



February 14, 2003

Marilyn R. Abbott
Secretary
U.S. International Trade Commission
500 E Street S.W.
Washington, DC 20436

Re: Investigation No. TA-2111-1 –
Request for Public Comments Concerning
the Impact of Trade Agreements: Effect of
the Tokyo Round, U.S.-Israel FTA, U.S.-
Canada FTA, NAFTA, and the Uruguay
Round on the U.S. Economy, 67 Fed. Reg.
182 (Sept. 19, 2002)

To the Commission:

The International Trade Commission published a notice requesting public comment on the impact of several trade agreements. The Commission instituted this investigation for the purpose of fulfilling the requirement in section 2111 of the Trade Act of 2002, in that it must report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate regarding the economic impact on the United States of the five trade agreements listed above.

The International Intellectual Property Alliance (IIPA)¹ hereby submits our comments related to the economic costs and benefits of strengthening copyright protection and enforcement protection of copyrighted products in two of the agreements – the Uruguay Round and NAFTA. Both these agreements were negotiated almost simultaneously in the early-to-mid 1990s, and therefore contain many similar provisions. However, in the eyes of the U.S. copyright community, the NAFTA standards are higher and more comprehensive than TRIPS. Both agreements played

¹ IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA's six member trade associations represent over 1,100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

an important role in elevating the standards of copyright protection and enforcement around the world. Strong laws and effective enforcement support the growth of the content industries.

Economic Benefits of Strong Copyright Protection

Copyright protection accomplishes a wide variety of public goals: it rewards creators; it develops local economies; it creates local jobs and income; it promotes foreign investment; it generates tax revenues; it establishes a structure for commercial practices; and it supports integration with the world trading system. Copyright gives creators the basic property rights that enable them to authorize and control the copying, distribution, performance and display of the works they create. Exercising these exclusive rights themselves, or licensing someone else to exercise them, is the main way that creators earn a living and generate revenue. That revenue is needed to underwrite the rising costs of producing and distributing motion pictures; developing, testing and maintaining computer software; scouting, recording, and promoting musical talent; developing new videogames; writing new books and educational materials; and all the other activities that are indispensable to bringing creative products to the public.

We cannot specifically attribute the strength of the U.S. copyright-based industries to the implementation of either the TRIPS Agreement or the NAFTA. At the same time, we cannot say definitively that there has not been some positive economic impact created by the two agreements on the copyright industries. These industries already were major contributors to the U.S. economy. Increasingly, many copyright sectors look to grow their markets overseas. What we can say is that the multilateral reach of TRIPS and the regional reach of NAFTA has provided firm foundations for countries to improve both their copyright laws and enforcement mechanisms to protect both their domestic rightsholders as well as foreign rightsholders. In other words, the playing field has been made more level.

Here in the United States, the copyright industries are one of the most vibrant sectors of our economy. In April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show:

- In 2001, the U.S. copyright industries accounted for 5.24 percent of U.S. Gross Domestic Product (GDP), or \$535.1 billion – an increase of over \$75 billion from 1999 and exceeding 5 percent of the economy and one-half trillion dollars for the first time.
- Over 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7 percent vs. 3 percent).
- Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5 percent of total U.S. employment.
- The U.S. copyright industries' average annual employment grew more than three times as fast as the remainder of the U.S. economy (5 percent vs. 1.5 percent).

- In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors, including: chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector.

IIPA's report contains almost yearly progressions regarding the contribution of the "core" copyright industries to the U.S. GDP.² When NAFTA entered into effect in 1994, the "core" copyright industries' contribution to the GDP was 3.76%; when TRIPS entered into effect in 1996, it was 4.08%; in 2001, it was 5.24%.

Copyright in the Uruguay Round: The WTO TRIPS Agreement

IIPA and its members were actively involved in supporting the U.S. negotiations during the Uruguay Round and the NAFTA in the early-mid 1990s.

In 1994, the Uruguay Round resulted in incorporating an entire chapter on intellectual property rights in a multilateral context. While the United States already had integrated IPR protection into its various trade laws, the Uruguay Round accomplished this trade-IPR linkage at the multilateral level. As a result, the World Trade Organization's Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) created new multilateral ground rules for substantive copyright protection. Perhaps more importantly, the TRIPS Agreement was the first international treaty ever to deal with the enforcement of intellectual property rights. The TRIPS Agreement entered into force for developed countries like the United States on January 1, 1996; less developed countries enjoyed a four-year transition and became subject to dispute settlement on January 1, 2000 for failure to meet their TRIPS' copyright and enforcement obligations.

First, in terms of substantive protection, the TRIPS Agreement advanced the level of copyright protection in several ways, such as:

- Incorporating by express reference the full panoply of exclusive rights provided under the 1971 Berne Convention on the Protection of Literary and Artistic Works;
- Affording explicit copyright protection for computer programs, databases and sound recordings;
- Including exclusive rental rights for computer programs and sound recordings;
- Providing a minimum term of protection for works, sound recordings and performances (life of the author plus 50 years, or 50 years' post-fixation);
- Providing performers with the ability to prohibit the unauthorized fixation of their live performances and the reproduction of such unauthorized fixations;
- Outlining a three-part test for limitations and exceptions to protection;
- Extending the Berne Article 18 obligation on retroactivity to the rights of performers and producers of sound recordings.

Second, the TRIPS Agreement achieved a major objective desired by the U.S. copyright industries, that is, obligations affecting civil, provision, border measures and criminal

² IIPA's Copyright Industries in the U.S. Economy: The 2002 Report can be accessed in its entirety at the IIPA website at http://www.iipa.com/copyright_us_economy.html.

enforcement. IIPA believes that the enforcement obligations in TRIPS provide a comprehensive foundation for the development of the procedures and remedies necessary for effective enforcement against copyright piracy. In general terms, TRIPS requires that member nations implement an enforcement system that:

- permits effective action against infringements;
- provides expeditious remedies which constitute a deterrent;
- is fair and equitable;
- is not unnecessarily complicated or costly;
- and does not entail any unreasonable time limits or unwarranted delays.

TRIPS obligations include critical enforcement tools such as: civil ex parte searches, injunctive relief, damages, effective border enforcement measures, and deterrent criminal penalties. TRIPS has a performance element in that it requires that member countries must apply their criminal laws in cases of commercial piracy; it is not enough to merely have laws on the books unless those laws are used effectively.

Copyright in the NAFTA IPR Chapter

NAFTA entered into effect on January 1, 1994. The scope of its substantive copyright provisions and its lengthy enforcement text are very similar to the provisions found in TRIPS. However, the NAFTA intellectual property provisions render superior copyright protection than that found in the WTO TRIPS Agreement in several ways. For example, NAFTA contains:

- A stronger and more straight-forward national treatment obligation;
- Explicit recognition of contractual transfers and other contractual arrangements for copyrighted materials;
- Explicit protection of encrypted program-carrying satellite signals, and requires criminal and civil offenses for the unauthorized use of encrypted program-carrying satellite signals as well as for the illicit manufacturing, importing and distributing of unauthorized decoding devices;
- The immediate entry into force of the intellectual property provisions (January 1, 1994), in contrast to the long transition periods found in the TRIPS Agreement.

Two problematic issues in the NAFTA IPR Chapter are: (1) the derogation from national treatment for the performer's right in secondary uses of sound recordings; and (2) Canada's extension of its "cultural industries" exclusion to intellectual property (this exclusion already existed in the U.S.-Canada FTA).

The U.S. copyright industries requested that the U.S. negotiators in the Uruguay Round seek the inclusion of the NAFTA improvements (such as the provisions on national treatment, contractual rights under copyright, and immediate entry into force) in the TRIPS text. Unfortunately those enhancements were not included in final TRIPS Agreement.

Economic Costs of Piracy: Effective Enforcement is Critical

As the forms of piracy continue to shift from hard-goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a piratical tool of choice in many countries. Weak border enforcement permits the easy passage of piratical product. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets. IIPA members conservatively estimate that their industries lose an approximate \$20-22 billion annually around the world due to copyright piracy (not including estimated losses due to internet piracy).

Importance of Copyright and Enforcement in Bilateral Free Trade Negotiations

Since the mid-1990s, the international level of copyright protection has continued to advance beyond the standards found in both TRIPS and NAFTA. The two 1996 treaties negotiated under the auspices of the World Intellectual Property Organization (WIPO), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) update international copyright standards for the Internet era. These two treaties lay the groundwork for the healthy expansion of electronic commerce in countries that ratify them, including the possibility of more and better jobs, more secure and diversified economies, and greater social and cultural advancement. The WCT entered into force on March 6, 2002, and the WPPT entered into force on May 20, 2002. Currently 40 countries have ratified the WCT and 39 the WPPT.

The U.S. government recently completed negotiations with free trade agreements with Singapore and Chile, and the Bush Administration has notified Congress of its intention to submit both agreements to the Congress.³ Negotiations have begun on other Free Trade Agreements (FTAs) which are expected to be completed by the end of 2003: Morocco; Central America (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua); the South African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland); and Australia. Regional negotiations on the Free Trade Agreement of the Americas (FTAA) have been underway, and are expected to be completed by the end of 2004.

The negotiations of bilateral and regional FTAs are assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offer a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties' obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

³ See White House Message to Congress on the Chile FTA, January 30, 2003, available at <http://www.whitehouse.gov/news/releases/2003/01/print/20030130-26.html>; see also White House Message to Congress on the Singapore FTA, January 30, 2003, at <http://www.whitehouse.gov/news/releases/2003/01/print/20030130-30.html>.

IIPA believes that the IPR chapters in the FTAs must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard-goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. Therefore, the IPR chapter in the FTAs should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, an FTA IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis, the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries still fail to comply with their TRIPS enforcement obligations, both in their legislation and in-practice. As we already have made clear, it is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

Conclusion

IIPA appreciates this opportunity to provide our observations on the benefits the U.S. copyright industries have gleaned – especially in the higher levels of substantive copyright obligations and enforcement measures – from the WTO TRIPS Agreement and the NAFTA IPR Chapter.

Respectfully submitted,



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