



September 15, 2009

Ms. Carmen Suro-Bredie  
Chairman, Trade Policy Staff Committee  
Office of the United States Trade Representative  
VIA [www.regulations.gov](http://www.regulations.gov)

**RE: Docket USTR-2009-0020**

Dear Madam Chairman:

The International Intellectual Property Alliance (IIPA) appreciates the opportunity to submit its views in response to your Request for Comments Concerning Free Trade Agreement with the Republic of Korea, which appeared in the Federal Register on July 27, 2009. See 74 Fed. Reg. 37084 (July 27, 2009).

In summary response to the question posed in the Request for Comments, IIPA believes that the Korea-U.S. Free Trade Agreement (KORUS FTA) makes substantial progress in achieving the applicable purposes, policies, priorities and objectives of the Bipartisan Trade Promotion Authority Act of 2002 (“TPA Act”). We believe that its prompt ratification and full implementation would be exceptionally beneficial to the U.S.-based copyright industries, and would contribute substantially to the economic health and global competitiveness of the United States.

#### About IIPA and the Copyright Industries

IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community.<sup>1</sup> These member associations represent 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual

<sup>1</sup> IIPA members include the following associations: Association of American Publishers (AAP), Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers’ Association (NMPA), and the Recording Industry Association of America (RIAA).

works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

As the TPSC knows, the copyright-based industries are among the fastest growing and most productive of any sector of the U.S. economy. On July 20, 2009, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2003-2007 Report*, the twelfth study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that the “core” U.S. copyright industries<sup>2</sup> accounted for an estimated \$889.1 billion of value added, or 6.44% of the U.S. gross domestic product (GDP) in 2007. These “core” industries were responsible for 22.74% of the growth achieved in 2007 for the U.S. economy as a whole. In every year from 2004 through 2007, the copyright industries grew more than twice as fast as the U.S. economy as a whole.

In addition, the “core” copyright industries employed nearly 5.6 million American workers in 2007 (4.05% of the entire U.S. workforce). These workers earned annual compensation averaging \$73,554, or 30% more than the average compensation paid to U.S. workers overall (\$56,817). Finally, estimated 2007 foreign sales and exports of the core copyright industries increased to nearly \$126 billion, far exceeding other major industry sectors such as aircraft, automobiles, agricultural products, or food.

Virtually since its inception, IIPA has been actively engaged on behalf of its member associations in the monitoring and development of copyright law and enforcement policy in the Republic of Korea (ROK). It has prepared comprehensive reports on these issues in each annual Special 301 proceeding since that mechanism was created in the Omnibus Trade and Competitiveness Act of 1988.<sup>3</sup> IIPA and its members also closely followed the progress of the negotiations for a Free Trade Agreement with Korea, and are intimately familiar with the provisions of the KORUS FTA that resulted from those negotiations.

#### Likely Impact of the Korea FTA

IIPA strongly believes that the adoption of the FTA with Korea is likely to have a beneficial impact on the copyright industry sector. Given the importance of this sector to the overall U.S. economy, and particularly to the growth of high-paying jobs and U.S. exports and foreign sales, this positive impact will, IIPA believes, contribute to a favorable outcome for the economy as a whole and for American consumers.

IIPA’s testimony to the TPSC in March 2006, at the outset of the FTA negotiations, predicted that “many sectors of our economy could reap significant benefits from a sound and

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<sup>2</sup> The “core” copyright industries are those that create copyrighted materials as their primary product. All the figures quoted in the text are much higher for the “total” copyright industries, which include the “core” industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. *The 2003-2007 Report* is posted on the IIPA website at <http://www.iipa.com>.

<sup>3</sup> The nine most recent annual IIPA Special 301 reports on ROK are available at <http://www.iipa.com/countryreports.html#S>, listed under South Korea.

comprehensive US-Korea FTA. This is certainly true of the copyright sector as well. However, these benefits can only be realized if the FTA includes high standards for copyright law reform; concrete deliverables for strengthening enforcement of copyright in Korea; and firm commitments to reduce or eliminate market access barriers in the copyright sector. If Korea agrees to and fully implements such FTA provisions, the prospects for increased U.S. – Korea trade in copyrighted materials would be great, with accompanying positive effects on U.S. employment in the copyright sector, and in U.S. global competitiveness.”

On the whole, we submit that the FTA that has been negotiated meets the high standards that we called for, in copyright law reform, copyright enforcement, and market access for the copyright sector. If these provisions of the KORUS FTA come into force, and if they are fully implemented by the ROK government, we believe that the positive effects we foresaw at the outset of this process are likely to be achieved. Korea is a major export market for U.S. copyright works of all kinds. The provisions of the FTA, particularly those summarized below, could open this market further to these exports and foreign sales, with particular regard to dismantling the major market access barrier that we face in this and so many other foreign markets: piracy. A more robust market for U.S. copyright materials in Korea can only benefit the American worker, the American position in global trade, and the American economy as a whole.

#### Selected FTA Provisions

In this submission, IIPA wishes to call attention to a few of the critical provisions of the KORUS FTA for the copyright sector. (We also direct the Committee’s attention to the report of the Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15) in this regard. See <http://www.iipa.com/pdf/ITAC15FinalReportKoreaApril272007.pdf>.)

#### Re: Copyright Protections

- Protection of temporary copies. Korea today stands almost alone among nations in refusing to apply the copyright owner’s exclusive right of reproduction to cover the making of temporary copies, such as those made in the Random Access Memory of a personal computer. In light of the ever-increasing economic importance of such copies in the digital networked environment, in which the making and use of such temporary copies is rapidly becoming the primary means by which many copyright works are consumed by the public, this is a significant gap in current law. IIPA is pleased that, in Article 18.4.1 of the FTA, Korea has committed to closing this gap by giving the reproduction right a scope that accords with world copyright standards.
- Technological protection measures. Article 18.4.7 commits Korea to repairing the deficiencies in its current legal framework for safeguarding the technologies that right holders use to control access to and use of their works. Such protections are a critical aspect of global minimum standards for copyright protection, as

embodied in the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

- Online service provider liability. By agreeing to the detailed regime set forth in Article 18.10.30 of the FTA, including the critical undertaking to provide legal incentives for service providers to cooperate with right holders in deterring piracy, Korea has taken a significant step forward toward a more effective system for combating the high levels of online copyright infringement that prevail in that market.
- Exclusive rights for sound recordings. Korea will be obligated, under Article 18.6.3 of the FTA, to bring all means of digital dissemination of sound recordings to the public – including webcasting, streaming and digital broadcasting – within the scope of the exclusive rights of recording producers. Implementation of this FTA commitment should help to dispel uncertainty about the reach of current law, and promote a robust legitimate market in licensed use of these new media to disseminate sound recordings.
- Extension of term of copyright protection. Article 18.4.4 of the FTA, when implemented, will bring Korea in line with the unmistakable global trend toward extending the term of copyright protection, thus removing the potential irritant to international trade that results from divergent terms among trading partners.
- Contractual rights. Under Article 18.4.6 of the FTA, Korea is obligated to allow all right holders to exercise economic rights in their own names. This could provide a strong legal counterweight to provisions of current Korean law that mandate collective administration of exclusive rights or rights to remuneration.
- Protection for encrypted signals. Article 18.7 of the FTA commits Korea to providing both civil and criminal remedies against those who decode program-carrying satellite signals without authorization, an important new legal tool to be wielded against signal theft.

Re: Enforcement

- Statutory damages. In a major step forward, Korea agreed in Article 18.10.6 of the FTA to supplement its system of civil damages for copyright infringement with a regime of pre-set statutory damages, a reform that will encourage civil enforcement by providing a predictable and deterrent remedy against infringers.
- Other civil remedial provisions. A number of provisions in paragraphs 7-10 of Article 18.10.6 of the FTA will enhance the remedies available to right holders in civil litigation in Korea, including seizure and destruction of infringing copies and the materials and implements used to make them; requirements for defendants to identify third parties in the production or distribution chain of pirated products; and the award of costs and attorneys' fees to prevailing parties.

- Outlawing “camcording.” Implementation of Article 18.10.29 of the FTA will help to ensure that Korea does not become a source for unauthorized master digital copies of motion pictures through illicit in-theater camcording.
- Ancillary offenses. Korea agreed in Article 18.10.28 of the FTA to provide criminal remedies against trafficking in counterfeit or illicit labels, documentation or packaging associated with pirate product.
- Enforcement against book piracy. In a side letter, Korea agreed to take specific steps to increase its efforts against book piracy and other copyright infringements on university campuses, ranging from stronger institutional copyright policies to enhanced training and public education campaigns.
- Enforcement against Internet piracy. In a particularly significant commitment, contained in another side letter to the FTA, Korea agreed to make internet piracy a law enforcement priority, with specific references to cooperation with the private sector and to the need to prosecute not only direct infringers, but also those who “profit from developing and maintaining services that effectively induce infringement.” This commitment, which surpasses what is found in other free trade agreements the U.S. has negotiated, is especially appropriate given the ubiquity of online infringement throughout Korea’s highly networked digital marketplace.

#### Re: Market Access

- Audio-visual quotas. Although much of Korea’s complex system of quotas that impede the access of U.S. film and TV producers to theatrical, broadcast, cable and other distribution channels remains in place, most of these quotas are locked in by the FTA at the least restrictive levels allowed under current law. See FTA Art. 12.6.1.c (amendments to non-conforming measures may not decrease conformity with FTA market access requirements).
- Foreign ownership. Korea has committed in FTA Annex I- Korea at 55 to phasing out most restrictions on foreign ownership of “program providers” that package channels for broadcast or cable distribution.

Of course the KORUS FTA is not a perfect agreement. IIPA is disappointed, for instance, by the ROK’s refusal to allow the norm of national treatment to apply to the availability of equitable remuneration for the terrestrial broadcast of sound recordings, thus perpetuating the unfair denial of this revenue stream to U.S. performers and producers. We also wish that Korea could have been persuaded to make more ambitious market access commitments with regard to new platforms for the delivery of content such as video on demand and Internet protocol television. In such a wide-ranging and comprehensive agreement, compromises on a number of other issues were inescapable. But on the whole, the copyright industries consider this one of the strongest and most progressive FTAs ever negotiated. The fact that the negotiating partner in

this case was a large and dynamic economy such as the ROK further enhances the overall value of the agreement.

### TPA Act Purposes, Policies, Priorities and Objectives

The main features of the KORUS FTA summarized above clearly advance the negotiating objectives of the United States, as laid out in Section 2102 of the TPA Act, 19 U.S.C. section 3802. While the following list is neither exhaustive nor comprehensive, and in many cases a single KORUS FTA provision maps onto several different negotiating objectives laid out in the statute, the following are worth particular note:

- Adoption of the KORUS FTA will promote “more open, equitable and reciprocal market access” for copyright industry products and services, both through the market access improvements summarized above, and through the provisions that will enable a more effective effort by the ROK against piracy, the leading market access barrier that the copyright industries across the board experience in the Korean market (19 U.S.C. 3802(a)(1); see also sections 3802(b)(2) (objective “to reduce ... barriers to international trade in services”) and 3802(b)(4)(B) (“fair, equitable and nondiscriminatory market access opportunities for United States persons that rely on intellectual property protection”));
- KORUS FTA obligations regarding enforcement, as listed above, will advance the negotiating objectives of “full implementation of ... enforcement obligations under [the TRIPS Agreement],” see section 3802(b)(4)(A)(i)(I); “ensuring that standards of ... enforcement keep pace with technological developments,” see section 3802(b)(4)(A)(iv); and the general objective of “providing strong enforcement of intellectual property rights,” see section 3802(b)(4)(A)(v);
- The substantive copyright law provisions summarized above will advance a number of the statutory negotiating objectives, including sections 3802(b)(4)(A)(i)(II) (“standard of protection similar to that found in United States law”); 3802(b)(4)(A)(ii) (“strong protection for new and emerging technologies and new methods of transmitting and distributing [copyright] products”); and 3802(b)(4)(A)(iv) (calling for “standards of protection [that] keep pace with technological developments and ... ensur[e] that rightholders have the legal and technological means to control use of their works through the Internet and other global communications media”).

### Conclusion

In sum, the potential of the KORUS FTA for boosting the U.S. copyright sector, and with it the overall U.S. economy, is considerable. But neither our sector, nor the nation as a whole, can reap these benefits until the KORUS FTA comes into force.

The key to realizing this exciting potential involves two critical steps. First, the KORUS FTA must be approved by Congress. Second, the ROK must do the same, and Korea's wide-ranging and extensive FTA commitments must be fully and promptly implemented.<sup>4</sup> While IIPA knows that neither step will be easy to achieve, we strongly believe that making the KORUS FTA a reality is in the best interests of American creators, producers, and distributors of copyright materials, of the millions of workers employed in this sector, and of the American economy as a whole. We urge the Administration and the Congress to make ratification of the KORUS FTA a top priority, and we stand ready to assist in advancing this critical goal.

Respectfully submitted,

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<sup>4</sup> Once the FTA negotiations concluded, Korea moved quickly to draft the extensive legislative changes needed to bring its copyright and related laws into compliance with its FTA obligations. A draft amendment released in mid-2007 would have achieved this objective to a considerable extent, though it needed improvement in some areas. Since then, however, Korea's copyright laws have been significantly reorganized, and thus the FTA implementing amendments need substantial revision in order to fit into the new statutory structure. This effort may have stalled pending uncertainty about the fate of the FTA as a whole.