

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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September 4, 2012

VIA ELECTRONIC SUBMISSION
USTR-2012-0014

Mr. Douglas Bell
Chair, Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: Negotiating Objectives With Respect to Canada's Participation in the Proposed Trans-Pacific Partnership Trade Agreement

Dear Mr. Bell:

In response to the Federal Register notice published July 23, 2012 (77 Fed. Reg. 43,131), the International Intellectual Property Alliance (IIPA) hereby submits this Request to Appear at the September 24, 2012 public hearing on the above-referenced topic.

The IIPA witness will be:

Steven J. Metalitz
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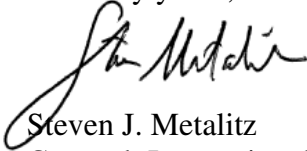
The IIPA testimony is attached, and may be summarized as follows:

On behalf of the U.S. copyright industry trade associations and companies it represents, IIPA welcomes the participation of Canada in the TPP negotiations. The inclusion of a national market of Canada's size and development in an ambitious TPP agreement could substantially amplify the beneficial effects of such an agreement on the economies, workforces and cultural milieux of all TPP members. The fact that Canada has long been, and remains, our country's largest trading partner further augments these potential benefits. However, these benefits will not be realized unless the TPP requires high standards for the legal protection of creative works, and for the national enforcement regimes that implement that protection. The positive potential of the TPP also turns significantly on the extent to which it reduces or eliminates market access

barriers to free trade among TPP partners in goods and services that depend on copyright protection.

The IIPA testimony provides an indicative list of major copyright law and enforcement topics on which U.S. negotiators should engage with their Canadian counterparts in the TPP context. This includes both topics that were inadequately or detrimentally addressed in the recently enacted copyright reform legislation in Canada, and topics that the new legislation does not substantively address. The testimony also briefly surveys other TPP negotiating objectives of concern to the copyright industries.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Steven J. Metalitz". The signature is fluid and cursive, with the first name "Steven" and last name "Metalitz" clearly distinguishable.

Steven J. Metalitz

Counsel, International Intellectual Property Alliance

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Testimony of the International Intellectual Property Alliance Participation of Canada in the Trans-Pacific Partnership Trade Negotiations USTR-2012-0015 September 24, 2012 Public Hearing

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide the Trade Policy Subcommittee with comments addressing issues relating to Canada's participation in the proposed Trans-Pacific Partnership Trade Agreement (TPP). This testimony supplements the comments IIPA previously filed in Docket No. USTR-2011-0019.

IIPA welcomes the participation of Canada in the TPP negotiations. The inclusion of a national market of Canada's size and development in an ambitious TPP agreement could substantially amplify the beneficial effects of such an agreement on the economies, workforces and cultural milieus of all TPP members. The fact that Canada has long been, and remains, our country's largest trading partner further augments these potential benefits. However, these benefits will not be realized unless the TPP requires high standards for the legal protection of creative works, and for the national enforcement regimes that implement that protection. The positive potential of the TPP also turns significantly on the extent to which it reduces or eliminates market access barriers to free trade among TPP partners in goods and services that depend on copyright protection.

Copyright

Our testimony focuses primarily on item (h) in the Federal Register notice, seeking comments on "[r]elevant trade-related intellectual property rights issues that should be addressed in the negotiations." 77 Fed. Reg. at 43,132 (July 23, 2012). In particular, we address some of the key areas where Canada's participation in the TPP negotiations provides opportunities for needed improvements in that country's copyright law and enforcement regime.

IIPA strongly supports the negotiation of a TPP-FTA IPR chapter that builds on the strong intellectual property chapters of existing FTAs, notably the provisions contained in the Korea-U.S. FTA that recently came into force. Measuring Canada's current copyright law and enforcement regime against that yardstick helps in identifying some of the key negotiating objectives the U.S. should pursue with Canada in the TPP context.

On June 29, 2012, Canada marked an important step forward in its years-long effort to modernize its copyright law. Bill C-11, enacted on that date, will soon come into force. This copyright reform legislation fills a number of critical gaps between Canada's outmoded copyright law, and the higher standards that have attracted a growing global consensus in recent years (and that should be reflected in the IPR chapter of the TPP-FTA). A major stated goal of the copyright reform process in Canada was to enable the country to accede to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty; enactment of C-11 advances

Canada considerably along the path toward that goal. Of course, full compliance with the WCT and WPPT should also be the touchstone of the TPP agreement, so that its participants can demonstrate that they have provided the critical legal tools needed to protect copyright in the digital networked environment and to promote the healthy growth of electronic commerce in creative works.

However, in some important areas, Bill C-11 fell short of bringing Canadian law into step with the current global standards that the TPP agreement should embody. In addition, the legislation left unaddressed the major well-known shortfalls in Canada's overall enforcement regime against piracy and counterfeiting. It also remains to be seen whether the new tools and protections added by enactment of Bill C-11 will actually be implemented in a way that enables Canada to overcome its reputation as a haven where technologically sophisticated international piracy organizations can operate with virtual impunity in the online marketplace.

The following lists some of the major copyright topics on which U.S. negotiators should engage with their Canadian counterparts once the latter arrive at the TPP negotiating table. The list must not be regarded as exhaustive, however.¹ The list begins with topics on which the recent legislation changed Canadian law, and then continues with ongoing concerns that were not directly affected by enactment of Bill C-11.

- **Making Available Right:** The new Canadian legislation aims to bring Canada into compliance with Article 14 of the WPPT by recognizing a "sole right" of a sound recording producer to control on-demand public access to the recording. However, serious questions remain about whether this "making available" right will be truly enforceable in the Canadian courts, because a newly enacted provision of the Copyright Act (section 67.1(4)(b)) seems to prohibit any lawsuit for infringement of this exclusive right (without Ministerial consent) until a tariff has been filed with the Copyright Board covering the recording in question. Such a precondition would be inconsistent with the recognition of an "exclusive right" of making available, as the WPPT requires.
- **Enforcement against online piracy:** U.S. FTAs (including those entered into with four TPP negotiating partners) contain detailed obligations for an enforcement regime against online copyright infringement, including effective legal incentives for intermediaries to cooperate in such enforcement, and carefully calibrated safe harbors that grant remedial limitations to intermediaries that do cooperate in specified ways. It is essential that the TPP FTA's IPR chapter bind signatories to take the needed steps to encourage such cooperation. Canadian law falls far short of providing such a framework. It fails to provide meaningful incentives for network service providers to cooperate with copyright owners to deal with copyright infringements that take place in the digital network environment, instead offering inappropriately sweeping immunities. For example:

¹ In particular, we note that the new Canadian copyright reform legislation has significantly expanded the exceptions to copyright protection in current law, and added many new ones. The compatibility of several of these new or expanded exceptions with the well-established "3-step test" for acceptable limitations on exclusive rights (see TRIPS Art. 13; WCT Art. 10; WPPT Art. 16) is subject to serious question. The U.S. government should be vigilant against any effort by Canada or any other TPP partner to weaken or relax the 3-step test, whether or not advocated with reference to any of Canada's newly recognized or broadened exceptions.

- a. Hosting: a party who “provides digital memory” for use by others “for the purpose of allowing the telecommunication of a work through the Internet or another digital network” is not liable, under the new Canadian law, for infringing activity that it hosts, unless it knows that a court has already adjudged the user’s conduct to be infringing, or unless it is part of a service found to have been provided “primarily for the purpose of enabling” infringement. No takedown would ever be required in order to preserve immunity, which the party could enjoy even with respect to infringing material within its knowledge and under its control. This immunity is far broader than safe harbors provided to hosting services elsewhere in the world, and does little to encourage needed cooperation between network service providers and content owners.
 - b. Linking: Services meeting the exceptionally broad definition of “information location tool” in new section 41.27 (“any tool that makes it possible to locate information that is available through the Internet or another digital network”) can claim immunity (other than from injunctions), even if they never “take down” links to infringing materials after notice, so long as they pass along those notices. (This immunity also does not apply to services provided primarily for enabling infringement.) Furthermore, any injunctive relief that would be available could only protect against infringement of the specific copyright at issue in a specific case, and not that of other copyrights, even those belonging to the same copyright owner.
 - c. Repeat infringers: None of the intermediary immunities under Canadian law requires beneficiaries to take any actions to try to prevent recidivists from repeatedly using their services to commit copyright infringement, even on a massive scale. This omission negates much of the benefit otherwise derived from the requirement in the new law that service providers forward notices of infringement to their customers. Apart from the fact that failure to comply with this requirement would not disqualify the service provider from legal immunities, the value of this “notice and notice” regime is undermined by the lack of any requirement that service providers keep track of notices, so that repeat infringers are not repeatedly sent the same notice which they have ignored previously. To treat the first-time violator identically with the serial offender virtually guarantees that the notices will have no deterrent effect.
- **Statutory damages**: Although Canada’s law already provides for availability of pre-established damages for copyright infringement, the recent amendments could render the statutory damages option ineffective in achieving its goals of full compensation and deterrence in the online environment, where it is compellingly needed to deter large scale infringers. The new law limits statutory damages to a range of C\$100 - C\$5,000 for all infringements carried out by any defendant for “non-commercial purposes,” a phrase the law does not define. Even this meager award is available only to the first copyright owner to seek a statutory damage award against a given defendant. All other right holders would be barred from seeking statutory damages; and indeed, statutory damages would be entirely eliminated for all other infringements carried out by that defendant prior to the date that the first copyright owner’s lawsuit was filed. These sharp limitations, which can

be invoked by institutional as well as individual defendants, especially harm authorized Canadian licensees seeking to defend licensed rights, and thus may prospectively diminish opportunities for all right holders in both established distribution channels and the developing online marketplace. These provisions are inconsistent with the standard the U.S. should pursue in the TPP.

- **National Treatment:** National treatment and MFN are the cornerstones of free trade agreements and a defining part of the broader relationship between trusted partners. Canada has maintained a variety of discriminatory practices that limit remuneration to U.S. performers and record labels for uses of their performances and recordings in Canada. The new law establishes a point of attachment (through the WPPT) for the application of national treatment; but it also expressly permits the Minister of Industry to limit the protection of sound recordings of any WPPT country whose remuneration right, in the Minister's view, differs materially from that provided in Canada. U.S. FTAs are wisely premised on the bedrock principle of non-discrimination, and Canada must adhere to that principle as an aspect of its TPP commitments, providing national treatment under its copyright laws without exceptions.
- **Term of protection:** Although a growing international consensus is well advanced (including in a number of TPP partner countries) in support of longer terms of copyright protection, Canada's law remains unchanged on this score. The disparity of term of protection between the U.S. and its largest trading partner will make trade tensions almost inevitable in the future, with respect to a growing body of works that remain protected in one country but not in the other. Canada's presence at the TPP table must translate into a commitment to eliminate or sharply reduce this disparity.
- **Ex officio authority for border enforcement:** As repeatedly stressed by USTR in its Special 301 reports on Canada, until Canada empowers its customs officers to act against suspected pirate or counterfeit imports or in-transit materials, its borders remain effectively wide open to such abuses, thus unnecessarily increasing the stress on U.S. border controls. This gap, long acknowledged by Canadian authorities, must be filled in order for Canada to accede to a robust TPP IPR text.
- **Shortfalls in criminal remedies:** Canada's trademarks law does not include any criminal penalties for a range of counterfeiting violations; nor does its criminal code prohibit manufacture, sale or distribution of fake labels of authenticity, a common feature of organized schemes to traffic illicitly in unauthorized software applications. These omissions adversely impact enforcement efforts, which often rely on these ancillary offenses to attack criminal piracy rings. Numerous legislative reports have documented the need to upgrade these features of Canadian law, and the TPP negotiations may present an excellent opportunity to accelerate long-delayed reforms in this area.

Other Issues

We offer the following brief observations regarding some other topics on which public comments are sought by the Federal Register notice:

(f) Existing barriers to trade in services between the United States and Canada that should be addressed in the negotiations: IIPA strongly believes that the TPP market access chapters must be comprehensive in scope, strictly avoiding any sectoral carveouts that preclude the application of free trade disciplines. We note that several market access barriers cited by USTR in its 2012 National Trade Estimate report on Canada involve, for example, content quota requirements for television, radio, cable television, direct-to-home broadcast services, specialty television, and satellite radio services. It should be possible to address such barriers to trade in the TPP, and thus augment consumers' access to diverse content, while promoting local cultural expressions.

(g) Relevant electronic commerce issues that should be addressed in the negotiations: Electronic commerce is integral to the business models of the copyright industries. It should be a high priority to ensure that this critical means of production and distribution of copyrighted works is not jeopardized by discriminatory regulations or market access barriers. We also note that resolution of a number of the copyright issues identified above – in particular, enabling enforcement of the exclusive right of making available, and bringing up to global standards the legal tools available to combat online piracy and promote inter-industry cooperation – will help promote the healthy development of a Canadian e-commerce market in creative works and associated goods and services.

In the context of cloud computing and other online delivery of content and services it is critically important to secure the freedom to transfer and exchange data among data centers that are located in different TPP countries. Laws and regulations concerning data privacy and data security, for example, must not be permitted to prevent the flow of data across international boundaries. Export control regulations can also curtail the growth of cloud computing by impeding the flow of data from customers in one country to data centers in another one, or from a data center in one country to some other data center in another one. TPP countries should cooperate on finding ways to ensure that such regulations do not burden trade unnecessarily.

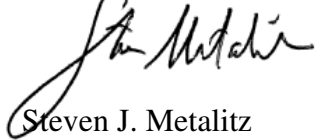
Additionally, the Federal Register notice requests comments on how Canadian participation in TPP might affect “new approaches designed to promote innovation and competitiveness, [and] encourage new technologies...”. In this regard, we note that strong copyright laws, paired with effective enforcement, contribute to the development of robust and competitive marketplaces for copyright materials. This in turn facilitates the public's access to more works, including more works in multiple formats and on new and developing platforms. These trends all support innovation, and the development of new technologies and business models for the creation, dissemination and consumption of copyrighted works. We encourage USTR to continue to press for strong copyright provisions within the TPP as part of its heightened commitment to ensuring that the agreement promotes innovation, competition, and technological development.

About IIPA

The IIPA is a private sector coalition of seven trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by

piracy and other market access barriers. IIPA's seven member associations (listed below) represent over 3,200 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 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 fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. The members of the IIPA 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).

Respectfully submitted,



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