Leverage That is "Criminal": Seeking to Balance the Rights of Korean Defendants and Plaintiffs in Small-Scale Software Copyright Cases

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Abstract

The previous few years have seen a “crackdown” against small businesses using illegal software in Korea, with right holders using the support of police to demand settlement payments from small business owners. Although this has helped to reduce piracy rates, some have stated that the crackdown has been excessive and the effect on small businesses has been negative. Right holders tell a different story, maintaining that piracy remains high and that small businesses comprise the majority of illegal software users.

This paper examines the two sides to the crackdown debate and criminal copyright liability statutes in Korea. I find that the current legal regime, while greatly assisting plaintiffs, does not do enough to encourage defendants to maintain legitimate defenses. In addition, Korea recently began utilizing a system of statutory damages for copyright cases. Given the presence of statutory damages, there is certainly no need to continue criminal enforcement of minor cases of infringement. Thus I suggest that (1) small scale software piracy be removed from the purview of law enforcement or, failing that, (2) binding arbitration should be made a prerequisite to the bringing of a criminal complaint, to encourage defendants with meritorious defenses to hold their ground.

Key words: Copyright, software, criminal procedure, statutory damages, arbitration, crackdown, Korea

Ⅰ. Introduction

The recent past has seen a drastic shift in the use of copyrighted software in Korea. The use of pirated software has dropped tremendously from 54% in 2000 to 40%,[1] but still remains noticeably above the OECD average of 27%.[2] Recently, there has been a "crackdown" to further discourage software piracy, with over 1,000 allegations of infringement being brought against small- and mid- size enterprises in 2011.[3] The crackdown relies on a key component of Korean criminal copyright law: that a right holder "victim"[4] of piracy may request criminal charges be brought against a defendant using the software in business,[5] and that a "victim" can drop the charges if he finds a settlement adequate. In this manner, a de facto plaintiff can avoid the costs of litigation and effectively pursue enforcement even when confronting smaller-scale infringement.

However, the raising of legitimate defenses remains strongly discouraged by the expense of litigation. Thus, many small businesses owners who have been charged are finding themselves forced to settle regardless of possible defenses or third-party pleas involving disreputable software vendors. This paper thus asks how one can create a structure that allows plaintiffs and defendants equal access to resolving copyright disputes, particularly when a

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1. Baek Hong-gi, "*Goso anin, sayongjawa jeojakkwonsaui sangsaengk daech'aek mareyeon*" ("고소 아닌, 사용자와 저작권사의 상생 대책 마련") [Rather than Sue, Seeking a Win-Win Policy for Users and Right holders], Sisa Majazine (시사매거진) Dream News, Apr. 3, 2012, *available at* http://www.sisamagazine.co.kr/news/articleView.html?idxno=10697 (last visited Aug. 13, 2012).

2. Woo Jong-guk, "*Bulbeob bokjae keunjeoli 'jisik kangkuk haebeob'* " ("불법 복제 근절이 '지식 강국' 해법") [To Eradicate Piracy, A Great Country's Knowledge is the Solution], Hanguk kyeongjae (한국경제매거진) [Korean Economics] Magazine, Feb. 15, 2012, *available at* http://magazine.hankyung.com/business/apps/news?popup=0&nid=01&c1=1005&nkey=2012021300845000261&mode=sub_view (last visited Aug. 13, 2012). The author attempted contact with various right holders but none responded before this papers' deadline.

3. Woo Jong-guk, *supra* note 2. In correspondence with various parties the term "crackdown" has often appeared in quotation marks, presumably to refer to the recent trend of increased enforcement. This paper, however, will generally abstain from that convention.

4. I use quotation marks here to denote that the victims are not victims in a typical moral sense, but simply parties whose artificial monopolies have been violated in a manner the law currently labels a crime.

5. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 124(3) (S. Kor.).

small business owner is accused of using infringing software. Given the recent addition of statutory damages, there seems to be no need to leave these cases within the ambit of prosecution, and I argue for their removal from law enforcement's purview. In the alternative, a new form of arbitration, conducted by the Korean Copyright Commission, should be made available to defendants in such cases.

This paper consists of four Sections including this introduction and a brief conclusion. Section II is a discussion of Korea's intellectual property culture and the software piracy crackdown. Thereafter, Section III elucidates Korean criminal copyright law, particularly the portions relevant to the current situation. Section III also discusses the new addition of statutory damages and the potential problems caused by the system. Finally, Section IV outlines two approaches to restoring balance and protecting defendants: decriminalization of small-scale infringement, or mandatory pre-criminal-complaint arbitration by a neutral body.

Ⅱ. The Software Piracy Crackdown

This section examines the context of the piracy crackdown, beginning with a general discussion of nations' changing perceptions of intellectual property ("IP") laws and possibly relevant cultural factors. Thereafter, the two sides are elucidated: Right holders and the Korea Software Property-Right Council ("SPC") argue that strong deterrence is needed, but the Korea Software User Protection Associates ("KOSUPA") believes that the crackdown is excessive and misdirected. By first understanding the roots of the crackdown and how the parties view it, we will have a more finely-tuned focus when examining the particulars of the law in subsequent sections.

A. "Developing" Respect for IP in General

Historically it is little secret that nations, and people, generally do not respect intellectual property laws except when it is in their best interest to do so. The United States was a European book pirate and refused to join the Berne Convention until it appeared that U.S. media industries stood more to

gain than to lose from assenting.[6] Similarly, many developing countries objected to TRIPS on the grounds that the increased protection of pharmaceuticals would deny them access to medical inventions.[7] The simple truth is that the artificial monopolies of intellectual property deny access for many; only a culture that presumes it is in the communal best interest to deny such access can show what we all-too-easily call "respect" for intellectual property.

Bearing this in mind, we should examine Korea's history before we can examine the intellectual property culture of Korea. Korea is the fastest-developed nation on earth. In only a few decades, it transformed from a country lacking in basic necessities to a world leader, hosting the G20 and producing high-technology products.[8] However, this speed of transformation has not brought everyone with it in equal shares: The poverty rate among Korea's elderly is the highest in the OECD[9] and it would seem fair to assume other striking differences (including technological savvy and attitudes towards IP) could be seen between the aged, middle-aged, and younger populations.

Against this backdrop of staggering change, and considering possible cultural influence, the software piracy debate can be more easily understood. The SPC has undertaken various educational campaigns to reduce piracy.[10]

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6. *See e.g.*, Peter K. Yu, *Four Common Misperceptions about Copyright Piracy*, 26 Loy. L.A. Int'l & Comp. L. Rev. 127, 129-130 (2003), *available at* http://digitalcommons.lmu.edu/ilr/vol26/iss1/7 (last visited Aug. 13, 2012).

7. For a discussion of TRIPS and intellectual property, *see generally* Alan O. Sykes, *TRIPs, Pharmaceuticals, Developing Countries, and the Doha 'Solution,'*, John M Olin Law & Econ. (Working Paper No. 101-150 # 140), *available at* www.law.uchicago.edu/files/files/140.Sykes_.TRIPs_.pdf (last visited Aug. 8, 2012).

8. *E.g.*, Kwon Tai-hwan, *Population Change and Development in Korea*, The Asia Society, *available at* http://asiasociety.org/countries/population-change-and-development-korea (last visited Aug. 13, 2012) (Korea's historical poverty and rapid development); Lee Hyo-sik *Seoul Selected as Venue of G20 Summit in 2010*, The Korea Times, Nov. 6, 2009, *available at* http://www.koreatimes.co.kr/www/news/biz/2009/11/123_55021.html (last visited Aug. 13, 2012) (G20 hosting); *Samsung Takes Back 1st Place in Smartphone Market*, The Chosun , Apr. 4, 2012 *available at* http://english.chosun.com/site/data/html_dir/2012/04/04/2012040401004.html (last visited Aug. 13, 2012) (sales of high technology by Korean company).

9. *Korea Highest in Elderly Poverty: OECD*, Korea Times, Nov. 8, 2008, *available at* http://www.koreatimes.co.kr/www/news/nation/2011/04/113_34066.html (last visited Aug. 13, 2012); Original report, *available at* www.oecd.org/statistics (keyword "Poverty" indicator "Poverty rate") (last visited Aug. 12, 2012).

10. Correspondence with Hyun-suk Kim (SPC Research Team Leader) to author (May 11, 2012), (on file with the author).

SPC does not enforce any rights, however, and so right holders aggressively pursued over 1,000 cases of criminal copyright allegations in 2011, most of which were settled.[11] KOSUPA sees the crackdown as excessive and argues that there must be a solution outside of the pressure to settle a lawsuit. We next examine both sides' arguments in greater detail.

B. Argument in Favor: The Crackdown is Necessary

The *overall* piracy rate in Korea is a staggering 40%. This is only slightly below the world average of 42% and much above the OECD average rate of 27%. America and Japan, in contrast, show a rate of only about 20%. If 1,000 cases can be prosecuted in a year then piracy is clearly of a staggering amount and is costing right holders significantly [12]

SPC believes that small- and mid- size businesses are the bulk of the infringers. As large businesses purchase software legitimately more often, there is no choice but to target the smaller ones who, due to ignorance or greed, do not. Furthermore, a single PC can have up to an estimated three million won (approx. $2,600 USD) installed on it. Therefore an enterprise with only 100 PCs could use three *eog* won (or over a quarter of a million dollars) in pirated software. [13]

Finally, SPC believes that stiff penalties are needed in addition to the extrajudicial enforcement currently taking place. Other nations have long had special damage provisions allowing a plaintiff to collect even when proving damages is difficult.[14] Korea only recently adopted statutory damages for copyright infringement cases;[15] when most of the suits were brought, damages were limited to actual loss suffered or benefit gained.[16] Finally, SPC argues that piracy is hurting youth employment, particularly in the software sector. The loss of jobs due to shutting down small businesses could presumably be

11. Woo Jong-guk, *supra* note 2.
12. *Id.*
13. *Id.*
14. *E.g.*, 17 U.S.C.A. § 504(c) (West 2012) (statutory damages between $750 and $30,000 USD per infringement or up to $150,000 per willful infringement).
15. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 125-2.
16. *Id.* at art. 125.

offset, or even completely counterbalanced, by software hirings.[17]

C. Argument Against: The Crackdown is Excessive, and Harmful

On the other hand, many small to mid-sized business owners are not technologically savvy and belong to a lackadaisical mindset regarding software piracy. Some of those who are not as young are likely to have grown up in what was once a country with few paved roads and little need for intellectual property protection. It is difficult to expect mindsets and technological ability to change so rapidly, especially if the law stands in a normative role of prescribing ideal behavior instead of current common practices.

Vendors also play a key role in the system. It is not uncommon for vendors of ill repute to switch hardware as well as use pirated software.[18] Ultimately, the business owner suffers. An owner or purchaser of computers unable to adequately inspect for pirated material can quickly find himself on the receiving end of a suit. Furthermore, though vendors were sometimes inspected in previous years the recent trend is to focus solely on the user of the software.[19]

Another issue is the fact that the "victims" have both law and power on their side. Although they need not hire an attorney, the police are obviously supportive of the "victim" and capable of requesting prosecution that can result in fines and possible jail time. The easiest-to-spot facts are all on the side of the right holder: there was use of infringing software in the defendant's business.

The defendant's excuse is likely to hinge on key legal issues--vicarious liability for an employee (adequate supervision) or the absence of knowledge.[20] Lay people in general may be unaware of these defenses. Furthermore, the defendant, if contesting an issue, is likely to need to undergo the expense of representation. Thus we have a situation wherein the tremendous expense of

17. Woo Jong-guk, *supra* note 2.

18. Correspondence with Yeon-su "John" Han (President of KOSUPA) to author (Mar. 12, 2012) (on file with the author).

19. Correspondence with Yeon-su "John" Han (President of KOSUPA) to author (Apr. 4, 2012) (on file with the author).

20. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 136(2).

litigating a case tends to fall on one set of shoulders—those of the accused. This naturally discourages the maintenance of defenses, even valid ones.

D. Conclusion: The Central Issue

There are two identifiable issues to be debated. The broader issue concerning the balance between IP owners and users is a possibly unresolvable issue and will not be addressed by this paper. I will address, however, the more specific issue of how to adequately incentivize the assertion of both rights and defenses in cases similar to those brought during the crackdown. Before doing this, we must be aware of the law as it currently stands, and therefore the next section discusses current Korean copyright law.

Ⅲ. Liability Under the Korean Copyright Act: Face the Police, or Fiscal Ruination

This section investigates two provisions of law that constrain defendants in these cases. First, we examine criminal liability under the Korean Copyright Act. Usage by a defendant of copyrighted material in business (regardless of scale) is sufficient to grant a plaintiff the power of the police and criminal investigation. This provision alone results in a degree of asymmetry: plaintiffs have a free representative, the police, and the leverage of the state. Sadly this is not the end of a defendant’s woes--the recent addition of statutory damages to the Copyright Act means that the possible gain of suit for a plaintiff is much greater than any actual loss caused by the defendant. Defendants therefore currently have every reason to settle quickly and minimal incentives to assert meritorious defenses, regardless of the level of formality of enforcement chosen by the plaintiff.

A. A Crime Regardless of Size

Criminal liability for copyright in Korea is, in theory, not limited to any size or class of infringement. Article 136 says simply that “any person who infringes ... shall be punish[ed by] imprisonment for not more than five years or a fine of not more than [KRW] 50 million [approximately $46,000 USD],

or both." Certain types of infringement are subject to a lesser fine and sentence, maximum thirty million won or three years.[21] There is no requirement of a profiteering motive or a large-scale operation.[22]

However, the majority of criminal cases must be advanced by request of the victim. In certain cases of importation, distribution, or actions "habitually for a profit-making purpose," the complaint may proceed without the request of the victim.[23] Thus the defendant's conduct, if sufficiently egregious, can remove the defendant from a classification only prosecutable at the victims' behest and place him within laws allowing prosecution according to the will of the state.

Part of the rationale for such a system is no doubt alien to those who come from a common law system. Despite much convergence in the two systems,[24] a prime difference can still be seen in the way civil law systems handle offenses to property as "minor crimes." The police in such situations, in Korea as well as other countries following the civil law tradition function not to gather evidence and promote prosecution so much as to effect an expeditious settlement for the victim.[25]

Such a system was needed because damages were limited to the value of the good, or the profit to the infringer.[26] Punitive, treble, or otherwise enhanced damages were abhorred in Korean law as against public policy.[27] Although there is a general rule that states that fee-shifting will take place in civil suits, as the damages were often less than fees would be (never mind the ever-present difficulties of judgment collection), it was of questionable ef-

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21. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 136(2).

22. *Id.*

23. *Id.* at art.140.

24. *E.g.*, Katja Funken, *The Trend Towards Convergence*, pp. 6-13, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=476461 (last visited Aug. 13, 2012).

25. *E.g.*, Heyong beob [Criminal Act] Act. No. 7623, July 29, 2005, art. 260 (crimes of minor violence not to be prosecuted against the will of the victim) and 266 (injury by negligence not to be prosecuted against the will of the victim); for a humorous, if profanity-laden explanation of the differences (written by a Korean and former New York District Attorney), the reader may *see generally* "Ask A Korean: What is all this about Blood Money?", *available* at http://askakorean.blogspot.com/2011/04/what-is-all-this-about-blood-money.html (last visited Aug. 13, 2012).

26. *Cf.* Jeojakkwon beob [Copyright Act], No 11110, Dec. 2, 2011, art. 125, 125-2.

27. Correspondence with Yuna Lee (editor, Jeonbuk National University Law Review) to author (May 18, 2012) (on file with the author).

ficiency for a plaintiff to pursue redress through the courts and not the police, as a plaintiff doing so could easily advance more than the stake of litigation to his attorney. Thus, unless copyright infringement enforcement is to be limited to the largest and most egregious cases, an alternative to "typical litigation needed to exist that usurped less of the right holders' time and resources.

Dealing specifically with the context of small businesses and vicarious liability, "the use for business of copies of a program produced by infringing on the copyright of the program ... by a party who acquired it with the knowledge of such infringement is infringement."[28] Another provision of law restates that liability does not extend to a party who lacks "the knowledge, by negligence, of the fact that such act [infringes]."[29] But confusingly, failure to adequately supervise may charge an employer with respondeat superior liability.[30] Being aware of the use of the computer will tend to create a duty on the part of the owner to be aware of pirated software in use. [31] In one case, where an employee installed unauthorized software without the permission or knowledge of the employer, the employer was still contacted by the police and settled the case.[32] However, a more recent case resulted in an acquittal on appeal of similar facts.[33] Given these conflicting outcomes, and the difficulty of predicting success in litigation, it is no surprise that defendants are loathe to advance their positions.

Returning to the main issue, although this system is laudable for its protection of "victims," it does little to protect the accused. A person defending a case must undergo the expense of representation and thus there is a strong incentive to settle regardless of the merits. The situation has only worsened with the additional enactment of statutory damages.

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28. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art 124(1) 3.
29. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011. (which article)
30. *Id.* at art. 141.
31. Correspondence with Yeon-su "John" Han (President, Korea Software Users Protection Association) to author (Apr. 13, 2012) (on file with the author).
32. Correspondence with Yeon-su "John" Han (President, Korea Software Users Protection Association) to author (Apr. 4, 2012) (on file with the author).
33. Correspondence with Yeon-su "John" Han (President, Korea Software Users Protection Association) to author (May 4, 2012) (on file with the author).

B. From the Police Station to Debtors' Prison: Statutory Damages

Enacted in December 2011, but not having taken force until August 1, 2012 (after the previously-cited news articles in Part II) was a provision allowing statutory damages. Article 125-2 grants damages of up to 10 million won [8,845 USD] or 50 million won for "commercial use" [44, 229 USD] per infringement.[34] Statutory damages are a longstanding concept in US law,[35] where treble, punitive, and other enhanced damages are common, but this approach is comparatively new to Korean law. The theory behind statutory damages is relatively simple--"to effect just compensation that bears a reasonable relationship to compensatory damages that may be difficult or impossible to prove"; the "added consideration [of] ... the need to deter future infringement ... [should] not [be] disproportionately dominant"[36] In a context similar to the one being discussed, one American court explicitly stated that "the value of deterrence must be balanced against the inequity of imposing heavy financial burdens on small businesses."[37]

A defense based on lack of knowledge, as is common in these cases, likely presents an all-or-nothing dilemma to the defender. If his assertion of unawareness is successful, he will prevail entirely on the suit. If not, however, he is likely to not only be liable, but to be seen to some degree as culpable--and culpability encourages greater statutory damages (to foster greater deterrence). The plaintiff, on the other hand, has no greater fear than he did before; his maximum exposure remains shifted fees. His maximum takings, however, have been multiplied by the equivalent of perhaps millions of won [thousands of dollars].

Thus the new enactment solved a problem that did not exist. Although there was an absence of incentive for private judicial enforcement, the availability of police to address minor infringements used in business provided adequate avenues for right holders. In fact, that system showed a degree of

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34. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 125-2.

35. *E.g.* 17 U.S.C.A. § 504(c) (West 2012).

36. Ron Coleman, *Statutory Damages in Copyright Casea*, Likelihood of Confusion, *available at* http://www.likelihoodofconfusion.com/legal-publications-ron-coleman/statutory-damages-copyright-cases/ (last visited Aug. 13, 2012).

37. *Joe Hand Promotions, Inc. v. Hernandez*, No. 03 Civ.6132(HB), 2004 WL 1488110 (S.D.N.Y. June 30, 2004).

unfairness to the defendant as it stood. The addition of statutory damages has transformed a moderately unfair field into a completely one-sided game. The next section discusses two methods of restoring the balance.

Ⅳ. Two Solutions for Changing Times

To protect plaintiff "victims" without using damages that are perceived as punitive, Korea gave the right holder tremendous free leverage in the form of police investigation and possible criminal prosecution. This stance alone placed the best cards in the hand of the plaintiff, but recently, the position of defendants has further worsened. New provisions allowing statutory damages[38] have shifted all cards to the plaintiff. A defendant may find himself facing the police (if the right holder chooses not to sue) or a possible judgment of many times the value of the software, plus fees (if the right holder opts for judicial enforcement).

This section proposes two alternatives to restore balance and fairness to Korea's copyright system. First, small-scale copyright infringement, even in business, should be removed from the purview of the criminal justice system. Unfortunately, as the statutory damage provisions were recently legislated without a legislative counterpart realigning the criminal provisions of the Copyright Act, it is unlikely they will be repealed in the near future. Therefore we will also examine possible means to adjust the criminal enforcement system and ultimately conclude that, as an alternative to decriminalizing minor infringements, mediation through the Korea Copyright Commission ("KCC") should be made a prerequisite to criminal investigation by the police.

A. Decriminalization of Minor Copyright Infringement

One scholar has applied cost-benefit analysis to criminalization of copyright infringement.[39] Taking a utilitarian perspective, she stated: "[A] law overcriminalizes when the costs of treating conduct as a crime exceed the

38. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 125-2.

39. Geradine Szott Moohr, *Defining Overcriminalization through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 Am. U. L. Rev. 783 (2005).

benefits of the new criminal law."[40] In other words, though criminal sanctions may deter infringement and increase benefit to authors, "the benefit of deterrence may not be as great as anticipated, and it may not exceed the costs of treating infringement as a crime.'[41]

At least three costs are to be considered when copyright infringement is criminalized: First, reduced access to copyrighted material.[42] Second, overdeterrence or "the threat of being branded a thief" could result in the abstinence from using copyrighted material "even when doing so is not illegal."[43] A copyright is not the same as physical property; there are numerous limitations to a right holder's rights, to strike a balance between an artificial monopoly and public benefit.[44] Before considering the third cost, that author noted that "civil laws, with their generous statutory damages, can achieve a better balance" between right holder and the public.[45] American law generally agrees; statutory damages exist[46] and criminal copyright investigation is limited to willful infringement in certain economic contexts involving commercial advantage or reproduction and distribution,[47] which will generally remove small-scale infringement from the purview of law enforcement.

The third and more generalized cost is that, where criminal sanctions are not in tune with common morals, the public at large may lose respect for the law, making it more difficult to enforce other criminal sanctions.[48] This is because "[r]esearch indicates that criminal law is best viewed as a mechanism to reinforce community values that already exist."[49] For these reasons, that scholar was skeptical that criminalizing peer-to-peer file sharing was an intelligent direction for U.S. law. Although I concede there is currently insufficient data to conclude what community values there are regarding copyright

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40. *Id.* at 785.
41. *Id.* at 792.
42. *Id.* at 802.
43. *Id.*
44. *E.g.*, Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art 23 *et. seq.* (general limitations to authors rights), 101-2 - 101 -7 (special limitations for computer programs).
45. *Id.* at 804.
46. 17 U.S.C.A. § 504(c) (West 2012).
47. *Id.* at § 506.
48. Moohr, *supra* note 39, at 804 - 05.
49. *Id.* at 798.

in Korea, given the recent development and technological knowledge gaps identified in sections II.A. and II.B., it is worth considering whether criminal sanctions against small business owners are engendering respect for law or bitterness towards an unfair system.

A fourth cost not identified by that scholar is the simplest cost: the actual expense of paying for law enforcement investigations of copyright infringements. Public coffers effectively subsidize the right holders' enforcement. It is difficult to think of another legal area of such thorough protection; if my car is stolen, can I elect for statutory damages while also demanding a law enforcement investigation? Of course not. Granting a plaintiff both statutory damages and the power of the police is simply too much; there is no need[50] to drain public coffers with police investigations when the plaintiff can collect the bonus of statutory damages.

B. Adjustments to the Criminal Enforcement System

As the legislature did not decriminalize small-scale infringements transpiring in business when statutory damages were enacted, it may be the case that such a change in the law is not to be expected. There are then three options which could improve the position of defendants in the criminal investigations: First, counsel could be supplied to defendants. Second, police could undergo specialized training in copyright law to be more aware of possible legal defenses. Third, a neutral body trained in copyright could arbitrate complaints before the police investigate. As the first two options are rather impractical, and a body exists that is capable of arbitration at a very low cost, I suggest the third option.

Supplying lawyers for every accused is not cost- or time- effective. Rarely does one hear about an overstaffed pro bono organization. KOSUPA has been

50. While it is true that various treaties compel some degree of criminalization of copyright infringement, those agreements generally prohibit only piracy on a "commercial scale." *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Annex 1C to the Marrakesh Declaration, a World Trade Organization document (plurilateral accord), *available* at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Aug. 13, 2012); Anti-Counterfeiting Trade Agreement, plurilateral accord, *available* at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (last visited Aug. 13, 2012); KORUS FTA, U.S.-ROK, *available* at http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited Aug. 13, 2012).

successful in supplying counsel to some defendants[51] but it would be naive to assume that they can always do so, particularly if there is a great increase in suits at any given point in time. The government could fund these defenses, but then concerns of overworked, underpaid attorneys arises; furthermore, it would be much less expensive than simply utilizing pre-investigation arbitration as detailed below. The second option is similarly inefficient. Software copyright cases make up a very small minority of the work done by police (less than one hundredth of one percent of "specialized law enforcement,"[52] which itself is only one subset of enforced laws) and therefore it would seem inefficient to expend further resources focusing on a small and rarely-occurring issue.

For these reasons, I propose that mandatory pre-complaint arbitration would better balance the rights of the parties. Plaintiffs will still be able to use potential criminal sanctions to collect awards in meritorious actions. Defendants will be granted greater ability to assert their defenses. Larger scale cases, involving importation or distribution, would remain investigable by law enforcement (whether they should remain so or not is a debate for another day).

Conveniently, there is already a competent body to handle such arbitrations, the Korea Copyright Commission ("KCC").[53] KCC is a governmental non-profit organization that researches copyright law, recommends royalty rates for compulsory licenses, and may, upon request, attempt to resolve disputes between parties (among other duties).[54] KCC is currently statutorily empowered to engage in two kinds of dispute resolution: mediation[55] and conciliation[56] (similar to arbitration).

Mediation is the less formal, and subordinate, of the two alternatives. If

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51. Correspondence with Yeon-su "John" Han (President, Korea Software Users Protection Association) to author (May 4, 2012) (on file with the author).

52. Kyeongcha'r tonggye yeonbo (경찰통계연보) [Police Statistical Report] 2010, Korea National Police Agency, p. 219. (Prosecution under the former "Computer Software Act" which has since been replaced by provisions in the Copyright Act; although there is little doubt that the total number of cases has increased since the "crackdown," even a growth factor of 100x would mean that software copyright cases only make up 1% of "specialized law enforcement.")

53. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 112 *et. seq.*

54. *Id.* at art. 113.

55. *Id.* at art. 113-2.

56. *Id.* at art. 114.

conciliation is sought during the mediation process, mediation is suspended.[57] If resolution does occur it is memorialized in letters, not a formal determination with the force of a verdict as in the other form of ADR, conciliation.[58] Conciliation is a highly expedited,[59] closed-door proceeding,[60] but one in which KCC has greater power to request the production of witnesses and documents.[61] If conciliation is reached, it is binding on the parties as a judicial determination.[62] Unfortunately, the only sanction available for nonproduction or nonattendance is a declaration that the conciliation failed.[63] Furthermore, a party requesting conciliation must bear some degree of the cost upfront.[64]

Right holders are not currently necessarily amenable to subjecting themselves to mediation or conciliation.[65] There is nothing to gain if a right holder gives up the legal leverage of the police's authority and possible fines, but everything to lose if the mediator (or conciliator) sides with the defendant. In the absence of a legal provision mandating ADR, we can expect mediation and conciliation not to take place, and the relative inequality between defendants and plaintiffs to continue.

In terms of statutory law, right holders can be coerced into appearing before the KCC if alternative proceedings are mandatory when requested by one party. An example statute would read as follows: "Prior to the filing of a formal complaint to the police, an alleged victim in a case involving crimi-

57. *Id.* at art. 113-2(4).

58. *Cf. Id.* at art 113-2(5) (mediation-based agreements memorialized in letters) *with* art. 117 (conciliation has the same effect as a judicial determination of rights).

59. Jeojakkwon beob silhaeng ryeong [Enforcement Decree of The Copyright Act], Presidential Decree No. 23338, Mar. 15, 2012, art. 61(5) and 65 (failure to reach conciliation within a maximum of six months means that conciliation is deemed to have failed).

60. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 115 and 116.

61. Jeojakkwon beob silhaeng ryeong [Enforcement Decree of The Copyright Act], Presidential Decree No. 23338, Mar. 15, 2012, art. 62.

62. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 117.

63. Jeojakkwon beob silhaeng ryeong [Enforcement Decree of The Copyright Act], Presidential Decree No. 23338, Mar. 15, 2012, art. 63(1).

64. *Id.* at art. 61(2).

65. Correspondence with Yeon-su "John" Han (President of KOSUPA) to author (May 4, 2012) (on file with the author).

nal conduct under article 124(1), paragraph 3 [the paragraph criminalizing use in business of copyrighted material] must first submit to special arbitration by the Korean Copyright Commission, advancing all fees appurtenant thereto. If the complaining victim fails to appear at mediation or conciliation or otherwise intentionally frustrates the proceedings, s/he gives up his or her right to bring a criminal complaint. The KCC shall arbitrate the matter and the decision of the KCC shall be binding on the parties. If the decision is in favor of the plaintiff, it is enforceable by the police per article 124(1) paragraph 3. Costs of special arbitration shall be assigned pursuant to procedures set by KCC." [66] (A parallel amendment to KCC's empowering statute, article 113 would also be needed to grant KCC the authority to engage in this process.[67])

This alone, however, is insufficient to ensure fairness and consistency. Legal determinations made by the KCC should be retained in some form to ensure consistency from situation to situation. Decisions by the KCC in special arbitration can be printed and given the force of effective precedent within police investigations and similar arbitration proceedings. In this manner, the investigating police can be aware of the various defenses and when they are, or are not established.

A plaintiff who enjoys victorious special arbitration may then use law enforcement to assist in collecting his due reward, and a defendant may use his victory to dissuade the police from pursuing the matter. Special arbitration, however, should not serve as a substitute for litigation when the plaintiff wishes to pursue statutory damages. That is, a plaintiff victorious before the KCC (and a presumably unrepresented defendant) and should not be able to use the arbitration decision as conclusive evidence of infringement when pursuing enhanced damages in a court proceeding. The plaintiff is electing for a low-risk, low-reward forum and it would be categorically unfair to allow a defendant to risk a sum much greater than both lawyer's fees in a less formal

66. Other paragraphs of article 124 prohibiting larger-scale enterprises would not be modified under my current proposal. (*See* Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011, art. 124.) Thus importers, distributers and other, larger infringers would still be at the mercy of the police and prosecutors. I would caution the reader against reading this as an endorsement of criminal copyright laws in general; whether criminal copyright sanctions are ever appropriate or efficient is a worthwhile debate, but not one to be undertaken in this article.

67. Jeojakkwon beob [Copyright Act], Act. No. 11110, Dec. 2, 2011.

proceeding such as the proposed environment.

Another difference between this proceeding and the existent conciliation is that statements made in special arbitration would not be privileged. Since arbitration here is meant to take the place of formal legal proceedings, there must be a degree of transparency of statements; parties and witnesses must be bound to their statements and ready to answer for their actions before the KCC and before the police. It is possible that parties may object to the non-privileged nature of this system. However, a defendant has little reason for protest--statements made to the police during an investigation are not privileged, therefore the only change in position of the defendant is one of improvement (from a victim-oriented investigator to a neutral one). The plaintiff may complain that he is not similarly undergoing any improvement in position, but this is because his position is already too strong. He may opt to sue and collect statutory damages and fees, but rather he has chosen expedited, low-cost extrajudicial enforcement. In any case, his statements to police would be no more privileged than the defendant's--which is to say, they would not be protected at all.

Expenses for this proceeding should be expected to be noticeably less than any proceeding involving attorneys and the court system. The plaintiff has already opted to go without an attorney by avoiding the court system; hopefully, with an educated neutral party provided by the KCC, the defendant can similarly forego representation. Estimates for conciliation expenses by KCC are under 100,000 won[68] [$88 USD]. If plaintiffs are asked to advance the modest cost of special arbitration, frivolous allegations will be deterred. To defray expenses for meritorious claims, costs should fall on the losing party, and the KCC can set guidelines for apportioning expenses in cases of split decisions. Given the modest price of this procedure, if costs are shifted, the risk of shifted special arbitration expenses is noticeably less than the millions of won [thousands of USD] or greater a formal lawsuit entails. Through this proceeding, plaintiffs and defendants can be assured a forum of equal opportunity and a magistrate of expertise, without undergoing the fiscal outlays of litigation.

68. "Conciliation" Korea Copyright Commission, *available at* eng.copyright.or.kr (click on "services" then "conciliation") (last visited Aug. 11, 2012).

Ⅴ. Conclusion

The current system, while admirable in its protection of plaintiff's rights in small cases, strongly discourages defendants from asserting possibly valid legal defenses. The software crackdown has had a negative effect on some businesses, although whether that effect would be offset by increased youth employment in a "perfect" pirate-free world is debatable. Korea's adoption of statutory damages should result in a concomitant decriminalization of smaller-scale copyright infringement, as plaintiffs no longer need to worry about de minimis recovery. If, however, the use in business of software is not removed from law enforcement's oversight, KCC special arbitration, binding on both parties, would encourage the maintenance of legitimate defenses while allowing plaintiffs a low-expense form and the convenience of police-supported enforcement.

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Manuscript received: May 29, 2012; *review completed:* August 29, 2012;
accepted: September 14, 2012