Coalition Letter of NGOs to the U.S.T.R.

March 24th, 2006

Ambassador Rob Portman
United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508
United States of America

Subject: Korean and US NGOs Position Paper on the copyright issues in the Korea-US FTA Negotiation

Dear Ambassador Rob Portman,

We, Korean and US NGOs undersinged here, would like to submit written comments on the Korea-US FTA negotiation.

We are deeply worried about the Korea-US FTA negotiations especially on the issues of copyright. Considering the FTA that the US negotiated with other countries such as Australia and Singapore, and what the US has been demanding from the Korean government thus far, we assume that US will request IPR protection similar to or stronger that the US IPR laws. And we think it will bring about dangerous situations, for example, to obstruct fair use, science research, technology advancement and publishing.

Below material includes our detailed opinions on the issues of copyright in. We honestly request that our important opions should be considered very carefully.

Thank you for your consideration.

Sincerely Yours,

[NGOs]
Christian Coalition for Media Reform (Korea)
Citizens' Action Network (Korea)
Cultural Action (Korea)
Dasan Human Rights Center (Korea)
Essential Action (US)
Health Right Network (Korea)
Intellectual Property Left 'IPLeft' (Korea)
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Korean and US NGOs Position Paper on the copyright issues in the Korea-US FTA Negotiation

We strongly oppose the inclusion of the copyright clause in the current FTA negotiation between Korea and the United States.

Considering the FTA that the United States negotiated with Singapore, Australia, and Chile, and what the United States has been demanding from the Korean government thus far, we assume that the United States will request copyright protection similar to or stronger than the United States copyright laws such as the 1998 DMCA(Digital Millennium Copyright Act).

However, the DMCA and extending the copyright protection period in the Sonny Bono Copyright Term Extension Act (CTEA) have been under much criticism because it obstructs fair use, science research, technology advancement, and publishing. Furthermore, there are strong concerns about how it impedes computer security research. Nonetheless, United States has been imposing their own copyright laws on other countries by adopting laws similar to the DMCA in the FTA. Among them, we cannot allow the extension of the copyright protection period to 70 years or setting the penalty for circumventing the technical measures for protection at the broad level of the laws in the United States because these clauses violate the fundamental principles of the copyright laws. The United States must stop such demands on the Korean government immediately.

1. Extending the protection period

United States has extended the copyright protection period to 70 years after the death of the creator through the enactment of the CTEA. Furthermore, the United States has imposed the same protection period in Singapore, Australia, and Chile through the FTA and FTAA negotiations. The CTEA demands a 20 years extension to 50 year protection provided for in the Berne Convention and

TRIPs agreement, which most countries have joined. However, extending the protection period to 70 years defies the very reason for having a protection period. The extension will distort the copyright into an permanent right.

Creative works are results of the efforts of the creators. However, the creation draws up on the cultural legacy left by our predecessors. Similarly, when the new creation is officially published, the successors will in turn build on them for future creations, resulting in more creative works. Consequently, the creative works are part of the cultural legacy of all mankind. Hence, giving the creator a timeless monopoly on the use is not appropriate. The very reason of having a protection period is based on the premises that the creation is a cultural legacy. The limited protection period can protect the creator, thus encouraging creation, as well as enhance the cultural legacy for more creation by entering the work into public domain at the end of the period.

Then what is the appropriate protection period? The protection period should be determined based on the cultural standard of each country, the purpose of having the protection period, and the characteristics of the works.

The original purpose of copyright protection is to cultivate cultural development in a country through the protection of copyright. Thus, the determination of the protection period requires the consideration of the cultural policies of each individual country. Therefore, the protection period is set differently according to the cultural standard of each country. Indeed, trying to set the protection period uniformly through the treaties is inconsistent with this purpose. When protection periods are set in the treaties, they should be set at the minimum level, and any extensions to the minimum period should be left to the autonomy of each country.

Moreover, when setting the protection period, the fundamental purpose for having the protection period must be consider. The period must be set so that it can encourage creation as well as terminate early enough to bring the creation into the public domain while it still has value. It is meaningless to have public use of creative works when there is no value in using the work.

Creative works takes various forms such as music, art, literature, academic

research, software, and architecture. Accordingly, the protection period needs to be set differently depending on the form. For example, software needs a shorter protection period compared to literature. In the case of software, technology progresses at a much faster pace and the cost recovery time is also very short. Furthermore, 50 years after the death of the creator, there is no benefit to making the software a public good because after such a long time, the software becomes useless. Hence, protecting software until 50 years after the death of the creator is equivalent to protecting it during the full lifetime of the software. The protection period must be shortened to have any value in brining the software into the public domain. Instead extending the protection period by another 20 years will in reality give permanent protection to not only software, but to all creative works.

Hence, the protection period for copyright should be determined based on each countries cultural standard, the purpose of having the protection period, the objective for legislating the copyright law, and the characteristics of each creative work. It can not be open for negotiations in a trade agreement. Moreover, the Sonny Bono Copyright Term Extension Act (CTEA) has prevented over 400,000 creative works from entering public domain in the United States. It is under criticism as infringing on the cultural rights of many people in order to protect the business profit of a few large corporations and has been mocked as the “Mickey mouse law”. Imposing the CTEA worldwide will further infringe on the rights of all mankind worldwide in order to protect the business interest of a few large corporations. Therefore, United States must cease such efforts to impose the CTEA worldwide immediately.

2. Demanding a stronger sanctions on circumvention of technical measures

United States is imposing their own laws on technical measures for protection in the copyright laws article 1201 in the FTA to other countries. United States laws on technical measures for protection of copyright material prohibits acts to circumvent the technical measure for limiting access and to manufacture and provide services or tools for the purpose of circumventing the technical measures to restrict access or use.

However, in the WCT adopted by WIPO, technical measures for protection of copyright material are limited to restricting use. In the WCT, it repeatedly states that “exercise the right by this Treaty or the Berne Convention” and “acts not allowed by the creator or the law”. Furthermore, according to WCT, access to the creative work is not an act limited by the copyright law.

Hence, United States’ claim that the technical measures that limits access to works must also be protected is beyond the requirements provided in the international treaty and extremely limits the use of creative works. Prohibiting and punishing acts to circumvent technical measure to access to creative work, even when it does not infringe the copyright, is expanding the scope of copyright laws. Moreover, such laws will excessively limit fair use of the creative works. Such position by the United States is more or less imposing heavier burden than the international treaties on FTA partners to protect United States’ interest and forcing the people of the other party to sacrifice their interest for few transnational capital.

3. Demanding the stipulation of temporary reproduction

When computer programs or digital works are used via the computer, or searched, viewed, or transmitted on the Internet, these works are stored temporarily on the computer RAM. Such stored works go away automatically and are not saved when another command is run or the computer is powered off. Storage of digital works in the computer RAM are not permanent as saving them in secondary storage devices such as the hard drive. It is referred to as temporary reproduction or storage to indicate that the stored works go away when the computer is powered off. Such temporary reproduction on the computer is most commonly seen on the computer RAM, but also occurs on the computer buffer when the works are transmitted over the Internet via streaming technology. Furthermore, when digital works are transmitted from on-line service providers relaying them over the network, temporary reproduction occurs in the system server or cache server. Finally, when Application Service Provider (ASP) provide computer programs over streaming technology, the client computer RAM will also temporarily store information on the RAM.

Even in the United States copyright laws, temporary reproduction is not explicitly regulated. However, the United States has demanded that Korea

stipulate temporary reproduction as copying under the copyright law for many years.

Yet, when temporary reproduction is acknowledged as copying, the balance desired by the copyright law between the user and the copyright holder becomes even more biased toward the copyright holder because copyright holders will be able to control even the most typical use as viewing information from public website. Similar to protecting technical measures to access works, such stipulation will protect the copyright holder's right to access the works, which is not within the scope given in the current copyright. Furthermore, temporary reproduction is a by-product of legal use of the creative work. It does not hold any economic value independent of the legal use, and therefore the regulation of temporary reproduction cannot be justified. When temporary reproduction is acknowledged as copying, users will be unfairly charged twice. On the other hand, if the temporary copy is allowed, there is no additional incentive to the creator, and thus it is not in accord with the purpose of acknowledging copyright as exclusive rights.

United States must stop its demands to stipulate temporary reproduction by unreasonably including temporary reproduction as copying.

4. Demand for strict enforcement of the copyright laws

United States has been continuously demanding strict enforcement of the copyright laws such as direct police involvement. However, Korea is in the process of establishing strict enforcement practice that is stricter even than the United States. We hold that such enforcement practices of the Korean government is harmful to the people's freedom of expression, freedom to operate a business, and the privacy of the people and must be corrected immediately. However, if the United States is for strong protection of copyrights, United States government might have something to learn from the Korean government.

In Korea, it is common for the Korean Software Property-right Council, comprised of software development companies, the prosecutor and the police to crack down on copyright infringements in cooperation. Through such

mechanisms, the copyright holders have excessively strong protection on their copyright. In addition, currently the revision of copyright law being reviewed in the legislator includes provisions to allow the minister of culture and tourism direct administrative control over the deletion and collection of copyright infringements. The provisions even include measures to fine those who do not comply with the administrative instructions given by the minister. United States should not demand actions from the Korean government that they themselves do not take in their own country. Such demands can only be considered as intimidation by those with a stronger position in the international relations.

In addition to this, Unites States has been putting pressure on the Korean government using 'Super 301'. This is a product of United States' nationalistic conception. More precisely, such actions demonstrate the United States position to protect the interest of the few businesses in their own country at the cost of the cultural rights of all other people worldwide. This is a total disregard for human rights by the United States government. United States must withdraw its unreasonable demands on the copyright protection and stop trying to impose them in the current FTA negotiations with the Korean government. We strongly oppose the Korean-US FTA that includes the United States' demands on copyright. If the FTA still moves towards a stronger protection of the copyright and disregards the rights of the users, we have no choice but to fight for the obstruction of the Korea-US FTA.

March 24th, 2006

Endorsement

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