# ACTA in Korea

## 1. Introduction

One excuse of the major ACTA players, i.e., the US and the EU, is that ACTA would bring about no change in their domestic legal system.[[1]](#footnote-1) This indicates that ACTA aims at exporting US or EU model, or their mixture. Then it is easy to anticipate big changes in other negotiating countries. One of them is Korea. However, in Korea, ACTA fails to attract attentions from policy makers and scholars. Even IP industries are uninterested in the ACTA talks. Is this because the anticipated change is not a big deal? Or, is this because they prefer to the change? I would say that it is more because greater change of our legal system is to happen by bilateral agreements concluded by Korean government with both the US and the EU. Some potential change by the FTAs is much higher than the standard proposed in ACTA.

For instance, the US-Korea FTA contains a side letter entitled “” under which any web site that permits unauthorised reproduction, distribution or transmission of copyrighted work may be shut down. The camcording provision of the US-Korea FTA is stricter than ACTA: not only those who actually use an audiovisual device. The additional reason of the indifference is domestic standard for the protection and enforcement of IP is already high enough.

ACTA is

## 2. Civil Enforcement

### 2-1. Injunction

ACTA proposal contains an injunctive relief, permanent or interlocutory, against intermediaries (Art. 2.X(2) of page 5 and Art. 2.5.X of page 8). The intermediaries under the proposed ACTA text are broadly defined as referring to those whose “services are used by a third party to infringe an intellectual property right.” Some significant elements seem to be under discussion as they are in brackets: Whether this is optional or mandatory, whether the intermediaries are liable when they are infringing IPRs, or whether the conditions and procedures relating to such injunction would be left to national courts’ discretion. However, when considering this was proposed by the EU on the basis of its Directive, (Directive 2004/48/EC of The European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Arts. 9(1)(a) and 11 use almost the same languages, Recital (23) “The conditions and procedures relating to such injunctions should be left to the national law of the Member States.” + Recital (59) of Directive 2001/29/EC “In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party’s infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.). It is likely that the injunctive relief against non-infringing intermediaries would be mandatory with certain level of discretion left to national courts.

EU-Korea FTA, Article 10.48(2) “Each Party shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are being used by a third party to infringe copyright, related right, trademarks or geographical indications.” In Footnote 21, “the scope of “intermediary” is determined in each Party’s legislation, but shall include those who deliver or distribute infringing goods, and also where appropriate, include online service providers.” This injunctive remedy against the intermediaries is also applied in the form of interlocutory injunction (Article 10.46(1)).

Injunctive relief against those who do not directly infringe IPRs is possible under the existing domestic rule. But the ACTA would introduce two fundamental changes.

First, ACTA aims at a harmonized rule which is based on European model. Injunctive remedy varies depending on legal traditions. Contributory, vicarious or inducement liability under the US tort theory, authorization, joint-tortfeasor and various liability under the Common Wealth Countries, and duty of care or Störerhaftung doctrine under the civil law tradition. Under which conditions and to what extent a non-infringing entity is liable are matters of general civil doctrine. Creating an exception which is only applied to a civil dispute involving IPRs is alien (\*\*\*).

Second, the ACTA proposal puts the principle and exception into reverse by making the injunctive relief against the non-infringing intermediaries to be a principle, not an exception. The Korean IP laws allow injunction against “those who are infringing or likely to infringe protected rights.”[[2]](#footnote-2) Here, the person who is likely to infringe protected rights does not include the non-infringing intermediaries, in principle. As a general rule, the Civil Act provides a room for the civil liability of a third party. Article 760(3) stipulates that “instigator or accessories shall be deemed to act jointly.” But the remedies against the instigator or accessories are limited to compensation under the doctrine of Article 750 providing that “any person who causes losses to or inflicts injuries on another person by unlawful act, wilfully or negligently, shall be bound to make compensation for damages arising therefrom.” Accordingly, the mere fact that the services are used by a third party to infringe IPRs is not enough to impose liability of injunctive relief on the intermediaries who provide such services.

Yet this does not mean that the injunctive relief against the intermediaries is entirely denied under the Korean legal system. In exceptional cases, the courts awarded the injunctive relief against a service provider. For instance, the injunctive relief is granted where the full recovery of injuries (such as monetary compensation or recover of impaired reputation) is impossible after a right (personal rights in this case) is infringed and where it is difficult to expect the full compensation of damages (Supreme Court 93Da40614, 40621, April 21, 1996). In connection with IPR infringement cases, the Korean Court held, in Soribada case[[3]](#footnote-3), that a peer-to-peer service provider specifically designed for MP3 music file sharing is liable for copyright infringement. But the court enumerates several conditions that the P2P service provider (Soribada) is liable: The service provider:

* Knew or should know users’ infringement;
* Can control illegal file sharing;
* Plan to make profit from the service;
* Did nothing but display a notice; and
* Aid the users’ copyright infringement.

In trademark infringement decision,[[4]](#footnote-4) the Court denied general monitoring or filtering obligation of the defendant to prevent trademark infringements taking place in an online open market place. The defendant, G market who provides the online open market place, is held to be obligated to prevent the trademark infringement where:

* He obtains actual knowledge of the infringement as a result of clear indications by the right holder, or it is objectively evident that trademark infringing goods are sold through his service; and
* The prevention of the trademark infringement is possible both in technological and economic senses.

Youtube v. Viacom or Perfect 10 cases in the US. “knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough. That is consistent with an area of the law devoted to protection of distinctive individual works, not libraries. To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users’ postings infringe a copyright would contravene the structure and operation of the DMCA.”

### 2-2. Damages

ACTA proposes pre-established damages (Article 2.2(2) of p. 6) and damages liability of innocent infringers, the amount of which may also be pre-determined (Art. 2.2(3)).

The pre-established or statutory damages is an alien concept in civil law jurisdiction. The underlying principle of the damages relief is to ensure a full compensation of actual injury caused by an unlawful act. Therefore a causal link between the unlawful act and the injury should be established, in principle, by the injured. So if there is no actual injury even when an unlawful act takes place, the person who committed the unlawful act is NOT liable.

## 3. Border Measures

### 3-1. Scope

Only copyright and trademark

## 3-2. In-Transit and Applicable Law

Not the law of exporting or importing countries

## 4. Criminal Enforcement

### 4-1. Scope – Commercial Scale

The term “commercial scale” is a key element in determining the scope of criminal enforcement. ACTA requires a criminal sanction to be applied “at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.” (Article 2.14(1) of p.15). The criminal penalties are also to be applied to counterfeit labels when they are circulated on commercial scale (Art. 2.14(2) of p. 15). In contrast, the condition of commercial scale is not required in the proposed camcorder provision (Art. 2.14(3) of pp. 15-16).[[5]](#footnote-5)

ACTA does not provide a general definition on what the “commercial scale” is. Instead, it spells out two categories of commercial scale copyright piracy: significant wilful copyright infringement that have no direct or indirect motivation of financial gain (Art. 2.14(1)(a); and wilful copyright infringements for purposes of commercial advantage or financial gain (Art. 2.14(1)(b)). In connection with the copyright infringement, the commercial scale is determined according to the financial gain. The financial gain is defined in footnote 37 as encompassing “the receipt or expectation of receipt of anything of value.” This expression came from the U.S. law. During the ACTA negotiation, the US and Japan supported “private financial gain,” while Australia and New Zealand demanded to delete the term “private.” The consolidated text of April 2010 shows that the compromised text reflects the concerns of Australia and New Zealand. Nonetheless, the deletion of the term “private” does not seem to change horses in midstream. It is because the financial gain includes the receipt of anything of value and the term “anything of value” is generally interpreted broadly to embrace almost any benefit received by a defendant [citation needed].

Although a 1976 amendment changed infringement for profit to infringement “undertaken for purposes of commercial advantage or private financial gain,” it retained the element of an economic motive. *See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 15.01 [A], [B] (Dec. 1998)* *§* 15.01[B][1] (“One constant about the 1976 Act . . . is that criminal exposure . . . required all the elements for civil copyright liability, plus the added two ingredients of willful infringement for purpose of commercial advantage or private financial gain.”) [United States v. LaMacchia, 871 F. Supp. 535, 539 (D. Mass. 1994) (“Since 1897 . . . the concept differentiating criminal from civil copyright violations has been that the infringement must be pursued for purposes of commercial exploitation.”)]

Then, in the early 1990s, it became possible to post misappropriated digitized software programs on electronic bulletin boards, making them available to the public at no cost. As the *LaMacchia* case made clear, this conduct – misappropriating and distributing without a profit motivation – did not violate criminal copyright laws.16 The case stimulated Congress to enact the NET,17 which eliminated the requirement of financial gain and thus of commercial purpose. Congress had removed the historical division that had protected noncompetitive users from criminal liability. The following year, in enacting the DMCA, Congress went further by criminalizing conduct that might lead to infringement. … The NET also changed the definition of "financial gain,"22 to encompass "anything of value, including the receipt of other copyrighted works."23 As used in other federal criminal provisions, the term “anything of value” is generally interpreted broadly to include almost any benefit received by a defendant.24 By this indirect means, the traditional "for profit" provision now includes infringements that had, in the past, triggered only civil liability.25

The US model 🡪 shifting from commercial purposes to commercial impact (Jeong 2010, 29)

4-2. Unintended Consequences: New Business Model of Criminal Sanction

If the threshold at which the criminal procedure is triggered is as low as ACTA proposes, unintended consequences may happen. This concern is based on the recent Korean experience.

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| --- | --- | --- | --- | --- | --- |
| Year | 2005 | 2006 | 2007 | 2008 | 2009 |
| Complaints Received | 14,838(290) | 18,227(611) | 25,027(2,832) | 90,979(21,953) | 89,410(22,169) |
| Indictment | Demand for a Trial | 19(0) | 23(0) | 26(0) | 8(0) | 67(0) |
| Summary Indictment | 1,486(19) | 1,473(31) | 1,637(76) | 3,975(118) | 3,956(17) |
| Non-Prosecution | Dismissal | 1,013(19) | 1,445(20) | 3,836(313) | 12,446(1,575) | 24,702(13,707) |
| Withdrawal | 9,481(155) | 11,426(389) | 15,195(1,865) | 51,255(11,855) | 27,150(2,936) |
| Suspension | 215(33) | 1,865(118) | 1,986(379) | 16,520(6,056) | 24,676(4,243) |
| Etc. | 2,624(64) | 1,995(53) | 2,347(199) | 6,775(2,349) | 8,859(1,266) |

Year | 2006 | 2007 | 2008

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Complaint (Total) | 18,227 | 25,027 (+137%) | 90,979 (+364%)

Complaint (Juveniles) | 611 | 2,832 (+464%) | 2,3470 (+829%)

Decision of the Prosecution

- Indictment | 1,496 | 1,663 (+111%) | 4,003 (+240%)

- Non-Prosecution Disposition | 15,640 | 21,808 (+139%) | 83,862 (+385%)

- Etc. (incl. stay of indictment) | 1,767 | 1,508 (-15%) | 3,150 (+209%)

(Source: The Korea Supreme Prosecutors’ Office, Press Release, Feb. 2009)

The Figure 1 below shows the skyrocketed increase of criminal complaints in 2008, an increase of 360% from 25,027 in 2007 to 90,979 in 2008. This figure remains almost unchanged in 2009 (89,410) and \*\*\* in 2010.

<Figure 1> The number of criminal complaints (Source: press release of the Minister of Culture, Tourism and Sports and

According to the Copyright Commission(a governmental body), the number of request of dispute resolution decreases every year due to the profit-seeking of some law firms and in relatively large cases the law firms acting on behalf of copyright holders deny to join the dispute resolution process (Sisa Journal NO. 953, January 21, 2008)

According to the Analysis of Crime 2009 of the Supreme Prosecutors’ Office, 15% of under-age crime is related to the copyright infringement (among the 134,992 suspected under-age, the suspected copyright infringers occupy around 15% (200,272). While the under-age crime occupies 6%, the copyright crime by the under-age amounts to 23%. One observes that the percentage would reach 50% when considering many under-age obtain users accounts in the name of their parents. According to the police office, one law firm established a publishing company by using a name of lawyer’s wife and hire around three hundreds staff members to monitor and chase the online activities which are technically copyright infringement (Digital Times December 7, 2009 <http://www.dt.co.kr/contents.html?article_no=2009120802010351699001>).

In solving this problem, the Korean government invests vast efforts in educating existing copyright law without paying attention the structural conditions that promote the abusive practices. 저작권기소유예제도도 그 일종(금년 3월 종료).

## 5. Internet Enforcement

5-1. Three Strikes Rule

5-2. Camcording Provision

## 6. Procedural Justice

Imbalance between the negotiators’ tongue and texts. There is also a mismatch between 🡪 this mismatch can be viewed in light of procedural justice. This is significant because ACTA mainly deals with proceedings before the judicial and administrative bodies. General Comment No. \*\*

## 7. Conclusion

Procedural justice: implementation shall be subject to adequate procedural safeguards in conformity with

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통계표명 : **전체사건 접수 및 처리현황**[ 단위 : 인원 ]

| 통계표 |
| --- |
|  | **2000** | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** | **2008** | **2009** |
| **총접수** | 2,381,523 | 2,471,568 | 2,460,211 | 2,486,813 | 2,656,611 | 2,439,002 | 2,467,522 | 2,612,622 | 2,797,436 | 2,891,156 |
| **처분계** | 2,336,005 | 2,428,154 | 2,414,841 | 2,437,128 | 2,602,171 | 2,373,846 | 2,402,972 | 2,548,883 | 2,736,064 | 2,820,395 |
| **기소** | 1,208,138 | 1,314,275 | 1,342,482 | 1,298,812 | 1,370,339 | 1,145,597 | 1,094,113 | 1,217,284 | 1,316,987 | 1,196,776 |
| **기소율(%)** | 51.7 | 54.1 | 55.6 | 53.3 | 52.7 | 48.3 | 45.5 | 47.8 | 48.1 | 42.4 |
| **불기소** | 1,046,910 | 1,034,044 | 996,937 | 1,062,839 | 1,158,195 | 1,152,298 | 1,226,617 | 1,224,947 | 1,303,386 | 1,478,448 |
| **불기소율(%)** | 44.8 | 42.6 | 41.3 | 43.6 | 44.5 | 48.5 | 51.0 | 48.1 | 47.6 | 52.4 |

출처 :  대검찰청 (검찰통계시스템)

주)

* \* 총접수 = 구수 + 신수
\* 처분계 = 기소 + 불기소 + 기타(소년보호사건송치+가정보호사건송치+타관이송+성매매보호사건송치+수사중)
\* 기소 = 공판기소인원 + 약식기소인원
\* 불기소 = 혐의없음 + 기소유예 + 죄가안됨+공소권없음 + 각하 + 기소중지 + 참고인중지+공소보류
\* 기소율 = (기소건수/처분계) X 100
\* 불기소율 = (불기소건수/처분계) X 100

 **[지표해석]**

**■ 사건 접수 추이**

° 전체 사건접수 인원은 1998년부터 2003년까지 230만 명~240만 명 대를 유지하면서 소폭 등락을 거듭하다 2004년에는 265만명으로 크게 증가함

   - 2004년의 경우 경기침체에 따른 경제사정 악화, 도로교통법 위반사범의 증가등으로 인해 사건접수 총인원이 크게 증가한 것으로 분석됨

° 2004년도에 260만명대로 증가했던 사건접수 인원이 2005년과 2006년에는  2000년~2003년도와 비슷한 추세인 240만 명 대로 감소하였으며, 도로교통법위반 등 행정법규위반사범의 증가로 인하여 2007년도는 2004년 수준인 260만명 대로, 2008년도는 279만대로, 2009년도는 289만대로 점점 증가하는 추세임.

**■ 사건 처리 현황**

° 기소인원은 1998년부터 2004년까지 120만 명~130만 명에서 소폭 등락을 거듭하면서 큰 변화를 보이지는 않았으나 2005년 이후 소폭하락하다가 2008년과 2009년에는 이전 수준으로 증가하였음.

°  불기소 인원은 1998년부터 2003년까지 100만 명~110만 명 대를 유지하면서 소폭 등락을 거듭하다 2004년에는 전년도에 비하여 약 10만 명 정도 증가하였으며, 2005년도에는 2004년도와 비슷한 수치 유지하고 2006년도에는 전년에 비해 약 7만 명 증가하였다가 2007년도에는 소폭 감소하고 2008년도에는 전년대비 약 7만명이 증가하다 2009년도에는 140만명대를 나타냈음.

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* **기소의 종류** :  구공판, 구약식
- 구공판 : 피의사실 또는 범죄사실이 중대한 경우 검사가 법원에 정식재판을 청구하는 것
- 구약식 : 피의사실 또는 범죄사실이 인정되나 그 사실이 경미하여 벌금형이 예상되는 경우 정식재판과 달리 피고인을 출석시키지 않고 약식명령을 구하는 재판(서면재판)
* **불기소의 종류** :  혐의없음, 기소유예, 공소권없음, 기소중지, 각하, 참고인중지, 죄가안됨
- 불기소 : 검사가 사건을 수사한 결과 재판을 회부하지 않는 것이 상당하다고 판단되는 경우에 기소를 하지 않고 사건을 종결

# Summary for PT

Civil Enforcement

Injunction against Intermediaries

Pre-established Damages

Other Measures

Provisional Measures – inaudita altera parte

Border Measures

Existing Laws:

Scope: suspension of release 🡪 trademark and copyright and related rights

Upon Request – pre-registered trademark and copyright 🡪 notification to those who registered their rights 🡪 request + warranty

Ex-officio: when infringement of trademark or copyright is clear 🡪

#### Procedural Justice

Civil, criminal and administrative proceedings should be based on the principles of equality before courts and tribunals. Everyone’s right to fair trial is a key element of human rights to safeguard the rule of law. ACTA negotiators have failed to pay due attention to this human rights aspect of procedural justice. The draft text of ACTA is full of provisions biased for the benefits of one party, IP right holders. Procedural justice is merely expressed in vague, declaratory languages without workable provisions which guarantee fair and equitable procedures between IP right holders and alleged infringers.

#### Scope of Agreement

Patent

Some negotiators, mainly the EU, try to extend ACTA to all forms of IP at least in civil enforcement and border measures. In contrast to copyright and trademark, patent requires fundamentally different approaches. First, patent infringement occurs even when an alleged infringer is not a free rider. For instance, in the US, patent infringements by the free riders are only 1.76% (Cotropia & Lemley, 2008) or about 4% (Bessen & Meurer, 2008). Second, validity of patent is highly dubious. About 46% of US patents have been held invalid at trial (Allison & Lemley, 2008). According to the Korea Patent Office, from 1984 to 2005, 45.2% of registered patents have been found invalid at the first instance trial. In Japan, the invalidation rate at the first trial is 46.7% on average from 2000 to 2006 (Ono, 2008). In Europe, patents attacked under the European opposition procedure were either revoked completely or narrowed in about 70% of all cases (Graham & Harhoff, 2006). Finally, determination of patent infringement is very difficult even for patent court judges. The difficulty arises from the patent protection conferred upon more abstract or conceptual information than copyrightable expression and trademark’s symbolic information. These three factors indicate that the ACTA proposals for the civil enforcement (especially injunction and provisional measures) and border measures are hardly applied to patent.

Trademark

The draft ACTA is premised on the assumption that all of the unauthorised use of marks, identical to or cannot be distinguished from a validly registered trademark, are bad for society. However, this assumption is simply incorrect. In many jurisdictions, trademark rights are accorded on a first-to-file system. This means that many registered trademarks are not actually used and subsist only on paper. Infringement of the “paper” trademark brings about little risk of consumers’ confusion to the origin or quality of goods or services. The ACTA proposals having no distinction between the “paper and “genuine” trademarks may encourage abusive or bad faith trademark registration by those who have an intention of profiting by threatening enforcement of trademark rights against legitimate user of mark.

#### Injunctions against Intermediaries

No safe harbour in ACTA for intermediaries other than ISP.

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##### Strowel edn. 2009: Third Party Liability + MIPLC (Internet Law)

* US: Common Law & Tort
	+ Contributory: Knowledge (Sony) + “Substantial Participation” in, or “Material Contribution” to, the Infringement(s);
	+ Vicarious: Right and Ability to Control Infringements + Direct Financial Benefit from infringing activities;
	+ Inducement: “with the object of promoting” infringement / with an object to promoting its use to infringe copyright (Grokster)
	+ Perfect 10 Inc. v. Visa International Services 🡪 payment processing services made no ‘material contribution’ and no vicariously or contributorily liable / Perfect 10 Inc. v. Amazon 🡪 search engine linking: not vicariously liable but could be contributorily liable if it had actual knowledge
* Common Wealth
	+ Authorisation: cover a broader range of activities that the third party may ‘sanction, approve or countenance’, ‘permit’ or even treat with inactivity or indifference. E.g., juke box providers, bandstand owners, purchasing agents and similar third parties have been held liable for ‘autorising’ the infringement of others.
	+ But in CBS Records v. Amstrad (UK) 🡪 equipment [twin-deck tape-recorder] manufacturers merely ‘facilitated’ or gave users the ‘power’ to infringe.
	+ AU: three-part test for authorisation (Moonhouse case): University library, coin-operated photocopiers – implementing inadequate supervision and warning 🡪 liable for ‘authorising’ / Three-part in AU Copyright Act: control (power to prevent), relationship (b/w two persons), and due care.
	+ Vicarious liability – employer
	+ Joint tortfeasor liability – engaged in a ‘common design’
	+ Criminal law accomplice liability – knowingly incites (solicits, encourages, pressurises, threatens or endeavours to persuade), or aids, abets, counsels or procures another to commit a criminal copyright offense (rare in practice)
* Civil Law Jurisdiction
	+ Knowingly assistance
	+ Duty of care to avoid damage – general legal ‘duty of care’: an obligation to act reasonably to prevent harm to others.
	+ Injunctive relief against third parties – German doctrine of Störerhaftung – in line with this doctrine, the EC InfoSoc Directive allows an injunction against intermediaries whose services are used to infringe a copyright.

##### EU Legislations and Cases

ECJ (Case C-557/07, LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH, 19 February 2009)[[6]](#footnote-6) 🡺  in Summary: Access providers which merely provide users with Internet access, without offering other services such as email, FTP or file sharing services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Article 8(3) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. Under that article, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. Access providers who merely enable clients to access the Internet, even without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, provide a service capable of being used by a third party to infringe a copyright or related right, inasmuch as those access providers supply the user with the connection enabling him to infringe such rights.

Moreover, according to Recital 59 in the preamble to Directive 2001/29, rightholders should have the possibility of applying for an injunction against an intermediary who ‘carries a third party’s infringement of a protected work or other subject-matter in a network’. It is common ground that access providers, in granting access to the Internet, make it possible for such unauthorised material to be transmitted between a subscriber to that service and a third party.

That interpretation is also borne out by the aim of Directive 2001/29 which, as is apparent in particular from Article 1(1) thereof, seeks to ensure the legal protection of copyright and related rights in the framework of the internal market. The protection sought by Directive 2001/29 would be substantially diminished, in that regard, if ‘intermediaries’, within the meaning of Article 8(3) of that directive, were to be construed as not covering access providers, which alone are in possession of the data making it possible to identify the users who have infringed those rights. (see paras 42-46, operative part 2)

42      It should also be pointed out that, under Article 8(3) of Directive 2001/29, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

43      Access providers who merely enable clients to access the Internet, even without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, provide a service capable of being used by a third party to infringe a copyright or related right, inasmuch as those access providers supply the user with the connection enabling him to infringe such rights.

44      Moreover, according to Recital 59 in the preamble to Directive 2001/29, rightholders should have the possibility of applying for an injunction against an intermediary who ‘carries a third party’s infringement of a protected work or other subject-matter in a network’. It is common ground that access providers, in granting access to the Internet, make it possible for such unauthorised material to be transmitted between a subscriber to that service and a third party.

45      That interpretation is borne out by the aim of Directive 2001/29 which, as is apparent in particular from Article 1(1) thereof, seeks to ensure the legal protection of copyright and related rights in the framework of the internal market. The protection sought by Directive 2001/29 would be substantially diminished if ‘intermediaries’, within the meaning of Article 8(3) of that directive, were to be construed as not covering access providers, which alone are in possession of the data making it possible to identify the users who have infringed those rights.

46      In view of the foregoing, the answer to the first question is that access providers which merely provide users with Internet access, without offering other services such as email, FTP or file‑sharing services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Article 8(3) of Directive 2001/29.

EU Enforcement Directive (DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights): *Article 11***Injunctions** Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC. // *Article 9* **Provisional and precautionary measures** 1. Member States shall ensure that the judicial authorities may, at the request of the applicant: (a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC; // InfoSoc Directive (DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society) *Article 8* **Sanctions and remedies** 3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

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**Brussels court refers two questions to the ECJ on injunctions against ISPs over illegal P2P file sharing**

**http://www.twobirds.com/English/News/Articles/Pages/Brussels\_court\_refers\_ECJ\_injunctions\_against\_ISPs\_050510.Aspx**

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10.05.10 - [Laurent Masson](http://www.twobirds.com/English/Lawyers/Pages/Laurent_Masson1.aspx)

In a case between the collecting society SABAM and internet service provider Scarlet, relating to the measures which can be imposed on Scarlet to prevent illegal peer-to-peer (P2P) file sharing over its network, the Brussels Court of Appeal has referred to the European Court of Justice (ECJ) two questions about the legality (including a test of proportionality) of the injunctions requested by SABAM.

The case began on 24 June 2004, when SABAM, the largest Belgian copyright collecting society, initiated summary proceedings against S.A. Tiscali, now Scarlet Extended, an internet access provider with a market share in Belgium of less than 4%. SABAM requested that the President of the Court of First Instance of Brussels impose a cease and desist order against Scarlet to prevent its subscribers from copying and making available to the public, through various P2P tools, files containing copyright protected music.

The initial claim was based on section 87, §1 of the Belgian Copyright Act of 30 June 1994, which allowed the President to order the cessation of any infringement of copyright or neighbouring right. At that time it was commonly accepted that the President had jurisdiction to decide on such claims, even though Belgium had not yet implemented the EU Copyright Directive 2001/29 including, in particular, article 8.3 which imposes an obligation on Member States to *“ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright (…)”.*

In an interlocutory judgment given on 26 November 2004, the President held that SABAM’s rights were being infringed and, before rendering a final decision, he appointed a judicial expert to investigate the feasibility of technical measures and their related costs to block or filter illegal file sharing.

In the report that he submitted to the President in January 2007, the appointed expert identified seven filtering solutions applicable to Scarlet’s network, but indicated that only one of them, called Audible Magic, seeks to identify specific content on P2P networks rather than merely identifying P2P applications. The expert stressed, however, that technical validity and efficiency over the medium term could not be guaranteed for any filtering solution. Furthermore, he stated that the Audible Magic solution as such was not sized to be used as a filter by an ISP, and that it did not block all protected content and also blocked some unprotected content.

However, the President concluded that satisfactory technical filtering measures were available and, in a judgment on 29 June 2007, ordered Scarlet to prevent infringement of SABAM’s rights:

*"by making impossible for its clients to send or receive through peer to peer software electronic files containing protected musical works included in   the SABAM repertoire”.*

The 28 January 2010 Brussels Court of Appeal decision arises from an appeal filed by Scarlet against this judgment of 29 June 2007.

The Court held that section 87, §1 of the Belgian Copyright Act of 30 June 1994 must be interpreted in accordance with the relevant provisions of the 2000/31 E-Commerce Directive (which organises the liability regime of ISPs, including prohibiting ISPs from being generally required to monitor the content of the communications that it transmits) and also the 2001/29 Copyright in the Information Society Directive and the 2004/48 Intellectual Property Rights Enforcement Directive (both of which allow, under certain conditions, competent judicial authorities to impose injunctions against intermediaries whose services are used by a third party to infringe copyright).

The Court also questioned whether the measures requested by SABAM would not breach EU and national privacy and data protection laws (such as the 95/46 Data Protection Directive and the 2002/58 Privacy and Electronic Communications Directive).

The Court referred to the ECJ’s 29 January 2008 ruling in the Promusicae matter. This case concerned a request from Promusicae, the Spanish organisation of producers and publishers of musical and audiovisual recordings, that Telefónica, an ISP, should disclose the identities and physical addresses of certain of Telefónica’s clients who had been using P2P software and providing access to shared files of personal computers to copies of musical recordings in which members of Promusicae held exploitation rights. Promusicae sought disclosure of the above information in order to be able to bring civil proceedings against the persons concerned.

In its judgment of 29 January 2008, the ECJ held that, when implementing EU Directives relating to intellectual property and the protection of personal data, Member States must do so in a way which allows a fair balance to be struck between the various fundamental rights protected by the legislation (namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other). Further, when interpreting the national implementation of those directives, Member States’ authorities and courts must not only interpret their national law in a manner consistent with the Directives, but also make sure that they do not interpret them in a way which conflicts with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality.

The Brussels Court of Appeal stated that it is bound by the same need to reconcile the requirements of the protection of different fundamental rights, it being however understood that, in the present case, the interference in privacy would affect all the ISP’s customers and occur prior to any actual intellectual property rights infringement, instead of affecting a limited amount of individuals whose IP address and date and time of connection were known after infringement of intellectual property rights, as in the Promusicae matter.

The Court therefore deemed it necessary to refer the two following questions for preliminary ruling to the ECJ:

“1/ Do Directives 2001/29 [Copyright] and 2004/48 [(IPR) Enforcement], read in conjunction with directives 95/46 [Data Protection], 2000/31 [E-Commerce] and 2002/58 [privacy and electronic communication], interpreted  notably  in light of Articles 8 [privacy] and 10 [expression] of the Convention for the Protection of Human Rights and fundamental freedoms, allow Member States to authorize a national judge seized within the framework of a procedure on the merits and on the basis of the sole legal provision providing that: "They [the national judge] can also order a cease and desist injunction against intermediaries whose services are used by a third party to infringe a copyright or related right”, to order an Internet Access Provider (IAP) to roll out, towards all its clientele, in abstracto and preventively, at the exclusive expense of the IAP and with no time limit, a filtering system of all electronic communications, both inward and outward, passing through its services, notably by the use of peer to peer software, with a view to identify on its network the flow of electronic files containing a musical, cinematographic or audio-visual work in which the plaintiff claims to have rights and then block their transfer, either at the level of the request or at the occasion of sending?

2/ In case of a positive answer to question sub.1., do these Directives require the national judge, requested to rule on a request for an injunction against an intermediary whose services are used by a third party to infringe a copyright, to apply the principle of proportionality when he has to decide on the effectiveness and dissuasive impact of the requested measure?”

The ECJ’s answers to these questions will lead to a more harmonised approach to an issue which has, so far, created conflicting case law within Member States and will therefore be scrutinised by industry.

##### German Case Law

http://www.bardehle.com/uploads/tx\_toco3downloadlist/IP\_Report\_2008\_I.pdf

**3. Düsseldorf Appeal Court broadens responsibility of forwarding agents for the handling of goods, increasing requirements to verify compliance with German patent law (Case I-2 U 51/06 – Störerhaftung des Spediteurs/Liability of an international forwarding agent)**

The plaintiff was an exclusive licensee of patented mp3-player technology. The defendant, an international forwarding agent (i.e. a carrier or transport agency), had imported patent infringing mp3-players from China which were confiscated on the plaintiff’s request by the German customs authority. The plaintiff then requested to have the infringing goods destroyed.

The defendant objected to this request, arguing that forwarding agents would have no obligation to verify the compliance of the goods with German patent law, and thus no responsibility for the patent infringement would have occurred by any acts of the defendant in his function as forwarding agent. Furthermore, the defendant asserted that the plaintiff would not be in a position to request from the defendant to agree to the destruction of the goods, since after confiscation by customs the defendant would no longer be the possessor of the goods. As a general rule, due to the great amount of handled goods, forwarding agents are usually not obliged to verify the compliance of the goods with German patent law. However, if the forwarding agents are informed about existing issues, they are – on a case by case basis – obliged to check the compliance of the handled goods separately. If they do not comply with this obligation, the forwarding agents will, as the case may be, become legally responsible for a patent infringing import of the infringing goods and will have to agree to a destruction of the goods.

According to earlier German case law, it was not clear whether and in which situations a forwarding agent would be obliged to verify the legitimacy of the handled goods. On April 19, 2007, the Federal Supreme Court decided in an internet auctioning case (trademarks) that the provider would only be obliged to verify the legitimacy of the goods in case of an obvious infringement (Federal Supreme Court Case I ZR 35/04 – Internet Versteigerung II). On August 15, 2007, the Hamburg Appeal Court decided in a trademark case that a forwarding agent would only have to check the goods, if there is a definite acknowledgement of falsification (Hamburg Appeal Court Case 5 U 188/06 – YU-GI-OH!-Karten). In this respect, the Hamburg Appeal Court decided that the mere confiscation by the German customs authority would not be sufficient to cause such a definite acknowledgement. A preliminary decision of a Court would be required to constitute the definite acknowledgement.

Now, the Düsseldorf Appeal Court decided in a patent infringement case that the mere information of a patent infringement (e.g., a confiscation by the German customs authority) already constitutes an obligation of the forwarding agent to check the legitimacy of the goods. The way of how this verification can be achieved has to be decided by the forwarding agent, but after being notified about an infringement, the forwarding agent will be responsible for this infringement and will therefore be obliged to agree to a destruction of the infringing goods, irrespective of any differing instructions by his client. Furthermore, and differing from the decision of the Cologne Appeal Court of August 18, 2005 (Case 6 U 48/05 – “Lagerkosten nach Grenzbeschlagnahme”/storage costs after border seizure), the Düsseldorf Appeal Court also confirmed the requirement that the forwarding agent has to be at least the indirect possessor of the goods, although the goods were concretely in the realm of the German customs authority.

With this decision, the Düsseldorf Appeal Court strengthens the position of owners of protective rights, as they are now entitled to also sue a forwarding agent which directly assists in putting infringing goods onto the German market. Since this decision, however, differs from the opinion of the Cologne Appeal Court, it is hoped that the Federal Supreme Court will decide on this question in the near future. Reported by Thomas Schachl

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<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2009-9&Seite=5&nr=49330&pos=164&anz=282>

**3. German Federal Supreme Court confirms broad responsibility of forwarding agents for handled goods; increased requirements to examine compliance of handled goods with German patent law (decision of September 17, 2009 – Case Xa ZR 2/08 – MP3-player import) The plaintiff is an exclusive licensee of patented mp3-player technology. The defendant, an international forwarding agent, has imported patent-infringing mp3-players from China on behalf of his client. These mp3-players were confiscated on the plaintiff’s request by the German customs authority. Subsequently, the plaintiff requested to have the infringing goods destroyed. The defendant objected to this request, being of the opinion not to be responsible for patent infringement, because forwarding agents had no obligation to examine the compliance of the goods they handle with German patent law.**

According to earlier German case law, forwarding agents were usually regarded as not being obliged to generally examine the compliance of handled goods with German patent law, in view of the great amount of goods handled in international trade. It was, however, not clearly decided, whether there may be exceptions to this rule, and if yes, in which specific situations such an exception may be assumed. On April 30, 2008, the Federal Supreme Court decided in an internet auctioning case (trademarks) that the provider would only be obliged to examine the legitimacy of the handled goods in case of an obvious infringement (Federal Supreme Court I ZR 73/05 I ZR – Internet Versteigerung III/Internet Auction III). On August 15, 2007, the Court of Appeals Hamburg decided, again in a trademark case, that a forwarding agent would only have to examine the legitimacy of the handled goods, if there is a definite acknowledgement of falsification (Court of Appeals Hamburg 5 U 188/06 – YU-GIOH!-Karten/YU-GI-OH!-Cards).

With the present decision, the Federal Supreme Court confirmed the Court of Appeals Düsseldorf’s preceeding decision that in patent infringement matters, forwarding agents were usually not obliged to examine the compliance of the handled goods with German patent law, but already mere indications of patent infringement (e.g. seizure by the German customs authority, receipt of a warning letter, and the like) constituted an obligation to evaluate the legitimacy of the goods. The extent of such an evaluation was not definite and was to be determined on a case-by-case basis, depending on the alleged extent and likelihood of patent infringement (principle of reasonableness).

As a result, only in case the forwarding agent was aware of potential patent infringement indications and did also not comply with his obligation to evaluate this situation, the patent proprietor was entitled to request the forwarding agent to omit further infringement and to destroy all infringing goods. With this decision, the Federal Supreme Court strengthens the position of patent proprietors aiming to also attack forwarding agents. The requirements for suing a forwarding agent who directly assists to put infringing goods into the German market, are now clarified. However, the forwarding agent may only be successfully attacked for transporting any patent infringing goods, if the forwarding agent is aware of sufficient indications of patent infringement, e.g. a warning letter or a custom’s seizure. In such cases, forwarding agents may then avoid risks of attacks by examining the patent situation.

However, in simple cases, e.g. importation of only a few pieces, it could be sufficient for the forwarding agent to comply with its obligations to just refer to its client and to request related instructions in view of the alleged patent infringement.

Reported by Thomas Schachl, LL.M.

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**Liability shipping company**

**17/09/2009**

[**DE - MP3 Player Import / infringement**](http://www.eplawpatentblog.com/eplaw/2009/09/de-mp3-player-import-infringement.html)

**MP3 Player Import, infringement proceedings (liability of a shipping company), Federal Supreme Court, Germany, 17 September 2009, Docket No. Xa. ZR 2/08**

A shipping company shipping patent infringing articles can be held responsible for patent infringement, if it does not clarify with reasonable effort whether the shipped articles are actually infringing or not immediately after notification by customs authorities that the shipped articles might be patent infringing. However, there is no general obligation for shipping companies to examine shipped articles as to a violation of intellectual property rights before they are accepted for shipment.

Read the judgment (in German) [here](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2009-9&Seite=5&nr=49330&pos=164&anz=282).

Read a summary in English (provided by [Bardehle Pagenberg](http://www.bardehle.com/en/home.html)) [here](http://www.eplawpatentblog.com/2010/April/German%20Fedral%20Supreme%20Court%20Xa%20ZR%202-08.pdf).

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**Pirate Bay ISP hit with German injunction; must stop hosting**

By [Nate Anderson](http://arstechnica.com/author/nate-anderson/) | Last updated 17 days ago

Major movie studios have won yet another round against The Pirate Bay, this time cutting off one of the site's chief ISPs, Cyberbunker.

The district court in Hamburg, Germany has issued an injunction against Cyberbunker and its owner, Sven Olaf Kamphuis, demanding that he cut off service to The Pirate Bay. Failure to do so will result in massive fines of €250,000 per act of online infringement, or up to two years in prison.

The Motion Picture Association, the international version of the MPAA, requested the injunction and a judge concluded that Cyberbunker did not qualify for the "safe harbors" found in EU law, given that the hosting service had been notified about copyrighted movies listed on The Pirate Bay.

Cyberbunker is run by CB3ROB Data Services, a Berlin company. The [company's website](http://www.cb3rob.net/) hosts prominent links to the Dutch and German Pirate Parties, along with "untraceable transit" and "privacy and diplomacy guaranteed."

"We go forward to defend freedom and all that is good and just in the world," reads the site. "The total solution provider in a hostile world!"

The Pirate Bay has proved elusive, shuffling its servers, [ownership](http://arstechnica.com/tech-policy/news/2009/10/who-owns-the-pirate-bay-part-ii.ars), and ISPs around the world in an effort to avoid the studios. Pirate Bay admin Fredrik Neij works for DCP Networks, a Swedish company that provides "a wide range of proxy services, tunneling services, DNS hosting and colocation," according to Neij. DCP has hosted numerous BitTorrent sites over the years and has tremendous experience at keeping them going.

Over the last couple of years, however, the studios have managed to secure the conviction of four key Pirate Bay defendants in a Swedish court, convinced several European judges to censor the site, and obtained injunctions against Pirate Bay hosts.

Despite it all, the site remains accessible, though the MPA promises that "litigation is continuing against other facilitators in Sweden who are hosting trackers."

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Liability of online service provider: <http://www.lefis.org/app/courses/mod/resource/view.php?id=2413>

Liability for Other Intermediaries 🡺 <http://www.lefis.org/app/courses/mod/resource/view.php?id=2426>

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http://www.marques.org/class46/Default.asp?D\_A=20080502

**Bundesgerichtshof: Trade mark infringement and Internet auction platforms**

In a decision of 30 April 2008, the German Federal Supreme Court (Bundesgerichtshof) has confirmed its earlier jurisprudence and decided that it is possible to apply for an injunction directly against an Internet auction house, which hosts a platform where vendors are offering counterfeit and trade mark infringing goods. The Bundesgerichtshof has published a press release in connection with this case, which is summarised and translated (unofficial translation) below. The decision is not yet available in its entirety.

The claimant in the case produces and distributes luxury watches under the trade mark ROLEX. Third party vendors had offered counterfeit watches, which were clearly marked as “fake ROLEX watches” on the defendant’s internet auction platform “Ricardo”. The claimant applied for an injunction against the Internet auction house. The Higher Regional Court of Cologne had allowed the claim and this decision has now been confirmed by the Bundesgerichtshof, Germany’s highest court in civil law matters.

The Bundesgerichtshof ruled that the defence ("Haftungsprivileg") for host providers under the German Telemediengesetz (Telemedialaw) only applied to the responsibility under criminal law and the liability for damages but did not apply to claims for an injunction for a discontinuance (of a trade mark infringing act). The Internet auction house's liability stemmed from the fact that it had *made* the offer of the trade mark infringing products *possible* in the first place, even though it was not selling the products itself. The Court explained that it was a prerequisite of such a liability (“Störerhaftung”) that the third party vendors had offered the counterfeit goods in the course of trade (“im geschäftlichen Verkehr”) because this qualified it as trade mark infringement. The Court ruled that after being notified of an “obvious trade mark infringement” by the claimant, the defendant had not only had the duty to immediately block the infringing offer, but the defendant should have also taken the necessary precautions to avoid further infringing acts on its website. The Court emphasized that is did not ask for an unacceptable amount of policing because this "would question the whole business model" of internet auctioning. At the same time, the Bundesgerichtshof stressed that is was the defendant’s legal duty to take all possible technical precautions to prevent trade mark infringing offers on its platform. In this particular case the goods had been clearly marked as “fake ROLEX watches” and the defendant had already been notified by the claimant about similar infringing acts in the past. The Court decided that the defendant therefore should have had adequate control measures in place, which would have allowed better monitoring of the website for further infringements of the claimant’s trade mark. As this issue had been the subject of previous law suits between the parties, the defendant had clearly failed its legal duties and it was therefore possible for the claimant to apply for an injunction directly against the Internet auction house itself.

Case reference: Bundesgerichtshof, I. Zivilsenat, I ZR 73/05 – Internet-Versteigerung III of 30 April 2008.

The Court's press release (No. 87/2008) can be retrieved by clicking [here](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2008&Sort=3&nr=43650&pos=1&anz=89) (in German).

**Class 46 comment: This decision further clarifies the duties of Internet auctions houses to monitor their websites for counterfeit goods and as such strengthens the rights of trade mark owners considerably.**

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##### EU-Korea FTA

Article 10.48(2) “Each Party shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are being used by a third party to infringe copyright, related right, trademarks or geographical indications.” In Footnote 21, “the scope of “intermediary” is determined in each Party’s legislation, but shall include those who deliver or distribute infringing goods, and also where appropriate, include online service providers.” This injunctive remedy against the intermediaries is also applied in the form of interlocutory injunction (Article 10.46(1)).

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##### **Korea**

Intermediaries의 법적책임

대법원 2004. 7. 22. 선고 2003다62910 판결 🡪 한국에서 위조상표를 부착한 의류를 일본 보따리상에게 판매함으로써 일본에서의 일본 상표권 침해행위를 용이하게 한 피고의 행위는 침해해위에 대한 방조가 됨(다만 일본 상표법은 외국에서 일어난 침해 유도 행위를 불법행위로 해석하지 않으므로 피고의 행위에 대해 공동불법행위의 책임을 물을 수는 없다).

한국에서는 공동불법행위 책임(민법 750조 제3항)이 주된 쟁점.

소리바다 대법원 판결(대법원 2007. \*\*\* 11652 판결) “저작권법이 보호하는 복제권의 침해를 방조하는 행위란 타인의 복제권 침해를 용이하게 해주는 직접, 간접의 모든 행위를 가리키는 것으로서 복제권 침해행위를 미필적으로 인식하는 방조도 가능함은 물론 과실에 의한 방조도 가능하다고 할 것인바, 과실에 의한 방조의 경우에 있어 과실의 내용은 복제권 침해행위에 도움을 주지 않아야 할 주의의무가 있음을 전제로 하여 그 의무를 위반하는 것을 말하고, 이와 같은 침해의 방조행위에 있어 방조는 실제 복제권 침해행위가 실행되는 일시나 장소, 복제의 객체 등을 구체적으로 인식할 필요가 없으며 실제 복제행위를 실행하는 자가 누구인지 확정적으로 인식할 필요도 없다.

온라인서비스제공자와 같은 직접 침해자가 아닌 방조자를 상대로 한 금지청구(정상조 편, 저작권법 주해, 1066면) 🡪 권리침해 상태의 발생에 관여하였고 그 침해상태를 지배하고 있어 이를 해소할 수 있는 지위에 있는 자라면 금지청구권의 대상이 된다고 새겨야 타당함(소유권방해배제청구권에 관한 민법 제214조와 관련하여 대법원은 타인의 지배에 속하는 사정으로 인하여 방해를 받은 경우에 그 방해하는 사정을 지배하는 지위에 있는 자에 대하여 방해의 제거를 청구할 수 있다고 판시, 대법원 1966. 1. 31. 선고 65도218 판결). + 소리바다 가처분이의 항소심(서울고등법원 2005. 1. 12. 선고 2003나21140 판결) 🡺 소리바다 운영자를 상대로 한 저작권침해정지청구 인정: 근거 (1) 침해간주 규정(현행 저작권법 제124조)은 방조행위자를 제외한다고 단정할 수 없음(간주규정은 방조행위에 포섭되기 어려운 행위들도 포함하여 청구의 대상을 넓히고 있음). (2) 개별 이용자보다 서버의 운용에 의한 방조행위를 정지시킴으로써 보다 실효적인 정지효과를 달성할 수 있다. (3) 저작권법은 ‘권리를 침해하는 자’를 상대로 한 금지청구를 인정하며(제123조) 이는 획일적으로 방조자를 제외하고 있지 아니한 것으로 보이는 점. 🡺 금지청구의 상대방이 될 수 있다면, 금지청구의 대상이 되는 행위는 무엇인가? 방조행위인 점은 분명한데, 침해행위와 상당인과관계에 있는 방조행위로 한정은 되어야 할 듯.

Injunction is likely to extend to cover import (entering into the channels of commerce) and export. Parallel importation – in Korea copyright holder does not have a right to ban an importation of infringing works.

The draft text proposes a mandatory extension of injunction to intermediaries. This is highly problematic in that the intermediaries are too broad. Under the overly broad definition of the intermediary, anyone can be the intermediary whenever its service is used by a third party to infringe an IP right (Article 2.X: Injunctions (2)). This is well beyond the issue of online service providers’ liability. For example, a drug approval authority can be the intermediary because it provides a service for the marketing approval of a patent infringing pharmaceutical product. Any website that puts a third party’s advertisement can be the intermediary when the ad contains a trademark infringing sign. An ISP can be a target of an injunctive litigation when its user conducts an unauthorised filing sharing. What kind of injunctive relief is to be given against the intermediary? Traditional remedy of injunction is a court order to stop infringing activity. But this order cannot be issued against the intermediary because the intermediary did nothing to stop. Then the injunctive relief intended by the ACTA proposal is to order the intermediary to stop providing the service used by an infringer. If the intermediary has to stop its service \*\*\*

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대법원 1995.7.28. 선고 94다19129 판결 【손해배상(기)】

[공1995.9.1.(999),2962]

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【판시사항】

가. 소속 공무원이 위법한 철거명령과 계고처분을 하고 철거대집행 실시에 있어서 피해예방 조치 등을 게을리 하였다는 이유로, 지방자치단체의 손해배상 책임을 인정한 사례

나. 불법행위로 인한 건물 훼손의 경우, 건물 철거비용이 통상손해에 포함되는지 여부

【판결요지】

가. 소속 공무원이 위법한 철거명령과 계고처분을 하고 철거대집행 실시에 있어서 피해예방 조치 등을 게을리 하였다는 이유로, 지방자치단체의 손해배상 책임을 인정한 사례.

나. 불법행위로 인하여 건물이 훼손된 경우 그 손해는 수리가 가능하다면 그 수리비, 수리가 불가능하다면 그 교환가치(시가)가 통상의 손해이고, 사용및 수리가 불가능한 경우 통상 불법행위로 인한 손해배상액의 기준이 되는 건물의 시가에는 건물의 철거비용은 포함되지 않는다.

【참조조문】

가. 국가배상법 제2조 제1항 / 나. 민법 제393조 , 제750조 , 제763조

【참조판례】

나. 대법원 1989.6.27. 선고 88다카25861 판결(공1989,1157), 1990.1.12. 선고 88다카28518 판결(공1990,460), 1991.12.10. 선고 91다25628 판결(공1992,485)>

【전 문】

【원고, 상고인 겸 피상고인】 이한기 소송대리인 변호사 윤승영

【피고, 피상고인겸 상고인】 서울특별시 소송대리인 법무법인 동호합동법률사무소 담당변호사 안범수

【원심판결】 서울고등법원 1994.2.15. 선고 92나63803 판결

【주 문】

각 상고를 기각한다.

상고비용은 각자의 부담으로 한다.

【이 유】

1. 피고 소송대리인의 상고이유 중 손해배상의 인과관계 유무에 관한 부분을

판단한다.

원심판결 이유에 의하면 원심은, 그 판시와 같은 사실을 인정한 다음, 피고 산하의 중구청장이 무허가 건물부분의 철거대집행을 함에 있어 무허가 건물부분뿐만 아니라 적법하게 허가받은 건물부분까지를 포함하여 철거를 명하는 위법한 철거명령과 계고처분을 하였고, 대집행을 실시함에 있어서도 철거대상이 아닌 적법한 건물 부분에 대하여 철거로 인한 피해가 발생하지 아니하도록 피해예방 조치를 하고 충격이 적은 공법을 사용하여 철거대집행을 하도록 지시·감독하여야 할 주의의무를 게을리 함으로써 원고에게 손해를 가하였다 할 것이므로 달리 특별한 사정이 없는 한 피고는 소속 공무원인 중구청장의 과실로 인하여 원고가 입은 손해를 배상할 책임이 있다고 판단하였는바, 기록에 비추어 보면 원심의 이러한 사실인정과 판단은 옳다고 여겨지고, 거기에 상고이유의 주장과 같은 채증법칙을 위배하여 사실을 오인한 위법이나 민법 제750조 소정의 손해배상의 인과관계 유무에 관한 심리미진 내지 법리오해의 위법이 있다고 할 수 없다.

2. 원고 소송대리인의 상고이유(제출기간 경과 후에 제출된 원고의 보충상고이유서 기재는 상고이유를 보충하는 범위 내에서) 제1,3점과 피고 소송대리인의 상고이유 중 손해배상 범위에 관한 부분을 함께 판단한다.

불법행위로 인하여 건물이 훼손된 경우 그 손해는 수리가 가능하다면 그 수리비, 수리가 불가능하다면 그 교환가치(시가)가 통상의 손해라 할 것이다(대법원 1991.12.10. 선고 91다25628 판결, 1990.1.12. 선고 88다카28528 판결 등 참조).

원심판결 이유에 의하면 원심은, 이 사건 건물은 현상태로 사용할 수 없음은 물론 수리 또한 불가능할 정도에 이르렀음을 인정하고, 피고가 배상하여야 할 손해배상의 범위를 판시 감정인의 감정결과에 따라 이 사건 건물의 불법행위 당시의 시가인 금 501,306,413원으로 산정한 다음, 통상 불법행위로 인한 손해배상액의 기준이 되는 건물의 시가에는 건물의 철거비용은 포함되지 아니하고, 위 철거대집행시 임차인 등이 손해를 입었다고 인정할 증거가 없다고 하여 원고의 위 철거비용 주장과 위 임차인에 대한 손해배상금 주장을 모두 배척하고 있는바, 기록에 비추어 보면 원심의 이러한 인정과 판단은 옳다고 여겨지고, 거기에 상고이유의 주장과 같은 채증법칙을 위배한 위법이나 손해배상의 법리를 오해한 위법 및 석명권을 행사하지 아니하여 심리를 미진한 위법이 있다고 할 수 없다.

3. 원고 소송대리인의 상고이유 제2점과 피고의 상고이유 중 과실상계에 관한 부분을 함께 판단한다.

원심은 원고에게도 위 손해의 발생에 판시와 같은 과실이 있고, 그 과실비율은 50%로 봄이 상당하다고 판단하였는바, 기록에 비추어 보면 원심의 평가가 현저히 불합리하다고 인정되지 아니하고, 거기에 상고이유의 주장과 같은 과실상계에 관한 법리오해의 위법이 있다고 할 수 없다.

4. 그러므로 각 상고를 기각하고 상고비용은 각자의 부담으로 하기로 관여 법관들의 의견이 일치되어 주문과 같이 판결한다.

대법관 박만호(재판장) 박준서 김형선(주심) 이용훈

(출처 : 대법원 1995.7.28. 선고 94다19129 판결【손해배상(기)】 [공1995.9.1.(999),2962])

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대법원 2009.12.24. 선고 2008다3619 판결 【손해배상(기)】
[미간행]

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【판시사항】
[1] 항공기 사고로 사망한 약사의 일실수입 산정에서 망인이 약사로서 65세가 될 때까지 일할 수 있다고 본 원심의 판단을 수긍한 사례
[2] 항공기 사고 피해에 대한 위자료 산정의 특수한 참작요소
[3] 항공기 사고 피해에 대한 위자료 산정에 항공기 사고의 특수한 사정을 제대로 참작하지 않음으로써 그 재량의 한계를 일탈한 위법이 있다고 한 사례

【참조조문】
[1] 민법 제393조, 제763조 / [2] 민법 제393조, 제751조, 제763조 / [3] 민법 제393조, 제751조, 제763조

【전 문】
【원고, 상고인】 원고 1외 2인 (소송대리인 법무법인 정동국제 담당변호사 서동희외 5인)
【피고, 피상고인】 중국국제항공공사 (소송대리인 법무법인 광장 담당변호사 김재환외 2인)
【원심판결】 서울고법 2007. 12. 4. 선고 2006나49217 판결
【주 문】
원심판결 중 위자료에 관한 원고들 패소 부분을 파기하고, 이 부분 사건을 서울고등법원에 환송한다. 원고들의 나머지 상고를 각 기각한다.

【이 유】
상고이유를 판단한다.
1. 원심은 망 소외 1의 직업·경력·연령 및 건강상태 등에 비추어 경험칙상 망 소외 1이 약사로서 65세가 될 때까지 일할 수 있다고 보았는바, 기록에 의하여 살펴보면 원심의 판단은 수긍이 가고, 상고이유의 주장과 같이 가동연한에 관한 법리를 오해한 위법이 없다.
2. 원심은, 판시와 같은 항공기 추락과 함께 그 승객인 소외 1, 2 부부가 사망하게 된 이 사건 사고로 망 소외 1, 2(이하 ‘망인들’이라 한다)과 그 자녀인 원고들이 입은 정신적 고통에 대하여 항공사인 피고의 위자료지급의무를 인정한 다음, 피고와 손해배상에 관한 협상이 이루어지지 않아 5년 이상 손해를 전보받지 못하고 있고 피고가 손해배상금 5,000만 원을 선지급한 후 협의가 마무리되면 위로금으로 1억 원 정도를 지급하겠다고 제안한 바 있는 점, 삼풍백화점붕괴사고 및 대구지하철화재사고의 경우 사망한 사람들에게 특별위로금으로 1억 7,000만 원 및 2억 2,100만 원이 각 지급된 전례가 있는 점 등을 근거로 망인들에 대한 위자료 액수를 각 1억 5,000만 원으로 정해야 한다는 원고들의 주장에 대하여, 망인들과 원고들의 나이, 가족관계, 이 사건 사고의 경위 및 결과, 그 밖에 변론에 나타난 여러 사정을 참작하면 망인들의 위자료는 각 8,000만 원, 원고들의 위자료는 각 500만 원으로 정함이 상당하므로, 위 인정 범위를 초과하는 원고들의 주장은 이유 없다고 판단하였다.
그러나 원심의 판단은 다음과 같은 이유로 수긍하기 어렵다.
이른바 항공기사고로 인한 불법행위의 경우에는 통상의 교통사고와 달리 위자료 산정에 있어 참작되어야 할 다음과 같은 특수한 사정이 있다. 우선 항공기사고는 대개 승객 대부분이 사망하거나 치명적 손상을 입게 되는 대형참사로 이어지므로 그 추락·충돌 과정에서 승객은 극심한 공포와 고통을 느끼게 되고, 사고로 인하여 승객의 사체가 심각하게 훼손되거나 시신이 완전히 수습되지 않는 처참한 결과가 많이 발생한다. 또 사고수습·원인규명·손해파악에 상당한 시간이 소요됨으로써 손해배상이 장기간 지연되는 경향이 있어 이에 따른 피해자측의 고통이 적지 아니하고 항공사측의 사고수습의 방식이나 태도에 따라 그 고통이 더욱 가중될 수 있다. 한편 통상 항공기사고는 피해자측에게 아무런 과실 없이 발생하므로 가해자측의 과실 정도만이 그 위자료 산정에 영향을 주게 된다. 뿐만 아니라 항공사는 항공보험에 가입하여 항공기사고로 인한 거액의 손해배상 위험에 대비하고 있는데, 항공보험은 사고발생지, 피해자의 거주지를 구분하지 아니하고 동일한 사고에 대하여는 같은 기준으로 손해배상을 한다는 전제 아래 보험요율과 보험료를 정하고 재보험을 통하여 그 위험을 다시 분산시키고 있으며, 그 보험료는 항공운임에 포함되어 승객들에게 전가되고 있다. 항공보험 및 재보험제도는 동일한 항공기사고의 피해자들에 대하여는 항공사가 항공보험으로 담보하고자 예정한 손해배상의 범위와 액수를 감안하여 유사한 피해배상이 이루어질 수 있는 기능을 하고 있다고 볼 수도 있다. 나아가 항공사측의 중대하고 전적인 과실로 대형참사를 초래한 항공기사고에 대하여는 고액의 위자료를 부과함으로써 가해자를 제재하고 유사한 사고발생을 억제·예방할 필요도 있다.
따라서 사실심법원은 항공기사고의 위자료를 산정함에 있어 일반적인 위자료 참작 요소 외에 앞서 본 바와 같은 피해자의 극심한 공포와 고통, 결과의 처참성, 사고수습 및 손해배상의 지연, 가해자측의 과실 정도와 사고 후의 태도, 항공보험을 통한 위험의 분담, 사고발생에 대한 제재와 예방의 필요 등 변론에 나타난 항공기사고의 특수한 사정도 함께 참작하여 그 직권에 속하는 재량으로 위자료 액수를 정하여야 한다.
그런데 원심판결의 이유와 기록에 의하면, 이 사건 사고는 항공기 승무원들의 중대하고 전적인 과실로 발생하였고 그 승객들에게는 아무런 과실이 없었던 점, 이 사건 사고 과정에서 발생한 항공기의 충돌·폭발·화재로 승객 대다수가 사망하고 사체가 대부분 심하게 손상되는 등 사고의 결과가 참혹하였고, 이에 따른 승객들의 공포와 고통 또한 극심하였을 것으로 보이는 점, 이 사건 사고로 인하여 부부인 망인들이 일시에 사망한 점, 피고는 항공보험을 통하여 항공기사고에 따른 손해배상의 위험을 충분히 담보해 둔 것으로 보이는 점, 그런데도 망인들과 원고들의 손해는 장기간 전혀 전보되고 있지 아니한 점 등을 알 수 있는바, 이와 같은 항공기사고로서의 특수한 사정들과 앞서 본 법리에 비추어 보면, 원심은 위자료 산정에 있어 이 사건 변론에 나타난 항공기사고의 특수한 사정을 제대로 참작하지 아니함으로써 손해의 공평한 분담이라는 이념과 형평의 원칙에 현저히 반하여 그 재량의 한계를 일탈하였다고 볼 수 있다. 이에 관한 상고이유의 주장은 이유 있다.
3. 그러므로 원심판결 중 위자료에 관한 원고들 패소 부분을 파기하고 이 부분 사건을 다시 심리·판단하도록 원심법원에 환송하며, 원고들의 나머지 상고를 각 기각하기로 관여 대법관의 의견이 일치하여 주문과 같이 판결한다.

대법관   김능환(재판장) 김영란(주심) 이홍훈 민일영

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[공2010상,202]

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【판시사항】

[1] 항공기 사고로 사망한 치과의사의 일실수입 산정에서 망인이 치과의사로서 65세가 될 때까지 일할 수 있고 그 소득액의 1/3이 생계비로 소요될 것이라고 본 원심의 판단을 수긍한 사례

[2] 항공기 사고에 대한 위자료 산정의 특수한 참작요소

[3] 항공기 사고 피해에 대한 위자료 산정에 항공기 사고의 특수한 사정을 제대로 참작하지 않음으로써 그 재량의 한계를 일탈한 위법이 있다고 한 사례

【판결요지】

[1] 항공기 사고로 사망한 치과의사의 일실수입 산정에서 망인이 치과의사로서 65세가 될 때까지 일할 수 있고 그 소득액의 1/3이 생계비로 소요될 것이라고 본 원심의 판단을 수긍한 사례.

[2] 항공기 사고의 위자료를 산정함에 있어 일반적인 위자료 참작 요소 외에 피해자의 극심한 공포와 고통, 결과의 처참성, 사고수습 및 손해배상의 지연, 가해자측의 과실 정도와 사고 후의 태도, 항공보험을 통한 위험의 분담, 사고발생에 대한 제재와 예방의 필요 등 항공기 사고의 특수한 사정도 함께 참작하여 그 직권에 속하는 재량으로 위자료 액수를 정하여야 한다.

[3] 항공기 사고 피해에 대한 위자료 산정에 항공기 사고의 특수한 사정을 제대로 참작하지 않음으로써 손해의 공평한 분담이라는 이념과 형평의 원칙에 현저히 반하여 그 재량의 한계를 일탈한 위법이 있다고 한 사례.

【참조조문】

[1] 민법 제393조, 제763조 / [2] 민법 제393조, 제751조, 제763조 / [3] 민법 제393조, 제751조, 제763조

【전 문】

【원고, 상고인】 원고 (소송대리인 법무법인 화우 담당변호사 양삼승외 3인)

【피고, 피상고인】 중국국제항공공사 (소송대리인 법무법인 광장 담당변호사 김재환외 2인)

【원심판결】 서울고법 2007. 12. 4. 선고 2006나112603 판결

【주 문】

원심판결 중 위자료에 관한 원고 패소 부분을 파기하고, 이 부분 사건을 서울고등법원에 환송한다. 원고의 나머지 상고를 기각한다.

【이 유】

상고이유(상고이유서 제출기간이 경과한 이후 제출된 상고이유보충서의 기재는 상고이유를 보충하는 범위 내에서)를 판단한다.

1. 상고이유 제1점에 대하여

원심은, 치과의사로서 병원을 개업·운영해 오다가 2002. 4. 15. 이 사건 사고로 사망한 소외 1의 사고 당시 월 소득은 2001년도 소득을 토대로 산정되는 판시 금액으로 보아야 한다는 원고의 주장에 대하여, 이에 부합하는 증거들 중 갑 제4, 6호증의 일부 기재는 망 소외 1의 사망 후 그 유족인 원고가 세무서에 신고한 2001년도 소득에 관한 자료로서 그 소득액은 망 소외 1이 그 사망 전 신고하였던 소득액에 비추어 실제보다 높게 신고된 것으로 보이고, 갑 제26호증의 1, 2, 3의 기재는 망 소외 1이 작성한 상업장부, 진료차트 등을 토대로 한 자료이나 그 수입의 대부분을 차지하는 현금수입 내역의 신빙성을 확인할 방법이 없으며 그 필요경비 또한 세무서 신고 내역과 상당한 차이를 보이고 있으며, 제1심 감정인 소외 2의 일부 소득감정 결과는 감정대상인 회계기록과 증빙자료 간의 차이, 회계기록의 불일치, 증빙자료의 부실, 금융자료와의 대사 불가능 등의 감정상 한계가 있다는 등의 이유로 위 부합 증거들을 모두 배척한 다음, 망 소외 1이 사망하기 전에 신고한 2000년 소득액을 기초로 그 투하자본의 기여액을 공제하는 방법에 의하여 산정한 판시 금액을 이 사건 사고 당시의 월 소득액으로 인정하였는바, 관련 증거들을 기록에 비추어 살펴보면, 원심의 판단은 수긍할 수 있고, 상고이유의 주장과 같이 일실수입 손해액의 판단에 관한 법리를 오해하거나 채증법칙을 위반한 위법 등이 없다.

2. 상고이유 제2점에 대하여

기록에 나타난 망 소외 1의 연령, 직업, 경력, 건강상태 등에 비추어, 망 소외 1이 치과의사로서 65세가 될 때까지 일할 수 있다고 본 원심의 판단은 수긍이 가고, 상고이유의 주장과 같은 사정만으로 그 가동기간을 70세까지로 볼 수 없다. 이 부분 상고이유의 주장은 이유 없다.

원심은 앞서 본 바와 같은 망 소외 1의 월 소득 수준과 경험칙에 비추어 그 소득액의 1/3이 생계비로 소요될 것으로 판단하였는바, 이러한 원심의 판단은 정당하고, 상고이유의 주장과 같이 생계비 인정에 관한 법리를 오해한 위법 등이 없다.

3. 상고이유 제3점에 대하여

원심은, 판시와 같은 항공기 추락과 함께 그에 탑승하였던 소외 1과 그 아들 소외 3, 소외 4가 사망하게 된 이 사건 사고로 망 소외 1, 소외 3, 소외 4(이하 ‘망인들’이라 한다)와 망 소외 1의 모인 원고가 입은 정신적 고통에 대하여 항공사인 피고의 위자료지급의무를 인정한 다음, 이 사건 사고로 가족들 전원이 사망함으로써 망인들이 엄청난 충격을 받게 된 점, 대형참사를 수반한 항공기사고에 대하여는 항공안전을 담보하기 위해 다른 교통사고와는 달리 엄격한 책임을 물을 필요가 있는 점, 피고는 대형항공사로서 영국 로이드사에 보험가입이 되어 있어 이 사건 사고로 인한 경제적 손실이 크지 아니한 점, 다른 항공기사고의 경우 사망자에 대하여 1인당 9억 원 정도의 위자료가 지급된 전례가 있는 점 등을 고려하여 망 소외 1에 대한 위자료를 3억 원, 망 소외 3, 소외 4에 대한 위자료를 각 2억 원, 원고에 대한 위자료를 1억 원으로 정해야 한다는 원고의 주장에 대하여, 망인들과 원고의 나이, 이 사건 사고의 경위 및 결과, 그 밖에 변론에 나타난 여러 사정을 참작하면 망인들의 위자료는 각 8,000만 원, 원고의 위자료는 2,000만 원으로 정함이 상당하므로, 위 인정 범위를 초과하는 원고의 주장은 이유 없다고 판단하였다.

그러나 원심의 판단은 다음과 같은 이유로 수긍하기 어렵다.

이른바 항공기사고로 인한 불법행위의 경우에는 통상의 교통사고와 달리 위자료 산정에 있어 참작되어야 할 다음과 같은 특수한 사정이 있다. 우선 항공기사고는 대개 승객 대부분이 사망하거나 치명적 손상을 입게 되는 대형참사로 이어지므로 그 추락·충돌 과정에서 승객은 극심한 공포와 고통을 느끼게 되고, 사고로 인하여 승객의 사체가 심각하게 훼손되거나 시신이 완전히 수습되지 않는 처참한 결과가 많이 발생한다. 또 사고수습·원인규명·손해파악에 상당한 시간이 소요됨으로써 손해배상이 장기간 지연되는 경향이 있어 이에 따른 피해자측의 고통이 적지 아니하고 항공사측의 사고수습의 방식이나 태도에 따라 그 고통이 더욱 가중될 수 있다. 한편 통상 항공기사고는 피해자측에게 아무런 과실 없이 발생하므로 가해자측의 과실 정도만이 그 위자료 산정에 영향을 주게 된다. 뿐만 아니라 항공사는 항공보험에 가입하여 항공기사고로 인한 거액의 손해배상 위험에 대비하고 있는데, 항공보험은 사고발생지, 피해자의 거주지를 구분하지 아니하고 동일한 사고에 대하여는 같은 기준으로 손해배상을 한다는 전제 아래 보험요율과 보험료를 정하고 재보험을 통하여 그 위험을 다시 분산시키고 있으며, 그 보험료는 항공운임에 포함되어 승객들에게 전가되고 있다. 항공보험 및 재보험제도는 동일한 항공기사고의 피해자들에 대하여는 항공사가 항공보험으로 담보하고자 예정한 손해배상의 범위와 액수를 감안하여 유사한 피해배상이 이루어질 수 있는 기능을 하고 있다고 볼 수도 있다. 나아가 항공사측의 중대하고 전적인 과실로 대형참사를 초래한 항공기사고에 대하여는 고액의 위자료를 부과함으로써 가해자를 제재하고 유사한 사고발생을 억제·예방할 필요도 있다.

따라서 사실심 법원은 항공기사고의 위자료를 산정함에 있어 일반적인 위자료 참작 요소 외에 앞서 본 바와 같은 피해자의 극심한 공포와 고통, 결과의 처참성, 사고수습 및 손해배상의 지연, 가해자측의 과실 정도와 사고 후의 태도, 항공보험을 통한 위험의 분담, 사고발생에 대한 제재와 예방의 필요 등 변론에 나타난 항공기사고의 특수한 사정도 함께 참작하여 그 직권에 속하는 재량으로 위자료 액수를 정하여야 한다.

그런데 원심판결의 이유와 기록에 의하면, 이 사건 사고는 항공기 승무원들의 중대하고 전적인 과실로 발생하였고 그 승객들에게는 아무런 과실이 없었던 점, 이 사건 사고 과정에서 발생한 항공기의 충돌·폭발·화재로 승객 대다수가 사망하고 사체가 대부분 심하게 손상되는 등 사고의 결과가 참혹하였고, 이에 따른 승객들의 공포와 고통 또한 극심하였을 것으로 보이는 점, 이 사건 사고로 인하여 망인들뿐 아니라 함께 탑승하였던 그 가족들 3명도 일시에 사망한 점, 피고는 항공보험을 통하여 항공기사고에 따른 손해배상의 위험을 충분히 담보해 둔 것으로 보이는 점, 그런데도 망인들과 원고의 손해는 장기간 전혀 전보되고 있지 아니한 점 등을 알 수 있는바, 이와 같은 항공기사고로서의 특수한 사정들과 앞서 본 법리에 비추어 보면, 원심은 위자료 산정에 있어 이 사건 변론에 나타난 항공기사고의 특수한 사정을 제대로 참작하지 아니함으로써 손해의 공평한 분담이라는 이념과 형평의 원칙에 현저히 반하여 그 재량의 한계를 일탈하였다고 볼 수 있다. 이에 관한 상고이유의 주장은 이유 있다.

4. 결론

그러므로 원심판결 중 위자료에 관한 원고 패소 부분을 파기하고 이 부분 사건을 다시 심리·판단하도록 원심법원에 환송하며, 원고의 나머지 상고를 기각하기로 관여 대법관의 의견이 일치하여 주문과 같이 판결한다.

대법관 김능환(재판장) 김영란(주심) 이홍훈 민일영

(출처 : 대법원 2009.12.24. 선고 2008다3527 판결【손해배상(기)】 [공2010상,202])

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대법원 1996. 4. 12. 선고 93다40614,40621 판결 【허위비방광고행위금지등·손해배상(기)등】
[집44(1)민,323;공1996.6.1.(11),1486]

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【판시사항】
[1] 비방광고에 대한 대응광고 비용이 비방광고로 인한 손해인지 여부(적극)
[2] 비방광고로 인하여 회사의 인격·명예·신용이 훼손된 데 대한 손해액을 3억 원으로 본 원심판결을 수긍한 사례
[3] 비방광고로 인한 인격권 침해에 대한 사전 구제수단으로서 광고중지 청구를 인정한 원심판결을 수긍한 사례
[4] 부작위채무에 관한 판결절차에서 장래의 채무불이행에 대비한 배상을 명할 수 있는지 여부(적극)

【판결요지】
[1] 비방광고들로 인한 피해를 최소한으로 줄이기 위하여 광고들이 실렸던 일간지마다 동일한 크기의 대응광고를 게재할 필요가 있었다면, 그 비용도 비방광고들로 인하여 입은 손해이다.
[2] 비방광고들로 인하여 인격과 명예, 신용 등이 훼손됨으로써 분유제조업체인 피해 회사가 입은 손해의 종류와 성격, 피해 회사의 지명도와 영업의 신용도, 피해 회사의 규모 및 영업실적, 비방광고들의 허위성의 정도와 비방성의 강도, 비방광고 행태 전반에서 드러나는 악의성의 정도, 조제분유 제품을 선택하는 소비자들의 보수성, 부정적 광고가 미치는 영향의 즉각성과 지속성, 부정적 영향으로부터 회복함이 곤란한 점, 부정적 광고에 대하여 효율적인 구제수단인 사죄광고가 허용되지 아니하는 점, 비방광고 회사의 규모와 재산 정도 등 여러 사정을 참작하여 그 손해액을 금 300,000,000원으로 정한 원심판결을 수긍한 사례.
[3] 인격권은 그 성질상 일단 침해된 후의 구제수단(금전배상이나 명예회복 처분 등)만으로는 그 피해의 완전한 회복이 어렵고 손해전보의 실효성을 기대하기 어려우므로, 인격권 침해에 대하여는 사전(예방적) 구제수단으로 침해행위 정지·방지 등의 금지청구권도 인정된다는 이유로 광고중지 청구를 인정한 원심판결을 수긍한 사례.
[4] 부작위채무를 명하는 판결의 실효성 있는 집행을 보장하기 위하여는, 부작위채무에 관한 소송절차의 변론종결 당시에서 보아 채무명의가 성립하더라도 채무자가 이를 단기간 내에 위반할 개연성이 있고, 또한 그 판결절차에서 민사소송법 제693조에 의하여 명할 적정한 배상액을 산정할 수 있는 경우에는, 그 부작위채무에 관한 판결절차에서도 위 법조에 의하여 장차 채무자가 그 채무를 불이행할 경우에 일정한 배상을 할 것을 명할 수 있다.

【참조조문】
[1] 민법 제393조 , 제763조 / [2] 민법 제393조 , 제751조 , 제764조 / [3] 민법 제214조 , 제764조 / [4] 민사소송법 제693조 , 민법 제398조

【참조판례】
[3] 대법원 1988. 6. 14. 선고 87다카1450 판결(공1988, 1020)

【전 문】
【원고(반소피고),피상고인】 남양유업 주식회사 (소송대리인 변호사 송두환)
【피고(반소원고),상고인】 파스퇴르분유 주식회사 (소송대리인 변호사 차광웅)
【원심판결】 서울고법 1993. 7. 2. 선고 92나43779, 43786 판결
【주문】
상고를 기각한다. 상고비용은 피고(반소원고)의 부담으로 한다.

【이유】
상고이유를 본다.
1. 제1 내지 4점에 대하여
원심이 이 사건 우유 건조기와 카제인나트륨에 관하여 그 판시와 같은 사실을 인정하고 피고(반소원고, 이하 피고라고만 한다)의 이 사건 광고들은 모두 사실과 다르게 원고(반소피고, 이하 원고라고만 한다)를 비방하고 그 명예를 훼손하는 내용을 담고 있다고 판단한 데에 이어 우리 나라 우유업계가 피고의 도발로 이른바 '광고전쟁'에 빠졌다고 인정하는 한편, 원고가 피고를 비방하는 내용의 광고를 하였음을 전제로 하는 피고의 반소 청구원인을 배척하였음은 모두 옳고 거기에 소론과 같은 증거 취지의 오해, 채증법칙 위배, 증거에 대한 판단유탈, 이유불비, 심리미진의 잘못이 있다고 할 수 없으므로 논지들은 모두 받아들일 수 없다.
2. 제6점에 대하여
원심이 인정한 바와 같이, 원고가 피고에 의한 이 사건 비방광고들로 인한 피해를 최소한으로 줄이기 위하여 이 사건 광고들이 실렸던 일간지마다 동일한 크기의 대응광고를 게재할 필요가 있었다면, 그 비용도 이 사건 광고들로 인하여 원고가 입은 손해라 할 것이므로 같은 취지의 원심판단은 옳고 거기에 소론과 같은 손해배상에 관한 법리오해의 위법은 없다. 논지도 이유가 없다.
3. 제7점에 대하여
원심은 이어서, 이 사건 광고들로 인하여 원고의 인격과 명예, 신용 등이 훼손됨으로써 분유제조업체인 원고의 사회적 평가가 낮아지고 그 사업수행에 커다란 악영향이 미쳤으리라는 점은 경험칙에 비추어 쉽게 인정할 수 있으므로, 피고는 위 사회적 평가의 침해에 따라 원고가 입은 무형의 손해를 배상할 의무가 있다고 판단한 다음, 원고가 입은 손해의 종류와 성격, 원고의 지명도와 영업의 신용도, 원고 회사의 규모 및 영업실적, 이 사건 광고들의 허위성의 정도와 비방성의 강도, 피고의 광고행태 전반에서 드러나는 악의성의 정도, 조제분유 제품을 선택하는 소비자들의 보수성, 부정적 광고가 미치는 영향의 즉각성과 지속성, 부정적 영향으로부터 회복함이 곤란한 점, 부정적 광고에 대하여 효율적인 구제수단인 사죄광고가 허용되지 아니하는 점, 피고 회사의 규모와 재산 정도 등 여러 사정을 참작하여 그 손해액을 금 300,000,000원으로 정하였는바, 피고에게 원고가 입은 무형의 손해를 배상할 책임이 있다는 원심의 판단은 옳고( 민법 제764조 참조), 또한 기록에 비추어 보건대, 원심이 산정한 손해액도 적정하다고 보여지므로 원심판결에 위자료에 관한 법리오해나 이를 과다하게 정한 위법이 있다는 논지도 모두 받아들일 수 없다.
4. 제5점에 대하여
가. 원심이, 인격권은 그 성질상 일단 침해된 후의 구제수단(금전배상이나 명예회복 처분 등)만으로는 그 피해의 완전한 회복이 어렵고 손해전보의 실효성을 기대하기 어려우므로, 인격권 침해에 대하여는 사전(예방적) 구제수단으로 침해행위 정지·방지 등의 금지청구권도 인정된다고 전제한 다음, 우리 나라 우유업계 전체가 이른바 '광고전쟁'의 소용돌이에 휘말리게 된 경위와 그 동안의 피고의 광고행태에 비추어 보면, 피고가 원고를 비방하는 광고를 재현할 위험은 아직도 존재하므로 원고는 피고가 자행할 위법한 광고로부터 그 명예·신용 등을 보전하기 위하여 피고에게 그러한 광고의 중지를 요구할 권리가 있다고 판단하였음은 옳고, 거기에 소론과 같은 법리오해의 위법이 있다고 할 수 없다.
나. 그런데 부작위채무는 부대체적 채무로서 그에 대한 강제집행은 간접강제만 가능한 것이고 통상적으로는 판결절차(협의의 소송절차)에서 먼저 채무명의가 성립한 후에 채권자의 별도의 신청에 의하여 채무자에 대한 필요적 심문( 민사소송법 제694조)을 거쳐 민사소송법 제693조에 따라 채무불이행시에 일정한 배상을 하도록 명하는 간접강제결정을 할 수 있는 것이라고 할 것이다.
그러나 부작위채무에 관하여 언제나 위와 같이 먼저 채무명의가 성립하여야만 그 다음 단계에서 비로소 간접강제결정을 할 수 있다고 한다면, 채무명의의 성립과 집행단계 사이의 시간적 간격이 있는 동안에 채무자가 부작위채무를 위반할 경우 손해배상이나 위반 결과의 제거 등 사후적 구제수단만으로는 채권자에게 충분한 손해전보가 되지 아니하여 실질적으로는 집행제도의 공백을 초래할 우려가 있는 것이므로, 부작위채무를 명하는 판결의 실효성 있는 집행을 보장하기 위하여는 부작위채무에 관한 소송절차의 변론종결 당시에서 보아 채무명의가 성립하더라도 채무자가 이를 단기간 내에 위반할 개연성이 있고, 또한 그 판결절차에서 민사소송법 제693조에 의하여 명할 적정한 배상액을 산정할 수 있는 경우에는 위의 부작위채무에 관한 판결절차에서도 위 법조에 의하여 장차 채무자가 그 채무를 불이행할 경우에 일정한 배상을 할 것을 명할 수 있다고 함이 상당하다. 이렇게 하더라도 판결절차는 필요적으로 변론을 거치므로 민사소송법 제694조에 의한 심문을 거치지 아니하여도 채무자에게 불이익이 없으며, 이 판결의 배상명령 부분에 대하여 상소할 수도 있으므로 별도로 같은 법 제693조 제2항에 의한 즉시항고가 인정되지 아니한다고 하여 채무자에게 아무런 불이익도 없는 것이다.
기록에 의하면 이 사건 원심 변론종결 당시를 기준으로 하여 볼 때 비방광고를 금지하는 이 사건 판결 이후에도 단기간 내에 피고가 이를 위반할 개연성이 있었던 것으로 보여지고, 또한 원심 변론종결시까지 심리한 자료만으로도 그에 대한 적정한 배상액을 산정하기에 충분하였다고 보여지므로 위 판결절차에서 채무자인 피고가 장차 채무불이행시에 채권자인 원고에게 그 판시의 금액을 배상할 것을 명할 수 있다고 할 것이다.
원심이 그 판시 비방광고의 중지명령에 이어 이를 강제하기 위하여 이를 위반할 경우의 배상을 명한 근거는 논지가 주장하는 바와 같이 명예회복을 위한 적당한 조치를 규정한 민법 제764조에 있는 것이 아니라, 부작위채무에 대한 간접강제를 규정한 민사소송법 제693조에 있는 것으로 보여 이는 앞에서 설시한 법리에 기초한 것으로서 정당하고, 거기에 논지가 주장하는 바와 같은 불법행위로 인한 명예훼손의 경우의 원상회복을 위한 적당한 처분에 관한 법리오해의 위법이 있다고 할 수 없다.
5. 그러므로 상고를 기각하고 상고비용은 패소한 피고의 부담으로 하기로 관여 법관의 의견이 일치되어 주문과 같이 판결한다.

대법관   김형선(재판장) 박만호(주심) 박준서 이용훈

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#### Damages

WIPO: http://www.wipo.int/enforcement/en/faq/judiciary/faq08.html#pre

Statutory damages is an alien concept in certain civil law countries that do not award nominal or punitive damages. The principle of damages relief is a full compensation of actual injury caused by an unlawful act. Also is alien the damages liability of innocent infringers who have a burden to pay unfair profit.

Why the judicial authority has to consider the calculation measured by the right holder? Determination of the amount of damages should be measured by a judge in taking account of objective value of … (Art. 2.2(1)(b)).

손해배상의 범위 🡪 제한배상의 원칙에 따라 배상할 손해의 범위를 비교적 좁게 인정(프랑스), 완전배상의 원칙에 따라 그 범위를 비교적 넓게 인정(독일) 우리 민법 제393조는 기본적으로 전자의 입장 통상의 손해를 한도로 하고 특별한 사정으로 인한 손해는 채무자가 그 사정을 알았거나 알 수 있었을 때 … 특허법 제128조가 민법 제393조의 특칙은 아니다. 민법 제393조는 배상의 대상이 될 수 있는 손해의 항목이 무엇인지에 관하여 규정하고 있는 것이지 손해액의 산정에 관하여 규정하고 있는 것은 아니다. 특허법 제128조는 기본적으로 민법 제750조의 특칙이라고 봐야 할 것이다(박성수, 특허침해로 인한 손해배상액의 산정 (2007) 경인문화사, 19-20면) 우리 민법 제393조는 통상손해와 특별손해를 분리하여 규정함으로써 제한배상원리에 접근(170면).

손해배상 🡪 침해행위는 (1) 행위자의 고의 또는 과실, (2) 위법한 것, (3) 행위자에게 책임능력, (4) 권리자에게 손해가 발생, (5) 침해자의 침해행위와 권리자의 손해 사이에 인관관계가 존재.

128조 🡪 (1) 이익반환설 (침해행위로 얻은 이익의 전부를 특허권자에게 반환, 독일 판례법의 침해자수익의 반환방법), (2) 입증편의설 (손해배상의 관념을 변경한 것은 아니다) 🡪 다수설, (3) 손해평가설 (손해배상의 범위에 대한 특칙으로, 상당인과 관계설에 따른 손해평가 이외의 손해배상 범위를 정하는 기준), (4) 예시적 손해개념 규정설(정상조). 128조 3항(실시료 상당액)에 대한 다수설은 일단 특허침해가 발생하면 그 손해의 발생 및 최저손해액, 그리고 인과관계의 존재가 항상 인정된다고 해석하고 있다(99면) 따라서 특허침해자로서는 특허권자의 손해액이 그보다 적다는 것을 주장 증명함으로써 위 규정의 적용으로부터 벗어나는 것은 허용되지 않는다고 해석한다. 이 견해는 특허법 제128조 제3항을 이른바 최저배상액의 법정이라고 한다(송영식 외 2인 (주4) 477면, 99면, 정희장 (판례자료 56집(1991) 428면, 이상경). 이러한 다수설에 대하여 128조 제3항이 특허권자에 대한 손해의 발생까지 의제하는 것으로 보기 어려우므로 위 규정은 손해액계산규정으로만 보는 것이 타당하다는 소수설이 있다(전효순, 권택수).

특 128조와 민 393조의 관계: 실시료 상당액 🡪 통상손해(특허권의 무단실시라는 특허권침해가 발생하면 특허권자에게는 실시료 상당액을 잃어버리는 손해가 통상적으로 발생하는 것) (101면) … 결국 특허법 128조의 손해는 모두 통상손해로 분류할 것이고 특별손해로 분류하기는 어렵다(103면).

#### Other Civil Remedies

Even when materials and implements the predominant use of which has been in the manufacture or creation of infringing goods, such material and implements cannot be destroyed so far as they are possessed by a third party rather than an infringer. This may bring an infringement of property right of the third party. If a P2P site is predominantly used by users in sharing copyright infringing works

침해조성물 폐기 등의 청구: 저작권법 제123조 제2항 “침해행위에 의하여 만들어진 물건의 폐기나 그 밖의 필요한 조치” 🡪 침해행위에 사용되거나 제공된 물건의 포함 여부는 학설 대립(부정설: 허희성, 오승종; 긍정설: 이상경, 송영식) [판례: 서울고법 2003. 8. 19. 선고 2002나22610 판결 🡪 ‘슈퍼 삼국지’의 완제품, 반제품, 출판용 지형, 필름을 폐기하도록 명한 사례] 1148면: 그 밖의 조치에 포함되는 것으로 새겨야 입법취지 실현에 타당. 일본 저작권법 제112조 제2항은 “침해의 행위를 조성한 물건”, “오직 침해행위에 제공된 기계”를 폐기대상으로 명기. 침해조성물의 폐기를 청구하기 위하여서는 그 물건이 피고의 소유라는 점이 전제되어야 함. + 과잉폐기청구의 금지 (서적의 일부 삽화와 내용이 타인의 저작물을 이용한 경우 서적 전체의 제작, 판매, 반포를 금지할 이유가 없으며, 저작권침해부분에 해당하는 삽화 및 내용은 판독할 수 없을 정도로 말소 또는 삭제 (서울고법 1998. 7. 15. 선고 98나1661 판결(확정)). 서적의 무단복제된 부분을 제외하고도 별도의 저작물성이 인정되는 이상 서적 전체에 대한 광고의 금지를 구하는 것은 과잉청구(서울지법 서부지원 2002. 3. 27. 선고 2001가합3917(확정)),

무담보 압류(법 제123조 제3항) 🡪 권영준 1151면: 민사집행법에 의하더라도 담보제공없이 보전명령을 하는 것이 가능하다.

**마약 및 향정신성물질의 불법거래방지에 관한 국제연합협약 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**제5조 제8항 (제5조는 몰수에 관한 규정) 이 조의 규정은 선의의 제3자의 권리를 침해하는 것으로 해석되어서는 아니된다.

#### Provisional Measure

The proposal lacks procedural justice because it makes a principle the provisional measures *inaudita altera parte* (Art. 2.5(X)(1). Provisional measures without prior hearing of the other side should be allowed in exceptional case where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

#### Border Measures

Although there is a room to exclude other rights than trademark, GI, and copyright, the border measures aim to cover all IP rights. Need of special provision for patent on its validity. Determination of patent infringement is highly difficult even for patent court judges.

Border measures are to be taken by customs offices which lack capacity to determine the infringement of IP rights. So the measure should be limited to a case where IP infringement is objectively clear. It’s unclear whether the counterfeit trademark goods include any goods having a confusingly similar trademark. The confusing similarity depends on market condition and consumer’s perception. For instance, Rolex v. Rolens … In FN 26 pirated copyright goods. So where the competent authorities have no capacity to render a judicial or semi-judicial decision, the suspension

Lack of procedure to hear importer’s opinion and appeal process – parallel importation

Lack of procedural provisions for the period during which the suspension of goods is sustained.

Destruction of goods is made by the determination of customs office. Should be changed to judicial decision (including preliminary decision) or in a case where the importer or exporter admits, explicitly or implicitly, the infringement.

Art. 2.10: why is the determination of infringement to be made by the competent authorities? Border measures are preliminary measure taken by administrative bodies not by judicial bodies.

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Border measures in Korea are to be taken in two ways: one by the Trade Commission and the other by the Customs Office. The Trade Commission may, upon request or ex officio, initiate an investigation and sanction import or export of suspected IPRs infringing goods. Here, the IPRs include not only copyright and trademark but also other forms of IPRs such as patents, utility model rights, industrial design, geographical indication, lay-out design (topographies) of integrated circuits, and trade secrets. The Trade Commission may determine the existence of IPRs infringement at its own discretion and even take a provisional action to prevent any further injury caused by the IPRs infringement. The border measures taken by the Customs Office are relatively restrictive. The Customs Office may, upon request or ex officio, suspend the release of goods which are suspected as infringing trademark or copyright.

However, the procedures before the Trade Commission and the Customs Office

The border measures taken by the Trade Commission – the Trade Remedy Act and the Act on the Investigation of Unfair International Trade Practices and Remedy against Injury to Industry (Unfair Trade Remedy Act). The Trade Remedy Act prohibits importing (including domestic sale of the imported goods), exporting (including domestic manufacturing for such purposes) goods which violate IPRs (including patent rights, utility model rights, industrial design rights, trademarks, copyrights and neighbouring rights, lay-out designs of integrated circuits, geographical indications or trade secrets) protected by the domestic laws or treaties signed by the Republic of Korea (Article 4). The Trade Commission may take, upon request, a provisional measure to prevent the injury (Article 7). For the provisional measure, there should be an irreparable harm (Article 7) and the applicant has to offer a security deposit to the Trade Commission (Article 8). When the Trade Commission determines the existence of IPR infringing activities as set forth in Article 4, the Commission may: (a) order the suspension of imports, exports, sales, and/or manufactures; (b) ban the landing of such goods and abandon such goods; (c) order the publication of corrective action; (d) order the publication of violation of the Act; or (e) take other necessary corrective measures (Article 10).

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Trade Remedy Act

**Article 4 (Prohibition of Unfair International Trade Practices)**

 No one shall engage in any of the acts described in the following subparagraphs (hereinafter referred to as "Unfair International Trade Practices"):

1. Acts related to goods, etc., which violate patent rights, utility rights, design rights, trademarks, copyrights, neighboring rights, program rights, lay-out designs of integrated circuits, geographical indications or business secrets protected by the laws and subordinate statutes of the Republic of Korea and/or treaties signed by the Republic of Korea as a party concerned (hereinafter referred to as "Goods, etc. Violating Intellectual Property Rights") such as:

(a) Acts of importing goods, etc. violating intellectual property rights, or selling such goods domestically; or

(b) Acts of exporting goods, etc. violating intellectual property rights, or manufacturing such goods domestically for export.

**Article 7 (Provisional Measures)**

(1) Any party who has applied to the Trade Commission for an investigation, or who is injured or threatened with irreparable injury by reason of unfair international trade practices under an ex officio investigation, may apply to the Trade Commission for an injunction or other measures preventing injuries from unfair international trade practices (hereinafter referred to as "Provisional Measures").

(2) Where provisional measures are applied for, the Trade Commission shall promptly complete the investigation and decide whether to take provisional measures. Where the Trade Commission opts to implement provisional measures, it shall order an injunction or take other necessary measures, without delay to deal with related unfair international trade practices.

(3)The Trade Commission may request assistance from the head of administrative authorities concerned where the Trade Commission considers such action necessary for the enforcement of provisional measures.

**Article 8 (Security Deposits)**

(1) Any person who applies for a provisional measure shall offer a security deposit to the Trade Commission.

(2) With respect to the type of security deposit, the appraisal, the method of offering the security, and the change and supplement of security deposit under paragraph (1), the provisions set forth in Articles 29 through 32 of the Framework Act on National Taxes shall apply mutatis mutandis. In this case "the chief of the tax office" shall be deemed the "Trade Commission."

(3) Where the Trade Commission does not accept an application for provisional measures or completes the investigation and determination procedures on unfair international trade practices under Article 9(1) herein, the Trade Commission shall return the security deposit.

(4) With respect to the security deposit system, matters other than those determined by paragraphs (1) through (3) herein, shall be prescribed by the Presidential Decree.

**Article 10 (Corrective Measures)**

 (1) Where the Trade Commission determines that unfair international trade practices exist in violation of the provisions set forth in Article 4(1) or (3) herein, the Trade Commission may: (a) order the suspension of imports, exports, sales, and/or manufactures; (b) ban the landing of such goods and abandon such goods; (c) order the publication of corrective action; (d) order the publication of violation of the Act; or (e) take other necessary corrective measures. In this case the Trade Commission shall seek the opinion of the Minister of Commerce, Industry and Energy.

(2) The Trade Commission may request assistance from the heads of administrative authorities concerned where the Trade Commission deems such request necessary for the performance of corrective measures under paragraph (1).

(3)Where the Trade Commission determines that unfair international trade practices exist under the provisions set forth in Article 4(2), the Trade Commission may recommend that the Minister of Commerce, Industry and Energy take corrective measures against the offender.

#### Criminal Offenses

Commercial scale is too broad. Financial gain includes the receipt or expectation of receipt of anything of value (footnote 37). Indirect motivation of financial gain. Inciting, aiding and abetting the offences. If the lower criteria is applied the Korean experiences show that the threat of criminal offenses becomes one of the business model of copyright industries or copyright lawyers.

Camcorder provision – using an audiovisual recording device is a preliminary action.

#### Digital Chapters

# ACTA in comparison with US-Korea and EU-Korea FTAs

## Chapter One. Initial Provision and Definitions

#### Definition of IP

#### Definition of counterfeit

* ACTA: at FN12 🡪 For purposed of this Section, counterfeit trademark goods means any goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in this Section are invoked [**Can:** It is to be understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder.]
* US-Korea FTA
* EU-Korea FTA: at FN 27 🡪 (a) counterfeit goods, which are: (i) goods, including packaging, bearing without authorisation a trademark identical to the trademark duly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the trademark holder’s rights; (ii) any trademark symbol (logo, label, sticker, brochure, instructions for use or guarantee document), even if presented separately, on the same conditions as the goods referred to in subparagraph (a)(i); or (iii) packaging materials bearing the trademarks of counterfeit goods, presented separately, on the same conditions as the goods referred to in subparagraph (a)(i)

#### Definition of piracy

* ACTA 🡪 at FN 13: For purposes of this Section, pirated copyrighted goods means any goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or related rights under the law of the country in which the procedures set out in this Section are invoked.
* US-Korea FTA
* EU-Korea FTA 🡪 at FN 27 (b) pirated copyright goods, which are or contain copies made without the consent of the right holder, or of a person duly authorised by the right holder in the country of production, of a copyright or related right, regardless of whether it is registered in each Party’s legislation

## Chapter Two - Legal Framework for Enforcement of IPRs

### Section 1: Civil Enforcement

### Article 2.1: Scope

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.x: Injunctions

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.2 Damages

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.3 Other Remedies

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.4 Information Related to Infringement

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.5 Provisional Measures

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Section 2: Border Measures

### Article 2.x: Scope of the Border Measures

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.6 Application by Right Holder

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 2.7 Ex-Officio Action

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 2.8 Provision of Information from Right Holder

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 2.9 Security or Equivalent Assurance

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 2.10 Determination as to Infringement

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 2.11 Remedies

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 2.12 Fees

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 2.13 Disclosure of Information

### Section 3: Criminal Enforcement

### Article 2.14 Criminal Offenses

#### Scope of Criminal Enforcement

* ACTA: At least wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale.
* US-Korea FTA
* EU-Korea FTA: Article 10.54 at least of wilful trademark counterfeiting and copyright and related rights piracy on a commercial scale. [FN 22: the term “related rights” is defined by each Party in accordance with its international obligations] + Article 10.57 The provisions of this Sub-section (criminal enforcement) shall apply to aiding and abetting of the offences referred to in Article 10.54.

#### Commercial Scale

* ACTA 🡪 Article 2.14: Wilful copyright or related rights piracy on a commercial scale includes: (a) significant wilful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and *[****MX''***: The concept "financial gain" should include "financial loss", i.e. money which right holders would be deprived of as a result of illegal activities. *The term "commercial advantage or private financial gain" should be defined.]*(b) wilful copyright or related rights infringements for purposes of commercial advantage or [US/J: private] [Aus/NZ: ~~private~~] financial gain.
* US-Korea FTA
* EU-Korea FTA 🡪 seems to have no definition on the “commercial scale”

#### Camcorder Provision

* ACTA: Article 2.14.3. Each Party shall provide for criminal procedures and penalties to be applied [J: in accordance with its laws and regulations,] against any person who, without authorization of the holder of copyright or related rights in a motion picture or other audiovisual work, knowingly [US: uses an audiovisual recording device to transmit or make] [J: makes] a copy of [J:, or transmits to the public] the motion picture or other audiovisual work, or any part thereof, from a performance of the motion picture or other audiovisual work in a motion picture exhibition facility open to the public. 🡺
* US-Korea FTA
* EU-Korea FTA: No provision

### Article 2.15 Criminal Liability and Penalties

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.16 Seizure, Forfeiture, and Destruction

* ACTA
* US-Korea FTA
* EU-Korea FTA

### Article 2.17 Ex Officio Criminal Enforcement

* ACTA
* US-Korea FTA
* EU-Korea FTA

Section 4: Special Measures Related to Technological Enforcement Means and the Internet

Article 2.17 / 2.18 Enforcement Procedures in the Digital Environment

* ACTA
* US-Korea FTA
* EU-Korea FTA

Chapter Three – International Cooperation

Article 3.1 International Enforcement Cooperation

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 3.2 Information Sharing

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 3.3 Capacity Building and Technical Assistance

* ACTA
* US-Korea FTA
* EU-Korea FTA

Chapter Four – Enforcement Practices

Article 4.1 Enforcement Expertise, Information and Domestic Coordination

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 4.2 Management of Risk at Border

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 4.3 Transparency/Publication of Enforcement Procedures and Practices

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 4.4 Public Awareness

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 4.5 [EU] Destruction of Infringing Goods

Chapter Five – Institutional Arrangements

Article 5.1 The Committee

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 5.2 The Secretariat

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 5.3 Contact Points

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 5.4 Transparency

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 5.5 Consultation

* ACTA
* US-Korea FTA
* EU-Korea FTA

Article 5.6 [EU] Observers

## Chapter Six – Final Provisions

* ACTA
* US-Korea FTA
* EU-Korea FTA
1. ACTA does not purport to create new IPRs … ACTA will not go further than the current EU regime for enforcement of IPRs (European Commission on Trade, The Anti-Counterfeiting Trade Agreement (ACTA): Fact Sheet, January 2009, at pages 1 and 2). USTR 🡪 we do not view the ACTA as a vehicle for changing U.S. law (p1). … We are not seeking any obligations that go beyond U.S. law concerning termination of repeat infringers, monitoring of online behavior, or expeditious receipt of copyright holders of information concerning alleged infringers (p3 USTR’s letter to Senate Ron Wyden, January 28, 2010). [↑](#footnote-ref-1)
2. Art. 126 of the Patent Act, Art. 65 of the Trademark Act, Art. 123 of the Copyright Act, and Art. 10 of the Unfair Competition Prevention Act. [↑](#footnote-ref-2)
3. Seoul Higher Court *2003Na21140*, January 12, 2005 and its confirming decision of the Supreme Court (\*\*\*). [↑](#footnote-ref-3)
4. G market v Adidas, Seoul Higher Court 2009Ra1941, [↑](#footnote-ref-4)
5. Therefore, if a person uses an audiovisual recording device to make a copy of any part of a movie played in a cinema, s/he is liable for a criminal offense even when s/he has “no direct or indirect motivation of financial gain” or “no purpose of commercial advantage or financial gain.” [↑](#footnote-ref-5)
6. http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Suchen&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=LSG\*&domaine=&mots=&resmax=100 [↑](#footnote-ref-6)