending the Japanese Act to include provisions on secondary liability, which could then subject indirect infringers to the possibility of injunction under the Japanese Act.[48]

The right of producers of phonograms pertaining to rental is addressed in Article 97 of the Japanese Act. Producers are granted an exclusive right of rental for a period of one year,[49] after which time "commercial phonogram lenders...shall pay a reasonable amount of remuneration to the producers whose phonograms (in which neighboring rights subsist) have been so offered to the public."[50] The rights of phonogram producers automatically change from exclusive rights to remuneration right one year after the first sale.[51]

The Japanese Act contains a broad private use copying exemption, but this exemption has not been interpreted to apply to file-sharers, at least not to file-sharers who upload works.[52] While downloading a copy of a work for private use would likely fall under the exemption, downloading to a shared folder would permit other users of the particular file-sharing software to copy and thus constitute infringement.[53] The same article also creates a system under which compensation is provided to copyright owners of privately copied works.[54] Under this system, a fee is applied to goods frequently used in connection with private copying, such as blank CDs,[55] collected by the

---

[47] JASRAC v. Yugen Kaisha Nihon MMO, 1845 HANREI JIHŌ 36 (Tokyo Dist. Ct., Dec. 17, 2003).

[48] Working Group Paper (Japanese). Copy on file with the author.

[49] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 97, para. 1.

[50] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 97, para. 3.

[51] *See* Copyright Research and Information Institute, Copyright for Beginners, http://www.cric.or.jp/cric_e/beginner/begin.html#q5_4.

[52] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 30, para. 1. *See also* Yuko Noguchi, *Why You Need to be Aware of Digital Copyright Issues*, Managing Intellectual Property Japan Focus Supplement, *available at* http://www.managingip.com/?Page=17&ISS=22151&SID=639387. The exact parameters of the exemption are unclear, but one who shares with another via file-sharing software is not shielded by art. 30. Interview with Tetsuya Obuchi, Professor of Law, The University of Tokyo, in Tokyo, Japan, conducted in English (Jan. 18, 2007); interview with Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan, conducted in English and Japanese (Jan. 22, 2007).

[53] *See* JASRAC v. Yugen Kaisha Nihon MMO, 1845 HANREI JIHŌ 36 (Tokyo Dist. Ct., Dec. 17, 2003), aff'd Tōkyō Kōtō Saibansho [Tokyo High Ct.], Mar. 31, 2005, case number Heisei 16-Ne-405.

[54] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 30, para. 2.

[55] Naturally not all units of product subject to the fee are used in the copying without permission (if often legal copying) of copyrighted works. Some overinclusiveness has been

Japanese Government, and paid to the Japanese Society for Rights of Authors, Composers and Publishers ("JASRAC") for subsequent distribution to particular artists as the organization deems appropriate.[56] The fee is not separately itemized when purchases are made, and many Japanese are not aware that such a fee is included in purchases of recording media.[57]

2. Korean Copyright Act

The Korean Act, like the Japanese Act, grants to authors a set of rights familiar to students of American copyright law, including reproduction, publication, distribution, broadcast, and modification.[58] The Korean Act permits a variety of legal causes of action against parties related to file-sharing. Civil suits against individual users of file-sharing software are legally available where infringements occur,[59] but no such suits have yet been attempted. Criminal prosecutions may also be taken against direct copyright infringers.[60] Thus far, approximately 30 Koreans have been prosecuted for infringements resulting from file-sharing (including both uploading and downloading).[61]

---

deemed an acceptable cost to achieve a measure of compensation for private copying, but debates over whether particular products should bear the fee has been lively and unpredictable. *See* the discussion in "Legal Distinctions between Japan and Korea: Private Copying Exemption Compensation System," Section VII(B) *infra*, for a detailed treatment of this issue. In the context of iPods, *see* Salil K. Mehra, *The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, 79 U. COLO. L. REV. 421 (2008).

[56] According to an intellectual property practitioner, even inquiry with JASRAC has not uncovered a specific mechanism or system for calculating and making distributions. Interview with Mr. Daisuke Tatsuno, Attorney, Tokyo Aoyama Aoki Law Office-Baker & McKenzie, in Tokyo, Japan, conducted in English, (Jan. 20, 2007).

[57] When asked, 17 of 24 Japanese high school and university students surveyed indicated that they were not aware that such a fee was applied to sales of these goods. Survey results, *infra* note 139.

[58] Copyright Act of Korea, English translation provided by the Korean Ministry of Government Legislation *available at* http://www.moleg.go.kr/english/09/view.html?folder=_04_06_1&code=948773847171.xml.

[59] "Any person who has the copyright or other rights protected under this Act . . . may demand of a person infringing his rights to suspend such act or demand a person likely to infringe his rights to take preventive measures or to provide a security for compensation for damages." Copyright Act of Korea, art. 91.

[60] "[Infringers] shall be punishable by imprisonment for a term of not more than three years or a fine of not more than 30 million won, or shall be punishable by both imprisonment and a fine." Copyright Act of Korea, art. 98.

[61] *See* Ah-young Chung, *Movie File Swappers to Face Copyright Violation Charges*, KOREA TIMES, March 17, 2006. *See also* Ah-young Chung, *Internet Users Want Legal File-Sharing*, *supra* note 5.

Parties who assist in the infringement of copyright, including file-sharing service providers, are subject to civil penalties. Though the Korean Act does not contain explicit provisions on secondary copyright infringement, liability for an indirect infringer arises under Article 760(3) of the Korean Civil Act, pursuant to which the secondary actor may be liable as a joint tortfeasor with the direct copyright infringer.[62] Plaintiffs in copyright infringement suits can recover damages and may also seek either temporary or permanent injunctive relief against copyright infringing tortfeasors.[63] The providers of Korea's Soribada service, for instance, were liable as indirect infringers because they provided the mechanism for direct infringement and have been enjoined from offering the service.[64] Parties contributing to an infringement in a secondary capacity might arguably be subject to criminal liability,[65] although Korea has not yet had a successful prosecution of a creator or distributor of file-sharing software. The creators and distributors of Soribada, the Yang brothers, were charged with criminal copyright infringement under a criminal aiding and abetting theory, but the charges were dismissed.[66]

The Korean Act contains a broad private copying exemption that is textually very similar to the Japanese exemption: "It shall be permissible for a user to reproduce by himself, without any commercial purposes, a work already made public, within the limit of his personal, family or the equivalent use."[67] This exemption is limited to works already made public that are copied with no profit motive, for personal use, and where the copying is undertaken by the user himself or herself.[68] Owners of the distribution right of a sound recording can decide whether or not to permit rental of phonograms.[69] This right is exclusive for the duration of the copyright.[70]

---

[62] The clause states, "[t]he abettor or aider shall be considered as a joint tortfeasor." [Civil Act], Act No. 471 of 1958, art. 760, para 3. Applied to this situation, a person who aids and abets a copyright violation jointly commits the infringement.

[63] Copyright Act of Korea, art. 91, 93; SOO-KIL CHANG ET AL., *supra* note 6, at 142-43.

[64] Supreme Court of Korea, Jan. 25, 2007, 2005 DA 11626.

[65] "Anyone who aids another's criminal act shall be punished as an aider." Korean Criminal Act, art. 32.

[66] Seoul Central District Court, Jan. 12, 2005, 2003 No 4296. *See also* Sung-jin Kim, *Legal Battle on Online Music File Swapping Enters New Phase*, KOREA TIMES, May 20, 2003.

[67] Copyright Act of Korea, art. 27.

[68] SOO-KIL CHANG ET AL, *supra* note 6, at 139.

[69] Copyright Act of Korea, art. 43.

[70] *Id.*

III. TECHNICAL ARCHITECTURE OF MAJOR JAPANESE AND KOREAN FILE-SHARING SERVICES

Understanding the major Japanese and Korean file-sharing cases requires a basic knowledge of the technologies employed by the file-sharing programs at issue in each litigation. The Japanese File Rogue service had a central server, operated by the MMO Japan Company, where users could store files in a common folder and online users could then access and download files from that folder.[71] Winny, which was independently designed and distributed after File Rogue's owner was enjoined from continuing the service, is based on its Japanese predecessor WinMX and on Freenet [72] and has a pure P2P ("peer-to-peer") architecture; that is, the technology involved only connections between equally positioned ("peer") end users. Users exchanged content directly, with no central data storage or transparent requests viewed by an administrator.[73] Winny, like Freenet, was designed to try to assure user anonymity.

Under its original technical architecture, Soribada in Korea had a central server that maintained a list of the internet protocol addresses of all registered users but did not have community folder data storage and did not index the names of each file offered for sharing.[74] The second version of Soribada, and all subsequent versions of the program, no longer handled file requests through the central server, instead connecting

---

[71] *See* CHRISTOPHER HEATH, COPYRIGHT LAW AND THE INFORMATION SOCIETY IN ASIA, *supra* note 10; Teruo Doi, *supra* note 18, at 18.

[72] Freenet is a file-sharing network that stores encrypted fragments of shared files on various participating computers; the location of files are shifted and most users do not know what materials are being stored for sharing on their computers at any particular moment in time. This architecture was designed to seek to prevent any party from exercising control over the network and to provide user anonymity by making materials difficult to link with a particular user. *See* IAN CLARKE ET AL., FREENET: A DISTRIBUTED ANONYMOUS INFORMATION STORAGE AND RETRIEVAL SYSTEM, in DESIGNING PRIVACY ENHANCING TECHNOLOGIES: INTERNATIONAL WORKSHOP ON DESIGN ISSUES IN ANONYMITY AND UNOBSERVABILITY PROCEEDINGS 46, 46-47 (Hannes Federrath ed., Berkeley, CA, USA, July 25-26, 2000).

[73] *Winny Developer Isamu Kaneko Convicted and Fined 1.5 Million Yen*, INTERNET WATCH, Dec. 13, 2006, http://internet.watch.impress.co.jp/cda/news/2006/12/13/14222.html (Japanese).

[74] Kwang-Suk Lee, *The Momentum of Control and Autonomy: A Local Scene of Peer-to-Peer Music-Sharing Technology*, 27 MEDIA, CULTURE & SOC'Y 799, 804 (2005).

users directly via P2P.[75] Other programs popular in Korea, such as Pruna and edonkey,[76] are generally P2P.

IV. CASE HISTORIES OF JAPAN AND KOREA

Japan and Korea have each had one principal case brought against the provider of a popular file-sharing service: *MMO File Rogue* in Japan and *Soribada* in Korea. Korea also has some experience (with mixed results) of prosecutions of individual users. In Japan, the criminal conviction of the programmer of the file-sharing program Winny has added a new dimension to the legal topography of the Japanese file-sharing debate.[77]

A. Japanese Cases: File Rogue, Winny

1. First File-Sharing System: File Rogue

In an early case involving "bulletin board" posts,[78] *[Undisclosed Party] v. Nifty Serve K.K.* ("*Nifty*"), the Tokyo District Court found a service provider could be liable for a user's activity as a joint tortfeasor under the Japanese Civil Code if it was aware of a legally objectionable activity and had a chance to prevent or reverse it.[79] A similar theory might have been invoked against File Rogue, Japan's first widely used file-sharing service. The software, owned and distributed by the MMO Japan Company, was made available to the public starting November 1, 2001. File Rogue had a central server that indexed the names of the files each user was offering in a shared music folder. MMO Japan sought to use the service as part of a for-profit business model. File Rogue was the most popular P2P file-sharing service for Japanese file-sharers at that

---

[75] Suwon District Court, Seongnam Branch, July 9, 2002, 2002 KAHAP 77. *See also* MARCUS BRUNNER & ALEXANDER KELLER, SELF-MANAGING DISTRIBUTED SYSTEMS 56-57 (Springer-Verlag 2003).

[76] In the interviews I conducted, these were the file-sharing programs most commonly mentioned by Korean students. Survey results, *infra* note 138.

[77] *Winny Creator Guilty in Copyright Violations*, JAPAN TIMES, *supra* note 3.

[78] Bulletin board systems were popular from the late 1970s to the early 1990s as forums largely accessed by modems where users could exchange messages and other data. *See* http://en.wikipedia.org/wiki/bulletin_board_system.

[79] [Undisclosed Party] v. Nifty Serve K.K., 1610 HANREI JIHŌ 22 (Tokyo Dist. Ct., May 26, 1997). In this case, the bulletin board service provider could observe the posts made and had the technical ability, as the administrator, to remove legally offensive posts. A joint tortfeasor may be held liable for the injury that resulted from the wrongful act and on that basis may be obligated to pay damages to the plaintiff.

time, although its registered users numbered only about 42,000.[80] The *Nifty* theory was not pursued by the *MMO File Rogue* plaintiffs. This was likely because a finding of joint tortfeasor liability, as in *Nifty*, could result in an award of damages, but a finding of direct copyright infringement is necessary for an injunction, the relief most desired by the plaintiffs.[81]

MMO Japan was sued by JASRAC and the Recording Industry Association of Japan (the "RIAJ") on February 28, 2002, and a preliminary injunction was issued against the defendants (MMO Japan and Michihito Matsuda, a company executive) in January of 2003.[82] The District Court ultimately ruled against the defendants, finding them liable as direct infringers based on the underlying copyright infringement activities of File Rogue users and issuing a permanent injunction on December 17, 2003.[83]

In finding MMO Japan and Mr. Matsuda to be guilty of direct copyright infringement, the Court imported the Karaoke Doctrine: if a business enterprise has control over an infringing activity and profits by the activity, then the business is liable for direct infringement.[84] The Karaoke Doctrine was originally articulated in a case involving the unauthorized use of music in a karaoke "snack" or bar.[85] The snack bars in question played music tracks from copyrighted songs while customers sang the songs' lyrics; these performances were not authorized by the copyright holders of the songs. Though the customers themselves did the singing, the plaintiffs argued for direct infringement of the public performance right to be found on the part of the snack owner in order to obtain an injunction.[86] The Court found that the owner of the snack infringed the copyrights in the performed songs because the guests' singing occurred under the owner's control, and the owner enjoyed resultant business profits.[87] The owner controlled the performances

---

[80] CHRISTOPHER HEATH, COPYRIGHT LAW AND THE INFORMATION SOCIETY IN ASIA, *supra* note 10.

[81] Note that File Rogue "represent[ed] the first Japanese case on the legality of file-sharing programs." Etsuo Doi, *Review of Recent Intellectual Property Cases in Japan*, PAT. & LICENSING, Feb. 2003, at 18.

[82] Columbia Music Entm't K.K. v. MMO Japan K.K., 1810 HANREI JIHŌ 29 (Tokyo Dist. Ct., Jan. 29, 2003).

[83] *See* JASRAC v. Yugen Kaisha Nihon MMO, 1845 HANREI JIHŌ 36 (Tokyo Dist. Ct., Dec. 17, 2003).

[84] *Id.*

[85] 2 MINSHŪ 199 (Tokyo High Court, No. 1204(O), 1988).

[86] *Id.*

[87] *Id.*

because the owner and the snack's employees had physical control of the performance-related equipment and space.

The plaintiffs in the *MMO File Rogue* case successfully advocated for a finding of direct infringement by an extension of the Karaoke Doctrine.[88] The District Court's ruling[89] was upheld by the Tokyo High Court on March 31, 2005[90] and no appeal to the Japanese Supreme Court was taken. The High Court accepted the District Court's finding of fact that 96.7% of the files exchanged were copyright-protected works and were shared without permission from the copyright holder.[91] Though the MMO Japan terms of use included an admonition not to use the software to exchange files illegally, the Court found MMO Japan to have directly infringed the rights of copyright owners.[92] The High Court emphasized the technical architecture and the commercial nature of the MMO Japan service. The Court found as fact that the search feature required an artist's name to perform a search, which suggested to the Court that it was intended for use in sharing popular music.[93] MMO Japan was found to exercise the necessary control over user activities, though in this case the defendant had physical control of the encoded file-sharing software and the central servers, but not the computers of the users who made and retained copies of the shared files.[94] The Court was particularly concerned about whether MMO Japan knew of the infringement and whether it took measures to prevent the infringement.[95]

---

[88] Noguchi, *supra* note 53; interview with Tetsuya Obuchi, Professor of Law, The University of Tokyo, in Tokyo, Japan, conducted in English (Jan. 18, 2007); Interview with Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan, conducted in English and Japanese (Jan. 22, 2007).

[89] *See* JASRAC v. Yugen Kaisha Nihon MMO, 1845 HANREI JIHŌ 36 (Tokyo Dist. Ct., Dec. 17, 2003).

[90] *See* Tōkyō Kōtō Saibansho [Tokyo High Ct.], Mar. 31, 2005, case number Heisei 16-Ne-405.

[91] Tatsuhiro Ueno, *Commentary on Court Decisions- "File Rogue" Case - Interlocutory Judgement of the Tokyo District Court on 29 January 2003*, 134 CIPIC JOURNAL 1-20 (2003) (Japanese).

[92] *Id.*

[93] *See* Tōkyō Kōtō Saibansho [Tokyo High Ct.], Mar. 31, 2005, case number Heisei 16-Ne-405.

[94] The court determined that the defendant knew of the infringement and took no significant steps to prevent the infringement. In the context of those determinations, facilitating the service by compiling lists of shared files on central servers (although those servers did not actually store any proprietary, infringing content) was deemed sufficient to meet the necessary "control" requirement under the Karaoke Doctrine. *See* Tatsuhiro Ueno, *Commentary on Court Decisions*, *supra* note 92.

[95] The Karaoke Doctrine was not a natural fit for the facts of the case, and the Court seems to have applied a broader fairness standard. The Court examined the scienter and deterrent efforts, if any, of the defendant and after finding the defendant knew of and failed to obstruct copyright infringements, the Court applied the Karaoke Doctrine test in such a way as to

The profit prong of the Karaoke Doctrine test was satisfied although revenue from File Rogue had not yet been realized. Merely being a private, for-profit company with what appeared to be a long-term profit objective for the service was sufficient.[96]

The knowledge required was not specific knowledge of a particular illegal sharing of a file, but the knowledge that infringements were happening in general. Consequently, many Japanese scholars have criticized the decision.[97] The lack of a provision on secondary liability in the Japanese Act has caused the Tokyo courts to stretch the Karaoke Doctrine and expand the realm of direct infringement, as it was the only mechanism for granting injunctive relief against MMO Japan. Interestingly, the Osaka courts have begun to award injunctions against those who are found to aid but not directly commit infringements of copyright.[98] Thus a "circuit split" exists between Tokyo and Osaka.[99] Despite Osaka's judicially innovated solution, the Tokyo courts continue to refrain from granting injunctions against indirect infringers but, being equally unwilling to disallow an injunction against MMO Japan and similarly situated defendants, they have extended the category of direct infringers.

2. Post-File Rogue Developments in Japan

After MMO Japan was permanently enjoined, many Japanese continued to file-share. Unlike in Korea, where alternatives to Soribada

---

produce a favorable outcome for the plaintiff, including an injunction of the File Rogue service. However, the doctrinal basis of the decision, rooted in a nebulous standard of "control" and the acceptance of purely speculative future profits as sufficient, seems an awkward fit.

[96] *See* Tōkyō Kōtō Saibansho [Tokyo High Ct.], Mar. 31, 2005, case number Heisei 16-Ne-405.

[97] In interviews, professors described this policy as "nonsense" and "indefensible." The resulting expansion of the Karaoke Doctrine was described as "illogical" and "extended to the limit." Interview with Professor Tetsuya Obuchi, Professor of Law, Tokyo University, in Tokyo, Japan, conducted in English (Jan. 18, 2007); interview with Professor Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan, conducted in English and Japanese (Jan. 22, 2007); interview with Professor Koji Okumura, Professor of Law, Kanagawa University, in Tokyo, Japan, conducted in English (Jan. 23, 2007).

[98] *See* 1842 HANREI JIHŌ 120 (Osaka Dist. Ct., Feb. 12, 2003); 1911 HANREI JIHŌ 65 (Osaka Dist. Ct., Oct. 24, 2005).

[99] In the Japanese judiciary, there are eight *Kōtō Saibansho*, or High Courts, which are the structural equivalent of American circuit courts. The *Saikō Saibansho*, or Japanese Supreme Court, sits above the High Courts. For further information, *see* http://www.courts.go.jp/english/.

have been numerous, with no single primary substitute emerging,[100] file-sharing in Japan centered on a new Japanese-language service, Winny. The Winny software was programmed by Mr. Isamu Kaneko, a former researcher at Japan's prestigious Tokyo University. The program was based on WinMX and Freenet and like Freenet was designed to preserve user anonymity.[101] Winny was made freely available on the internet and was not distributed by a corporation or other going business concern. Mr. Kaneko expressed his intention that Japanese use Winny to facilitate the sharing of information but placed a warning on his website not to illegally share copies of copyrighted works.[102] Nonetheless, Winny, like File Rogue, was used principally for the sharing of such works,[103] especially popular music and movies.

The Japanese music industry was faced with a dilemma. Unlike in *MMO Japan*, no business entity at the point of distribution could be targeted in a civil suit alleging Karaoke Doctrine infringement. The industry continued to consider suits against individual end users to be an undesirable legal recourse for public relations reasons.[104] As a Japanese scholar described the situation, "The police clearly wanted to find someone who was liable for the whole system, and arrested the programmer."[105] The music industry pressured criminal prosecution of Kaneko, Winny's principal programmer, as an aider and abettor of copyright infringement by Winny users.[106] Kaneko was convicted by the Tokyo District Court of criminally aiding and abetting copyright infringement, to the surprise of many Japanese observers. Although the prosecution produced no evidence that Kaneko encouraged the use of

---

[100] Koreans who stated that they downloaded music listed a wide variety of different services that they used for these activities. While many were popular amongst users, no single file-sharing software was used by a majority of file-sharers. *See* survey results, *infra* note 138.

[101] Keita Ooi et al., *Survey of the State of P2P File-Sharing Applications*, NTT Information Sharing Platform Laboratories, *available at* https://www.ntt-review.jp/archive/ntttechnical.php?contents=ntr200405024.pdf.

[102] There is some disagreement about what Kaneko's intentions were when he programmed Winny. *See, e.g.*, Salil K. Mehra, *Software as Crime: Japan, the United States, and Contributory Copyright Infringement*, 79 TUL. L. REV. 265, 272-274 (2004).

[103] *See* Tatsuhiro Ueno, *Commentary on Court Decisions*, *supra* note 92.

[104] Interview with Mr. Hideo Ogura, Attorney, Tokyo-Hirakawa Law Office, in Tokyo, Japan, conducted in English (Jan. 26, 2007).

[105] Interview with Tetsuya Obuchi, Professor of Law, The University of Tokyo, in Tokyo, Japan, conducted in English (Jan. 18, 2007).

[106] *Hōtekisekinin, doko made 「Winny」 kaihatsushataiho* [How much legal accountability can be assigned? "Winny" Developer Arrested], ASAHI SHIMBUN, May 11, 2004; *Winny kaihatshusha taiho: irei no kaihatsusha taiho . . . hosokai ni wa gimon no koe 「sofuto jitai wa gohō」* [Winny developer arrest: unprecedented developer arrest . . . doubting voices among legal circles say "the software by itself is legal"], MAINICHI SHIMBUN, May 10, 2004, at http:// www.mainichi-msn.co.jp.

Winny to violate copyright, the fact that the vast majority of uses of Winny involved the exchange of copyrighted works was taken as evidence that Kaneko knew that Winny was being used illegally, and this knowledge was sufficient for conviction.[107] The Court described the Winny program as possessing "meaningful" legal uses,[108] but Kaneko's "selfish and irresponsible" act of making the software publicly available caused him to be culpable nonetheless.[109] Kaneko knew or should have known of the intention of the vast majority of users, inferred from the rates of infringement using Winny.[110] Though the crime carried the possibility of a prison sentence, the District Court imposed only a fine on Mr. Kaneko.[111]

In light of Mr. Kaneko's conviction, the potential criminal law exposure of future file-sharing software programmers in Japan is somewhat unclear. Even creating a "neutral" program that is used in some cases to infringe may be enough for a conviction. But what share of uses not involving copyright infringement would be necessary for a programmer to escape the imputation of knowledge of infringement and thereby escape criminal liability? As one scholar noted, "It is clear when 99% percent of uses are illegal. It is clear when 99% of uses are legal. Nothing else is clear."[112] Some scholars believe that a programmer would have to deduce some way of screening or otherwise obstructing infringing uses to escape liability;[113] inasmuch as that may prove difficult

---

[107] In fact, the Court explicitly stated that it was not determining that Kaneko had intended that infringements by users occur. *See Winny Creator Guilty in Copyright Violations*, JAPAN TIMES, *supra* note 3.

[108] Unlike File Rogue, which required the entry of an artist's name to perform a file search, Winny had a more general searching mechanism. Therefore, the design did not itself suggest the software should be used for the exchange of music recordings of well-known artists and could just as easily be used to identify a work for legal copying as for illegal copying.

[109] *Id.*

[110] *See, e.g.*, *Winny kaihatshusha taiho: irei no kaihatsusha taiho . . . hosokai ni wa gimon no koe 'sofuto jitai wa goho'* [Winny developer arrest: unprecedented developer arrest . . . doubting voices among legal circles say 'the software by itself is legal'], MAINICHI SHIMBUN, May 10, 2004, at http:// www.mainichi-msn.co.jp (quoting copyright law expert Hiroharu Yoshimine as saying "sofuto jitai ni ihousei wa naku, mondai wa shiohoho ni aru hazu" [the software itself is not illegal, the problem is how it is used].

[111] *Winny Creator Guilty in Copyright Violations*, JAPAN TIMES, *supra* note 3.

[112] Interview with Tetsuya Obuchi, Professor of Law, The University of Tokyo, in Tokyo, Japan, conducted in English (Jan. 18, 2007).

[113] In the Japanese Supreme Court case of *JASRAC v. Videomates, Y.K.*, the Court found that in the case of a product sold for profit with a high likelihood of being used to infringe copyright, the profiting party may be obligated to take some affirmative steps to prevent the infringing use. 1722 HANREI JIHÔ 108 (Sup. Ct., Mar. 2, 2001). In that case, the defendant was a karaoke equipment leasing merchant who did not verify that lessees entered into copyright licensing agreements with the owners of the songs that were played on the

or impossible, the Winny decision will likely have a significant "chilling effect" on computer programmers and other technological innovators by effectively imposing strict liability for the infringing activities of software users.[114]

To date, there have been no civil lawsuits brought against individual file-sharers in Japan.[115] Although hesitant to make confident predictions, Japanese scholars and practitioners expect that for reasons of corporate image and limited potential for recovery and deterrence, such lawsuits are unlikely in the future.[116] A total of four Japanese file-sharers have been arrested on suspicion of criminal copyright infringement, and one was convicted and given a suspended sentence.[117] This may at least in part be due to a general aversion to criminal sanctions in this kind of case, as seen in the widespread criticism of Mr. Kaneko's conviction.[118] Interestingly, one expert commented that Japanese consider criminal copyright sanctions acceptable only against commercial piracy of

---

machines. Merely notifying lessees of this requirement was found to be insufficient, given that a relatively easy alternative, confirming that the licenses had been obtained, existed. *Id.* For a further discussion of this case, *see* Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems Current and Future Issues on Secondary Liability under Copyright Laws in the United States and Japan*, 22 LOY. L.A. ENT. L. REV. 37, 70-71 (2001). This case has not been explicitly applied to Winny, but the result in Winny suggests that the *Videomates* requirement of affirmative steps may apply even to parties who have not made profits and are not found to have had a profit motive. However, it is not clear how much affirmative action would be expected; in the *Videomates* case, the preventative measure the Court required was an easily implementable one that would have had limited direct costs (though the cost consequences of not leasing to parties who may infringe copyright would likely have been far greater).

[114] Interview with Koji Okumura, Professor of Law, Kanagawa University, in Tokyo, Japan, conducted in English (Jan. 23, 2007).

[115] Reputational consequences for entertainment labels of bringing suit against consumers directly appear to be a general deterrent to suits. For a discussion of how this issue has developed in the context of potential suits for infringement of character copyrights, *see* Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?*, 55 RUTGERS L. REV. 155 (Fall 2002).

[116] Interview with Tetsuya Obuchi, Professor of Law, The University of Tokyo, in Tokyo, Japan, conducted in English (Jan. 18, 2007); interview with Tatsuhiro Ueno, Professor of Law, Rikkyo University (Jan. 22, 2007); interview with Koji Okumura, Professor of Law, Kanagawa University, Tokyo, Japan, conducted in English (Jan. 23, 2007).

[117] *Winny File-Sharer Gets Suspended Term*, JAPAN TIMES, *supra* note 44.

[118] *See, e.g.*, *Winny Kaihatsusha taiho ihou copy no onshou ni mesu 「kaihatsu jitai ha gohou」* [Winny Developer Arrested, Breeding Grounds for Illegal Copies Became a Target of Police; Debating "Development Itself is Legal"], Yomiuri Shimbun, May 10, 2004; *Houtekisekinin, doko made 「Winny」 kaihatsushataiho* [How much legal accountability can be assigned? "Winny" Developer Arrested], Asahi Shimbun, May 11, 2004; *Winny kaihatshusha taiho: irei no kaihatsusha taiho ... hosokai ni wa gimon no koe 「sofuto jitai wa gohou」* [Winny developer arrest: unprecedented developer arrest ... doubting voices among legal circles say "the software by itself is legal"], MAINICHI SHIMBUN, May 10, 2004, at http://www.mainichi-msn.co.jp.

physical copies, something that he associated with China and Korea, but not with Japan.[119]

B. Korean Cases: Soribada and Individual Prosecutions

Soribada went online in May of 2000, founded by the brothers Jung-Hwan Yang and Il-Hwan Yang. Before designing Soribada, the Yang brothers visited the U.S. and closely studied Napster. While the Yangs intended that Soribada would be operated as a business and would eventually include a fee-based swapping system, Soribada debuted as a program that enabled users to share files for free.[120] Soribada was quickly sued by the Recording Industry Association of Korea ("RIAK"), an organization representing 133 recording labels. The civil suit alleged that the Soribada business and its operators, the Yang brothers, knowingly aided and abetted copyright infringements by users by maintaining a file-sharing network with transparent requests and exchanges. After an initial order to shut down by the Suwon District Court,[121] the Yang brothers released Soribada 2.0, which had no central servers and thus lacked the search and exchange transparency of the original software.[122]

Finding their original suit, based on the knowledge imputed to Soribada's administrators through the central server structure, to be frustrated, RIAK pressed for criminal copyright charges, which were subsequently brought against the Yangs under Korean Criminal Code, §32.[123] The Seoul District Court dismissed the charges, and the defendants prevailed on appeal in January of 2005.[124] The Copyright Protection Center, an organization created by the Korean Government to enforce copyright laws,[125] sought to remedy a deficiency in the original charges against the Yangs by also charging the "primary" copyright offenders and so filed a criminal suit against 36 users for online copyright violations from January to July of 2005.[126] Even after criminal charges

---

[119] Interview with Tetsuya Obuchi, Professor of Law, The University of Tokyo, in Tokyo, Japan, conducted in English (Jan. 18, 2007). This viewpoint raises an interesting observation: Japanese may often view this kind of economic crime as one generally committed by nations with less advanced economies than that of Japan. The practice of file-sharing may not be viewed as a crime for the very reason that many Japanese people engage in the practice and/or do not consider it to be wrongful.

[120] Kwang-Suk Lee, *supra* note 75, at 804.

[121] Suwon District Court, Seongnam Branch, July 9, 2002, 2002 KAHAP 77.

[122] Deok-Hyun Kim, *Soribada Reopens Music Sharing Service*, KOREA TIMES, Aug. 26, 2002.

[123] Seoul District Court, May 15, 2003, 2001 GODAN 8336.

[124] *Soribada Cleared of Copyright Violation Charges*, KOREA TIMES, Jan. 13, 2005.

[125] *See* Office of the United States Trade Representative, *supra* note 40.

[126] Ah-young Chung, *Internet Users Want Legal File-Sharing*, *supra* note 5.

against the Yangs were ultimately dismissed, the Korean recording industry pressed for criminal sanctions against the individual users.

Starting in December of 2004 with the release of Soribada 3.0, music file downloads were available to purchase through the Soribada program, although the search for a file also returned results of peers sharing the file for free. A second civil suit was brought against the Soribada business enterprise, and the Seoul District Court ruled for the plaintiffs on August 31, 2005.[127] The Court went a step further than previous decisions by announcing that it would be illegal for internet users to distribute Soribada's file-sharing software as well as to share music files with existing peer-to-peer programs, essentially ordering a complete halt to any use of the Soribada program.[128] The decision was appealed to the Korean Supreme Court and, as widely expected by Korean scholars and practitioners,[129] was upheld.[130] The Korean Supreme Court found that the administrators of Soribada (namely, the Yang brothers) aided copyright violations by failing to cautiously avoid assisting copyright infringers. No knowledge of any particular infringement was required for secondary liability; rather, negligence on the part of the defendants was sufficient.[131]

At its peak popularity, Soribada had a very large membership, and it was estimated that 20% of South Koreans registered with Soribada to use the software.[132] In the fall of 2005, Soribada 3.0 went offline. Soribada was re-released in March of 2006, and since April 1, 2006,

---

[127] *See Soribada Shuts Down P2P Site After Court Verdict*, CHOSUN ILBO, *supra* note 10; Cho Jin-seo, *Korea: Internet Users Bypass Music File Subscription Service*, Korea Times, Apr. 5, 2006; Kim Tong-Hyung, *Debate Continues Over Free Music Downloads*, KOREA TIMES, July 11, 2006; Kim Tong-Hyung, *Court Blocks Free File-Sharing Service*, KOREA TIMES, Sept. 1, 2005.

[128] According to the Court, "The defendant admitted that it is impossible to control individuals from uploading and downloading music files on its network. We order a suspension of Soribada's services and the distribution of its programs to guard against the infringement of copyrights." Kim Tong-Hyung, *Court Blocks Free File-Sharing Service*, *supra* note 128.

[129] Interview with Youngjoon Kwon, Professor of Law, Seoul National University, in Seoul, Korea, conducted in English (Jan. 4, 2007); interview with Sirgoo Lee, Attorney, in Seoul, Korea, conducted in English (Jan. 9, 2007); interview with Justin Choi, Attorney, in Seoul, Korea, conducted in English (Jan. 9, 2007); interview with Andy Kim, Attorney, in Seoul, Korea, conducted in English (Jan. 9, 2007).

[130] Supreme Court of Korea, Jan. 25, 2007, 2005 Da 11626. An English language summary is available at http://library.scourt.go.kr/download?sourceFilePathName=/app/sclib/htdocs_sclib/up_file/case_eng/2_85.2005Da11626.htm&destFileName=2_85.2005Da11626.htm. *See also* Bae Ji-sook, *P2P Industry Frowns as Court Bans Its Service*, KOREA TIMES, Oct. 14, 2007.

[131] *Id.*

[132] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD INFORMATION TECHNOLOGY OUTLOOK 2004: PEER TO PEER NETWORKS IN OECD COUNTRIES, *available at* http://www.oecd.org/dataoecd/55/57/32927686.pdf.

Soribada has permitted only the purchase of music file downloads.[133] Unlike in Japan, where a particular program, Winny, emerged as the dominant file-sharing resource after File Rogue was enjoined, the continuing demand for P2P file-sharing in Korea has been met by a large number of new file-sharing software applications, including Pruna and other variants of eDonkey (donkey p2p), WeDisk, Limewire, Nate, Monkey3, bugsmusic, Fileguri, Don Quixote, DieHard, Santa25, PD Box, and File Box.[134]

Following the complaints made against 36 individual users in July 2005, the Seoul Prosecutor's Office charged and obtained convictions against those users. In contrast with the Japanese music industry, the Korean music industry has pursued criminal complaints against many more file-sharers, submitting complaints and delivering information on about 13,000 individual users to the Prosecutor's Office. The Prosecutor's Office then announced a new standard for prosecution: only users who share files for commercial gain will be prosecuted.[135] Consequently, the Prosecutor's Office has not pursued criminal charges against any of the 13,000 users, who were all viewed as having file-shared for private, non-commercial reasons.[136]

V. FILE-SHARING USER BEHAVIORS

It is difficult to determine with any precision the overall rate of file-sharing in Japan and in Korea. Although I have not performed a scientific survey of the general population, surveys and interviews conducted with high school and university students in both countries, a segment of the population one expects would be particularly likely to engage in file-sharing, prove illuminating.

In Korea, of 43 students[137] who shared with me their experiences with file-sharing, 41 stated that they have used file-sharing programs to obtain copies of works they knew to be copyrighted. Of these, 36 did not

---

[133] Han Eun-Jung, *Soribada to Charge Fees in April*, KOREA TIMES, Feb. 28, 2006.

[134] These were the filing sharing applications that interviewees most often mentioned that they used since free downloads have no longer been available from Soribada. *See* survey results, *infra* note 138.

[135] Ah-young Chung, *Commercial Online Music File Swappers Face Criminal Charges*, *supra* note 5.

[136] *See id.*

[137] Twenty-four of the students are seniors in high school; the other 19 are university students. The surveys and interviews were conducted in Seoul, Korea on January 3, 4, 5, 9, and 11, 2007. Surveys were conducted in English and in Korean (translation assistance was provided by Min Ah Lee and Dong-Hyup Ha).

consider their acts to be morally wrong, and 33 believed that file-sharing should not be illegal. The most commonly cited reason for file-sharing was to avoid the expense of buying music. The second most common rationale was that individual action and information sharing on the internet should be open and free. Finally, some students suggested that the very nature of information was that it should be freely exchanged, independent of medium.

In Japan, of 24 students[138] who discussed this topic, 14 indicated that they have shared copyrighted works online. Expense and the desire to "sample" particular tracks were the most commonly mentioned explanations, although convenience was also commonly cited. Of the 14 who had file-shared, six students still felt that file-sharing should be illegal. Overall, 15 thought that file-sharing was morally wrong.

In general, the fraction of students sharing files was broadly consistent with the observed trend that Korean file-sharing rates are very high, while file-sharing is somewhat less prominent in Japan. It was not surprising that in both nations, the cost of obtaining legal copies of works was the most common reason for file-sharing, although it is interesting that Korean students frequently expressed an idea of the internet as a free space in explaining their behavior, while Japanese students frequently cited convenience.

VI. THE ECONOMIC SITUATION IN JAPAN AND KOREA

Copies of many forms of proprietary content can be shared, including films and television programs, computer software, and games. I focus on music because in both Korea and Japan, the music industry has been most vocal about claimed economic loss. Organizations related to the music industry have driven the legal action in both countries as civil litigation plaintiffs[139] and as criminal action complainants.

Both Korea and Japan have experienced a significant decline in CD sales during the past eight years. It is noteworthy that the period of time when the CD market has shrunk corresponds to the approximate

---

[138] Nine of the students are juniors or seniors in high school; the other 15 are university students. Therefore, the majority of my interviews in Japan were with university students, whereas I had a more even split between high school and university students in Korea. It should be noted that the trends for frequency of file-sharing were similar between groups: slightly more than half of Japanese high schoolers and Japanese university students stated that they shared files, while the vast majority of both groups in Korea said that they did. The interviews were conducted Tokyo, Japan on January 18, 19, and 24, 2007. Interviews were conducted in English and occasionally in Japanese (translation assistance was provided by Masahiro Furuko and Alison Furuko).

[139] *See* discussion of *File Rogue* and *Soribada*, Section IV(A) *supra*.

period of time that file-sharing services have been widely available and used by many in the general population.[140] However, there is not a clearly documented causal relationship between file-sharing activities and a decrease in music sales. Amongst other alternative explanations, some of the CD sales have likely been replaced by other legal means of obtaining music, such as fee-based downloading.[141] However, it is apparent from legal strategy and public rhetoric that the major organizations representing the music industry in both Japan and Korea consider file-sharing to be an economic threat to their businesses, and for the purposes of this analysis I shall assume that at least some reduction in the rate of legal acquisition of music has resulted from file-sharing. The relative reductions in sales revenue in the two countries have hardly been equal, however.

The Korean music industry has experienced a significantly larger relative reduction in traditional media sales. In all, annual CD sales in 2005 in Korea shrank to approximately 25% of 2001 levels, resulting in total revenue of less than US$80 million.[142] On the other hand, in Korea digital downloads may at least to some extent substitute for traditional purchases of recorded media. In 2006 and 2007, approximately sixty percent of the music industry's annual revenue came from fee-based legal downloads.[143]

Japanese CD sales have fluctuated up and down in recent years, but the overall trend has been towards a decrease in CD sales revenue. CD sales revenue fell from 607.5 billion yen in 2001 to 367.2 billion yen

---

[140] For a treatment of this issue globally, *see* Brett Keintz, *The Recording Industry's Digital Dilemma: Challenges and Opportunities in High Piracy Markets*, 2 REV. ECON RES. ON COPYRIGHT ISSUES 83-94 (2005)

[141] Other commonly cited factors include consolidation in radio, shifts in consumer spending patterns, declines in the interest of the public in listening to music, and reduction in promotion efforts by record companies. For an examination of the unclear causation between the decline in Japanese CD sales and file-sharing, *see* Tatsuo Tanaka, *Does File Sharing Reduce Music CD Sales? A Case of Japan, available at* http://www.iir.hit-u.ac.jp/iir-w3/file/WP05-08tanaka.pdf. Some studies claim to have found some empirical evidence of a negative effect on music sales from file-sharing. *See, e.g.*, Norbert J. Michel, *The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis*, 6 TOPICS IN ECON. ANALYSIS & POL'Y (Issue 1, Article 18) 1 (2006).

[142] Ethan Smith, *supra* note 11.

[143] Eric Pfanner, *Music Industry Steps Up Search for Digital Revenue*, INT'L HERALD TRIB., Jan. 24, 2008, at 11, *available at* http://www.iht.com/articles/2008/01/24/technology/music.php; Eric Pfanner, *Digital Music Sales Soar 80 Percent in '06*, INT'L HERALD TRIB., Jan. 17, 2007, at 19; INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *supra* note 11.

in 2005, a decrease of about 40%, and have since decreased further.[144] In 2007, CD sales fell to 333.3 billion yen.[145] Although total revenue decreased between 2001 and 2005, revenue has been stable and even grown in subsequent years, increasing from 431.3 billion yen in 2004 to 456.5 billion yen in 2005 to 466.6 billion yen in 2007.[146] Japan, like Korea, has experienced noteworthy growth of digital download sales,[147] though Japan has been slower to adopt the download business model. Japanese downloads remain relatively high-priced compared to equivalent services in the U.S. and especially in Korea, and account for a much smaller percentage of total music sales revenue than in Korea.[148] Still, gross sales of downloaded copies in Japan have exceeded industry expectations and are cited by the RIAJ to explain overall revenue growth in the industry.[149]

Japan and Korea share a strong domestic concern regarding the economic effects of file-sharing and other infringements of copyright, at least rhetorically.[150] Both countries have large entertainment industries that generate significant revenue domestically and internationally. Both, for instance, have internationally prominent popular music artists, and both produce television and film works that have found lucrative markets abroad (Korean television dramas and Japanese anime are well-known examples). It is believed by some scholars that production of creative works in these two nations has reached a point where the society-wide economic interest in protecting those works as domestically produced assets may outweigh the cost savings and other benefits of widespread consumption through piracy.[151] The U.S. itself transitioned from a country of widespread intellectual property piracy to one with significant

---

[144] RECORDING INDUSTRY ASSOCIATION OF JAPAN, RIAJ YEARBOOK 2006, *available at* http://www.riaj.or.jp/e/issue/pdf/RIAJ2006E.pdf.

[145] RECORDING INDUSTRY ASSOCIATION OF JAPAN, RIAJ YEARBOOK 2008, *available at* http://www.riaj.com/e/issue/pdf/RIAJ2008E.pdf.

[146] *Id.* While the RIAJ focuses on an absolute increase in revenues from year to year, the rate of increase has been rather slow, a total of 8.2% for the last three years. *See id.*

[147] Digital download sales reached 75.5 billion yen in 2007, accounting for 16% of music industry recording revenues, twice the share of 2005. *Id.*

[148] Japan's 16% of music distribution revenues from digital downloads compares to a 57% share in Korea. *See id.*; *see* INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *supra* note 11.

[149] *See* RECORDING INDUSTRY ASSOCIATION OF JAPAN, RIAJ YEARBOOK 2008, *supra* note 146.

[150] *See, e.g.*, STRATEGIC COUNCIL ON INTELLECTUAL PROPERTY, STRATEGIC PROGRAM FOR THE CREATION, PROTECTION AND EXPLOITATION OF INTELLECTUAL PROPERTY (2003), *available at* http://www.kantei.go.jp/foreign/policy/titeki/kettei/030708f_e.html (English translation); KIM YOUNG, *supra* note 27.

[151] Interview with Tetsuya Obuchi, Professor of Law, Tokyo University, in Tokyo, Japan, conducted in English (Jan. 18, 2007); interview with Youngjoon Kwon, Professor Law, Seoul National University, in Seoul, Korea, conducted in English (Jan. 4, 2007).

cultural production and strong copyright protections in the nineteenth century.[152] Certain Japanese and Koreans believe that their countries have made or will make the same transition because their national economic interests are best served by a strong intellectual property enforcement regime.[153]

Notwithstanding the negative economic impacts probably caused by file-sharing, such sharing still continues and has not been effectively deterred by economic or legal considerations in either country. Further, a noticeable disparity exists in terms of the scale of purported economic impact of file-sharing between Japan and Korea. Korean file-sharing is more widespread[154] and seems more intractable based on the viewpoints of file-sharers. To analyze the disparity in file-sharing rates and effects between Japan and Korea, it is useful to consider legal differences between the nations, as well as broader social issues.

VII. LEGAL DISTINCTIONS BETWEEN JAPAN AND KOREA

One might seek to explain Japan's lower frequency of file-sharing compared to Korea in terms of differences in law and legal enforcement and the consequences of those legal differences for individual behavior. Both Korean law and Japanese law permit civil and criminal action against individual file-sharers. Given that the two nations have similar copyright infringement punishment regimes, one might suspect that Japan has effectively deterred file-sharing by better enforcing its laws. However, punishment of Koreans and Japanese for file-sharing infringements of copyright has been quite rare. Between the two nations, in fact it is in Korea where there have been significantly more actions and punishments against individual users of file-sharing services. About 30 file-sharing individuals were successfully prosecuted for copyright infringements in Korea,[155] while in Japan there have been only four arrests and one prosecution.[156]

---

[152] *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 234 (2000).

[153] *See* Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 2007); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331 (2003).

[154] *See* "File-Sharing User Behaviors," Section V *supra*.

[155] *See* Ah-young Chung, *Internet Users Want Legal File-Sharing*, *supra* note 5.

[156] *See Winny File-Sharer Gets Suspended Term*, JAPAN TIMES, *supra* note 44; *Japan Police Arrest Two for File Sharing*, CNN.COM, *supra* note 44; IT Jiten, *supra* note 43.

In the absence of greater punitive measures in Japan, what other legal distinctions might account for Japan's relatively low rates of file-sharing? I propose and examine three subtle but potentially meaningful differences: (i) the presence of a legal music rental industry in Japan, (ii) the Japanese private copying exemption compensation system; and (iii) the general tendency towards crafting legislative compromise solutions to copyright disputes in Japan.

In resolving conflicts over the regulation of copyrighted works, certain countries have addressed the issue of rental rights. In the U.S., the United States Copyright Act of 1976 was amended to include an exception to the first sale doctrine for phonorecords,[157] granting an exclusive rental right to the producers of audio recordings and thus requiring would-be music rental businesses to obtain permission from the copyright holders,[158] while owners of legitimate copies of copyrighted works in other forms could dispose of them as they saw fit, including through rental.[159] Unsurprisingly, while video rentals have flourished for much of the past two plus decades, no successful music rental business has been established in the U.S.

A. Rental Right of Copyrighted Audio Works

The rental issue has likewise triggered debate in Japan and Korea. Korea, like the U.S., has vested phonorecord producers with an exclusive rental right, while Japan grants an exclusive right to rent sound recordings to phonorecord producers for the effective term of one year after the original distribution of the phonorecord, after which point the right conferred upon producers is limited to remuneration only.[160] Producers are entitled to receive fees from the rental proceeds but cannot prevent the copies from being rented in the first place. Music rentals are a thriving business in Japan, especially since the introduction of CDs. Consequently, while Korean consumers, like American consumers, can legally acquire music only through the purchase of copies of sound recordings or the invocation of an applicable exception to copyright, Japanese consumers have been able to choose between purchasing a copy or renting a copy.

---

[157] 17 U.S.C. § 109(b)(1)(A) (2006).

[158] In the U.S., the exclusive rental right in phonorecords was granted to copyright holders in the Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727.

[159] The first sale doctrine is a limitation to copyright that permits one who legally acquires a copy of a work to dispose of it as he or she chooses, including through gift or resale, without the permission of or payment to the copyright holder. *See* 17 U.S.C. § 109 (2006).

[160] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 97.

In the digital era, many Japanese make a personal copy of the music recordings that they rent.[161] The rental business model, however, continues to be permitted by the Japanese Act despite this outcome. While it is not clear whether the music industry has benefited from such renting businesses, this distinction in law and its consequences for the music business prepared the industry for the arrival of file-sharing. I argue that this has reduced the potential economic impact of file-sharing on Japanese copyright owners.

For consumers in nations without available music rentals, file-sharing presented an opportunity to obtain music without paying the price of a CD. CDs cost the equivalent of at least US$30 in Japan, while Korean CDs are priced in a range similar to CDs in the U.S.[162] When asked, Korean file-sharers frequently cite the price of music CDs as a motivation for file-sharing.[163] Of 34 Korean students who considered file-sharing to be a substitute for CD purchases, 21 said that they would consider low-priced rentals instead of, or in addition to, file-sharing if such an option were available. Conversely, Japanese high school and university students who elect not to file-share commonly cite the cheap and legal availability of music through rental as a reason not to use file-sharing services.[164] For those Japanese who do elect to file-share, the relevant competition between file-sharing and legitimate music distribution was not with CD sales, but rather the cheapest legal option to obtain a copy, namely, CD rentals. As a Japanese intellectual property expert commented, "The only reason to buy a CD in Japan has always been to get the packaging."[165]

Where the relevant competition, in terms of potential displacement of music industry revenue, is between file-sharing and low-cost music rental, I draw two inferences:

---

[161] Eight of ten CD renters indicated they had made a copy of a rented CD: survey results, *supra* note 139.

[162] Estimates were obtained by reviewing the website CD sales offers of major vendors in the two countries, including www.sony.jp, www.amazon.jp, www.gmart.co.kr, and www.annyoung.com.

[163] Thirty-seven of 41 Korean file-sharers cited price as a rationale. Survey results, *supra* note 138.

[164] Of the ten students surveyed who did not file-share, seven stated that rental availability affected their decision. Survey results, *supra* note 139.

[165] Interview with Mr. Hideo Ogura, Attorney, Tokyo-Hirakawa Law Office, in Tokyo, Japan, conducted in English, (Jan. 23, 2007). Technically, music within the one year exclusive rental right period may be available only for purchase and not for rental because the rental right is still exclusive during this time. Given the presence of the rental industry and the inevitable rentals to begin, at latest, a year after release, music is frequently licensed for rental even during the first year.

1. consumers are relatively less likely to file-share when an inexpensive and legal option to acquire the content is available; and
2. when consumers elect to file-share rather than to rent, the income to the copyright holder displaced by each decision is smaller than when the displaced legitimate option is the purchase of a full-price copy of the sound recording.

Of course, not every instance of file-sharing is itself a displacement of a legitimate copy sale or rental.[166] Nevertheless, file-sharing does probably supplant some quantity of legal copy acquisition that is remunerative for the music industry. In the case of Japan, the rise of file-sharing led to relatively fewer such substitutions because file-sharing is less attractive as a substitute for CD rental than as a substitute for much more expensive CD purchases. The substitutions that would occur would displace less revenue per substitution where the substitution is for a rental. In explaining the lower Japanese frequency of file-sharing compared to Korea, the availability of music rentals may be an important factor driving such a distinction.

Interestingly, the difference is not that the Japanese music industry is particularly adaptive or forward-thinking, but rather that the Japanese Government has forced the industry to adapt by legislatively balancing economic interests with wide consumption of creative works and retention of copies by individuals. If anything, the Japanese music industry has been unusually slow to act on its own; for instance, the online sale of music downloads was initially obstructed in Japan by the refusal of the industry to negotiate with iTunes and other online vendors interested in expanding into Japan. (iTunes now operates a Japanese store with tracks available for 150 yen or 200 yen per track.[167]) In spite of little adaptive momentum within the Japanese music industry, governmental policy has forced it to cope with the realities of new technologies, and specifically with the proliferation of digital copies of music that are not paid for.

---

[166] Indeed, a virtue of file-sharing is that the total quantity of cultural creations consumed by each file-sharer is likely far greater than if file-sharing was not available and all such content was obtained as proprietary copies. The average file-sharer likely obtains and listens to some music that she would neither buy nor even rent in the absence of file-sharing.

[167] *See, e.g.*, http://www.apple.com/pr/library/2005/aug/04itms.html. Although exchange rates fluctuate, the price can be considered to be about US$1.50 to 2. Due to the limited availability of legitimate downloads, Japanese file-sharers cite convenience as a major motivation behind their sharing activities. Survey results, *supra* note 139.

B. *Compensation System for Private Copying Exemption*

Both Japan and Korea include in their national copyright statute a relatively permissive personal use exemption allowing copies to be made for private use amongst family and a close social circle. These personal use exemptions have been criticized for being too broad, although it has been argued that such a policy simply legalizes activities that the government cannot prevent and that many individuals will independently judge an appropriate use of copyrighted works (i.e., private copying for use in the home in the company of family and friends only).[168] It seems doubtful that either Japan or Korea would act to prevent these private uses even if a prevention mechanism existed.[169] The parameters of the exemption have drawn little legal attention in either Japan or Korea.

To complement its personal use exemption, Japan has sought to compensate copyright owners for potential loss of income from private copying by charging a fee (the "Article 30(2) Fee") on certain retail products, such as blank CDs and other media often used for recording copies of works, under Article 30(2) of the Japanese Act. The funds are then conveyed to JASRAC for distribution to individual copyright holders.[170] The manner of distribution is managed privately by JASRAC.[171]

Private copying is legally permissible and does occur frequently in Japan. Though the total revenue generated by the music industry from the Article 30(2) Fees might not be very large compared to other revenue streams,[172] the Japanese compensation system does represent a distinction in law in which Japanese lawmakers have sought to craft statutory compromises that will provide support to artists. The Article 30(2) Fee provides an additional revenue source that supplements the overall

---

[168] Amongst Korean scholars, the point has been made by Professor Sang-Jo Jong. *See* Sang-Jo Jong, *Criminalization of Netizens for Their Access to On-line Music*, 4 JOURNAL OF KOREAN LAW 58 (2004).

[169] Korea's recent policy decisions not to punish individual non-commercial file-sharers, even where music industry watchdogs had gathered evidence themselves and presented complaints to Seoul prosecutors, suggest the difficult position that governments and prosecutors find themselves in when asked to prosecute "crimes" that center on widespread, commonly accepted, private (and especially home-based) activities.

[170] *See also* Salil K. Mehra, *The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, *supra* note 56.

[171] Interview with Mr. Daisuke Tatsuno, Attorney, Tokyo Aoyama Aoki Law Office-Baker & McKenzie, in Tokyo, Japan, conducted in English (Jan. 20, 2007).

[172] Compensation through this mechanism totaled 413.9 million yen in 2007. RECORDING INDUSTRY ASSOCIATION OF JAPAN, RIAJ YEARBOOK 2008 (2008), *supra* note 146.

monetary incentive to produce music while preserving a relatively broad sphere for personal autonomy and enjoyment of cultural works.

This provision, like the rental rules, compels industries affected by new technologies to accept that individuals will likely use those technologies in ways that the industry would not prefer, such as using CD burners to copy CDs, and so forces these industries to cope with new technologies and social attitudes while providing some statutory support for maintaining profitability. Recent debates on this subject have centered on what products should be subject to the Article 30(2) Fee. After much discussion, the iPod has so far not been subject to the fee,[173] though I consider the reasoning for this decision to be dubious.[174] One might imagine that Japan could broaden Article 30 by more liberally interpreting the private use exemption and by correspondingly increasing the amount of the Article 30(2) Fee and/or increasing the number of products subject to the Article 30(2) Fee. Japanese scholars have expressed the concern that, taken too far, such a structure could violate Japanese international treaty obligations, including TRIPs,[175] while practitioners emphasize that Japan's well-funded and influential entertainment industry could be expected to effectively lobby against any expansion of the private use exemption, inasmuch as it would need to be implemented by the Japanese Diet.[176] These seem to be legitimate concerns, but one should not discount at least the broader tendency in Japan to utilize legal measures to temper the conflict between individual freedom and access to creative works on one hand and financial incentives to authors and artists on the other.

The approach of the Japanese Diet and the courts to such issues as music rental, punishment of end users, and private use compensation may be applied in other contexts; of particular interest is the unresolved issue of secondary liability in Japan.

---

[173] Mehra, *supra* note 56.

[174] The rationale is apparently that not all iPod users also make private copies of copyrighted works that displace legitimate sales. However, this is a questionable distinction, as not all purchasers of products already subject to the fee, such as blank CDs, make such copies, either. It seems reasonable to expect that most iPod owners, like many blank CD purchasers, will store private copies on the purchased media.

[175] Interview with Tetsuya Obuchi, Professor of Law, Tokyo University, in Tokyo, Japan, conducted in English (Jan. 18, 2007); interview with Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan; conducted in English and Japanese (Jan. 22, 2007); interview with Koji Okumura, Professor of Law, Kanagawa University, in Tokyo, Japan, conducted in English (Jan. 23, 2007).

[176] Interview with Mr. Daisuke Tatsuno, Attorney, in Tokyo, Japan, conducted in English (Jan. 20, 2007); interview with Mr. Ryota Goto, Attorney, in Tokyo, Japan, conducted in English (Jan. 16, 2007).

C. *Secondary Liability Amendment: Growing Momentum in Japan*

The tendency of the Japanese Diet to broker compromises on issues of technology and copyright is likely to continue with a carefully balanced amendment to the Japanese Act to address secondary liability. The conviction of Mr. Kaneko for programming Winny and distributing it to the public has attracted substantial media attention and criticism. There has been sharp criticism of the use of a criminal sanction against Kaneko.[177] As a Japanese scholar observed, "It is illogical that Mr. Kaneko is guilty of a crime, but not liable [to be subject to] an injunction."[178] Kaneko likely could not have been targeted for injunctive relief in a civil suit because the application of the Karaoke Doctrine, seemingly stretched to its limit in the *MMO File Rogue* case,[179] is very unlikely justified in Mr. Kaneko's case for the reasons which follow. First, not only did Kaneko receive no revenue from his role as programmer and distributor of Winny, but he had no business plan or other commercial interests attached to the program, nor any existing model for extracting economic value out of Winny, such as inserting ads in the Winny interface. Thus, the "profit" prong of the Karaoke Doctrine almost surely could not have been satisfied. Further, in the absence of any mediating role of a central server in file-sharing exchanges,[180] it is unclear under *MMO File Rogue* (which emphasized the importance of the central servers) whether Kaneko's actions could be said to have satisfied the "control" prong, either. Given the state of the statutory law and its ill-fit with the technology of Winny and the behavior of Mr. Kaneko, criminal prosecution was the last legal resort.

This situation demonstrates that the present civil law is inadequate to address current legal and social debates in Japan. Criminal prosecution of Mr. Kaneko, an accomplished, productive member of society not seeking profit from his creative activities, represents a significant disturbance in the balance that the Japanese Government has sought to establish between competing interests in the copyright debate. Interestingly, while optimizing creativity and innovation through the

---

[177] *See, e.g.*, Asahi News Blog, http://www.asahi.com.

[178] Interview with Tetsuya Obuchi, Professor of Law, Tokyo University, in Tokyo, Japan, conducted in English (Jan. 18, 2007).

[179] *See* discussion in "Case Histories of Japan and Korea: Japanese Cases: File Rogue, Winny," Section IV *supra*.

[180] As discussed in "Technical Architecture of Major Japanese and Korean File-Sharing Services," Section III *supra*, Winny is a "pure" P2P file-sharing program.

protection of incentives for artists and authors is often cited as a justification for strong copyright law, in this case excessive legal enforcement could have the effect of stifling innovation in the software field. Restoring a balance between social and technological freedom and innovation and the economic interests of copyright holders requires a modification to current law to extend injunctive relief to indirect infringements. Such a modification could also resolve the split between the Tokyo and Osaka courts on the issue of granting injunctions against indirect copyright infringers, discussed *supra*. Introducing explicit secondary liability provisions in the Japanese Act would permit injunctions available under the law to be applied against parties playing a secondary role in infringement. In Japan, a debate is currently underway as to what kind of secondary infringement rule would be most propitious, but one expects that, consistent with its prior approach, the Diet will elect to amend the Japanese Act in the near future.

Some Japanese scholars have advocated in the academic literature for a brand of "active inducement,"[181] similar perhaps to the U.S. Supreme Court's decision in *MGM Studios, Inc. v. Grokster, Ltd.*,[182] but carefully codified to reflect trade-offs between competing social interests.[183] The Japanese Working Group has surveyed legal approaches throughout the world in its consideration of possible amendments and has given consideration to a statutory active inducement standard. Some in the music industry would likely object to the standard, contending that it is too narrow and specific.[184] It remains unclear whether a lower bar might be proposed for establishing secondary liability. In any case, one expects the Japanese Diet to continue its tradition of intervening to balance interests, prevent socially undesirable legal outcomes, and reduce the economic anxieties of the entertainment industry through piecemeal legislative compromises.

---

[181] "Active inducement" would require that a defendant engaged in an act or acts that promoted or advanced the use of the underlying technology to infringe copyright, although there is no single definition of what acts would qualify, what mens rea would be required on the part of the defendant, or what other specific elements would be required to qualify an act or acts as "active inducement." In *MGM Studios, Inc. v. Grokster*, Ltd., the U.S. Supreme Court described its inducement standard as "[the defendant] distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement." 545 U.S. 913, 918 (2005).

[182] *Id.*

[183] *See* Tatsuhiro Ueno, JURISUTO No. 1326 (Japan), Jan. 1, 2007, at 75.

[184] Interview with Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan, conducted in English and Japanese (Jan. 22, 2007).

VIII. OTHER POINTS OF COMPARISON AND THE DISTINCTIVE KOREAN CASE

Beyond the legal distinctions drawn earlier, certain social and historical factors affect the unique state of file-sharing in Korea. These factors include Korea's uniquely high rate of broadband internet access, historical experience of copyright law as a foreign imposition, and cultural views and practices.

A. Rates of Internet Access

In evaluating how prominent file-sharing activities are and will likely be in the future in a society, a threshold issue is what portion of the society can be considered potential users of file-sharing software. Korea has the highest rate of internet access in the world, with over 94% of Korean households having internet access at the end of 2007.[185] In fact, since the introduction of Soribada in 2001 and the beginning of widespread file-sharing in Korea, the nation has consistently sustained the highest rates of access in the world.[186] After Japan experienced relatively low connectivity rates in the early years of file-sharing due to poor broadband infrastructure, high-speed internet access has significantly improved.[187] However, Japan's rate of home internet access is average amongst OECD nations, at just over 60% as of 2007.[188]

Based on levels of access, file-sharing has consistently had the potential to be quite widespread in both nations since the introduction of file-sharing software, but the fraction of Koreans with the connectedness to be file-sharers has been particularly high.[189] Since Korea has a higher rate of internet access than Japan, it has a larger fraction of individuals

---

[185] *S. Korea Tops OECD in Internet Penetration*, KOREA TIMES, *supra* note 9. *See also* Rob Frieden, *supra* note 9.

[186] *S. Korea Tops OECD in Internet Penetration*, KOREA TIMES, *supra* note 9.

[187] *See Korea Telecom Eyeing Japan's DSL Market*, Asia Pacific Telecom, June 1, 2001, at 11.

[188] *See* OECD DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY, OECD KEY ICT INDICATORS, *available at* http://www.oecd.org/document/23/0,3343,en_2649_34449_33987543_1_1_1_1,00.html. Japan has similar household internet access rates to the U.S. *See S. Korea Tops OECD in Internet Penetration*, KOREA TIMES, *supra* note 9.

[189] As one professor commented, "The internet boom was very sudden, people considered it very transformative. Korean people are very dynamic, and in a very short time they accepted the new technology and the new space." Interview with Youngjoon Kwon, Professor of Law, Seoul National University, in Seoul, Korea, conducted in English (Jan. 4, 2007).

with the technological ability to file-share, but this fact alone fails to capture the full scope of the file-sharing disparity.

B. *History of Copyright*

In Japan, copyright law was adopted in response to Japan's initial encounters with the West and as a bargaining concession in the renegotiation of treaties with the Western powers.[190] Thus, copyright can be seen in Japan the way it has been described in China: measures adopted as culturally foreign formal laws to appease the West.[191] However, the Japanese voluntarily undertook intellectual property legal obligations as part of a broader, independently formulated and long-term political strategy. The West lacked the power over Japan to impose intellectual property laws, but Japan viewed the adoption of such laws as a small price it would willingly pay to improve its international stature and treaty status.[192] Further, by the time that the original Japanese Copyright Act was adopted, Japan was industrialized and had a large publishing industry. Apart from its diplomatic strategy, domestic economics provided an incentive for Japan to adopt copyright provisions and, at least to some extent, to enforce them.

In contrast, Korea's entire history of copyright law through the early 1990s was one of imposition. No formal copyright law existed in Korea prior to Japan's annexation of Korea at the end of the nineteenth century. From the beginning of Korea's protectorate relationship with Japan through the post-occupation era, Japanese copyright law was enforced in Korea by Japanese decree, Japanese rule, or, in the chaotic years following Japan's withdrawal from the Korean peninsula, as the pre-existing default legal regime. When Korea finally passed its own laws, the nation was heavily dependent upon the U.S. for military protection and economic aid. When Korea rewrote its Copyright Act, the new text was crafted to reflect American preferences for relatively protective provisions.[193] In the era of the modern Korean Act, the U.S.

---

[190] *See* MCLAREN, *supra* note 14.

[191] Priest, *supra* note 12. I do not mean to generally introduce China to this analysis or to comment upon the view, discussed by Prof. Alford and Mr. Priest, *infra* note 217, that a cultural disconnect exists in China between prevailing social philosophies and copyright law. However, confining the analysis to the issue of imposition of foreign laws, it is significant to note that the Korean people had unusually little control over the promulgation of their copyright laws during this period, while Japan had a particularly well-developed diplomatic agenda behind the promulgation of its laws.

[192] *See* MCLAREN, *supra* note 14.

[193] For more detailed examinations of American influence in this stage of Korea's copyright law development, *see* Enger, *supra* note 37, at 199; GADBAW, *supra* note 12, at 272, 276, 279; Young A. Lee, *Recent Developments in Korean Law with Notes on the Protection of*

has pressured Korea to more closely enforce copyright law.[194] For Koreans who see twentieth century history in terms of successive imposition and influence by Japan and then by the U.S., including the implementation of the legal regimes preferred by those external powers, respect for the laws that remain from those eras is diminished accordingly. I do not suggest, as some would, that it is traditional culture in Korea that creates an incompatibility with those laws, but rather a general view that Koreans can and should remake laws shaped by foreign influence according to their own social will and preferences.

C. *Confucian View of Copyright in Korea and Japan*

Many in academia, journalism, and government have suggested that the nature of the tension between Korean society and its current copyright law is fundamentally philosophical. They argue that Koreans traditionally regarded artistic works as public goods, not private property, and the creation of such artistic works need not be incentivized through an American-style copyright regime.[195] Traditional Confucian ideals that elevate scholarship above the level of mere economic transaction and emphasize collective social benefit may help to explain a cultural non-acceptance of western copyright doctrine.[196] Though the Korean Government has gone to some lengths, at the behest of the U.S., to

---

Computer Software, 15 KOREAN J. COMP. L. 186, 196-197 (1987); Byoung Kook Min & Gary Sullivan, *Recognition of Proprietary Interests in Software in Korea: Programming for Comprehensive Reform*, 8 MICH. YEARBOOK INT'L LEGAL STUDIES 49, 50 (1987); Song, *supra* note 12, at 3; Youm, *supra* note 7, at 298.

[194] *See, e.g.*, Anna Y. Park, *Recent Development, International Trade-Agreement Between the United States and Republic of Korea Concerning Insurance Market Access and Intellectual Property Protection in the Republic of Korea*, July 21, 1986, 28 HARV. INT'L L.J. 166, 166-67 (1987) (discussing the sanctions threatened by the U.S. against Korea under Sec. 301 in 1986); Press Release, Office of the U.S. Trade Representative, U.S. Finds S. Korea IPR Regime Problematic, Increases Scrutiny (Jan. 8, 2004), *available at* http://seoul.usembassy.gov/e010804.html.

[195] *See, e.g.*, KIM YOUNG, *supra* note 27, at 161; Sang-Jo Jong, *Recent Developments in Copyright Law of Korea*, *supra* note 12, at 47; Song & Kim, *supra* note 12; Wineburg, INTELLECTUAL PROPERTY PROTECTION IN ASIA §1.01, *supra* note 12, at 1-9; Damon Darlin, *Where Trademarks Are up for Grabs: U.S. Products Widely Copied in South Korea*, WALL ST. J., Dec. 5, 1989, at B1, B5; Kyung-Won Kim, *A High Cost to Developing Countries*, N.Y. TIMES, Oct. 5, 1986, §3, at 2; Yong-sik Song, *supra* note 12; GADBAW, *supra* note 12, at 272, 283; Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, *supra* note 12. *But see* Il-Hyung Lee, *Culturally-Based Copyright Systems?: The U.S. and Korea in Conflict*, 79 WASH. U. L.Q. 1128 (2001).

[196] *See* Song & Kim, *supra* note 12, at 120; WINEBURG, INTELLECTUAL PROPERTY PROTECTION IN ASIA §1.01, *supra* note 12, at 1-9; Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, *supra* note 12; GADBAW, *supra* note 12, at 272, 283.

educate Koreans on the new copyright regime,[197] it seems that familiarity with Western copyright principles has not led to those principles being widely embraced in Korea.[198]

The view that an artist is rewarded not through monetary compensation, but through the dignity and honor that is accorded the author of a highly regarded work, may at least remain a colorable claim as applied to academic treatises and perhaps high-society art, but this idea seems inapplicable to Korean popular culture. It seems rather implausible that pop music idols would assume that they were producing art for the broad enrichment of the society and would thereby derive an incentive to create.[199] Likewise, average consumers would probably not expect that they were according to an artist cultural honor and status by listening to the artist's pop music.[200]

Further, the Confucian theory does not help to explain Koreans' view towards consumption of foreign-produced art.[201] The logic of the Confucian "anti-copyright" argument depends upon a certain social relationship between the author of the creative work and those who consume it where the author receives the accolades conveyed by the public and thereby experiences elevated status and importance in the society. This social arrangement, if a doubtful explanation of present-day Korea, simply does not exist where the authors are foreigners.[202] Arguably, the assumption that no property interests attach to creative works is so engrained that Koreans impose it subconsciously. Arguing from alleged subconscious attitudes seems of limited rigor. Further, this entire line of argument is undermined by the growth of materialism and the increasing value placed on economic status in Korea, both of which

---

[197] Sang-Jo Jong, *Recent Developments in Copyright Law of Korea*, *supra* note 12, at 47.

[198] Copyright infringements continue to occur frequently despite significant efforts by the Korean Government to educate the Korean public in modern copyright law. *See* Song & Kim, *supra* note 12, at 120; Song, *supra* note 12, at 1; Wineburg, *Jurisprudence in Asia*, *supra* note 12, at 25.

[199] In fact, in traditional Korean culture, entertainers held little prestige and were not honored for their art. *See* ANDREW C. NAHM, KOREA, TRADITION & TRANSFORMATION: A HISTORY OF THE KOREAN PEOPLE 101 (1988); Won Soon Park, *The Korean Situation on Music Copyright*, at 1, in INTERNATIONAL SYMPOSIUM ON THE NEW COPYRIGHT LAW.

[200] Apparently, entertainers are still not accorded particular respect, as seen in Korean vernacular. *See* Il-Hyung Lee, *supra* note 196, at 1127 (referencing the term "ddan-dda-rah" as a presently used derogatory reference to entertainers).

[201] *See id.*

[202] Rising anti-Americanism in Korea over the last several decades may further weaken the idea that Koreans mean to honor Americans or American artistic traditions through their consumption of U.S.-produced works. *See id.* at 1152-54.

suggest that, in modern Korean culture, monetary rewards may often displace academic status as a primary measure of success.[203]

Of the Korean students surveyed, almost all file-shared copyrighted works, and few considered it to be wrongful.[204] However, many stated they thought it was wrong to purchase pirated physical copies, and they said they would not purchase such copies even though they were not deterred from doing so by fear of punishment.[205] If it is accurate that Koreans who infringe copyright are influenced by a Confucian values system that considers private copyright to be a foreign concept, in the absence of fear of punishment there should be no difference between attitudes towards piracy of physical copies and of digital copies. While the Confucian argument applies generally to copies of works in all forms, what made file-sharing acceptable to Korean file-sharers was that it was occurring on the internet. Therefore, Korean file-sharers' differing attitudes towards piracy in physical copies and digital copies cast further doubt on this argument.

A similar logic applies to the role of traditional culture in Japan,[206] where the general scholarly consensus is that Confucian views of society and scholarship are less influential than in Korea.[207] For example, Japan has strong moral rights provisions in the Japanese Act,[208]

---

[203] *See generally* DENISE POTRZEBA LETT, IN PURSUIT OF STATUS: THE MAKING OF SOUTH KOREA'S "NEW" URBAN MIDDLE CLASS 19, 40 (1998) (citing CLARK W. SORENSEN, ANCESTORS AND IN-LAWS: KINSHIP BEYOND THE FAMILY, IN ASIA'S CULTURAL MOSAIC: AN ANTHROPOLOGICAL INTRODUCTION 118, 144 (Grant Evans ed., 1993)); Andrew E. Kim, *Korean Religious Culture and Its Affinity to Christianity: The Rise of Protestant Christianity in South Korea*, 61 SOC'Y OF RELIGION 117 (citing survey data indicating that the most common reason offered for the conversion to Christianity by Koreans is the anticipation of material gain).

[204] Thirty-six out of 43 did not consider file-sharing copyrighted works to be morally wrongful. Survey results, *supra* note 138.

[205] Of 43, 31 thought physical piracy to be morally wrong. Survey results, *supra* note 138.

[206] In particular, it is doubtful that young Japanese, who are an important entertainment industry target market and who likely account for much of Japan's file-sharing activity, are influenced by traditional cultural notions. An undergraduate law professor observed, "The Confucian culture has little influence on Japanese young people. Most of Japanese young people are more influenced by American culture". Interview with Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan, conducted in English and Japanese (Jan. 22, 2007).

[207] Interview with Tetsuya Obuchi, Professor of Law, Tokyo University, in Tokyo, Japan, conducted in English (Jan. 18, 2007); interview with Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan, conducted in English and Japanese (Jan. 22, 2007); interview with Koji Okumura, Professor of Law, Kanagawa University, in Tokyo, Japan, conducted in English (Jan. 23, 2007). *But see* Scott, *supra* note 12.

[208] Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 18-20. For a discussion of Japanese moral rights provisions, *see* Scott, *supra* note 12, at 328-41.

and many copyright suits are pursued even where any available damages would be far outweighed by litigation costs, presumably for reasons of vindicating personal rights and beliefs.[209] Strongly worded and enforced moral rights provisions communicate certain ideas about the way that a society values creative works but lead to an opposite outcome from what traditional collectivist "Confucian" values would suggest.[210] Rather than accommodating wide distribution of the work, moral rights enable individual author or artist preferences to be vindicated without consideration of collective social preferences for the distribution of that work.[211] By embracing a moral rights policy where the personality and individual expression of the author are empowered relative to other copyright rationales, such as the social utility of making works widely available to the public,[212] Japan's cultural views on copyright have produced a copyright regime that is relatively more restrictive, not less restrictive.[213]

While it is impossible to fully isolate and measure the effect of traditional philosophy, these considerations indicate that Confucian philosophical views do not substantially impact attitudes towards copyright infringement in either Korea or Japan, at least relative to other factors. While physical piracy is not widely tolerated in either country, at least not philosophically,[214] file-sharing is treated differently. In this way, Korea and Japan both present a strong contrast with prominent

---

[209] Interview with Tetsuya Obuchi, Professor of Law, Tokyo University, Tokyo, Japan; conducted in English (Jan. 18, 2007).

[210] *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 7-20 (1994), for a discussion of the philosophical underpinnings of moral rights doctrines in Continental Europe, from whence they were exported to Japan.

[211] *See generally, id.*; *see also* Stig Strömholm, *Droit Moral-The International and Comparative Scene from a Scandinavian Viewpoint*, 14 INT'L REV.INDUS.PROP. & COPYRIGHT L. [I.I.C.] 1, 13 (1983).

[212] *See* William W. Fisher, Theories of Intellectual Property, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001).

[213] For further discussion of Japanese legal circumscription of widespread exchange of cultural works, *see* Tyler G. Newby, *What's Fair Here Is Not Fair Everywhere: Does The American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1644 (1999) (stating that "Japan lacks a broad fair use doctrine"); Keiji Sugiyama, *The First Parody Case in Japan*, 9 EUR. INTEL. PROP. REV. 285, 286 note 2 (1987) ("[T]he Japanese Copyright Act does not contain a general fair use provision analogous to section 107 of the United States Copyright Act.").

[214] This is not to say that piracy of physical copies does not occur in both societies, particularly in Korea. *See supra* note 189. However, Koreans and Japanese both widely expressed the view that physical piracy should be illegal. Survey results, *supra* notes 138 and 139.

views in the academic literature regarding China,[215] as well as anecdotal evidence on the subject.[216]

In both Korea and Japan, then, there is good reason to doubt that Confucian philosophy has a significant impact on file-sharing behaviors, so this issue creates little distinction between the two nations. While historical experiences with copyright, discussed *supra*, may help explain the difference between rates of Korean and Japanese file-sharing and different attitudes about the wrongfulness of file-sharing, a further issue offers a fuller and perhaps more significant basis for distinction: the different role that the internet has played in the two societies, especially in terms of its impact on social organization and participation in political culture.

D. Social and Political Activity on the Internet

i. Semiotic Democracy

"Semiotic democracy" refers to a social state wherein individual members of a society help to shape the broader interpretation of cultural content and was introduced by Professor John Fiske in his book entitled "Television Culture".[217] Professor Fiske argued that even though television viewers merely watched rather than produced content, they nonetheless helped to create cultural meaning, and thus to participate in semiotic democracy, by developing their own interpretations of cultural content.[218] With the arrival of an open and interactive distribution platform – that is, the internet – individuals may now author widely disseminated content.[219] Of particular interest in the context of digital technologies is the possibility for greater collaboration between individuals.[220] Koreans have proven particularly inclined to participate in collaborative internet activities. For instance, Naver, the Korean

---

[215] *See* ALFORD, *supra* note 12. *See* also Priest, *supra* note 12.

[216] A representative of a Korean company with substantial holdings of copyrighted content discussed the difficulty of doing business in China: "I think it is a matter of priority. Different cultures have different priorities. In the U.S., it is a top priority to protect IP because they have a lot of content. In China, it is a low priority topic because building factories is more important at this stage of economic development. The costs of having your copyrights infringed are just a cost of doing business in China." Interview with Sirgoo Lee, in-house counsel at NHN Corporation, Seoul, Korea, conducted in English (Jan. 9, 2007).

[217] JOHN FISKE, TELEVISION CULTURE 62-83 (1987).

[218] *Id.* at 62-83.

[219] *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 28-31 (2004).

[220] *See id.* at 30.

company that owns Korea's most popular internet search engine, established a program called "KnowledgeIn" in 2004 where users post questions that are answered by other users.[221] In four years, Naver has compiled a database of over 80 million pages of questions and answers.[222]

The concept of semiotic democracy is predicated on the assumption that cultural outputs will be widely available,[223] and in the interactive internet age, on the assumption that tools for the creation and distribution of works will also be available. File-sharing programs play a significant role in facilitating semiotic democracy because they promote wide distribution of cultural works. While publicly accessible content can be posted through online channels other than file-sharing, two characteristics make P2P file-sharing unique: it is egalitarian and it is viral.

File-sharing, unlike web posting, gives all content creators similar opportunities to have their content discovered and shared. Traditional website postings can be accessed by others who know the web address where the file is located or who find the content by using search engines. Search engines rank results according to algorithms that give a significant advantage to pre-existing and institutionally supported content that is embedded more deeply in the interlinked fabric of cyberspace.[224] On a P2P network, each user has an equal chance to make content available to other users that may be identified according to common interest.

More critical to semiotic democracy is the viral nature of P2P networks. Content that is made available at a particular point on the internet can be controlled by censorship at that point; for instance, a file posted to a website can be removed by the internet service provider who provides the access and bandwidth for the individual poster. While it is natural to think of cyberspace as essentially free, the ability to suppress content systematically and selectively at chosen points makes cyberspace highly regulable, at least potentially.[225] However, P2P networks help circumvent the problem of control or suppression because, once a file is shared, recipients will not only possess the new file but in most cases will share that file with other P2P users as long as it is retained (unless the recipients elect not to share the file). A file on a website may be "shared"

---

[221] http://www.naver.com. Naver's KnowledgeIn was founded three years before Yahoo! Answers, and has been credited as an inspiration for the Yahoo! service by former Yahoo! Vice President for the Advanced Development Division, Bradley Horowitz, on his blog. See http://www.elatable.com/blog/?p=35.

[222] http://kin.naver.com.

[223] *See* Fiske, *supra* note 218.

[224] *See* Sergey Brin and Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, *available at* http://infolab.stanford.edu/pub/papers/google.pdf.

[225] *See* Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1996-99 (2006).

via downloading from the site, but the fact that files naturally move radially through a P2P network while being passively shared and easily exchanged by a potentially exponentially growing number of users limits the means by which information can be controlled on the internet.[226]

In Korea, file-sharing of copyrighted works may be infringement under the law, but it is not necessarily viewed as wrong by a majority of individuals in the society simply because it is against the law.[227] Rather, file-sharing of all kinds of works may be seen as a mechanism to bring about cultural sharing and a more semiotic culture. Though all of the students I interviewed were aware of the *Soribada* case and its outcome, when asked, 36 out of 43 students stated that they did not consider file-sharing copyrighted works wrongful.[228] File-sharing may not be viewed by those students as a crime where the intent of the sharers is not to deprive another of economic value, but to participate in a freer and more collaborative culture. In contrast, 15 of 24 Japanese students expressed the opinion that file-sharing copyrighted works is wrongful.[229]

The non-infringing uses of Soribada that were obstructed (or at least displaced into other file-sharing networks) upon the enjoinment of Soribada, and the value placed upon the ability to make those exchanges, as well as to interconnect with other members of the society more generally, was evident in the attitudes of file-sharers. When asked generally what considerations are important in making file-sharing laws and deciding how they should be enforced, 16 of 41 Korean students interviewed raised the desirability of internet freedom.[230]

The extent to which Koreans have embraced the empowering effects of semiotic democracy offers an alternative explanation for the frequency of Korean copyright infringements and challenges the proposition that the Korean Government could more aggressively enforce

---

[226] In some instances, clear social benefits have resulted from the ability of individuals to share files in spite of organized resistance by powerful actors. An American example proves illustrative. Diebold, a company that manufactures voting machines, produced a series of internal memos acknowledging that the vote tallying by some of its machines was inaccurate. The memos were leaked and posted online and were exchanged by students via file-sharing in spite of Diebold's successful efforts to pressure internet service providers to remove postings of the memos from websites. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS, 227-32 (2006). While use (and perhaps abuse) of legal channels could eliminate content from websites, no clear measure could be taken to prevent file-sharing of the incriminating memos. Ultimately, the documents were discussed in the mainstream media, and government officials finally demanded accountability from Diebold. *Id.* at 232.

[227] *See* Sang-Jo Jong, Recent Developments in Copyright Law of Korea, *supra* note 12.

[228] Survey results, *supra* note 138.

[229] Survey results, *supra* note 139.

[230] Survey results, *supra* note 138.

violations of copyright online. Korean prosecution policy up to the present time can be seen as a balance struck between social resistance to impeding the use of file-sharing programs and economic interests and the rights of authors generally. With the present moratorium on prosecutions of non-commercial file-sharing,[231] the pendulum on that balance has been shifted (perhaps, given societal dynamics and pressures, forced) in the direction of free exchange and consumption of copyrighted works.

ii. Political Democracy

While semiotic democracy may have significant value to individuals in a society, a connection between file-sharing and political democracy could prove particularly powerful in impacting future regulations. Though the controversy surrounding Soribada may, at first glance, appear to be rather unrelated to Korean political democracy, the decisions that Korea as a society make about its regulation of file-sharing and the internet in general may impact the democratic experience. As a nascent democracy, Korea may place more emphasis than other countries, including Japan and the U.S., on the role of online networking technologies in political life.

Korea was ruled for decades by authoritarian dictators beginning with General Park Chung-hee's coup d'etat in 1961.[232] The internet's rise to widespread use and prominence roughly corresponded with the first free and fair Korean presidential elections in the 1990s.[233] As a Korean scholar described it, "As a reaction, people thought that this was a real forum for real democracy. People thought that they could do anything in this cyberspace [unlike in the physical world]."[234] Restrictions on what programs can be provided to internet users, especially programs that

---

[231] *See* Ah-young Chung, *Commercial Online Music File Swappers Face Criminal Charges*, *supra* note 5.

[232] *See* JUERGEN KLEINER, KOREA: A CENTURY OF CHANGE (2001).

[233] The first seriously contested presidential election occurred in 1988, with the election of General Roh Tae-woo, but based on the controversial nature and outcome of that election, 1993 may be a more accurate starting point for Korean democracy. General Roh was selected as presidential candidate by his friend, the de facto dictator General Chun Doo-hwan, and was narrowly elected over the democratic revolutionary rivals Kim Young-sam and Kim Dae-jung, who both ran for the presidency that year and split the vote. JOHN KIE-CHIANG OH, KOREAN POLITICS: THE QUEST FOR DEMOCRATIZATION AND ECONOMIC DEVELOPMENT 98, 109-110 (1999). Both General Roh and General Chun were eventually tried and convicted of corruption, mutiny, and treason; Roh's 22-year sentence and Chun's death sentence were later commuted. *See* Andrew Pollack, *New Korean Leader Agrees to Pardon of 2 Ex-Dictators*, N.Y. TIMES, Dec. 21, 1997, § 1.

[234] Interview with Youngjoon Kwon, Professor of Law, Seoul National University, in Seoul, Korea, conducted in English (Jan. 4, 2007).

foster networking and exchange between users, may limit political activities online. Soribada was most often used for sharing copyrighted music files without permission, but large P2P networks have great potential as democratic tools. Consistent with the vision of file-sharing as a tool for stimulating idea exchange and dialogue, eight Korean file-sharing students mentioned that they use file-sharing software to obtain text documents that are freely distributed by the author and to obtain open source software; Japanese file-sharers did not mention these kinds of legitimately accessed material in their file-sharing activities.[235]

With only fifteen years of civilian rule (and twenty years of elected presidents), the Korean democratic government is in a much earlier phase of development than its counterpart in Japan. The same generations of individuals who utilize the internet as part of everyday life witnessed and participated in the birth of the present Korean democracy.[236] The potential of cyberspace to facilitate and foster many forms of democratic activity, along with the fact that these activities have taken place online for about as long as civilian democracy has existed in Korea, make this link between cyberspace freedom and democracy particularly meaningful.

Cyberspace has already facilitated South Korean democratic participation, as illustrated by the crucial role of online political activism in the election of former President Roh Moo-hyun.[237] Mr. Roh challenged the favored Grand National Party candidate Lee Hoi-chang in the 2002 election with a political strategy that made extensive use of online campaigning and used e-mail and text messaging to communicate with supporters. One online point of coalescence for Roh supporters was the increasingly popular online news site OhmyNews. On the day of the elections, exit polls showed Roh trailing in a tight race, and while citizens dialogued on OhmyNews, Roh campaigners furiously blogged and used online lists to e-mail and text message supporters to encourage them to vote.[238] "The discussion rooms were flooded with messages urging participation in the election. Furthermore, netizens drew up action plans

---

[235] *See* survey results, *supra* notes 138 and 139.

[236] The transition from authoritarian government to democracy was at least partially driven by mostly peaceful protests in Korea.

[237] President Roh Moo-hyun is not to be confused with President Roh Tae-woo, who is discussed *supra* note 234. Roh Moo-hyun was the presidential candidate nominated by the Uri Party for the 2002 election and narrowly defeated the Grand National Party's Lee Hoi-chang with significant support from young and first-time voters. *See* Jonathan Watts, *World's First Internet President Logs On*, THE GUARDIAN, Feb. 24, 2003, at 16, *available at* http://www.guardian.co.uk/technology/2003/feb/24/newmedia.koreanews.

[238] DAN GILLMOR, WE THE MEDIA 92 (2006).

for election day, when the internet and mobile phones were used for a massive campaign urging people to vote for candidate Roh."[239] Roh moved ahead late in the day and narrowly won the presidency. Online political activities intersected with traditional political organization and arguably helped to determine a critical election outcome.[240] While differences in material resources may make traditional political battles relatively predictable, individual political activism in cyberspace has meaningfully impacted Korean electoral politics and created new roles for citizen participation in politics.[241]

OhmyNews illustrates more generally how online networking can impact political culture. While major Korean newspapers remain limited in their political and social scope,[242] many Koreans with access to the internet have the opportunity to gather information online and to meaningfully contribute to the very production of that information. At OhmyNews, "news guerillas," average citizens who write about what they personally observe, contribute 75% of the published content of the online newspaper, which is meant to cover what traditional media does not.[243] The site provides unique content that gives readers ready access to new perspectives and has become one of the half-dozen most frequently used news sources in Korea.[244] For the over 34,000 news guerillas, the site changes their role in the information society. They are no longer just consumers, but also producers.[245]

Because Koreans utilize the internet for information dissemination and as an organizational tool, and because Koreans believe in the power of popular action to shape political outcomes, a free internet is essential to the Korean political experience. In 2002, OhmyNews reported on an accident in which two Korean girls were killed by an American army tractor.[246] Alerted to the incident by a web-based news service, Koreans organized online and within one week, Korea's largest anti-U.S. demonstrations to date were staged.[247] A more recent example of Korean organization and populist efforts are the U.S. beef protests held

---

[239] Woo-Young Chang, *Online Civic Participation, and Political Empowerment: Online Media and Public Opinion Formation in Korea*, 27 MEDIA, CULTURE & SOCIETY, 926, 931 (2005).
[240] *Id.*
[241] *See* Ihlwan Moon, *Have Computers, Will Fight for Reform*, BUS. WK., 50, Feb. 16, 2004.
[242] *See* JANG-JIP CHOI, DEMOCRACY AFTER DEMOCRATIZATION: THE CONSERVATIVE ORIGINS OF KOREAN DEMOCRACY AND CRISIS 17-38 (2002).
[243] Woo-Young Chang, *supra* note 240, at 928.
[244] GILLMOR, *supra* note 239, at 110-135.
[245] Donald Macintyre and Yoo-Seung Kim, *The People's News Source*, 165(3) TIME, May 29, 2005.
[246] Watts, *supra* note 238.
[247] *Id.*

against President Lee Myung-bak. President Lee agreed to lift Korea's five-year ban on the importation of American beef,[248] setting off a blogosphere frenzy followed by forty days of growing protests in the streets of Seoul.[249] Fueled by growing demonstration momentum and online fervor over the beef issue, which Koreans view at least as a health issue if not related to broader issues of sovereignty and self-determination,[250] the protests reached a crescendo that not even the resignation offers of President Lee's entire cabinet could silence.[251]

Has this discussion gone too far afield of the subject of file-sharing regulations? The connections between file-sharing and internet political activities are indirect and often speculative. However, if a society sees file-sharing regulation in the context of socially and politically relevant internet freedoms, it is likely to take a less restrictive approach to regulation than a society that does not. There are plausible reasons to think that Korea is more the former, and Japan more the latter.

In Japan, few examples of political activity on the internet can be found beyond commentary blogs and discussion boards. The Japanese experience with internet political activism is in a vein familiar to Americans: many politically oriented sites exist, but internet activities are essentially substitutes for other pre-existing political outlets, such as newspaper op-eds, and are not utilized for fundamentally new purposes. I propose that a relevant difference is the relative youth of Korean democracy and the fact that this democracy was achieved only recently through a process of mostly bloodless political transition, compelled by popular will and protests. The history of Korean social and political internet activity is, in fact, nearly as long as the history of its democracy. Japan, in contrast, has been continuously governed by a constitutional democracy under the same unamended constitution since 1947. The state of its politics is neither particularly dynamic nor likely to be subject to significant influence from internet-based tools. Korean democracy, on the other hand, is less mature and has considerable space for change in its political culture, while other societies that have access to cyberspace may not have as great an ability to reform longstanding political assumptions and practices. Individual Koreans have the ability to help shape the

---

[248] *See* Choe Sang-hun, *South Korea Seeks a Revised Beef Deal*, N.Y. TIMES, June 13, 2008, *available at* http://www.nytimes.com/2008/06/13/world/asia/13korea.html.

[249] Choe Sang-hun, *South Koreans Press Anti-Government Protests*, N.Y. TIMES, June 20, 2008, *available at* http://www.nytimes.com/2008/06/20/world/asia/20korea.html.

[250] *See* Choe Sang-hun, *An Anger in Korea Over More Than Beef*, N.Y. TIMES, June 12, 2008, *available at* http://www.nytimes.com/2008/06/12/world/asia/12seoul.html .

[251] *See* Choe Sang-hun, *S. Korean Cabinet Offers to Quit After Beef Protests*, N.Y. TIMES, June 13, 2008, *available at* http://www.nytimes.com/2008/06/10/world/asia/10korea.html.

uncertain dimensions and contours of Korean democracy, and online networking and file-sharing hold significant potential for facilitating political action.

Korea's high frequency of file-sharing and broad resistance to copyright law enforcement against file-sharers can be at least partially understood in light of Korea's twentieth century experience of copyright law and recent cultural and political forces that have instilled in many Koreans a belief that the internet is and should remain a free and open space.

IX. FUTURE ISSUES OF REGULATION AND ENFORCEMENT

In both Japan and Korea, as in many other nations, increasing attention is being devoted to the possibility of finding private industry solutions to problems that traditional copyright law has been unable to fully control. In general, the Korean music industry has been very aggressive about adopting fee-based internet downloads as a new channel of distribution, and the industry can be expected to continue to innovate in the face of widespread file-sharing amongst young Koreans. Other major industries based around works that are easily file-shared, such as the movie industry, can also be expected to explore new means of marketing and distributing products. In Japan, the music industry has been relatively slow to adjust to internet-based business models, but it has the luxury of slow adaptation because profits have remained relatively stable in recent years. I have argued that Japanese profit margins have in part been preserved by pre-existing legislative bargains by which the Japanese state has balanced economic interests with the desire of the public to utilize new technologies. This fundamentally different approach, driven by public discourse and compromise, will likely remain an essential component to Japanese regulation in the future.

A. Japan

Despite the slow emergence of fee-based downloads as a sector of the Japanese music market, the primary sources of music industry revenues in Japan now include CD sales, CD rentals, and digital downloads. Since CD sales remained relatively consistent in spite of a CD rental option in the years both prior to and following the introduction of file-sharing services, it seems likely that those consumers who elected to buy CDs prior to the era of file-sharing and fee downloads will in many cases continue to purchase CDs in the future. If the appeal of a CD is based on the fact of owning the official CD, with the accompanying

packaging and print on the disk itself, consumers will continue to get the benefit of those features only from buying the CD. In Japan, even if all consumers could efficiently rent or download for a fee any proprietary music content, there will still be a significant residual market for CDs. One might speculate that such a residual market might be larger in Japan than in some other countries, such as the U.S.; anecdotal evidence suggests that Japanese consumers get a psychic benefit from CDs as collectible items[252] and may associate the collection more with particular artist "idols" than consumers in other nations frequently do. The rapid initial growth of the Japanese download market, despite fees that are notably higher than in Korea or the U.S., indicates that downloads do and will likely continue to play an important role in the Japanese music industry business strategy. Japanese intellectual property practitioners perceive a growing emphasis on this sector from entertainment industry executives.[253]

The legal contours of the file-sharing debate are coming into focus in Japan. Under the *MMO File Rogue* case, companies that offer file-sharing services will likely have infringements by customers imputed to them through the Karaoke Doctrine or would likely face liability under a secondary liability theory if the Japanese Act is amended to include such provisions. Several members of the Japanese Working Group addressing the possibility of statutory amendment believed that secondary liability provisions would likely be crafted in such a way as to find a party situated similarly to MMO liable as an indirect infringer;[254] the provisions would function in lieu of Karaoke Doctrine liability and would not lessen the liability faced by an economic actor such as a service providing company. Japan now faces a fierce social debate over the potential chilling effect from the conviction of Winny's programmer, Mr. Kaneko. More significantly, the amount of programming of file-sharing software by Japanese in Japan can be expected to decline, and in fact major

[252] Interview with Mr. Hideo Ogura, Attorney, Tokyo-Hirakawa Law Office, in Tokyo, Japan, conducted in English (Jan. 26, 2007); interview with Mr. Daisuke Tatsuno, Attorney, Tokyo Aoyama Aoki Law Office-Baker & McKenzie, in Tokyo, Japan, conducted in English (Jan. 20, 2007); interview with Mr. Ryota Goto, Attorney, Tokyo Aoyama Aoki Law Office-Baker & McKenzie, in Tokyo, Japan, conducted in English (Jan. 16, 2007); survey results, *supra* note 139.

[253] Interview with Mr. Hideo Ogura, Attorney, Tokyo-Hirakawa Law Office, in Tokyo, Japan, conducted in English (Jan. 26, 2007); interview with Mr. Daisuke Tatsuno, Attorney, Tokyo Aoyama Aoki Law Office-Baker & McKenzie, in Tokyo, Japan, conducted in English (Jan. 20, 2007).

[254] Interview with Tetsuya Obuchi, Professor of Law, Tokyo University, in Tokyo, Japan, conducted in English (Jan. 18, 2007); interview with Professor Tatsuhiro Ueno, Professor of Law, Rikkyo University, in Tokyo, Japan, conducted in English and Japanese (Jan. 22, 2007).

substitutes for Winny have not arisen since the prosecution of Mr. Kaneko.[255] Users may respond to the changed situation by simply engaging in less file-sharing. Alternatively, there is another possibility that Japanese, like their Korean and American counterparts, may adopt a variety of new file-sharing programs and services, many programmed or based outside of Japan. In such a case, there is unlikely to be a single, easily identifiable party for litigation or prosecution to target, and many prospective defendants may be beyond the reach of Japanese legal jurisdiction. File-sharing services may not be viable for-profit enterprises in Japan, and Japanese computer programmers may furnish little additional coding innovation in file-sharing, but it is not certain from these conclusions that file-sharing activities would steeply decline.

Is it possible that the Japanese music industry will change the focus of its legal strategy to target individual file-sharing users? As discussed *supra*, such an approach would be legally possible but has not yet been pursued due to public relations concerns. As one lawyer noted, "Who wants to sue his own client?"[256] Might the industry pressure more criminal prosecutions of individual file-sharers?[257] This may be possible, but from the perspective of the music industry, such a course could have the same defects as civil litigation: namely, that the industry and specific music labels could be associated with the cases by the public, and industry esteem (and, potentially, commercial success) may be negatively affected as a result. The public backlash against the conviction of Mr. Kaneko suggests that public ill-will following criminal prosecutions of noncommercial file-sharing actors could be dramatic. In general, the most likely path would be no or very limited legal action against individual users, unless perhaps the music industry experienced an economically dire situation.

Despite the relatively slow progress made by the entertainment industry in Japan to adopt new distribution platforms and otherwise utilize internet technology in its business models, I believe that many in Japan remain optimistic that the Japanese entertainment industry will utilize technologies in tandem with strong digital rights management to facilitate broad dissemination of works and preserve industry profitability. Japanese scholar Zentaro Kitagawa coined the term

---

[255] A program based on Winny, called Share, has been developed in the Japanese language. Its popularity and success remains to be seen. For English-language information on this software, *see* http://www.uguu.org/share/ (last visited Oct. 7, 2008).

[256] Interview with Mr. Daisuke Tatsuno, Attorney, Tokyo Aoyama Aoki Law Office-Baker & McKenzie, in Tokyo, Japan, conducted in English (Jan. 20, 2007).

[257] As discussed *supra* note 44, in Japan there have so far been four arrests of individuals suspected of copyright infringement through file-sharing.

"copymart" to refer to a system where an electronic database would collect sets of licensing terms for works and users could accept the offered terms for individual works.[258] This transaction in rights presents the opportunity for copyright holders to exercise control over the particular terms under which they would license each individual work while enabling users to enjoy the convenience of obtaining digital copies of various forms of media through a centralized database.[259] Such a system could lead to greater access to and consumption of creative works by individual copymart consumers, with prices tending to decrease due to transaction cost savings and the greater volume of potential sales facilitated by the copymart system. The concept of transacting in rights may have particular appeal in Japan, where users cite convenience as a major reason for choosing file-sharing and the entertainment industry has hesitated to adopt digital distribution with uniform licensing terms and pricing.

B. Korea

Korea's music industry has already been transformed by the arrival of new technologies. With CD sales down 80% nationwide since 2001, the music industry has had to identify new business models and to fundamentally re-arrange the economic structure of the music business. The Korean music industry has implicitly recognized the threat of file-sharing and the attractiveness to users of free downloads by setting low download prices.[260] Koreans who defend their file-sharing of copyrighted works by arguing that no affordable legal option is available may no longer be able to plausibly cite this justification. File-sharing remains extremely common, at least amongst Korea's youth,[261] but the legal download market has quickly become highly lucrative. Still, the Korean entertainment industry, and in particular the music industry, may not yet have sufficiently adapted to demand for online delivery of content.

What future legal debates lie in store for Korea? The *Soribada* case firmly established liability for a file-sharing service provider, even one with a pure P2P architecture. Unsurprisingly, no equivalent business ventures have begun in Korea, but users continue to file-share with a variety of programs, many of which have foreign origins. With no available business entity defendant, the Korean music industry could

---

[258] ZENTARO KITAGAWA, COPYMART (2003) (Japanese).
[259] *See* The Copymart Institute website, http://www.copymart.jp.
[260] In Korea, individual downloads cost about 50 cents.
[261] *See* survey results, *supra* note 138.

consider civil suit against users, although they have been unwilling to pursue this strategy so far. Industry watchdogs have pressed individual prosecutions; however, now that the Seoul Prosecutor's Office has refused to prosecute non-commercial file-sharers, it seems that prosecution can no longer serve as an available legal remedy for the vast majority of file-sharing activities, unless the present policy is changed. Even if it were changed, however, many individual users claim that even more prosecutions would not deter them from file-sharing.[262] Most users expect that, given the very large number of file-sharers, their likelihood of being prosecuted is very small, and the chances would remain small even if the total number of prosecutions were significantly increased. Unless a very large (most likely an impracticably large) number of prosecutions were pursued, it is unlikely that a significant fraction of all Korean file-sharers would be successfully deterred.

What strategies are available, if not prosecution? One industry executive argued that the task of the Korean Government and the entertainment industry is to educate individual Koreans about the law and persuade them to voluntarily follow it. One professor noted, "People did not know what copyright law was. Now their behaviors are being affected, and soon everything will be balanced."[263] The legal status of file-sharing activities may have initially been ambiguous, although early Korean prosecutions of individual users, and the media attention that surrounded those cases, likely dispelled these notions. However, file-sharing continues, and popular opinion has not conclusively rejected file-sharing behaviors as wrongful and deserving of punishment. The view that as Koreans experience the benefits and detriments of the internet, they will conclude that regulation is necessary, may have force regarding some issues. Korea, like Japan and other nations, quickly encountered problems of defamation. Individual members of society who are falsely attacked by anonymous online perpetrators are clearly identifiable and often sympathetic victims.[264] One might expect that popular sentiment

---

[262] Of the 41 Korean file-sharers surveyed, 38 said they did not fear prosecution and did not factor the possibility of prosecution into their decisions to file-share. Survey results, *supra* note 138.

[263] Interview with Youngjoon Kwon, Professor of Law, Seoul National University, in Seoul, Korea; conducted in English, (Jan. 4, 2007).

[264] Defamation victims are easily identified for the very reason that the statements are defamatory: they make false assertions that injure the reputation of a particular person. The recent suicide of a famous Korean actress, purportedly caused in part by her distress from online libel against her, illustrates the sympathy the Korean populace has felt for defamation victims and the popular support such incidents may generate for further cyber-regulation, at least as it relates to defamation. *See* Choe Sang-Hun, *Korea Star's Suicide Reignites Debate on Web Regulation*, N.Y. TIMES, Oct. 12, 2008, *available at* http://www.nytimes.com/2008/10/13/technology/internet/13suicide.html.

favoring more stringent regulation may exist. In fact, Korea has debated strengthening its regulation of defamation on the internet.[265] Where, as with file-sharing, there is neither a clear and sympathetic victim of the internet action nor malicious intent by the actor, popular opinion against the action is significantly harder to marshal.

I argue that a more fundamental problem than knowledge of the law is respect for the law, especially laws that have remained almost totally unchanged since their promulgation, under foreign pressure, by a military dictatorship. Many Koreans may simply find the case for carefully following copyright law less than compelling, especially when violations of copyright involve internet file-sharing. In any event, Koreans have little tolerance for regulation of internet activities, including file-sharing. In that light, the Korean music industry may have little choice but to persuade users to utilize industry-sanctioned channels of obtaining content rather than to seek to enforce copyright rights online.
What, then, is the future of file-sharing and the music industry? It can be anticipated that no businesses similar to Soribada will be established under the current law, but file-sharing is likely to persist as long as individual Koreans find sharing to be acceptable behavior and do not voluntarily desist. Lawsuits against individual users are possible, although the Korean music industry has thus far elected not to pursue them, even when facing severe financial constraints. The challenge for the industry is to convince users to legally obtain copyrighted content, such as through traditional CD sales, digital downloads, or other not yet utilized channels. There is a trend in Korea of increasing fee-based downloads to mobile devices which may be a good way to capitalize on Korean taste for new technological innovations and expressed desire for convenient formats and timely delivery of entertainment content. Expanding the legal download market may be a significant part of the broader Korean music industry strategy to maximize its profitability.

X. CONCLUSION

This article has shown that legal enforcement, whether criminal prosecution or civil suits, is unlikely to curb file-sharing and protect

---

[265] *See* Michael Fitzpatrick, *South Korean Government Looks to Rein in the Net*, INT'L HERALD TRIB., Sept. 7, 2008, *available at* http://www.iht.com/articles/2008/09/05/business/sknet.php. Under proposed legislation, Korean discussion forum chat room participants would be required to verifiably register their real names, and web sites receiving defamation complaints would be required to remove allegedly defamatory information for 30 days pending government review. *Id.*

traditional content-based business models in Japan and Korea. In the Japanese case, relatively low rates of file-sharing stem from legislative compromises that, intentionally or not, have mitigated the incentives for users to file-share and the impact of file-sharing on industry revenues. In particular, the music rental industry altered the relationship between file-sharing and industry economics and has blunted the impact of file-sharing. Japan's private copying compensation system has produced some compensatory revenue for Japanese rights holders and could, with expansion of the set of products subject to the Article 30(2) Fee or an increase in the Article 30(2) Fee, become a more substantial source of revenue in the future. Consistent with Japan's tendency to confront tensions between economic interests and collective social interests and values, Japan can be expected to further manage the ramifications of file-sharing and avoid heavy litigation by crafting a statutory amendment to address indirect copyright infringement.

In Korea, file-sharing has remained widespread in spite of legal action taken against both service providers and individual users. With no immediate punitive threat present against noncommercial file-sharers, there is little reason to expect file-sharing to become less prominent. The high frequency of Korean infringement of copyrights online may result in part from Korea's historical experience with copyright law, as well as the particular value of a free internet to Korean social expression and political activities and identity. Forced to react to unfavorable business circumstances, the Korean music industry has adapted by rapidly expanding legal online distribution of copyrighted content. Inasmuch as file-sharing continues despite convenient and economical legal alternatives, however, the Korean music industry may have to adjust to significantly reduced revenue streams or to consider more drastic business reforms to induce voluntary consumer participation in industry business models. One already lucrative market segment that could be expanded is easy and rapid distribution to mobile devices.

Despite certain similarities between Japan and Korea, including their historically similar formal copyright law and similarly high levels of technology adoption and broadband penetration, each country faces a different set of file-sharing issues. In Japan, legislative compromises have been and remain vital to managing the potential economic impact of file-sharing, but additional industry-driven business forms will eventually become necessary to optimize content value in the digital age. In Korea, limited prospects for legislative compromises and the failure of legal enforcement to combat file-sharing place immediate pressure on Korean private enterprise to continue to innovate, technologically and strategically, to protect its own interests.