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United States-Republic of Korea Free Trade Agreement - CPTech comments  
27 March 20006  
James Love, CPTech

CPTech provides the following comments regarding the proposal for a US Korea Free Trade Agreement (US/Kr/FTA).

Our comments address the parts of the agreement that concern knowledge goods. In particular, we present a new way of thinking about the topics that have been addressed in previous US/FTAs under chapters on intellectual property rights, as well as provisions concerning pricing of pharmaceutical drugs.

As noted in the *2006 Economic Report of the President*, intellectual property rights can play an important role in creating incentives and rewards for investments in inventive and creative works. However, intellectual property rights can also be implemented in ways that are overreaching, anticompetitive, and protectionist, harming both economic growth and the interests of consumers.

Increasingly, economists, political scientists, business leaders and consumers are recognizing that intellectual property rights are forms of government regulation that have both costs and benefits, and which are also subject to regulatory capture by special interests.

Knowledge is the fuel of the modern economy, and trillions of dollars are spent on education and the creation and dissemination of information. We want businesses, consumers and other stakeholders to be informed, and take advantage of the best technologies and to manage knowledge resources wisely.

The freedom to use and share knowledge can be seen as the normal case (the general rule), and intellectual property rights as a limited exception (the exception to the rule). As noted in the February 2006 *Economic Report of the President*, it is difficult to find the right balance between intellectual property rights on the one hand and the freedom to use and share knowledge on the other hand.

Some level of intellectual property right protection is clearly necessary to create the incentives and rewards we need to support and reward creative and inventive individuals and communities. But we also very much need systems for creating and disseminating information resources that are not owned or controlled by anyone. The knowledge economy is a complex ecosystem. To support the discovery and development of new medicines, we rely upon a plethora of patent and sui generis methods of intellectual property protection to create incentives to invest in new medicines, but we also spend approximately \$30 billion per year through the National Institutes of Health (NIH) on government funded research, much of which freely enters the global knowledge commons. The US government vigorously promotes the patent system globally, but it also provides more global public goods for medical research than any other country. The Human Genome Project, the HapMap Project, Medline, and other public goods are as important to the drug discovery system as are patents and high prices on

new medicines.

There are trade related aspects of both issues in this knowledge ecosystem. The US government has supported the TRIPS and other multilateral and bilateral trade agreements that seek to address the issue of ensuring that every country provides minimum levels of protection for patents, copyrights and other types of intellectual property protection. These agreements deal with global “free riding” for investments that rely upon patents, copyrights or other types of intellectual property protection. But they do not address free riding issues relating to global public goods, such as costly project like the Human Genome Project or Medline. Nor do these agreements deal with another problem – the possible anti-competitive and protectionist nature of intellectual property systems that are overly restrictive in terms of access to knowledge.

US trade policy lacks balance. It places all of its emphasis on one issue – the possibility of free riding on investments that are protected by patents, copyrights or other types of intellectual property. It does nothing to address the free riding on public goods, and it is also doing nothing to address cases where inappropriate levels or badly managed intellectual property rights are an unwarranted encroachment on the public domain. There is simply no policy justification for this lack of balance. The reasons for a lack of balance are undoubtedly due to the vast lobbying resources of intellectual property right-owners, who can command the attention and attract the favors of political leaders and civil servants who supervise trade policy. It is also due to a lack of understanding of the importance of freedom and access to knowledge to the processes of innovation and economic growth.

Assumptions about the optimal balance between intellectual property rights and the public domain were shattered when the Internet emerged as the new platform for the sharing and distribution of knowledge resources. Everything about the Internet was a surprise. The core technologies for the Internet were either placed in the public domain, or freely licensed to everyone. Enormous attention was given to the benefits of open standards for certain key network and software technologies. The explosion of publishing on the Internet vastly increased the amount of information that was available without charge to anyone. New models for the development of “free software” were key to overcoming anti-competitive tendencies of some companies, and attractive as a superior model for designing, maintaining and enhancing certain services provided by software.

Scientists working on medical or agricultural research, and publishers of scholarly journals were deeply influenced by the amazing benefits of these new information technologies, as were venture capitalists and firms both big and small. New business models and new forms of collaboration among different communities of creative and inventive persons emerged overnight to explore and test these new possibilities. Some of this was strictly non-commercial, and some was very commercial. The “free” technologies of the Internet created enormous new private wealth, and vastly enriched the lives of the public at the same time. It is a dynamic and complex ecosystem that undoubtedly has done much to promote trade, investment, innovation, development and growth in other sectors of the economy.

Meanwhile, the rhetoric and policy objectives of US trade policy seemed firmly rooted in the past – and in some cases, hostile to these new paradigms. The Korean FTA is an opportunity to consider new thinking about trade policy. One possibility is to consider a new chapter in the FTA on Access to Knowledge (A2K). The United States is the largest source of public domain knowledge resources in the world, and the world benefits from a number of important limitations and exceptions in US copyright laws. But we also benefit from public goods provided by our trading partners, and the limitations and exceptions in foreign patent and copyright laws that guarantee greater access to their knowledge resources.

The Chapter on A2K should consider including these provisions:

## 1. Copyright and related rights.

- a. Korea should agree to provide for fair use of copyrighted works that are at least as liberal as US law.
- b. Korea should agree to forgo copyright of works by federal employees (the US standard).
- c. Orphan Works. Korea should agree to adopt measures that provide publishers greater access to "orphaned" copyrighted works, as has been proposed by the US Copyright office.
- d. Distance Education. Both countries should agree to adopt measures for limitations and exceptions to copyright that are effective in promoting greater access to education through new distance education tools. This is an important field for public and private sector organizations in the United States, and will often involve cross border delivery of services, making it highly appropriate to address in trade agreements.
- e. Persons with disabilities. Both countries should agree to provide effective measures that ensure that persons with disabilities can access copyrighted works.
- f. Documentaries. Both countries should jointly study problems facing filmmakers who seek to make documentaries, to determine if there is a need for global norms for non-voluntary use of copyrighted materials (with or without remuneration) for certain works. This might refer to "special cases where the social, cultural, educational or other developmental benefit of a use outweigh the costs imposed by it on private parties."
- g. Non-original or creative works. Facts and works lacking in creativity, should not be subject to copyright or copyright like protections. We note this is a position strongly supported by the US Chamber of Commerce and leading US database companies in the Congressional debates over proposals to introduce European style database protections in the US.
- h. Search engines and ISPs. Both countries should agree to minimum copyright limitations and exceptions that ensure that search engines and ISPs can provide valuable services to the public. We note the US is the global leader in search engine technologies, and we have an interest in protecting this sector from restrictive copyright regimes. The language for search engines could protect "The use of works in connection with Internet search engines, so long as the owners of works do not make reasonable measures to prevent access by Internet search engines, and the Internet search engine service provides convenient and effective means to remove works from databases upon request of the right owner."

## 2. Patents.

- a. Korea and the US should both agree to ensure that standards for inventive step for patents are sufficiently high to avoid unwarranted encroachments of the public domain.
- b. Both countries should share information and cooperate in efforts to improve the quality of issued patents, and to implement reforms in both pre and post grant review of patent quality.

## 3. Provision of Public Goods.

- a. The US and Korea should consider a provision that requires federally funded research articles to enter public archives within a certain amount of time, similar to the proposals in the United States for research funded by the National Institutes of Health.
  - b. Both countries could agree to provide incentives to government funded research grants to publisher in author/pays open access journals.
  - c. Korea and the US should provide commitments to support certain public goods. These could be provided through collaboration, or by each country independently. For example, the United States and Korea could agree to support public domain databases relating to Bird Flu or SARS, or to support digitalization (and translation) of public domain books.
  - d. Korea and the US could agree to minimum levels of federal support for servers that provide access to free software resources.
4. Special issues concerning standards. Open standards are global public goods, including those that are based upon appropriate licensing of patented or copyrighted technologies.
- a. Korea and the US should cooperate on the development of policies relating to disclosures of patents on proposed technical standards.
  - b. Korea and the US should cooperate on procurement policies that support the development of open standards for document and data formats, in order to promote competition in software markets and greater interoperability of devices and software used to manage knowledge resources.
  - c. Copyright and patent laws of both countries should permit the use of works in connection with legitimate reverse engineering.

In the area of medicines, the United States has promoted ever increasingly high standards for intellectual protection for medicines, and measures like the 1999 US/EC/Korea agreements on drug pricing, which are explicitly designed to raise drug prices in Korea. These measures are deeply resented in Korea, and have led to significant problems in access to new expensive medicines, such as the case so eloquently examined in the film *Dying for Drugs* (copy mailed under separate cover), which examines the case of Gleevec in Korea, a very expensive treatment for certain types of leukemia.

Rather than add to these already unpopular measures with even more anti-consumer measures that fuel anti-US political sentiment, and which are contrary to paragraph 4 of the 2001 Doha Declaration on TRIPS and Public Health, we suggest a different approach. The US should ask Korea to shoulder higher burdens of supporting publicly funded medical R&D, including research directed at global health care priorities, such as new treatments for Bird Flu, SARS, TB, AIDS and other areas where the the patent system by itself is not a sufficient mechanism to stimulate R&D.

These efforts could be addressed in a new chapter in the FTA concerning measures to support essential health care research.

Such a chapter in the FTA could also address other important issues, such as the global sharing of the costs of clinical trials that provide evaluation of the safety and efficacy of new drugs, including head-to-head comparisons of products within the same therapeutic class. This type of evidence is a global public good, and the chapter on essential health care research could provide a model for addressing the

global "who should pay" question.

Within this new trade framework, our foreign trading partners would not be asked to trade access to medicines for access to the US market. They would be asked to contribute to the global costs of medical innovation in areas where there is the greatest need, and where the United States has been providing the most global leadership, but in ways that are consistent with the protection of access to medicine and consumer protection. The US could more freely consider measures to protect our own consumers when appropriate (benefiting both US taxpayers and the US employers who pay for medicines), without undermining the entire global system for supporting new drug development. This is because it would recognize the importance of both public and private sector investments, and all of the legitimate mechanisms to support R&D for new medicines.

The US would benefit from this change in several ways. First, US employers would be more competitive, as foreign trading partners picked up a greater share of the cost of providing global public goods in the area of medical R&D. Second, the US would benefit from the new medicines supported by the foreign R&D, including priority areas like Bird Flu, AIDS or SARS that are important global problems. Third, the US would be seen in a much more positive light globally, at a time when anti-US political sentiment is hurting US businesses and US political interests. In this regard, we note the growing international interest in a new global framework to support essential medical R&D, as evidenced most recently by support for the World Health Organization's Executive Board proposed resolution EB117.R13, which will be debated in May 2006 at the World Health Assembly.