



April 5, 2004

Via electronic mail (FR0414@ustr.gov)

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee (TPSC)
Office of the United States Trade Representative
1724 F Street, N.W.
Washington, DC 20508

Re: Comments Concerning the Copyright and
Enforcement Obligations in the Proposed
United States-Panama Free Trade Agreement
(69 Fed. Reg. 8518, Feb. 24, 2004)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) supports the commencement of Free Trade Agreement negotiations with Panama. Our comments are aimed at highlighting relevant trade-related intellectual property issues, specifically copyright and effective enforcement, which should be considered in the Panama FTA negotiations.

Overview

On November 18, 2003, USTR notified the U.S. Congress that the President intends to initiate FTA negotiations with Panama.¹ Included in these negotiating objectives are high levels of copyright protection and effective enforcement mechanisms. IIPA and its members have been working with the U.S. government on FTA IPR negotiations already completed (Jordan, Singapore, Chile, Australia, Central America, Morocco, the Dominican Republic) as well as those in-process or about to commence (Bahrain, Thailand, Panama and SACU (Southern African Customs Union)). We can only imagine that an FTA with Panama will build on the work already done with the FTA IPR chapters with Central America. As IIPA has said before to the TSPC, the substantive copyright obligations in the FTA IPR chapter will assist in elevating copyright standards in the digital era.

IIPA Supports a U.S. Panama FTA with High Standards of Copyright Protection and Enforcement, And Actions Must Continue to be Taken to Enforce Existing Laws Against Piracy

As we enter the negotiating phase of the U.S.-Panama FTA, IIPA emphasizes that it is important that Panama continue to take all appropriate actions under their existing laws to combat copyright piracy in their domestic markets. Widespread copyright piracy, compounded by ineffective and inadequate criminal and civil enforcement mechanisms, already inflict heavy losses on the U.S. copyright industries as well as on their local industry colleagues. Panama already has bilateral IPR obligations (under the

¹ Letter of Ambassador Robert B. Zoellick to Speaker Dennis Hasser, November 18, 2003, posted at http://www.ustr.gov/new/fta/Panama/2003-11-18-notification_letter.pdf.

Generalized System of Preferences (GSP) and Caribbean Basin Initiative (CBI) trade programs) as well as international obligations (under the WTO TRIPS Agreement) to provide certain levels of copyright protection and effective enforcement.

Copyright piracy, combined with inadequate enforcement, has significantly limited such revenue and has become major market access barriers for the copyright industries. The challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard goods and toward digital media and unauthorized electronic transmissions. Over the last few years, unauthorized “burning” of CDs has grown rapidly in Latin America, adversely affecting the ability of legitimate businesses engaged in the creation and distribution of copyrighted materials – recordings, computer software, videogames, books, and to a lesser extent, DVDs – to compete against these pirated products.

Copyright Piracy in Panama: The following summary provides an overview regarding the scope of copyright piracy in Panama.

The Motion Picture Association of America (MPAA) reports that in 2003, it investigated and raided a major DVD-R and CD-R distributor that was also selling turnkey DVD-R reproduction labs. MPA believes that the Panama Canal Free Zone (CFZ) is becoming an increasingly important area for distribution of Asian-sourced optical discs and reproduction technology to smaller pirate labs in Central and South America as well as possible reproduction for out-of-country distribution. VHS piracy has been significantly reduced in terms of both retail and source piracy. VHS lab-oriented legal actions virtually eliminated all significant source piracy and retail piracy is limited to outlying towns. Effective police and prosecutorial action in Panama are responsible for this reduced video piracy. All three of the organized pirate reproduction and distribution rings originally identified by MPA have been dismantled. These legal actions have significantly reduced the rate of piracy in Panama and the limited piracy that exists is not done on an organized basis. Nevertheless, as optical disc piracy grows in the region, MPA is concerned about the possibility that Panama will become a transshipment point for optical disc piracy or pirate technology as the market for such pirate product grows.

The piracy of sound recordings and music in Panama remains high. While audiocassette piracy had been the preferred business of pirates for years, music CD piracy is now the preferred format of choice.

Business software piracy takes various forms, including counterfeiting, illegal reproduction and/or distribution by resellers, mail order houses, bulletin boards, other internet-based distribution and corporate end-user piracy. The greatest threat is when a corporate or institutional entity copies software onto the hard disks of many more computers than the number authorized. To address this problem, governments must lead the way in promoting legal software use within their ministries and offices.² In fact, Panama’s Ministry of Education is leading the initiative among various Panamanian agencies to implement Decree 273 of 2000 which regulates the usage of computer programs by public agencies. BSA already has indicated its commitment to provide a seminar to education information/MIS managers in Panama’s government agencies.

The U.S. entertainment software industry reports that piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game

² In a 2003 study commissioned by BSA, an estimated 10-point drop in the level of business software piracy throughout Latin American could result in 25,000 new jobs, US\$6.4 billion in additional economic growth, and more than US\$600 million in new tax revenues in the region. See IDC, Expanding Global Economies: The Benefits of Reducing Software Piracy, commissioned by the Business Software Alliance (April 2003), available at http://www.bsa.org/idcstudy/pdfs/Latin_America.pdf.

consoles, especially those entering Panama from Southeast Asia. Such optical media distribution networks are often under the control of organized elements including Chinese, Taiwanese, Paraguayan, Panamanian and Brazilian nationals. This transnational form of piracy points to the enhanced need for continued cooperation between governments in tracking infringing materials across borders.

The major forms of piracy afflicting the U.S. book publishing industry in the region involve commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks.

PANAMA (2003)	Estimated Trade Losses due to Piracy (in millions of U.S. dollars)	Estimated Piracy Levels
Motion Pictures	2.0	15%
Records & Music	N/A	N/A
Business Software Applications³	4.7	65%
Entertainment Software	NA	NA
Books	N/A	N/A
Total	> \$ 6.7 million	

N/A= Not Available

Copyright Enforcement In-Country: Panama has established a variety of specialized IPR entities over the years, including: IP departments in the Colon Free Zone and at the Customhouse General Offices; specialized IPR groups at the local police level; and most recently (starting in December 2003), the Judicial Technical Police. The Specialized Superior Office on IP infringements began its operations in January 2003. The Third Superior Court handles all IPR cases. The Interinstitutional Commission on Intellectual Property continues its coordination and policy oversight efforts.

We understand that recently a National Intellectual Property Prosecutor was named, and this office has a permanent budget and staff and with national jurisdiction. (Private industry has also contributed equipment for the office). This prosecutor will also have independent inspection and investigation abilities in the Canal Zone allowing industry representatives to more effectively investigate and raid in an area previously out of reach.

Cooperation between the copyright industries and Panamanian police and prosecutors has remained generally good. Since the implementation of the new Industrial Property Law in November 10, 1996, copyright actions may now be taken *ex officio*, which has greatly aided anti-piracy enforcement efforts in Panama. The Office of the Tenth District Public Prosecutor has been particularly vigilant in pursuing cases over the years, and we acknowledge their assistance. With some exceptions, however, much of the investigatory burden continues to be shouldered by private industry.

³ BSA's estimated piracy losses and levels for 2003 are preliminary, and will be finalized in mid-2004. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in Panama, 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 Panama (including U.S. publishers) and (b) losses to local distributors and retailers in Panama.

Industry cooperation with Panamanian customs is also improving, but much improvement is still needed. The Industrial Property Law (Law No. 35 of May 10, 1996), which entered into effect on November 19, 1996, allows Customs and CFZ officials to impose administrative sanctions and seize pirated and counterfeited products. Public prosecutors can act *ex officio* on infringements of copyright as well as industrial property.

The National Copyright Office continues its efforts to promote public awareness and respect for copyright. This office also took some anti-piracy actions with the recording industries in cities throughout Panama which results in the seizure of thousands of pirated music CDs.

Copyright Legal Reform: Panama's Law on Copyright and Related Rights entered into effect on January 1, 1995 (Law No. 15 of August 8, 1994). This law represented a significant improvement over the prior law and enabled Panama to adhere to the Berne Convention (effective June 8, 1996). In general, this 1994 copyright law was a relatively progressive one in the region a decade ago, even though there were some immediate challenges launched against this law.⁴ The 1994 Copyright Law required the filing of a complaint by rightholders in order to initiate actions; however this problem was alleviated by the passage of the Industrial Property Law in 1996, and copyright actions may now be taken *ex officio*.

Panama was one of the first countries in the hemisphere to join the two WIPO internet treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA and its members have advocated express implementation of these WIPO treaties' obligations into national law, instead of relying on self-execution of the law. Given the higher standards contemplated in an FTA IPR chapter, Panama's copyright law will require modification. In fact, various amendments to the copyright law have been proposed over the (e.g. 1996, 1998 and 2002), but have never been adopted. The 2002 undertaking appeared to be aimed primarily at implementing the provisions of the WIPO treaties into Panamanian law, extending the term of protection, improving enforcement mechanisms and strengthening penalties, for example.

Recent legal reform to the penal codes and Industrial Property Codes (Law No. 1 of January 5, 2004) appears to have been accomplished to minimize prior confusion and clarify that criminal sanctions, including aggravation of penalties, is available to both copyright and industrial property infringements.⁵ Under the Copyright Law, the level of administrative fines (from \$1,000 to \$20,000) have been inadequate to deter pirates from engaging in commercial piracy. It is important to note, however, that we continue to believe that the level of copyright infringement penalties should track the higher levels available for trademark counterfeiting.

Key Elements of a Strong Copyright and Enforcement Text in a Free Trade Agreement

IIPA has detailed the key FTA copyright substantive law obligations as well as the critical enforcement-related measures which must be included in any FTA. Fortunately, to date, most of our

⁴ For example, after the copyright law was adopted, a constitutional challenge was immediately raised by Panamanian radio broadcasters. In January 1996, the Supreme Court ruled that the challenged articles were constitutional, with the exception that the word "exclusive" was removed from the list of "exclusive rights" afforded to producers of sound recordings (this is cause for concern because the rights afforded to producers of sound recordings in the challenged article must be considered exclusive rights). Furthermore, the Panamanian government explained that the express TRIPS deficiencies in its Copyright Law (such as the lack of a rental right for sound recordings and no express protection for pre-1974 sound recordings) were corrected when Panama joined the WTO and implemented its provisions in its law (Law No. 23 of July 15, 1997).

⁵ With respect to copyright, this 2004 law revoked Article 126 of the Copyright Law which had provided that criminal sanctions had to begin at the instigation of the rightholder. The removal of this provision strengthens the ability of Panamanian authorities to bring *ex officio* criminal actions, a positive improvement.

recommendations have been integrated into the FTAs already concluded. We would expect that the same high level of standards would be included in the U.S.-Panama FTA.

SUBSTANTIVE COPYRIGHT OBLIGATIONS: It is critical that with respect to copyright, the U.S.-Panama IPR Chapter include, on a technologically neutral basis, the obligations in both WIPO Internet Treaties, other substantive improvements such as copyright duration, as well as modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Below, we highlight those key improvements.

- **Right of reproduction and protection for temporary copies:** The right of reproduction, for all works, including performances and sound recordings, must 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 Internet 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 and the "making available" right:** Copyright rightholders must have the exclusive right to authorize or prohibit the communication to the public of their works, including performances and phonograms, by wire or wireless means with respect to all forms of transmissions, including their "making available" to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. An "interactive" exclusive right is critical.
- **Right of distribution:** Copyright rightholders must have the exclusive right to authorize the distribution to the public of the original and copies of their works, including performances and phonograms, through sale or other transfer of ownership, as provided in the WIPO Internet Treaties, WCT Article 6 and WPPT Article 8.
- **Right of importation:** Copyright rightholders must have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the rightholder.
- **"Anti-bootlegging" provisions -- unfixed performances:** Performers must 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.
- **"Simultaneous" 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 all works, including for performers and producers of phonograms:** The enjoyment and exercise of all rights provided for in the Free Trade Agreement should not be subject to any formality.
- **Term of protection:** Given developments in communications media that are effectively making cross-border transmissions the norm, it is essential that all countries further harmonize the term of protection on a global basis. Where the term of protection of a work is 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. Where the term is calculated on a basis other than the life of a natural person, (such as with performances and phonograms), 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.

- Technological protection measures (TPMs): This is one of the key obligations in the WIPO treaties. Provisions must be included which implement these obligations on making illegal the act of circumvention of technological protection measures that effectively control access to copyrighted materials or materials, and the circumvention of TPMs that effectively control the exercise of exclusive rights. Furthermore, devices, services, and components that facilitate and defeat the measures that rightholders use to protect their works must be covered. Any exceptions to these requirements must be carefully and narrowly crafted to preserve the adequacy and effectiveness of the anti-circumvention prohibitions as the treaties require. Violations must be independent of infringement and subject to both civil and criminal remedies.
- Protection of rights management information: Adequate and effective legal remedies must be afforded to protect rights management information from unauthorized alteration and removal, consistent with the WIPO Internet Treaties. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of protected materials.
- Protection for encrypted program-carrying satellite signals: Criminal and civil liability must be afforded for encrypted program-carrying satellite signals which have been decoded without the authorization of the lawful distributor of the signal.
- National treatment: The principle of full national treatment, without exception or derogation, must be the norm in this FTA with respect to all works and sound recordings.
- Contractual rights: Any person acquiring or holding any economic rights must be able to freely and separately transfer such rights by contract. Any person or entity acquiring or holding any such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and phonograms, must be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights. All rights, including rights of communication, must not be subject to mandatory collective administration.
- Narrow exceptions to protection: Limitations or exceptions to exclusive rights must be expressly limited 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 rightholder, as provided in Berne, TRIPS and the WIPO treaties.
- Retroactivity provisions: The provisions of Article 18 of the Berne Convention (and Articles 9.1 and 14.6 of the TRIPS Agreement) should be applied strictly to the subject matter, rights and obligations provided for in the FTA.
- Government legalization of software (and more), plus protection against use of public computers and networks for copyright infringement: The FTA must contain an obligation for these countries to issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only properly licensed computer software; such instruments must actively regulate the acquisition and management of software for such government use. Furthermore, this obligation should be extended to other works as well such as textbooks. Finally, these order and decrees must obligate these nations to adopt provisions ensuring that their government agencies and other institutions containing publicly-controlled computers, computer systems or networks are not used in ways that infringe, or facilitate the infringement of, all copyrighted materials.

COPYRIGHT ENFORCEMENT: Effective copyright enforcement must remain a high priority and be a key element of the FTA. Our FTA proposals (below) illustrate the kind of measures which will, once implemented at the national level, simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies.

- Provide deterrent levels of criminal penalties and remedies (including copyright infringements as “serious” offenses and as predicate offenses under organized crime provisions): The FTA must include provisions requiring imprisonment and monetary fines for copyright piracy “on a commercial scale” and that include infringements causing commercial harm even if not done for profit, as is the case with many infringements on the Internet. To be “deterrent,” copyright offenses should be treated as serious offenses, and penalties should be consistent with those accorded to other serious crimes. Furthermore, the FTA text must encourage these nations to treat copyright offenses as predicate offenses under organized crime provisions of penal codes.
- Provide deterrent levels of civil damages for copyright infringement, including pre-established (statutory) damages: The FTA chapter should provide that damages actually imposed act as a deterrent and remove any gain to the infringer. To ensure deterrent civil damages, a system of pre-established damages (also known as statutory damages) must be adopted.
- Ensure *ex officio* actions in criminal cases: National enforcement authorities must be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or rightholder. This would allow authorities (such as police, inspectors, administrative officials, and prosecutors) to initiate actions on their own initiative – an essential component of an anti-piracy campaign aimed to “retake” the streets and remove infringing product.
- Ensure *ex officio* authority for customs officials: Customs authorities must be primarily responsible for preventing infringing products from entering or exiting each nation’s territory. They must be able to initiate border measures *ex officio*, without the need for a formal complaint by a private party or association or the rightholder. Border measures must be applicable to goods in transit and to goods destined for export.
- Civil *ex parte* search orders must be granted in an expeditious manner and without unnecessary costs: Each country must strictly implement its TRIPS Article 50 obligations. In civil cases, searches and seizures conducted *inaudita altera parte* must be statutorily implemented and requests should be acted upon and executed within a short period of time. Any security or bonding obligations must not result in unreasonably deterring recourse to these procedures.
- Extend civil and criminal remedies to cover violations of the technological protection measures and rights management information obligations: All available remedies and enforcement procedures applicable to copyright infringement must apply to the obligations dealing with the circumvention of technological protection measures (TPMs) and with rights management information (RMI). Further negotiations are needed to clarify the relationship between the TPM and RMI obligations and their corresponding enforcement provisions.
- Award fees/costs and require information: Awarding legal fees and costs to the injured party is also critical to the deterrence that is a TRIPS requirement. Each nation must be able to order the infringer to provide any information regarding other persons involved in the infringement and about suspected distribution channels.

- Provide presumptions of ownership and subsistence: To speed up the civil justice system by making it easier for rightholders and judges to bring cases to conclusion, the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work (including a performance or phonogram) in the usual manner must, in the absence of proof to the contrary, be presumed to be such designated rightholder as such. It must also be presumed that the copyright subsists in such subject matter, in the absence of proof to the contrary. Such presumptions should also pertain in criminal cases.
- Provide domain name registrant contact data: Unrestricted public access to current and accurate contact information about domain name registrations is a key ingredient for effective action against copyright piracy in the online environment. The FTA must require each nation to take steps to ensure that the country code domain registries under its control provide this public access, such as by bringing its registration policies into compliance with the WIPO ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes.
- Provide that secondary infringers face appropriate liability generally (especially Internet service providers): It is critical that Internet service providers, other intermediaries, and anyone who aids and abets infringements face appropriate liability. This is particularly important in the case of infringements being carried out over the electronic networks of service providers. Limitations on remedies available against service providers who promptly take down infringing material must be narrowly crafted and ensure that cooperation between service providers and rightholders is preserved. Notice and takedown procedures must be spelled out, be simple and expeditious and exist without the need for judicial intervention.

Conclusion

IIPA appreciates the opportunity to provide the TPSC with our views on the IPR Chapter in the U.S.-Panama FTA.

Respectfully submitted,



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