



January 5, 2005

Via Electronic Mail (FR0510@USTR.EOP.GOV)

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

Re: Notice of Intent to Testify at a Public Hearing Concerning the Proposed United States-Oman Free Trade Agreement (69 Fed. Reg. 70498, December 6, 2004)

To the Trade Policy Staff Committee:

This written notification responds to the Request for Comments and Testimony Concerning Proposed United States-Oman Free Trade Agreement, appearing in 69 Fed. Reg. 70498 (December 6, 2004). The request requires persons wishing to testify orally at a hearing that will be held in Washington, D.C. on Friday, January 14, 2005 before the Trade Policy Staff Committee (TPSC), to provide written notification of their intention, as well as a copy of their testimony, which is attached hereto.

Notice of Request to Testify

We hereby notify you that the following person wishes to testify at this hearing on behalf of the International Intellectual Property Alliance (IIPA):

Mr. Michael Schlesinger
Vice President and Associate General Counsel
International Intellectual Property Alliance
1747 Pennsylvania Ave. NW, Suite 825
Washington, DC 20006
Tel: 202.833.4198, Fax: 202.872.0546

Summary of Testimony

The following represents a short summary of the IIPA testimony, as required by the Federal Register notice. IIPA's full testimony follows this summary.

The International Intellectual Property Alliance (IIPA) strongly supports the commencement of Free Trade Agreement negotiations with Oman. An FTA with Oman (along with one announced for the United Arab Emirates) would be the next in a series (beginning with Bahrain) with countries in the Gulf region and would further set the stage for improved trade with all the countries in that important region. In particular, an FTA with Oman holds the promise of significantly raising the standards of copyright protection and enforcement in Oman and then, hopefully, in the rest of the Gulf region.

Copyright protection in Oman is provided by virtue of the Omani Copyright Law No. 37/2000 (effective May 21, 2000). Oman became a member of the WTO on November 9, 2000, and thus is bound



by the TRIPS agreement. Oman acceded to the Berne Convention effective July 14, 1999. Copyright protection and enforcement in Oman improved in 1999 and 2000, resulting in reductions in piracy levels for most media (e.g., the video/CD piracy rate stands at 25%), although there are still calculable losses due to piracy (e.g., losses of \$2 million in 2004 due to piracy of motion pictures; business software piracy remains an issue of concern). Oman improved its legal infrastructure with the passage of a new law in 2000, but that law still falls short of full compliance with the requirements of the Berne Convention and TRIPS Agreement, and fails to take into account all the requirements of the WIPO Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT).

An FTA with the United States will require Oman to further modernize its copyright law and enforcement regime, especially with respect to clarifying the existence of exclusive rights in the digital environment. For example, Oman would need to provide a right of reproduction and protection for temporary copies, an exclusive importation right (including a right to prohibit unauthorized “parallel” imports), an exclusive “distribution” right (which may be covered under Oman’s broad exploitation right, which protects “All sorts of material utilization of the work”), extended terms of life-plus-70 for natural authors and 95 years from first publication for works of corporate authors etc., full retroactive protection, and adequate legal protection/effective legal remedies against the circumvention of effective technological measures used by right holders to protect their works from unauthorized access or use.

In the area of enforcement, penalties would need to be significantly increased and civil remedies strengthened. Actions would need to be taken *ex officio* in both the criminal and customs areas. Presumptions would need to be added and broadened to speed up infringement proceedings. Enforcement would need to be strengthened to cope with online infringement, including creating clear standards of secondary liability for online service providers accompanied by certain limitations on infringement remedies that would ensure cooperation between service providers and right holders. A strong and expeditious notice and takedown system would be a key feature of this system. Finally, criminal and civil remedies would need to be extended to cover circumvention and rights management information violations. Several provisions of the current Omani law would need to be carefully scrutinized, amended (e.g., to provide *ex parte* civil searches as required by TRIPS and as would be required in an FTA with the United States), and in some cases, deleted, e.g., a provision that permits government sell-off of seized suspected pirated goods. In addition, several remedies, such as border measures, that do not appear in the current Omani law, would need to be provided, either in an amended copyright law, or in standalone customs legislation.

We thank the TPSC for permitting us to testify on this important initiative.

Respectfully submitted,

Michael Schlesinger
Vice President and Associate General Counsel, IIPA

Attachment: IIPA Testimony on the U.S.-Oman FTA IPR Chapter

**TESTIMONY OF
MICHAEL SCHLESINGER
VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL,
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

**PUBLIC HEARING CONCERNING
PROPOSED UNITED STATES-OMAN
FREE TRADE AGREEMENT
FRIDAY JANUARY 14, 2005
BEFORE THE TRADE POLICY STAFF COMMITTEE IN
WASHINGTON, D.C.**

Introduction:

My name is Michael Schlesinger, and I am Vice President and Associate General Counsel of the International Intellectual Property Alliance (IIPA). I am pleased to have this opportunity to share with you the perspectives of the U.S. copyright industries on the promise of the U.S.-Oman Free Trade Agreement.

About IIPA:

The IIPA is a coalition of six trade associations,¹ representing the copyright industries, which contribute an estimated 6% of the total U.S. gross domestic product (\$626.6 billion).² IIPA's members produce the nation's books, recorded music, films, videos and TV programming, business software and entertainment software. Since 1984, this diverse range of industries has worked together, individually and under the IIPA umbrella, to strengthen the copyright laws and enforcement regimes in over 100 countries around the world. IIPA has also represented the copyright-based industries in the negotiation of key bilateral and multilateral agreements (including the WTO TRIPS Agreement and the WIPO "digital" Treaties, the WCT and WPPT) to raise international minimum standards of copyright protection and, of increasing importance, enforcement.

IIPA and its members have been particularly active in working with the U.S. government on the various FTA IPR negotiations already completed (Australia; Bahrain; Central America, including Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua; Chile; the Dominican Republic; Jordan; Morocco; Panama; and Singapore) and those in-process or about to commence (Oman; Thailand; the United Arab Emirates; Andean countries, including Peru, Ecuador, Colombia and Bolivia; and the Southern African Customs Union, including Botswana, Lesotho, Namibia, South Africa, and Swaziland).

IIPA Strongly Supports an FTA with Oman Requiring High Standards of Copyright Protection and Enforcement

The United States entered into a Trade and Investment Framework Agreement with Oman on July 7, 2004. It follows, therefore, that the next step in U.S.-Oman trade

¹ IIPA's members represent over 1,300 companies, from the following associations: Association of American Publishers (AAP), Business Software Alliance (BSA), the Entertainment Software Association (ESA), Independent Film & Television Alliance (I.F.T.A.), Motion Picture Association of America (MPAA), and Recording Industry Association of America (RIAA).

² Economists Inc., *Copyright Industries in the U.S. Economy: the 2004 Report* (2004); the text of this report is posted on IIPA's website at http://www.iipa.com/pdf/2004_SIWEK_FULLL.pdf.

relations would be the negotiation of a Free Trade Agreement which puts into place all those aspects of a strong trading relationship, including high standards of copyright (and other IPR) protection and enforcement.³ Already, the U.S. has important FTAs in the region with Jordan and Morocco, and has signed the FTA with Bahrain. An FTA with Oman (along with the United Arab Emirates) would continue building stronger ties in the Gulf region and set the stage for improved trade with the other countries in that important region. In particular, these FTAs hold the promise of significantly raising the standards of copyright protection and enforcement in Oman and the rest of the region. As Ambassador Zoellick has stated:

A free trade agreement with the UAE and Oman will promote the President's initiative to advance economic reforms and openness in the Middle East and the Persian Gulf, moving us closer to the creation of a Middle East Free Trade Area An FTA with the UAE and Oman will build on the FTAs that we already have with Israel, Jordan, and Morocco, as well as the FTA that we recently have signed with Bahrain. It will also encourage the six members of the Gulf Cooperation Council to adopt standards that promote trade and investment.

A U.S.-Oman FTA that contains high levels of copyright protection and enforcement will benefit U.S. industries and set a precedent throughout the region which would follow the strong agreements with Jordan, Morocco, Bahrain, Singapore, Australia, etc. The copyright industries welcome a strong FTA in this area.

The Current Copyright Protection and Enforcement System in Oman

Oman has done a good job in recent years of enforcing copyright and has brought piracy rates down from the high levels of piracy that pertained there in the late 1990s. As late as 2000, the piracy level for business software was 87%, while the piracy rate for entertainment software was 91% as recently as 1999. By 2002, the piracy level for business software had decreased to 71%, which, while still high, demonstrates some improvement. A much more dramatic success story can be seen by looking at the piracy level for motion pictures, which was 100% in 1995, and in 2004, stands at 25%, one of the lowest rates in the region.

There remain a few specific piracy problems in Oman. A committee was recently formed comprising three Ministries: Information, National Heritage and Culture, and

³See http://www.ustr.gov/Document_Library/Press_Releases/2004/November/U.S._Announces_Intent_to_Negotiate_FTAs_with_UAE_Oman.html.

Commerce and Industry. The Committee used to receive complaints from right holders and take actions based on the information in the complaint; however, irregularities in the raid, such as the whereabouts of products seized being unknown, are commonplace. At present, the Committee is entirely inactive. We believe that one Ministry should coordinate activities to avoid in-fighting. In 2001, the Ministry of Heritage and Culture began conducting searches of companies suspected of using illegal software. However, to date, no criminal complaints have been filed and no deterrent fines or penalties have been imposed. The Omani government also continues (despite the positive progress noted above) to use some pirated software, and the business software industry looks forward to continuing to work with the government on legalization strategies. The publishing industry has reported in the past that illegal imports of editions authorized for sale only in India poured into Oman.

Oman amended its copyright law in 2000, through passage of the Omani Copyright Law No. 37/2000 (effective May 21, 2000). Oman became a member of the WTO on November 9, 2000, and thus is bound by the TRIPS agreement. Oman acceded to the Berne Convention effective July 14, 1999. Oman improved its legal infrastructure in 2000, with the passage of the new law, but that law still falls short of full compliance with the requirements of the Berne Convention and TRIPS Agreement, and fails to take into account all the requirements of the WIPO Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT). An FTA IPR text modeled on those agreed to by other trading partners of the U.S. will work to correct most if not all of these deficiencies.

Key Elements of a Strong Copyright and Enforcement Text in an FTA

SUBSTANTIVE COPYRIGHT PROVISIONS: It is critical that, with respect to copyright, the U.S.-Oman Copyright Chapter include, on a technologically neutral basis, the obligations in both the WIPO “Internet” Treaties, the WCT and WPPT, 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 holders 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, 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 holders 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. Furthermore, Oman must also fully implement their rental rights obligations under TRIPS Article 11.
- Right of importation: Copyright holders must have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the right holder.
- “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 thereof, that facilitate the defeat of measures that right holders use to protect their works (whether or not the act involved is infringing and such devices etc. that directly protect against infringement must be covered. Furthermore, 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.
- Contractual rights: Any person acquiring or holding any economic rights must be able to freely and separately transfer such rights by contract. 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, 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 right holder, 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 other copyrighted materials), plus protection against use of public computers and networks for copyright infringement: The FTA must contain an obligation of Oman 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 Oman to adopt provisions ensuring that its 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.

ENFORCEMENT: Effective copyright enforcement must remain a high priority and be a key element of the U.S.-Oman Free Trade Agreement. The FTA proposals 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. Oman must:

- 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 includes 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 Oman 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: Oman's enforcement authorities must be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or right holder. 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 Oman'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 right holder. Border measures must be applicable to goods in transit and to goods destined for export.
- Provide for civil *ex parte* search orders to be granted in an expeditious manner and without unnecessary costs: Oman must strictly 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. Oman must be able to order the infringer to provide any information regarding other persons involved in the infringement and the suspected distribution channels.
- Provide presumptions of ownership and subsistence: To speed up the civil justice system by making it easier for right holders 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, must be presumed to be such designated right holder 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 effectively enforcing against copyright piracy in the online environment. The FTA must require Oman 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 for effective liability in cases of secondary infringement generally and, particularly for Internet service providers: It is critical that Internet service providers, other intermediaries, and anyone who aids and abets in infringements carry 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 right holders is preserved. Notice and takedown procedures must be spelled out, be simple and expeditious and exist without the need for judicial intervention.

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IIPA greatly appreciates the opportunity to appear before the TPSC to testify on the proposed U.S.-Oman Free Trade Agreement and the importance of ensuring that strong levels of copyright protection and major steps toward the eradication of piracy in Oman result from this FTA.