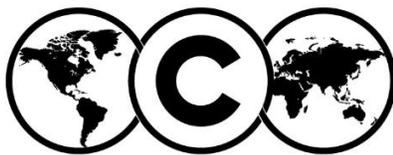


# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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September 16, 2011

Donald W. Eiss  
Acting Chair  
Trade Policy Staff Committee (TPSC)  
Office of the U.S. Trade Representative  
1724 F Street, N.W.  
Washington, D.C. 20508

**Re: CBI Report to Congress  
Caribbean Basin Economic Recovery Act and  
Caribbean Basin Trade Partnership Act: Report  
to Congress, 76 Fed. Reg. 48202 (August 8, 2011)**

Dear Mr. Eiss:

The International Intellectual Property Alliance (IIPA) welcomes this occasion to submit comments to the Trade Policy Staff Committee on the Caribbean Basin Economic Recovery Act (CBERA) and the U.S.-Caribbean Basin Trade Partnership Act (CBTPA). The CBERA, adopted in 1983, was the first U.S. trade program to contain intellectual property rights-related provisions. Since that time, the biennial report of the TPSC to Congress on the impact of these components of the Caribbean Basin Initiative (CBI) remains an important opportunity to review progress in the area of copyright protection and enforcement in this region.

In this submission, we emphasize the continued importance of the copyright sectors to the U.S. economy and to our foreign trade relationships, and we highlight the issues of most concern to the copyright sectors in the region. The IIPA urges the U.S. Government to continue to underscore to CBERA and CBTPA beneficiary countries the importance of fully enforcing intellectual property laws and regulations for the growth of the creative sectors across the Caribbean Basin.

## About the IIPA

The IIPA is a coalition of seven trade associations representing copyright-based industries in bilateral and multilateral efforts working to improve international protection of copyrighted materials and address market access barriers for the creative industries we



represent.<sup>1</sup> In July 2009, IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2003-2007 Report*, which published key findings including:

- The copyright industries contribute heavily to U.S. exports: the total core copyright sales in foreign markets exceeded \$116 billion in 2006 and nearly \$126 billion in 2007.
- In 2007, the value added for the total copyright industries reached \$1.52 trillion, or 11.05% of U.S. GDP.
- In 2007, 11.7 million people were employed by the total copyright industries, or 8.51% of the U.S. workforce.

Few in the copyright sectors today can ignore the importance of foreign markets, and in the digital age economies of any size can have an international impact on the market for copyrighted works. As a result, the IIPA relies on trade programs such as CBERA to establish a strong foundation for beneficiary countries to improve their copyright laws and enforcement mechanisms, toward the protection of both their own domestic right holders as well as foreign right holders. Comprehensive and modern copyright laws combined with effective enforcement are necessary for the copyright industries – both U.S. and local industries – to flourish.

### **Copyright Law and Enforcement Standards in the CBERA**

The 1983 enactment of the CBERA was a pivotal moment in the use of U.S. trade policy to promote exports of products and services protected by copyright, patents, trademarks, and other intellectual property laws. For the first time, Congress explicitly linked trade benefits to intellectual property protection by beneficiary countries.

The CBERA IPR provisions contain both mandatory and discretionary criteria. Among its mandatory criteria, the CBERA requires that beneficiary country status be denied if such country has nationalized, expropriated or otherwise seized ownership or control of property owned by a U.S. citizen (19 U.S.C. § 2702(b)(2)(A)) or has taken steps to repudiate or nullify any intellectual property (19 U.S.C. § 2702(b)(2)(B)). Furthermore, if a government-owned

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<sup>1</sup> IIPA's seven member associations are: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA). IIPA's seven member associations represent over 1,900 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 discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).



entity broadcasts U.S. copyrighted material, including films or television material, belonging to United States copyright owners without their consent (19 U.S.C. § 2702(b)(5)), the President shall not designate that country.<sup>2</sup>

Second, CBERA beneficiary countries must meet the two discretionary IPR criteria, found in 19 § U.S.C. 2702(c)(9) and (10). According to these provisions, the President shall take into account:

(9) the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights;

(10) the extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted materials, including films or television material, belonging to United States copyright owners without their express consent; [...]

The criterion requiring “adequate and effective” protection of intellectual property rights, including copyright protection and enforcement, is a flexible one that changes over time toward higher standards. The U.S. Congress expanded these intellectual property rights provisions when it passed the Caribbean Basin Trade Partnership Act (CBTPA) in 2000.<sup>3</sup>

In order to be a “CBTPA beneficiary country,” a country had to meet the original CBERA criteria and more. Here, Congress took the opportunity to spell out what it believes is covered by the “adequate and effective” criteria. Section 213(b)(5)(B)(ii) of the CBTPA (codified at 19 U.S.C. 2703(b)(5)(B)(ii) defines the IPR-related discretionary eligibility criteria to include: the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade- Related Aspects of Intellectual Property Rights described in Section 101(d)(15) of the Uruguay Round Agreements Act. The reference to “greater than” TRIPS is explained in the conference report as follows:

With respect to intellectual property protection, it is the intention of the conferees that the President will also take into account the extent to which potential beneficiary countries are providing or taking steps to provide protection of

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<sup>2</sup> IIPA believes that the CBI program would be strengthened further if the statute were amended to classify explicitly the violation of a trade agreement as a mandatory criterion.

<sup>3</sup> Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).



intellectual property rights comparable to the protections provided to the United States in bilateral intellectual property agreements.<sup>4</sup>

The bottom line was that each country had to re-meet all the CBERA IPR criteria as well as the explicit TRIPS-or-greater criteria and bilateral IPR agreement standards in order to benefit from the additional preferential tariff treatment available under the CBTPA.<sup>5</sup>

Importantly, as the various Free Trade Agreements enter into force with some of the countries also eligible under the CBERA and CBTPA, countries receiving preferential trade benefits under these programs are graduated, or removed, as eligible beneficiary countries (there may be some tariff lines which still receive some coverage for a small period of time). IIPA continues to be a strong supporter of the free trade agreements, like CAFTA-DR, all of which include a strong IPR chapter.

### **Copyright Law Developments in this Region**

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.

One of the copyright industries' most critical substantive challenges is to ensure that levels of protection available in any country extend to the important changes made by digital, networked environments. In order for protection to be "adequate and effective," modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control the reproduction, distribution and transmission of their creations, whether those works are in analog or digital form and whether they are distributed as permanent copies or via transmission over electronic networks like the Internet.

It is no longer sufficient in the Internet and digital world that countries merely meet their obligations under the WTO TRIPS Agreement. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) entered into force in early 2002, and together they provide the legal infrastructure for this new digital and Internet environment. Those countries that have signed up for FTAs have obligations to improve their copyright and enforcement laws up to the higher standards in the WCT and WPPT. In this region, so far Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panama, St.

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<sup>4</sup> See Conference Report of the House of Representatives on the Trade and Development Act of 2000 [to accompany H.R. 434], Joint Explanatory Statement of the Committee of Conference on Subtitle B—Trade Benefits for Caribbean Basin Countries.

<sup>5</sup> We note, however, that as a matter of political reality, the President on October 2, 2000 declared all CBERA beneficiaries (then 24 nations) as eligible CBTPA beneficiary countries.



Lucia and Trinidad and Tobago have deposited their instruments of ratification/accession with WIPO, and Saint Vincent and the Grenadines has ratified and acceded to the WPPT. All countries must implement these new obligations, and several of these countries (especially those FTA partners) already have done so. IIPA again strongly recommends that the U.S. government urge the other CBERA countries to promptly ratify these two WIPO Treaties and implement those obligations into domestic law.

Certainly bilateral improvement in heightening legal reform and enforcement measures has been accomplished in those countries that have entered into FTAs with the U.S. The IPR chapter in the CAFTA-DR and the Panama TPA contains high levels of substantive copyright obligations as well as specific enforcement mechanisms. And as discussed below, the primary challenge is to ensure that there is effective enforcement in-practice such that high levels of copyright piracy are significantly reduced.

IIPA continues to support Congressional approval of the U.S.-Panama Trade Promotion Agreement. While its copyright law is relatively modern, it will need refinement in order to fully upgrade to the IPR standards in the TPA. On the enforcement side, there are a variety of Panamanian agencies that have taken anti-piracy and anti-counterfeiting actions, especially within the Canal Zone, and undoubtedly continued vigilance is necessary there.

### **Copyright Piracy and Enforcement — Current Trends/Problems**

Below is a summary of the copyright sectors' major piracy problems in this region:

- In general, the **unauthorized “burning”** of CDs has grown rapidly throughout this region in recent years, challenging the ability of legitimate businesses engaged in the creation and distribution of copyright materials – sound recordings, computer software, videogames, books, and to a lesser extent, DVDs of audiovisual works – to compete against these pirated products.
- In addition, the copyright industries and national governments face increasing challenges to **enforce copyright laws** as the forms of piracy shift from hard-goods and toward digital media and unauthorized electronic transmissions via the Internet.
- **Business software piracy** involves counterfeiting, resellers, mail order houses, bulletin boards, and end-user piracy. The greatest threat comes from end-user piracy, where typically a corporate or institutional user copies software onto the hard disks of many more computers than the number authorized. End-user piracy occurs in government, education, and business enterprises throughout this region. It is imperative that software producers have access to both criminal remedies as well as civil *ex parte* search remedies.



- **Piracy of sound recordings and music** remains high throughout the Caribbean. While audiocassette piracy (analog) had been the preferred business of pirates for many years, the industry reports that the levels of CD piracy and DVD piracy now plague this region. The increased sale of CD-R and DVD burners is a recent development that continues to elevate piracy levels for sound recordings. As online distribution models for recorded music continue to develop, they face massive unfair competition from illicit filesharing and websites that distribute unauthorized music.
- **Satellite signal theft and cable piracy** continue to cause significant damage to the motion picture industry throughout the Caribbean. The unauthorized reception and retransmission of encrypted U.S. domestic satellite signals is widespread. Cable operators, homeowners, hotels, resorts and bars have erected satellite dishes to receive programming intended for reception only in the U.S., without obtaining the authorization from the copyright holders. Signal theft in this region has completely disrupted the orderly sequential distribution windows (i.e. release of motion pictures first to theaters, followed by home video, pay television and free television release) of MPA member company programming. As a result, theaters continue to be on the decline throughout the region. Signal theft also has harmed the establishment of a legitimate home video industry. **Video piracy** remains at significantly high levels throughout the region, and especially in Central America. Unfortunately, governments are often reluctant to take the unpopular step of taking enforcement action against street vendors. Finally, legislation to prohibit unauthorized **camcording** in theaters should be considered in these countries.
- The major form of piracy afflicting the U.S. book publishing industry in the region is unauthorized **commercial photocopying**. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks.
- The U.S. entertainment software industry suffers from inadequate enforcement as well. For example, Panama has in the past served as a major transshipment point for pirated and counterfeit entertainment software products on all platforms, including cartridges, personal computer CDROMs, and multimedia products. The growth of **online gaming** is an important part of the legitimate market, and internet cafés promoting unlicensed games or illegally reproduced software threaten this growing market.
- It is important for the local criminal, civil and customs authorities to work in a transparent and expeditious manner and apply deterrent penalties and remedies.

## Conclusion

Advancements in domestic copyright law reform, while critical to meeting the CBERA IPR criteria, are unfortunately insufficient on their own to prevent piracy of copyrighted works.



Many of the Caribbean region countries must adequately and effectively enforce their current copyright laws in-practice if they are to ensure that the creative sectors can flourish within their economies.

IIPA appreciates this opportunity to provide the TPSC with the copyright-based industries' view on the economic impact of the CBERA. We look forward to working with the Administration and Congress to increase the effectiveness of this important trade policy tool to tackle copyright piracy and improve copyright reform efforts in this region.

Respectfully submitted,

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