



Testimony of Robert W. Holleyman, II

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Subcommittee on Trade**

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Mr. Chairman, Ranking Member McDermott, thank you for holding this hearing today and inviting the Business Software Alliance¹ to testify. BSA is an association of the world's leading software and hardware companies. BSA members create the majority of the workplace productivity software in use in the US and around the world.

A core part of BSA's mission is to reduce software theft around the world. Our number one consideration in evaluating the KORUS FTA is how well it enhances our ability to carry out that mission. Over the past decade the Korean government has made great strides in combating software piracy through sustained law enforcement efforts. It is critical that these high levels of enforcement continue. Since the inception of negotiations our key goal for KORUS has been to preserve and supplement the strong IPR enforcement system Korea already has in place. We believe that, properly implemented, the KORUS FTA will do just that.

Let me provide a little background about the industry: America's copyright industries lead the world, and the US software industry is by far the largest of these copyright industries. The software and related services sector employs almost 2 million people in the US in jobs that pay nearly twice the national average.

The US has come through a harrowing economic crisis and is still struggling to return to pre-recession levels of employment. We believe our country's ability to

¹ *The Business Software Alliance (www.bsa.org) is the world's foremost advocate for the software industry, working in 80 countries to expand software markets and create conditions for innovation and growth. Governments and industry partners look to BSA for thoughtful approaches to key policy and legal issues, recognizing that software plays a critical role in driving economic and social progress in all nations. BSA's member companies invest billions of dollars a year in local economies, good jobs, and next-generation solutions that will help people around the world be more productive, connected, and secure. BSA members include Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, Cadence, CNC/Mastercam, Corel, Dassault Systèmes SolidWorks Corporation, Dell, Intel, Intuit, Kaspersky Lab, McAfee, Microsoft, Minitab, PTC, Progress Software, Quark, Quest Software, Rosetta Stone, Siemens, Sybase, Symantec, and The MathWorks.*

create jobs depends in large part on our ability to export. We support the President's ambitious goal of doubling US exports of goods and services over five years. Computer software is a critical sector in expanding exports. US software exports contribute a \$39 billion surplus to our nation's balance of trade. As much as 60 percent of revenues for the leading US software companies are generated from sales outside US borders.

The benefits of trade reach well beyond the large established players in the software industry that have a presence in foreign markets. There are at least three reasons why this is so:

- First, software is a key factor of production in many industries. Domestic software producers benefit when overseas markets are open to the goods and services that are produced using their software.
- Second, opening overseas markets for platforms that companies like Apple, Microsoft and others provide has direct benefits to the many small and medium-sized companies that develop software for those platforms.
- Third, by breaking down geographic boundaries the Internet puts foreign markets within reach of many smaller US companies – as long as potential trade barriers don't get in the way.

The software industry has thus been a long-time champion of efforts to expand export opportunities through free trade agreements. BSA supported successive Administrations in their quest to conclude the best possible agreement with the Republic of Korea, which is a major US trading partner and a major market for many of our member companies. Today, I am here to testify that BSA supports Congressional approval of the KORUS FTA at the earliest opportunity.

The KORUS FTA achieves high levels of commitments in several areas of importance to the software industry: Cross-border trade in services; electronic commerce; and protection of intellectual property rights (IPRs). Focusing on these areas, it is our assessment that the KORUS FTA represents significant progress toward achieving the applicable purposes, policies, priorities and objectives of the Bipartisan Trade Promotion Authority Act of 2002 (the TPA Act) as set out in section 2102 (19 USC §3802).

Cross-Border Trade in Services

As has been done in its other bilateral Free Trade Agreements negotiated by the US over the past decade, the KORUS FTA takes a "top-down" approach to scheduling services commitments – that is, general commitments subject to scheduled exceptions, as opposed to specifically scheduled commitments. Such an approach ensures far superior coverage than the WTO GATS architecture.

Significantly, Korea's schedule of exceptions does not contain any exception in the computer and related services sector. This means that Korea is committed to full market access and national treatment for all information technology services. This structure and scope will help ensure protection for evolving IT services, including those that are delivered electronically, and will help prevent new trade barriers from being created in the future.

Electronic Commerce

The KORUS FTA continues the practice in other recent bilateral FTAs of including a robust chapter on electronic commerce. Key elements of this chapter include:

- Confirmation that the supply of a service by electronic means falls within the scope of obligations on services.
- A permanent prohibition on duties on the importation or exportation of digital products, including both the transmission and its content.
- A requirement that national treatment rules apply to digital products.
- A requirement that MFN rules apply to digital products.
- A recognition that parties should refrain from imposing unnecessary barriers to electronic information flows across borders.

Protection and Enforcement of IPRs

Piracy in the Software Sector and its Economic Impact

The biggest trade barrier that software companies face throughout the world is rampant theft of their products. BSA companies, and the software industry as a whole, lose billions of dollars to software piracy each year. In 2009 43% of PC software placed in service was illegally copied. In many countries the piracy rate exceeded 75%, reaching highs of 90% or more in some markets. The commercial value of this piracy totals more than \$51 billion worldwide. This has an impact on local economies around the world that goes well beyond the direct impact to software producers. A recent IDC study estimates that reducing software piracy by 10 points over four years could stimulate the entire IT sector and produce over 500,000 new jobs, \$32 billion in increased tax revenues and \$142 billion in new economic growth.

Software Industry Efforts to Reduce Piracy

BSA and its individual members devote significant financial and human resources to preventing piracy worldwide. Our efforts are multi-faceted.

First, we are engaged in extensive educational efforts, designed to increase public understanding of the value of intellectual property and to improve overall awareness of copyright laws, on a global basis.

Second, we work closely with national and international bodies to encourage adoption of laws that strengthen copyright protection and promote an environment in which the software industry can continue to innovate.

Finally, where appropriate, BSA undertakes enforcement actions against those involved in the unlawful use, distribution or sale of its members' software. On the Internet, for example, BSA conducts a far-reaching "notice and takedown" program. BSA also engages in civil litigation against corporate end-users who are using our members' products without authorization. We work closely with local, national and international law enforcement bodies to protect the intellectual property rights of our members.

Substantive Copyright Provisions in the KORUS FTA

The copyright provisions of Chapter 18 of the KORUS FTA require the parties to implement levels of protection above those found in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the WIPO Copyright Treaty. The provisions build on these earlier agreements, filling in gaps and adding greater specificity and certainty. Many of the details in these provisions track existing US law fairly closely, particularly with respect to protections that US law (in the Digital Millennium Copyright Act) provides for works in digital form.

The following are some specific examples of FTA provisions that are particularly important to the business software industry:

- **Requirement that central government agencies do not use infringing software** (art. 18.4.9). Governments are among the world's biggest consumers of business software, and are not immune to unauthorized installation and use. The US government has issued an executive order that requires federal agencies to put the necessary controls in place to ensure that all software use is authorized, and other countries have issued similar decrees. The KORUS FTA, like its predecessors, requires the parties to have such orders or decrees in place to ensure that the government sets a positive example for the private sector. This obligation has no counterpart in the TRIPS agreement.
- **Express protection for temporary reproductions** (art. 18.4.1). Computer programs can be exploited without making a permanent copy. Unauthorized reproductions that endure in a computer's random access memory (RAM) for very short periods of time can cause economic harm to copyright owners. Protection for temporary reproductions is implicit in the Berne Convention (and, a fortiori, the TRIPS Agreement and the WIPO

Copyright Treaty), but the FTA provision affords added certainty by making this protection explicit.

- **Protection against circumvention of effective technological measures** (art. 18.4.7). One of the important methods that copyright owners use to protect against piracy of their works in digital form is the use of technological measures, such as product activation and digital rights management systems. These measures, however, can be vulnerable to hacking, and the international community agreed that legal prohibitions against circumvention were needed. The WIPO Copyright Treaty has a fairly general requirement, but the FTA provision adds much greater specificity concerning both the scope of the protections, the scope of limitations, and the available remedies.
- **Protection of rights management information** (art. 18.4.8). One means by which copyright owners can facilitate electronic commerce in works is by attaching information to the digital copies of their works that identifies the right holder and terms and conditions of use. Like technological measures, this rights management information is subject to hacking. The WIPO Copyright Treaty contains a fairly general requirement to protect rights management information, and the FTA provision adds greater specificity, particularly with regard to the available remedies.
- **Making available right** (art. 18.5). One of the main paradigms for dissemination of works on the Internet is posting works, or making them available for others to access or download at a time and place of their choosing. This activity is not expressly covered by any of the copyright owner's exclusive rights as spelled out in the Berne Convention and incorporated by reference into the TRIPS agreement. The KORUS FTA incorporates the so-called "making available" right from the WIPO Copyright Treaty.

Provisions on Enforcement of Copyright in the KORUS FTA

Article 18.10 of the KORUS FTA contains numerous obligations that provide for strong enforcement of IPRs. Many of these obligations build upon, clarify and extend obligations found in the TRIPS agreement. Others are entirely new and address enforcement issues that arise in the digital environment. All of them are consistent with US law.

Several of the provisions of Article 18.10 are of particular significance to BSA's efforts to combat corporate end-user piracy (the unauthorized use of software by business entities):

- **Pre-established (Statutory) Damages** (Art. 18.10.6). Statutory damages are an essential tool in civil litigation against end-user piracy, where poor or nonexistent recordkeeping by the infringer often makes it difficult to assess the full extent of actual damages. Statutory damages also serve as a deterrent, since they make it much more certain that infringers will face significant economic consequences as a result of their actions. Although US law has long provided for statutory damages, this provision is lacking in Korea’s copyright law. For the business software industry, persuading Korea to adopt a statutory damages regime was one of the major negotiating successes achieved by the US in this agreement.
- **Service Provider Liability** (Art. 18.10.30). The cooperation of Internet Service Providers is essential for fighting online piracy. The FTA contains provisions, closely modeled on section 512 of the US Copyright Act, that provide incentives to ISPs to cooperate with US right holders by removing infringing materials from their systems. These provisions are a TRIPS-plus element of the FTA that address a key issue of copyright enforcement in the digital environment.

A Note on Ex-Officio Authority in Criminal Cases

Article 18.10.27(f) of the KORUS FTA requires each party to provide “that its authorities may initiate legal action ex officio” with respect to cases of criminal copyright infringement. In recent years, the business software industry has seen high levels of criminal enforcement against corporate end-user piracy in Korea under the existing, complaint-based system. This has led to a decline in Korea’s software piracy rate and an increase in legitimate software purchases. BSA urges the US government to obtain assurances from the Korean government that its implementation of this provision will preserve the same high levels of enforcement without interruption after the FTA enters into force. It would be ironic indeed if Korean actions ostensibly to implement the KORUS FTA were to result in making it harder for software companies to protect their intellectual property rights.

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BSA appreciates this opportunity to provide its views on the KORUS FTA. We also note that many of the elements that we have identified in the KORUS FTA as being beneficial to the software industry are also present in the pending agreements with Panama and Colombia. For that reason, BSA supports congressional approval of those agreements as well.

Thank you for inviting me to testify. I’d be happy to answer your questions.