



Executive Summary and Comments of the
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
Submitted to the
Americas Business Forum VI
Workshop on Intellectual Property Rights
Buenos Aires, Argentina
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Executive Summary

The International Intellectual Property Alliance (IIPA) takes this opportunity to expand upon the already-agreed goals on copyright issues discussed at prior Workshops on Intellectual Property Rights at the Americas Business Forums (ABFs) held in Toronto (1999), San José (1998), Belo Horizonte (1997), and Cartagena (1996), in which IIPA was an active participant. IIPA, based in Washington, D.C., is a coalition of seven trade associations that collectively represent the U.S. copyright-based industries -- the motion picture, music, recording, business and entertainment software, and book publishing industries. IIPA's member associations (listed below) represent over 1,500 U.S. companies producing and distributing creative products protected by copyright laws throughout the world. Our member associations and/or their member companies, are actively engaged in nearly all of the FTAA nations, conducting commercial activities and/or anti-piracy enforcement actions. The U.S. copyright-based companies and our Latin and Caribbean colleagues involved the creative and cultural industries share similar goals of 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 and cultural development of local economies.

IIPA's submission to the ABF IPR Workshop covers three main points. First, we propose six (6) specific measures which will improve copyright enforcement in the hemisphere. These represent modern and effective methods which respond to today's digital piracy realities and should be included in the FTAA IPR Chapter. Second, we highlight twelve (12) areas of substantive copyright legal issues which reflect obligations found in TRIPS, NAFTA and the WIPO Treaties and should be included in the FTAA IPR Chapter to ensure adequate levels of protection in the current environment. Third, we urge ABF support on two additional issues important to the business community: (a) encouraging governments in the Hemisphere to purchase and use only legal (non-infringing copies) business software in their agencies, and (b) supporting countries in this region to keep the Internet "duty free" of any tariffs on electronic transmissions.

Comments and Discussion

1. In order to deter copyright piracy in-country and at the borders, the FTAA IPR Chapter should include specific enforcement measures to enable governments and rightsholders to enforce their exclusive rights.

Prior ABF IPR Workshops have agreed that effective enforcement against piracy is important and that copyright laws must be enforced (see ABF IPR Workshop recommendation from Cartagena, Belo Horizonte, and Toronto). Effective copyright enforcement in this Hemisphere remains a priority to IIPA and its members.

IIPA submits, for ABF consideration and support, measures aimed at enhancing anti-piracy enforcement efforts in this Hemisphere. Some of these suggestions are derived from the TRIPS Agreement, yet move beyond the specific requirements of TRIPS. IIPA believes that these specific measures would simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies. Examples of a few illustrative (non-exhaustive) issues in the enforcement area which should appear as specific obligations in the FTAA IPR Chapter and in member nations' legal regimes include the following:

- Execute civil *ex parte* search orders in a timely manner and without unnecessary costs: This is a TRIPS requirement (Article 50) which many countries in this Hemisphere need to provide in-practice and in a timely manner. In civil cases, searches and seizures conducted *inaudita altera parte* should be statutorily implemented and requests should be acted upon and executed within a short period of time. Any security or bonding obligations should not result in unreasonably deterring recourse to these procedures.
- Provide deterrent levels of fines and damages in the statute itself: Statutory maximum fines must be sufficiently high to act as a deterrent and actual fines and damage awards should be imposed by the judicial authorities at a level to make this deterrent effect credible by removing any gain to the infringer.
- Permit *ex officio* actions: The competent authorities in each country should be able to initiate criminal actions *ex officio*, without the need for a complaint by a private party or right holder.
- Ensure *ex officio* authority for customs officials: Customs authorities should be primarily responsible for preventing infringing products from entering that its country's territory. Customs authorities should be able to initiate border measures *ex officio*, without the need for a formal complaint by an authorized private party or association or the right holder. Border measures should be applicable to goods in-transit and to goods destined for export.
- Provide for a presumption of authorship and subsistence: To speed up the civil justice system by making it easier for rightsholders 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, performance or phonogram in the usual manner should, in the absence of proof to the contrary, be presumed to be such designated right holder in such. In the absence of proof to the contrary, it should also be presumed that the copyright or related right subsists in such subject matter. Such presumptions should also pertain in criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right.
- Extend civil and criminal remedies to cover violations of the technological measures and RMI obligations: All remedies and enforcement procedures applicable to copyright infringement should apply to the

obligations dealing with the circumvention of technological protection measures and with rights management information (see further discussion, below, about the WIPO Treaties).

2. The FTAA IPR Chapter should include substantive copyright provisions which support adequate and effective copyright protection in an era of technological growth and development.

IIPA believes that it is critical that -- with respect to copyright -- the FTAA IPR Chapter include, on a technologically neutral basis, the obligations in the soon-to-enter-into-force WIPO Copyright and Performances and Phonograms Treaties (WCT and WPPT), as well as modern and effective enforcement provisions that respond to today's digital and Internet piracy realities and that reflect the TRIPS obligations to which the countries of this Hemisphere are already subject.

There has already been ABF and regional support for countries to ratify the two treaties of the World Intellectual Property Organization -- the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (see Belo Horizonte ABF). It is fitting that the Americas already lead the world in the number of countries which have deposited their instruments with WIPO, with several others moving forward with their domestic efforts to ratify these Treaties.

IIPA believes that existing obligations in TRIPS, NAFTA and the WCT and WPPT should be included in the FTAA IPR Chapter. For your consideration, we highlight 12 specific, substantive issues, which merit inclusion in the Chapter:

- Right of reproduction: The right of reproduction, for both works and objects of neighboring rights, should 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 Treaties.
- Right of communication to the public: Copyright holders (which include authors, performers, producers of phonograms and their successors in interest) should have the exclusive right to authorize or prohibit the communication to the public of their works, performances or phonograms, by wire or wireless means, including the making available to the public of their works, performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Subject to the tripartite test in Article 13 of TRIPS and corresponding articles of the WCT and WPPT, this right may be subject, in the case of performers and producers of phonograms, to certain national exceptions or limitations for traditional free over-the-air broadcasting and similar uses.
- Right of making available [e.g. distribution]: Copyright holders should have the exclusive authorizing the making available [e.g. distribution] to the public of the original and copies of their works and phonograms through sale or other transfer of ownership.
- Right of importation: Copyright holders should have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the rightholder.
- Unfixed performances: Performers should 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.

- First 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 rights of performers and producers of phonograms: With respect to all rights of performers and producers of phonograms, the enjoyment and exercise of the rights provided for in this Agreement should not be subject to any formality.
- Contractual rights: Any person acquiring or holding any economic rights should be able to freely and separately transfer such rights by contract as provided in the NAFTA. 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, should be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.
- Term of Protection: Works should enjoy a term of protection of at least 70 years *post mortem auctoris* (see Toronto ABF). Where the term is measured other than by reference to the life of a natural person, as is generally the case with respect to the rights of phonogram producers, performers and certain other works, 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, or, failing such authorized publication within 25 years from the creation of the work, performance or phonogram, not less than 120 years from the end of the calendar year of the creation of the work, performance or phonogram.
- Technological measures: A provision should be included which tracks the WCT and WPPT obligations on making illegal the circumvention of technological measures and ensures that devices, services and components thereof are fully covered. The U.S. Digital Millennium Copyright Act (DMCA) may provide a useful model for how these treaty provisions can be implemented. Adequate and effective legal remedies, both criminal and civil, must be incorporated into the enforcement text. This is an essential element of a protection system that is adapted to the digital and Internet Age, where new threats of piracy are already upon us.
- Protection of rights management information: Adequate and effective legal remedies should be afforded to protect rights management information from unauthorized alteration and removal. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of copyrighted materials.
- Protection for encrypted program-carrying satellite signals: As provided in the NAFTA, criminal and civil liability should be afforded encrypted program-carrying satellite signals that has been decoded without the authorization of the lawful distributor of the signal.

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

- **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). IIPA encourages our business colleagues to support this effort because such legalization will have an immediate impact on commercial business transactions involving the use and distribution of legitimate copyright materials.
- **Keeping the Internet “Duty Free”:** IIPA recommends that all FTAA countries continue to honor the May 1998 WTO Ministerial Declaration which reflected 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 – both in government and in business – in this Hemisphere to continue their support for this important principle.

A reminder about other duties: 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. In fact, the San José ABF IPR Group supported this point. This issue merits continued attention by all businesses in this Hemisphere.

Conclusion

IIPA appreciates this opportunity to discuss additional measures on copyright protection and enforcement for the FTAA Americas Business Forum VI. 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.

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