



February 7, 2000

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW, Room 122
Washington, DCV 20508

Re: Public Comment Regarding Negotiations
Toward a Free Trade Area of the Americas,
64 Fed. Reg. 72715 (Dec. 28, 1999)

Dear Ms. Blue:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to the request made by the Trade Policy Staff Committee (TPSC) for comments on "its efforts to develop proposals and positions" concerning the Free Trade Area of the Americas (FTAA). Our comments will focus primarily on issues related to copyright protection and enforcement, both in the region and in the efforts to prepare a FTAA Intellectual Property Rights Chapter.

The International Intellectual Property Alliance

IIPA is a coalition of seven trade associations that collectively represent the U.S. copyright-based industries -- the motion picture, recording, music publishing, business and entertainment software, and book publishing industries. IIPA's member associations are the Association of American Publishers (AAP), AFMA (formerly the American Film Marketing Association), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA). These member associations represent over 1,350 U.S. companies producing and distributing materials protected by copyright laws throughout the world -- all types of computer software including business software and entertainment software

(such as videogame CDs and cartridges, personal computer CDs and multimedia products); motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

These U.S. copyright-based industries represent the leading edge of the world's high technology, entertainment and publishing industries. According to the most recent edition of the report, Copyright Industries in the U.S. Economy: The 1999 Report, prepared for IIPA by Economists, Inc., these core copyright industries accounted for \$348.4 billion in value added to the U.S. economy, or approximately 4.3% of the Gross Domestic Product (GDP) in 1997 (the last year for which complete data is available). The total copyright industries¹ accounted in 1997 for \$529.3 billion in value added, or approximately 6.53% of GDP. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1997 (6.3% vs. 2.7%). Employment in the core copyright industries grew nearly three times the employment growth in the economy as a whole between 1977 and 1997 (4.8% vs. 1.6%). More than 6.9 million workers were employed by the total copyright industries, about 5.3% of the total U.S. work force, in 1997. The core copyright industries accounted for an estimated \$66.85 billion in foreign sales and exports in 1997, a 11.1% gain over the \$60.18 billion generated in 1996. This report is made widely available to officials working on country and IPR issues at USTR, and throughout other agencies, including the State Department, the Commerce Department, the U.S. Patent and Trademark Office, and the U.S. Copyright Office. A summary of this report can also be found on IIPA's website, www.iipa.com.

IIPA's Activities in the FTAA Process

For the past five years, IIPA has participated in the business sector process of the FTAA, as exemplified by the Americas Business Forum (ABF), an event which takes place before the annual Ministerial Meeting. IIPA has taken part in the various ABF Working Groups on Intellectual Property held in Toronto (1999), San José (1998), Belo Horizonte (1997) and Cartagena (1996). Over the years, IIPA's recommendations to our Government and our business colleagues in the ABF consistently have been aimed at providing an expansive view on strengthening copyright substantive law and improving enforcement in this Hemisphere.

Several of our member associations and in turn, their member companies, are actively engaged in conducting commercial activities and/or anti-piracy enforcement actions in many FTAA nations. The U.S. copyright-based companies and our Latin and Caribbean colleagues involved the creative and cultural industries share similar goals of

¹ The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The "core" copyright industries are those which create copyrighted materials as their primary product.

expanding the legitimate markets for these creative products, which result in higher levels of domestic employment, more tax revenues generated for governments, and stronger economic development of local economies.

The comments below provide an outline of the kind of issues we recommend be raised by the U.S. Government in the near-term FTAA process.

1. The FTAA IPR Chapter should include substantive copyright provisions which go beyond the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement and include obligations that support adequate and effective copyright protection in an era of technological growth and development.

The mandate of the FTAA Ministers to the IPR Negotiating Group (made at San José) is clear: “Determine how to reduce distortions in trade in the hemisphere and promote and ensure adequate and effective protection to intellectual property rights. Changes in technology must be considered.” The Trade Ministers in Toronto directed the nine Negotiating Groups to prepare a draft of their respective chapters, including bracketed text, which is due three months before the next Ministerial Meeting (April 2001 in Buenos Aires) and the Third Summit of the Americas (April 2001 in Quebec City).

On the multilateral front, the January 1, 2000 deadline for full compliance by World Trade Organization (WTO) developing country members with all their copyright substantive and enforcement obligations under the TRIPS Agreement has arrived. With respect to copyright obligations, particular and immediate attention in national legislation in this hemisphere must be paid to (a) the protection for a full TRIPS-compliant term of pre-existing works and sound recordings (“retroactivity”) (among other issues) and (b) the practical fulfillment of enforcement obligations (discussed separately, below).

Foremost, IIPA believes that the FTAA IPR Chapter must go above and beyond the copyright substantive obligations found in TRIPS. The FTAA IPR Chapter must be a forward-looking document with technologically neutral terms. If we look around the globe, there are international FTAA trends in substantive copyright laws which IIPA believes should be included in the FTAA.

The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a global plague. It makes it cheaper and easier than ever for thieves to distribute unauthorized copies of copyrighted materials around the globe. Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. The challenge to legislators in each country is to make whatever changes to current law are necessary to realize this goal.

Many of these changes are contemplated by the two so-called “internet” treaties of the World Intellectual Property Organization (WIPO): the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The Americas already lead the world in the number of countries which have either deposited their instruments with WIPO or have passed ratification legislation necessary to move forward with developing their instruments of deposit. Argentina, El Salvador, Panama, St. Lucia and the U.S. have already deposited their ratification instruments for both Treaties with WIPO; Mexico has deposited its instruments for the WPPT. Mexico has completed its WCT process at the legislative level, and deposit with WIPO should be forthcoming. Both Costa Rica and Colombia have completed their legislative processes for both treaties, and deposit with WIPO is the next step.

Below is an illustrative (not exhaustive) list of the kinds of substantive copyright obligations (beyond TRIPS) which should be addressed in the FTAA IPR Chapter:

- Copyright owners should have the exclusive right of “making available” its works or phonograms to the public for on-demand access. Modern copyright laws recognize that exclusive rights over any means of delivery in which “members of the public may access works from a place and at a time individually chosen by them” is critical.
- Outlawing the unauthorized distribution of tangible copies of creative works must be covered. Furthermore, provisions against the circumvention of technological measures and rights management information should be included in an IPR Chapter.
- The term of copyright protection should be extended beyond the TRIPS minima. The basic term should be life of the author plus 70 years, or 95 years from date of first publication where the author is a legal entity, or in the case of the rights of a sound recording producer or a performer.

2. The enforcement obligations of the TRIPS Agreement must be implemented immediately to ensure the deterrence of copyright piracy in-country and at the borders. Additional means and measures (below) to achieve this outcome should be considered for inclusion in an IP Chapter.

Effective enforcement against piracy in the Americas is a priority for IIPA and its members. Of course, it is easy for government officials to agree on this point; it is an entirely different matter to actually take actions on all levels of national enforcement – using criminal, civil, border, judicial and/or administrative means – to achieve tangible results.

Inadequate and ineffective copyright enforcement continues to inflict significant trade distortions in this hemisphere. For example, in the case of U.S. copyright-protected products, U.S. companies lost an estimated almost \$2.6 billion in 1998 due to copyright

piracy in just 18 of the 34 FTAA countries outside the U.S. (estimated 1999 regional losses are not yet available). This conservative estimate does not even include losses due to piracy over the Internet. And without a doubt, the creative products of Latin and Caribbean authors, artists and producers are being stolen throughout the region as well. Between 2000 and 2005, the copyright industries expect to see much improvement in the effective enforcement of intellectual property rights in all the FTAA countries.

Although implementation of the TRIPS enforcement text remains an immediate priority, IIPA proposes that several additional measures aimed at enhancing enforcement efforts in this Hemisphere be included in this IPR Chapter. To repeat, the FTAA IPR Chapter should be a forward-looking agreement. Some of our suggestions are derived from the TRIPS Agreement, yet move beyond the requirements of TRIPS (and we reserve the right to amend this list of suggestions). Including such measures in national law and in the FTAA IPR Chapter, we believe, would simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies. Examples of such tools include:

- authorizing ex officio anti-piracy actions by law enforcement agencies, thus dispensing with a formal complaint by a private party as a procedural prerequisite to enforcement of the copyright or neighboring rights law. Within the past year, Paraguay and Guatemala, for example, have amended their laws to explicitly provide for this “public” action which grants authority to police and prosecutors to initiate copyright infringement actions;
- establishing statutory or pre-determined damages in civil cases, thus assuring the availability of deterrent damage awards, as required by TRIPS Article 41. Brazil has instituted such a system in its copyright law, and this has been most helpful in expediting civil infringement cases and generating just results;
- establishing presumptions of ownership and subsistence of protection in copyrighted works and sound recordings in favor of the right holder whose name appears on copies in the usual manner (an extension of Article 15 of the Berne Convention);
- authorizing exclusive licensees of copyright or neighboring rights to bring piracy and infringement cases in their own names.

Importantly, countries in the Americas should cooperate to secure commitments from its neighbors to take effective, coordinated enforcement measures against cross-border piracy operations, including those taking place over the Internet and in electronic commerce generally.

As mentioned above, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty also contain key provisions — notably including the requirement to provide “adequate legal protections and effective legal remedies” against the

circumvention of technological protection measures used to protect copyrighted materials. This broad enforcement obligation will be explored further as it is translated into national law.

3. Governments and businesses in this hemisphere should support additional measures to improve the scope of legal protection for legitimate copyright-protected materials and promote commercial development.

IIPA encourages government officials as well as our business colleagues to promote the three objectives below because they have an immediate impact on commercial business transactions involving the use and distribution of legitimate copyright materials.

- **Legalizing Government Use of Computer Software**

Governments in the FTAA countries should agree to issue appropriate instruments which mandate that all government agencies use only legal computer software. Such instruments (whether laws, executive decrees or agency regulations) should also cover government systems involving the acquisition and management of software to prevent end-user piracy from occurring. For example, the United States has an Executive Order (1998) covering federal agencies, and several countries and provinces in Latin America have also issued similar decrees (including, for example, Argentina, Colombia and Paraguay).

- **Keeping Import Duties Based on the Physical Medium**

For those copyrighted products on which tariffs continue to be imposed, it is imperative for governments to ensure that customs valuation is based on the physical medium embodying the copyrighted work or recording, and not the value of the copyrighted work or recording itself. The overwhelming international trend is toward assessing duties only over the value of the physical media.

- **Keeping the Internet “Duty Free”**

IIPA recommends that all FTAA countries continue to honor the May 1998 WTO Ministerial Declaration which reflects a standstill agreement where countries agreed not to impose tariffs on electronic transmissions. Such duties would certainly slow the growth of electronic commerce. While IIPA realizes that discussions on this issue continue at the multilateral level, we urge leaders in this Hemisphere – both in government and in business – to continue their support for this important principle.

Conclusion

IIPA appreciates this opportunity to discuss additional measures on copyright protection and enforcement in the FTAA negotiating process. A legal framework within

the FTAA which gives incentives to creativity, encourages responsibility, and rewards respect for property rights is indispensable to the healthy development of the marketplace for creative products in this hemisphere.

Respectfully submitted,

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IIPA