



February 27, 2003

Via Electronic Mail: FR0060@ustr.gov
Ms. Carmen Suro-Bredie
Chairman
Trade Policy Staff Committee
Office of the U.S. Trade Representative
1724 F Street, 5th Floor
Washington, DC 20508

Re: Request for public comments on the Second Draft Consolidated Text of the Free Trade Area of the Americas Agreement, 67 Fed. Reg. 249 (December 27, 2002)

To the Committee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) recently published a notice inviting public comment on any aspect of the second draft consolidated texts of the Free Trade Area of the Americas (FTAA) agreement, which is posted at www.ftaa-alca.org.

The International Intellectual Property Alliance (IIPA), a private sector coalition of six trade associations (below) representing the U.S. copyright community, hereby submits our comments on the Second Draft text of the intellectual property rights (IPR) chapter. The U.S. copyright-based industries are a vibrant sector of the U.S. economy,¹ and we are greatly concerned about the ongoing negotiations and the need to obtain an IPR chapter which has comprehensive and high levels of protection and enforcement.

The Need for High Levels of Copyright Protection and Enforcement in the FTAA

IIPA has previously provided to the TPSC our recommendations on both copyright substantive obligations and enforcement obligations which we believe should appear in the FTAA IPR Chapter.²

¹ 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. 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 the last 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, and 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.

² See IIPA, Comments to the Trade Staff Policy Committee on the First Draft FTAA Text, August 22, 2001, available at http://www.iipa.com/rbi/2001_Aug22_FTAA.pdf; see also IIPA, Comments to the Trade Staff Policy Committee on Market

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be a forward-looking, technologically neutral document that set out modern copyright obligations. These obligations 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. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region.

This means that the IPR Chapter should, at a minimum: (a) be TRIPS- and NAFTA-plus, (b) include, on a technologically neutral basis, the obligations in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT),³ 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, a large number of countries in this hemisphere fail to comply with the TRIPS enforcement obligations. IIPA believes that it is in the area of enforcement that some of the greatest gains can be achieved.

Comments on the Second Draft FTAA IPR Chapter

IIPA takes this opportunity to restate the key elements which we believe should be included in the FTAA IPR Chapter.⁴ Where appropriate, we provide observations on some objectionable proposals offered in the Second Draft FTAA text:

Substantive copyright issues

Below are several key, illustrative issues on substantive copyright issues which should appear in the chapter:

- Right of reproduction: The right of reproduction, for both works and objects of neighboring rights, should include a specific and express reference to the right including both permanent and temporary copies in line with the Berne Convention, TRIPS and both WIPO Treaties. It is important that clear language indicating that that temporary and transient copies (such as those made in the Random Access Memory (RAM) of a computer) are "copies" and are fully subject to the reproduction right.
- Right of communication to the public: Copyright holders should have the exclusive right to authorize or prohibit the communication to the public of their works, performances and phonograms, by wire or wireless means, including the making available to the public of their works, performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Subject to the tripartite test in Article 13 of TRIPS and corresponding articles of the WCT and WPPT, this right may be subject, in the

Access and Other Issues in the FTAA Negotiations, September 23, 2002, available at http://www.iipa.com/rbi/2002_Sep23_FTAA.pdf

³ As a region, the Americas have been very active in depositing their instruments of ratification for both Treaties with WIPO in Geneva. The WCT entered into effect on March 6, 2002, and the WPPT entered into effect on May 20, 2002. Sixteen of the FTAA countries have ratified these two treaties.

⁴ IIPA reserves the right to provide additional comments to U.S. government officials and negotiators on any specific matters related to the copyright and enforcement provisions of the FTAA IPR Chapter.

case of performers and producers of phonograms, to certain national exceptions or limitations for traditional free over-the-air broadcasting and similar uses.

- Right of distribution: Copyright holders should have the exclusive right authorizing the distribution to the public of the original and copies of their works and phonograms through sale or other transfer of ownership, as provided in WCT Article 6 and WPPT Article 8.
- Right of importation: Copyright holders (which include authors, performers, producers of phonograms and their successors in interest) should have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the rightsholder.
- Unfixed performances: Performers should have the right to authorize or prohibit (a) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and (b) the fixation of their unfixed performances.
- First publication with respect to performers and producers of phonograms: A performance or phonogram should be considered first published when it is published within 30 days of its original publication.
- No formalities for rights of performers and producers of phonograms: With respect to all rights of performers and producers of phonograms, the enjoyment and exercise of the rights provided for in the FTAA should not be subject to any formality.
- Term of protection: The term of protection of a work, performance or phonogram should be calculated on the basis of the life of a natural person; the term shall be not less than the life of the author and 70 years after the author's death; and where the term of protection of these are calculated on a basis other than the life of a natural person, the term should be not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram or, failing such authorized publication within 25 years from the creation of the work, performance or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance or phonogram.
- Technological protection measures: Provisions must be included which track the WCT and WPPT obligations on making illegal the circumvention of technological protection measures that effectively control access to copyrighted materials and the circumvention of TPMs that effectively control the exercise of exclusive rights. Services, devices and components must be covered. Any exceptions must be carefully crafted to preserve the adequacy and effectiveness of the anti-circumvention prohibitions, and should reflect the balancing achieved in the U.S. law, the Digital Millennium Copyright Act (1998). Corresponding adequate and effective legal remedies, both criminal and civil, must be incorporated into the enforcement text.
- Protection of rights management information: Adequate and effective legal remedies should be afforded to protect rights management information from unauthorized alteration and removal, consistent with the WCT and the WPPT. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of copyrighted materials.

- Protection for encrypted program-carrying satellite signals: As provided in the NAFTA, criminal and civil liability should be afforded encrypted program-carrying satellite signals that has been decoded without the authorization of the lawful distributor of the signal.
- National treatment: The principle of full national treatment, without exception or derogation, should be the norm in the FTAA IPR Chapter.
- Contractual rights: Any person acquiring or holding any economic rights should be able to freely and separately transfer such rights by contract as provided in the NAFTA. Any person acquiring or holding any such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and phonograms, should be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.
- Narrow exceptions to protection: Each country should confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.
- Retroactivity provisions: Each country should apply the provisions of Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (and Articles 9.1 and 14.6 of the TRIPS Agreement) to the subject matter, rights and obligations provided for in this FTAA.
- Moral rights: IIPA supports Article 9.1 of the TRIPS Agreement which provides that the rights conferred, or derived from, Article 6*bis* of the Berne Convention are not applicable in the TRIPS environment. Said another way, IIPA believes that moral rights should not appear in the trade context contemplated by the FTAA. We do note, for example, that there are some FTAA countries which do include varying levels of moral rights in their domestic laws. In those circumstances, IIPA believes the laws should make expressly clear that moral rights should be waivable (or to rephrase, an author should be able to exercise his or her moral rights by consenting to acts that might otherwise violate moral rights). Such waiver is essential to provide the owner of the economic right with the ability to finance, market and update the copyrighted product. Furthermore, because we believe that moral rights are ‘personal’ rights, they should not subsist after the author’s death, nor should they be transferred to other entities, including government agencies.
- Definitions: The copyright section includes lengthy proposals involving the definitions of particular terms on copyright (as well as trademark and patent) matters which may appear throughout the rest of the text. While it may be a valid exercise to include some copyright terms in a definitional section, IIPA is concerned that some terms may not be so easily defined at a regional level and instead should be left to national implementation. We will revisit this issue with our U.S. government colleagues as the negotiations progress.
- Folklore: IIPA continues to believe that the inclusion of provisions on folklore in a regional trade agreement is premature. While folklore is an important issue to many cultures, the protection of such under a trade instrument is not appropriate at this time.

Copyright Enforcement

Below are a few key, illustrative issues in the enforcement area that should appear as specific obligations in the FTAA:

- Civil *ex parte* cases: In civil cases, searches and seizures conducted *inaudita altera parte* should be statutorily implemented and requests should be acted upon and executed within a short time period. Any security or bonding obligations should not unreasonably deter recourse to these procedures.
- Level of fines and damages: Statutory maximum fines must be sufficiently high to act as a deterrent and actual fines and damage awards should be imposed by the judicial authorities at a level to make this deterrent effect credible by removing any gain to the infringer. To ensure such deterrent civil damages, a system of pre-established damages should be adopted. Statutory minimum fines at a deterrent level should also be considered as an important part of an enforcement system with deterrent capability.
- Presumption of authorship and subsistence: To speed up the civil justice system by making it easier for rightsholders and judges to bring cases to conclusion, the FTAA should provide that the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work, performance or phonogram in the usual manner shall, in the absence of proof to the contrary, be presumed to be the lawful right holder in same. In the absence of proof to the contrary, it should also be presumed that the copyright or related right subsists in such subject matter. Such presumptions should also pertain to criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right.
- Civil and criminal remedies should be expressly extended to cover violations of the technological measures and RMI obligations: All remedies and enforcement procedures applicable to copyright infringement should apply to the obligations dealing with the circumvention of technological protection measures and with rights management information.
- Customs: Customs authorities should be primarily responsible for preventing infringing products from entering that country's territory. Customs authorities should be able to initiate border measures *ex officio*, without the need for a formal complaint by an authorized private party or association or the right holder. Border measures should be applicable to goods in-transit and to goods destined for export.
- *Ex officio* actions: The competent authorities in each country should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or right holder.
- Government legalization of software: IIPA supports the obligations that each country should issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only computer software authorized for intended use. Such instruments should actively regulate the acquisition and management of software for such government use.
- Domain name registrant contact data: Unrestricted public access to current and accurate contact information about domain name registrations is a key ingredient in effective enforcement against

copyright piracy in the online environment. The FTAA should require signatories to take steps to ensure that the country code domain registries under their control provide this public access, such as by bringing their registration policies into compliance with the WIPO ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes.

ECONOMIC COSTS OF PIRACY

The current costs of copyright piracy to both U.S. copyright owners and local creators are quite high among some of the FTAA countries. IIPA members estimate that their industries lost at least \$1.6 billion due to copyright piracy in the following 13 countries during 2002. (Estimated piracy losses in other countries and losses due to market access barriers other than piracy are not presently available). Note that these losses are occurring in a day and age when the WTO TRIPS Agreement already is in effect for all countries in this hemisphere (with the exception of Haiti).

***ESTIMATED U.S. TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars) and LEVELS OF PIRACY for 2002
in 13 COUNTRIES in LATIN AMERICA***

	Motion Pictures		Records & Music		Business Software Applications ⁵		Entertainment Software		Books	TOTAL LOSSES
	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	
Argentina	30.0	45%	26.0	60%	70.7	62%	NA	NA	NA	126.7
Bolivia	NA	NA	15.0	85%	6.0	74%	NA	NA	5.5	26.5
Brazil ⁶	120.0	35%	320.4	53%	317.0	55%	NA	NA	14.0	771.4
Chile	2.0	40%	14.0	35%	59.4	51%	NA	NA	1.1	76.5
Colombia	40.0	90%	56.3	65%	16.2	50%	NA	NA	5.3	117.8
Costa Rica	2.0	40%	7.0	50%	8.6	61%	NA	NA	NA	17.6
Dominican Republic	2.0	60%	6.9	65%	2.9	61%	NA	NA	1.0	12.8
Ecuador	NA	NA	18.0	90%	5.5	59%	NA	NA	2.3	25.8
Guatemala	2.0	60%	4.8	NA	14.5	67%	NA	NA	2.5	23.8
Paraguay ⁷	2.0	80%	204.4	99%	4.3	69%	NA	NA	2.0	212.7
Peru	4.0	50%	70.2	98%	10.3	58%	NA	NA	8.5	93.0
Uruguay	2.0	40%	1.4	60%	5.2	60%	NA	NA	1.5	10.1
Venezuela	25.0	65%	29.0	75%	27.1	52%	NA	NA	18.0	99.1
TOTALS	231.0		773.4		547.7		NA		61.7	1613.8

⁵ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. BSA's trade loss estimates reported above represent losses due to piracy which affect only U.S. computer software publishers in-country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in-country (including U.S. publishers) and (b) losses to local distributors and retailers in-country.

⁶ Brazil: RIAA reports its 2002 level of recording piracy reflects an amalgamated rates; audiocassette piracy in Brazil was 99% and CD piracy rose to 53%.

⁷ Paraguay: RIAA reports that its estimated losses to the sound recording/music industry include both domestic piracy in Paraguay and estimated losses caused by transshipment.

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 in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

CONCLUSION

Finally, IIPA notes that prompt entry into force of the completed FTAA IPR Chapter is imperative. As mentioned above, almost all the FTAA countries are currently obligated to meet their multilateral copyright protection and enforcement obligations under TRIPS. Almost half of the FTAA nations already have deposited their instruments of ratification to the WIPO internet treaties.

IIPA appreciates this opportunity to comment again on our views on the substantive copyright issues and enforcement matters which should be included in the FTAA IPR Chapter.

Respectfully submitted,



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