



Australian Recording Industry Association Ltd.
ABN 72 002 692 944 ACN 002 692 944
Level 4, 19 Harris Street
Pyrmont NSW 2009
PO Box Q20
Queen Victoria Building
NSW 1230
Telephone: (02) 8569 1144
Facsimile: (02) 8569 1181
Website: www.aria.com.au



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Korea FTA Task Force
Department of Foreign Affairs & Trade
RG Casey Building
John McEwen Crescent
BARTON ACT 0221

By email: KoreaFTA@dfat.gov.au

Dear Sirs

Australia – Republic of Korea FTA

Thank you for the opportunity to comment on whether Australia should engage in a bilateral free trade agreement with the Republic of Korea (referred to as the ***Australia-Korea FTA***).

1. Who are we?

The Australian Recording Industry Association (**ARIA**) is the peak trade body for the recorded music industry in Australia. We have over 100 members ranging from the local affiliates of the four major international record companies through to significant Australian independent record labels and a substantial number of smaller Australian record labels.

Music Industry Piracy Investigations Pty Limited (**MIPI**) is the anti-piracy organisation for the Australian music industry. It is a joint venture between the Australian recorded music sector (represented by ARIA) and the Australian music publishers (represented by the Australasian Mechanical Copyright Owners' Society Limited, **AMCOS**).

2. Support for the Australia-Korea FTA

We understand that on 11 August 2008, Australia and Korea agreed to commence preparatory talks on an Australia-Korea FTA. This followed a joint non-government study into the feasibility of a free trade agreement between Australia and the Republic of Korea released in April 2008 (the ***Feasibility Study***).¹ The DFAT website relevantly states that:²

¹ Available at <http://www.dfat.gov.au/geo/rok/fta/rok-au-study-report.pdf>.

² <http://www.dfat.gov.au/geo/rok/fta/index.html>.

The study, conducted by ITS Global, a Melbourne-based trade consultancy, and the Korea Institute for International Economic Policy (KIEP), concluded that a free trade agreement between Australia and Korea offered significant opportunities to further strengthen our highly complementary and growing bilateral trade and investment relationship, and deliver gains to both countries through closer economic integration.

We understand that Korea is Australia's fourth largest merchandise export market and sixth largest overall trading partner. Australia is an importer of passenger motor vehicles and telecommunications equipment from Korea.³

Given the nature of our organisations, ARIA and MIPI support the Australia-Korea FTA as a mechanism for strengthening intellectual property (*IP*) protection in the Republic of Korea.

3. Intellectual property protection in the Republic of Korea

The Feasibility Study relevantly states:⁴

ROK has a relatively comprehensive IP regime with legislation providing protection for patents, trade marks, industrial designs, copyright and related rights, utility models, computer programs and layout designs of integrated circuits.

In recent years, ROK has strengthened its intellectual property laws in a number of areas, including improved protection for sound recordings and films and enhanced enforcement. Further positive changes are anticipated as a result of the KORUS FTA which was concluded in April 2007.

The text of the IP chapter of the Republic of Korea and United States FTA (*KORUS FTA*) referred to is available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/asset_upload_file273_12717.pdf.

4. Copyright issues in Republic of Korea

We believe that the Australian Korean FTA presents a unique opportunity to reinforce efforts to address several key copyright issues in the Republic of Korea. These are discussed below.

Public performance

Unlike Australian Law, the Korean Copyright Act does not confer a public performance right for sound recordings. The lack of public performance rights in Korea practically means that Australian artists and songwriters lose revenue due to an inability to collect royalties for this important activity. We understand that a significant percentage of legitimate music sales in Korea relate to foreign repertoire, suggesting that similarly there would be significant public performance of foreign repertoire.

Online piracy issues

The Recording Industry 2006 Piracy Report⁵ relevantly states:

Internet piracy is rife in South Korea and is severely hampering the development of the legitimate music market....

³ <http://www.dfat.gov.au/geo/rok/fta/index.html>.

⁴ Page 93.

⁵ IFPI, *The Recording Industry 2006 Piracy Report*, 2006, pages 11 and 15 (the *IFPI Piracy Report*).

With exceptionally high rates of broadband and mobile wireless penetration, South Korea has become one of the worlds most advanced digital markets, with high levels of online and mobile music sales but considerably higher levels of internet piracy.

There are hundreds of websites offering unauthorised music files for download to computers or mobile devices and numerous illegal file sharing services. There is also widespread use of music on blog sites and other streaming services.

Internet based piracy is the most prevalent form of piracy in Korea. According to the latest information from the Copyright Protection Center in Korea, the illegal distribution of music can be found on web-storages, community portal sites, online community forums, individual blog sites and P2P sites.

Korean websites offering unauthorised music files and illegal file sharing services based in Korea can be accessed by Australian consumers and no doubt help facilitate copyright infringement of sound recordings and musical works in Australia, adversely affecting the Australian music industry.

Independent Australian research ⁶ suggests that **18 per cent of the Australian population** (approximately 2.8 million people) illegally downloaded music regularly on the internet over a recent 12 month period. Those engaged in file sharing have dramatically increased the volume of music being illegally obtained from previous studies, downloading an average of 30 songs per month. This equates to over **1 billion songs being illegally traded per year** by Australians alone, compared to a legitimate digital market of 19 million. In addition, the research indicates that 57 per cent of those who download via a peer-to-peer service 'rarely' or 'never' then purchase the CD from a retailer, and that 26 per cent of illegal file sharers state they have bought less music (including CDs and digital downloads) as a direct consequence of their use of file sharing networks.

5. Role of the Australia Korea FTA

In our view, the Australia Korea FTA presents a unique opportunity for the copyright issues discussed above to be addressed. In particular, we submit that the following amendments could be recommended as part of the Australia Korean FTA negotiations:

1. Public performance rights: The introduction of a public performance right for producers is considered essential. Korea has declared that the 'communication to the public' remuneration right under the Korean Copyright Act will only apply to broadcasting (leaving public performance outside the scope of the right), and that reciprocity will apply. We would urge that at the very least, the Australia-Korea FTA include reciprocal provisions regarding the public performance right for producers.
2. ISP safe harbour provisions: the Safe Harbour provisions in the Korean Copyright Act do not clearly state that they only apply to monetary damages and therefore could be misinterpreted as providing a blanket exemption from all liability of internet service providers (**ISPs**) for copyright infringement on their networks. In line with Australian law, the relevant provisions in Korea should clarify that the safe harbours limit monetary relief only but injunctive relief remains available.
3. ISP standard of knowledge: the knowledge standard for ISPs under the Korean Copyright Act should not only include situations where the ISP has actual knowledge, but also when it is aware of facts or circumstances from which infringement is apparent.
4. ISP definition: the definition of "online service provider" under the Korean Copyright Act should not only cover those providers that provide services online, but also internet access providers. Irrespective of whether or not they provide web-based services.

⁶ Quantum Market Research commissioned by ARIA, February 2007.

5. Temporary copies: at present, the Korean Copyright Act does not expressly protect temporary copies, creating a large deficiency in the protection of producers against unauthorised electronic copies of their works.

6. Conclusion

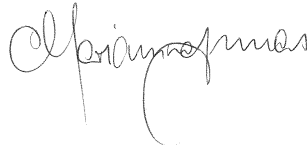
The Republic of Korea has significant digital piracy issues and given the international nature of the internet, websites and file sharing networks in Korea can be easily accessed by Australian consumers thus contributing to online intellectual property theft within Australia. In this context, the Australia-Korea FTA provides a unique opportunity for Australia to assist Korea in addressing some of the challenges it faces in respect of IP protection, particularly in areas of copyright legislation. Augmented protection of IP in Korea will afford greater business confidence and consequently improve trade for both Australian and Korean companies and organisations.

If you need further information, please contact Stephen Peach of ARIA or Marianna Annas of MIPI.

Yours sincerely



Stephen Peach
CEO ARIA
speach@aria.com.au
Tel +61 2 8569 1144



Marianna Annas
General Manager MIPI
mannas@mipi.com.au
Tel +61 2 8569 1177