



Date : 21/08/2006

## Copyright Issues in Proposed FTA between Korea and US

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Meeting:	89 Copyright and other Legal Matters (CLM) (Part 1)
Simultaneous Interpretation:	Yes

*WORLD LIBRARY AND INFORMATION CONGRESS: 72ND IFLA GENERAL CONFERENCE AND COUNCIL*  
20-24 August 2006, Seoul, Korea  
<http://www.ifla.org/IV/ifla72/index.htm>

### **Abstract**

*FTA negotiation between Korea and the US was initiated by the proposal of Korean administration and progressed faster than any other FTAs with US aiming to reach a conclusion by late this year or early next year. Differently from the Korean government having little strategies in intellectual property sectors, the purposes of trade negotiation of the US are to impose the protection standards under the US intellectual property rights (IPRs) law and to carry the US' positions that were failed to materialize in multilateral negotiation tables.*

*IPR negotiation history between Korea and the US goes back to 1984 when the US officially linked the IPRs to international trade by amending Section 301 of US Trade Act. The amended rules first targeted Korea for its inadequate*

*protection of US-held IPRs, and the threat of trade retaliation from the US forced Korea to reorganize the Korean IPR systems to match those of the US. After 20 years later, we Korean now face revision to the stricter intellectual property regimes which extend copyright term, expand the property right to temporary copy, and create new concept of copyright by giving copyright holder a power to control access or read the copyrighted material in digital world. Stronger protection and enforcement of copyright are for commercial interests of “copyright industries” and has no or little relationship with encouraging creative and innovative activities of individual creators. The negotiation for free trade agreement between Korea and the US, especially for the “TRIPS-Plus” world, should be stopped.*

## **Introduction**

I'm very happy to have this chance to discuss the current negotiations taking place for a free trade agreement between Korea and US, officially called the KORUS FTA. I would also like to thank the IFLA for giving me this opportunity.

In my presentation I will talk about the progress of the KORUS FTA negotiations and issues relating to intellectual property in general and copyright in detail.



## Progress of KORUS FTA Talks

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- ◆ February: Announcement of negotiation
- ◆ June: 1<sup>st</sup> round of talks
- ◆ July: 2<sup>nd</sup> round of talks
- ◆ August: Exchange of tariff cut proposals
- ◆ September: 3<sup>rd</sup> round of talks
- ◆ Much faster than any other FTA aiming to conclude the negotiation late this year or early next year (within one year)

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The KORUS FTA talks have progressed faster than any other FTAs with the US. Both parties, Korea and the US, aim to reach a formal agreement by late this year or early next year in light of the Trade Promotion Authority, commonly called “fast track negotiating authority” given to the Bush Administration, which will expire in July next year. If it is concluded as planned, the negotiations will not take even one full year from the official announcement of the launching of KORUS FTA this February. After a 90-day consultation period in the US, the negotiations were officially commenced this May, and through the first and second rounds this June and July, a third round of talks is scheduled next month (September). Last week, both parties already exchanged their initial tariff cut proposals for manufactured goods, agricultural products and textile.



## Stance and Purposes of Korean government

- ◆ US demanded four preconditions from Korea before entering into FTA talks: Reduction of the screen quota for domestic films; Lowering the standards of automobile exhaust fumes; Resumption of American beef importation; No new drug pricing policy
- ◆ Without seeking public opinion Korea offered concessions in the four sectors and started negotiations without analysing the expected economic effects of the KORUS FTA.

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This swift progress of the talks is partly due to political pressures on the Korean administration to conclude the talks. Last year, when Korean government proposed the KORUS FTA, the US stated that “it was premature to launch actual negotiations” and asked certain key outstanding issues to be resolved for the FTA talks, which include the reduction of the screen quota for domestic films, lowering the standards of automobile exhaust fumes, the resumption of American beef importation, and the no reform of drug pricing policy.

For paving the way to the FTA talks, the Korean government offered concessions in all four sectors. There were no processes in Korea to seek public opinion for these four sectors, or even with respect to having a free trade agreement with the US. Further, the Korean government tried to launch the FTA talks without analyzing the expected economic and social effects KORUS FTA could have on Korea.



## Approaches of US (1)

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- ◆ Impose standards of IPR protection similar to that found in US law such as DMCA (19 USC § 3802(4)(A)(i)(II))
- ◆ Stronger protection for new technologies and new method of transmitting and distributing products embodying IPR
- ◆ Only “protection” not “limitation”
- ◆ Stronger enforcement of IPR through civil, administrative and criminal mechanisms

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Now let's move on to the IPR issues in terms of the strategies of the United States. According to the Bipartisan Trade Promotion Act of 2002, the principle trade negotiating objectives of the United States include “ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights ... reflect a standard of protection similar to that found in United States law” (19 USC § 3802(4)(A)(i)(II)). This means that the objectives of the US for the KORUS FTA and all other FTA negotiations are to impose the protection standards under the US law such as the DMCA onto other nations. But we must be mindful of the fact that the US objective focuses on “protection” and not the “exceptions or limitations” contained in US law. Other key objectives of the US in IPR negotiations are stronger protection for new technologies and new methods for transmitting and distributing products embodying IPR and stronger enforcement of IPR through civil, administrative, and criminal enforcement mechanisms.

## Approaches of US (2)

- ◆ Carry positions that failed to materialize in multilateral tables including WTO TRIPS and WIPO (WCT, WPPT)
- ◆ US motives: net receipts in IPR trade were US\$ 28.4 billion and gross receipts totaled US\$ 51.3 billion; and “copyright industries” responsible 6% of GDP of US

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These congressional directives enumerated in the US trade act is to carry the US' positions that were failed to materialize in multilateral negotiation tables including WTO TRIPS and WIPO such as WCT and WPPT. The US believes that the FTAs are an effective mechanism for advancing US interests in securing intellectual property protection, and a more advantageous forum for achieving the intellectual property goals of the United States than multilateral settings (CRS Report for Congress RL33205, December 21, 2005).

The motives of the US to increase the IPR protection level worldwide are clear. According to WTO Trade Policy Review, net receipts of US as measured by IPR royalties and license fees were 28.4 billion in 2004 and gross receipts amounted to US\$ 51.3 billion.

The copyright industries are responsible for some 6% of the GDP of the United States, producing more international revenues than automobiles, aircraft or agriculture. Therefore, the copyright industries are of tremendous importance to the well-being of the economies of the US. So they are seeking ever higher levels of harmonization of the copyright laws of other nations with those existing in the US.



## IPR negotiation for 20 years (1)

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- ◆ IPR system was introduced in Korea in 1908 by a contract between Japan and the US to implement Japanese IPR system
- ◆ Section 301 of US Trade Act of 1984 first targeted Korea for inadequate protection of US-held IPR
- ◆ Korea acquiesced after about 10 month negotiation to raise the IPR protection in Korea

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The drive to strengthen IPR protection and expand US standards has directly affected Korean society. The first Korean IPR system was introduced in 1908 through a contract between Japan and the US to implement Japanese IPR system in Korea. About 80 years later, the Korean IPR system was re-organized to match or resemble those of the US. In 1984, the US amended Section 301 of US Trade Act to officially link intellectual property to international trade. The amended rule first targeted Korea for its inadequate protection of US-held IPR. After about a 10-month negotiation, the Korean government acquiesced to accept the demands of the US and raise the level of IPR protection much higher than actually needed in Korean society.



## IPR negotiation for 20 years (2)

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- ◆ Amendments of Korean IPR system in 1986
  - Copyright protection terms extension from 30 years to 50 years
  - Protection of computer software
  - Protection of sound recording for 20 years
  - Retroactive protection for US works and software published before the Amendment

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The result of the 1984 IPR negotiation spurred by the threat of trade retaliation from the US includes copyright protection term extensions from author life plus 30 years to 50 years after the death of the author, introduction of computer software protection, and retroactive protection for US works and computer software that were published before the effective date of the copyright law amendment.



## Effects of the 20 years negotiation

- ◆ Much higher protection of IPR than Korean society needs for encouraging creative and innovative activities
- ◆ Negative economic effects: deficit of IPR trade amounts US\$ –15 billion (2002 World Bank Report); and deficit of IPR royalties continues for 25 years from 1980

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The impacts of the results are enormous. First, the protection of IPR was much higher than what was needed for Korean society for encouraging creative and innovative activities because the scope of protection was not determined through internal consultation and therefore Korea lost the opportunity to seek a balance between the protection and limitations or exceptions of the rights. In terms of economic effects, the deficit of IPR trade balance amounts to US\$ -15 billion according to World Bank report of 2002, which is top in the world and triple of the deficit of China. This deficit of IPR royalties has continued for 25 years from the 1980s.



## Key Issues #1 – temporary copying

- ◆ Changing the nature or concept of copyright
- ◆ Temporary copy: reading, accessing information in digital world and executing computer software
- ◆ Power to control the users activities
- ◆ Results in raising royalty fees

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Now, I'd like to give you a short explanation on key issues in KORUS FTA with respect to copyright. These issues reflect the demands of US negotiators and as I know little demands from the Korean side with respect to copyright were made.

Temporary copy is one of the most important issues because it may change the nature or concept of copyright. Temporary copy occurs when we browse the Internet and in every aspect of use of copyrighted works in digital form such as reading and accessing information, and executing computer software. Current Korean law does not extend reproduction rights to cover copies made in the temporary memory of a computer. The US said the right to make and use temporary copies of works is attaining ever-increasing economic significance, and in some cases will become the primary means of legitimate exploitation of copyrighted materials. And, Korean law stands nearly alone in the world in its rejection of protection for temporary copies. So the US demands that copyright owner should have the right to prohibit temporary copy.

It is clear that the US demand extends the authors' right over their works on the Internet. And the balance between the user and copyright owner becomes even more biased toward the copyright holder because copyright holders will be able

to control even the most typical use as reading and accessing information in the digital world. This is not within the scope of the traditional copyright regime.

Further, most of the problems related to temporary copy can be resolved with traditional copyrights. For example, temporary copy occurring in Internet browsing can be controlled by the right to control non-temporary copy or the right to transmission to the public. In my view, the US demands to expand reproduction rights to the temporary copy is related to their desire to raise the royalty fees they can receive. If the unauthorized temporary copy is prevented, the copyright owner can ask royalties for every action of reading and accessing their works.



## Key Issues #2 – TPM

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- ◆ Current Korean law only prevents circumventing devices and TPMs applied to infringing activities
- ◆ US demands expansion to access control and circumventing acts
- ◆ Right to access control creates new concept of copyright and harm fair use

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The next issue is technological protection measures (TPMs). The current Korean Copyright Act prohibits the production and trafficking of devices aimed at circumventing TPMs. However, TPMs are limited to measures that prevent the infringing activities and Korean law does not prohibit the act of circumvention. US demands to expand the protection of TPMs to prohibit the act of circumvention and to protect measures that control access to copyrighted works.

Like the temporary copy, the expanded protection of TPM would create a new concept of copyright because the copyright owners have a right to control access to the copyrighted material and it will excessively limit fair use of the creative works.



## Key Issues #3 - Copyright Extension

- ◆ From 50 years to 70 years after the death of author
- ◆ Sonny Bono Copyright Extension Act 1998 – Disney’s rights to Mickey Mouse were due to expire in 2003
- ◆ Revenues from the Mickey Mouse character is US\$ 5.8 billion in a year (Source: Forbes Oct., 14, 2004)

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The US demands the extension of copyright term by 20 years. All FTAs involving US have the same clause. This is a direct replication of the US Sony Bono Copyright Extension Act of 1998, which was made possible largely due to the intense lobbying of the Walt Disney Corporation since the character Mickey Mouse was about to come into the public domain. The extension destroys the balance between copyright holders and users by preventing copyrighted works from coming back quickly enough into the public domain.

The main beneficiaries of the copyright term extension are large multi-national corporations located in the United States by allowing an additional 20 years of revenue. And I think the extension of copyright terms does little to encourage the original creators to write more and better works. It is just to keep and ensure the revenue of a small number of big copyright companies.



## Key Issues #4 Non-violation Complaint

- ◆ US-Singapore FTA Article 20.4(c)
  - When benefits the Party could reasonably have expected under IPR Chapter is nullified or impaired as a result of measure that is **not inconsistent** with the agreement
- ◆ Very dangerous concept
- ◆ Unbalances copyright law and undermines public policy

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The US-Singapore FTA contains a non-violation complaint provision. Article 20.4(c) allows dispute settlement procedures when “a benefits the Party could reasonably have expected to accrue to it under IPR Chapter (Chapter 16) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement”.

With respect to this non-violation complaint, TRIPS Agreement establishes a moratorium, and the TRIPS Council is still examining how the concept might apply in the context of the TRIPS Agreement.

The US expands and implements the non-violation concept through the FTAs. This concept is very dangerous. It may unbalance copyright law by elevating private property rights over the interests of the users and over other important national public policy considerations. Even when a court interprets the library exception more broadly or congress amends copyright law to allow digital copying in libraries that is consistent with the FTA provisions, the US copyright owner can still make a claim.



## Conclusion

- ◆ FTA is for commercial interests of US copyright industries
- ◆ No relationship with users' rights, preserving public domain or promoting library services
- ◆ TRIPS plus world driven by FTA fails to promote creative activities

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The KORUS FTA talks especially the IPR negotiations are for the commercial interests of US copyright industries. And, it has no or little relationship with enhancing users rights, preserving public domain or promoting library services.

If Korea accepts the demands of the US in the KORUS FTA, Korea will need to implement the rules enacted by the US Congress. And, Korea will have to wait an additional 20 years to see the copyrighted materials backing into its original domain, the public domain. Further, public services such as provision of information through libraries would be harmed by the expansion of copyright to access control and temporary copy.

The copyright law is not a necessary pre-condition for creative works to be made and TRIPS-Plus world driven by the US FTA failed to promote creative and innovative activities. The negotiation for free trade between Korea and the United States, especially for the TRIPS-Plus world, should be stopped.

Thank you!