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Via Email: FR0529@USTR.EOP.GOV

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

Re: Public comments on the Caribbean Basin
Economic Recovery Act and the Caribbean Basin
Trade Partnership Act, 70 Fed. Reg. 59389 (Oct. 12,
2005)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) takes this opportunity to respond to your request for comments in preparation of its Annual Report on the impact of the Caribbean Basin Economic Recovery Act (CBERA) and the Caribbean Basin Trade Partnership Act (CBTPA) on U.S. industries, consumers and beneficiary countries.

About the IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of seven trade associations (listed below), each representing a significant segment of the U.S. copyright community. These member associations represent about 1,900 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 CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

Actual or Probable Effect of the CBERA on the U.S. Economy

Section 215(a) of the CBERA requires that the President submit biennial reports to the Congress and the President regarding the actual and/or probable impact the CBERA has and/or will have on the U.S. economy generally and on the domestic industries affected by the Act.

IIPA cannot point to specific attributes which connect the strength of the U.S. copyright-based industries here in the U.S. to the actual implementation of the CBERA. At the same time, we cannot say

definitively that there has not been some positive economic impact created by the CBERA over the last two decades. We can, however, conclude that comprehensive, modern copyright laws, combined with effective enforcement of those laws, are necessary for the copyright industries – both U.S. and local industries – to flourish. Increasingly, many copyright sectors look to grow their markets overseas. As a result, the IPR standards in the CBERA (as amended) have provided, and can continue to provide, a good foundation for these eligible countries to improve both their copyright laws and enforcement mechanisms, in order to protect both their domestic rightsholders as well as foreign rightsholders.

The U.S. copyright industries are major contributors to the U.S. economy. In the United States, the domestic copyright industries constitute one of the most vibrant sectors of our economy. In October 2004, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2004 Report, the tenth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show:

- In 2002, the U.S. “core” copyright industries accounted for an estimated 6% of the U.S. gross domestic product (\$626.6 billion). The “core” industries are those industries whose primary purpose is to produce or distribute copyright materials.
- The “core” copyright industries employed 4% of U.S. workers in 2002 (5.48 million workers).
- Between 1997-2002, the core copyright industries added workers at an annual rate of 1.33%, exceeding that of the U.S. economy as a whole (1.05%) by 27%. Factoring out the difficult economic year of 2002, between 1997-2001, employment in the core copyright industries grew at an annual growth rate of 3.19% per year, a rate more than double the annual employment rate achieved by the U.S. economy as a whole (1.39%).
- In 2002, the U.S. copyright industries achieved foreign sales and exports estimated at \$89.26 billion, leading other major industry sectors such as: chemicals and related products, food and live animals, motor vehicles, parts, and accessories, and aircraft and associated equipment sectors.

IIPA’s report reflects almost yearly increases regarding the contribution of the “core” copyright industries to the U.S. GDP.¹

Our submission herein tracks our recent letter to the U.S. International Trade Commission in their investigation of the impact of CBERA.²

Comments on the CAFTA-DR

IIPA and its members are strong advocates of the comprehensive copyright and enforcement provisions found in the IPR chapter in the U.S.-Central American-Dominican Republic Free Trade Agreement (CAFTA-DR). In fact, IIPA testified at the April 2004 hearing on CAFTA-DR, noting the piracy levels in these six countries and the enforcement challenges there.³

¹ IIPA’s Copyright Industries in the U.S. Economy: The 2004 Report can be accessed in its entirety at the IIPA website at http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf.

² See IIPA, Letter to the USITC, Annual Report on the Impact of the Caribbean Basin Economic Recovery Act on U.S. Industries, Consumers and Beneficiary Countries, Sept. 6, 2005, available at <http://www.iipa.com/pdf/IIPA%20CBERA%20CAFTA%20filing%20to%20USITC%2009062005.pdf>.

³ See IIPA, Pre-Hearing Comments to the USITC, April 20, 2004 at http://www.iipa.com/rbi/2004_April19_CAFTA_DRFTA_USITC_testimony.pdf, and also IIPA, Post-Hearing Comments to the USITC, May 4, 2004 at http://www.iipa.com/rbi/2004_May4_CAFTA_DRFTA_USITC_posthearing_brief_Corrected.pdf.

The CAFTA-DR IPR Chapter recognizes that achieving comprehensive and high copyright protection and enforcement standards will support the U.S. economy, job creation, and the future of global e-commerce when these standards are implemented throughout this entire region. These nations also realize that their economies will increasingly depend on the creativity of their citizens, supported by comprehensive copyright protections, as new markets develop to promote the digital transmission of copyright material globally.⁴

Effective implementation of these new standards, both on-the-books and enforcement in-practice, is crucial. The six CAFTA-DR member nations should continue all efforts to halt piracy and improve their legal regimes. Once the agreement enters into effect (three nations still have to ratify it), the transition periods permitted under the FTA should not be seen as a justification to slow down or distract from national efforts to protect copyrights.

Copyright Law and Enforcement Standards in the CBERA, as Amended

Unfortunately, many of the CBTPA-eligible countries fail to meet the higher IPR standards – substantive levels as well as enforcement performance -- elaborated under the CBTPA, as amended. All countries in this region should be on-notice that they must take appropriate action, both in terms of reforming their legislation as well as enforcing their laws, to meet their “part of the bargain” in receiving these unilateral preference trade benefits.

To review, the 1983 enactment of the CBERA⁵ 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. Under CBERA program, countries can only receive trade preferences if they satisfy statutory criteria which include intellectual property rights (IPR) standards. The CBERA IPR provisions contain both mandatory and discretionary criteria.

In 2000, the United States-Caribbean Basin Trade Partnership Act (CBTPA) amended the CBERA to authorize the President to designate countries in this region to be eligible for preferential tariff treatment for certain articles by (1) extending duty-free and quota-free treatment for certain textile and apparel goods and (2) extending NAFTA-equivalent tariff treatment to a number of other products previously excluded from the CBERA program.⁶ In order to qualify for these benefits, the countries must meet certain designation criteria. Specifically, to be a “CBTPA beneficiary country,” a country had to meet the original CBERA criteria which include two IPR criteria, three mandatory and two discretionary.

First, the mandatory criteria in 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 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 country⁷. Second, beneficiary countries must

⁴ See IIPA Press Release, “The U.S. Copyright Industries Applaud the Signing of the U.S.-Central American-Dominican Republic Free Trade Agreement,” August 2, 2005, at <http://www.iipa.com/pdf/IIPA%20CAFTA%20DR%20Signing%20by%20Pres%20Bush%20FINAL%2008022005.pdf>

⁵ See Section 212 of the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67 (codified at 19 U.S.C. 2701 et seq.).

⁶ Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

⁷ IIPA believes that the CBERA program would be strengthened further if the statute were amended to make the

meet the two discretionary IPR criterion of the CBERA, found 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 is 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 the level of the intellectual property rights provisions when it passed the CBTPA in 2000. There, 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 intellectual property rights comparable to the protections provided to the United States in bilateral intellectual property agreements.⁸

The bottom line was that each country had to re-meet all the CBERA criteria as well as the explicit TRIPS-or-greater criteria and bilateral IPR agreement standards in order to enter the CBTPA. However, as a matter of political reality, the President declared all 24 CBERA beneficiaries as eligible CBTPA beneficiary countries on October 2, 2000.⁹

Economic Costs of Copyright Piracy in the Central American and Caribbean Region

Strong and comprehensive copyright protection and enforcement are key ingredients to robust economic growth and development. Copyright gives creators the basic property rights that enable them to authorize and control the copying, distribution, performance and display of the works they create. Exercising these exclusive rights themselves, or licensing someone else to exercise them, is the main way that creators earn a living and generate revenue. That revenue is needed to underwrite the hefty investments related to producing and distributing motion pictures; developing, testing and maintaining computer software; scouting, recording, and promoting musical talent; designing entertainment software; editing and distributing new books and journals; and all the other activities that are indispensable to bringing creative

violation of a trade agreement a mandatory criterion.

⁸ 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.

⁹ USTR Press Release, “USTR Announces AGOA/CBI Country Designations,” available at <http://www.ustr.gov/releases/2000/10/00-67.pdf>. See also 65 Fed. Reg. 60236 (Oct. 10, 2000).

products to the public. Inadequate laws and ineffective anti-piracy enforcement adversely affects employment, job creation and revenues, both in the United States as well as abroad.

Widespread Piracy and Inadequate Enforcement

IIPA believes that the most immediate problem in the Central American and Caribbean, as is the case throughout the Americas, is the failure of many of these countries to adequately enforce their existing copyright laws. High levels of copyright harm both U.S. and local creators.

With many of these U.S. companies increasingly relying on foreign licensing and sales revenues, piracy combined with inadequate enforcement, has become a major impediment to this continued revenue growth and has become the major market access barrier for the copyright industries. The challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially as the forms of piracy shift from hard-goods and toward digital media and unauthorized electronic transmissions. The unauthorized “burning” of CDs has grown rapidly throughout Latin America and the Caribbean, thus 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. Inadequate and ineffective copyright enforcement has failed to stem this problem and continues to distort trade in this region. Criminal and civil justice systems must work in a transparent and expeditious manner and apply deterrent penalties and remedies.

- 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. Taking enforcement actions against street vendors and other distributors is often perceived by governments as unpopular steps.
- 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 and civil *ex parte* search remedies.
- Piracy of sound recordings and music remains high in this region. While audiocassette piracy (analog) had been the preferred business of pirates for many years, the industry reports that the levels of CD piracy (digital) and DVD piracy (audiovisual) have plagued this region. The increased sale of CD-R and DVD burners are a recent development that continues to elevate piracy levels for sound recordings. For example, the recording industry reports that piracy in the Dominican Republic continues to remain severe, with estimated piracy levels appearing to increase during 2005.

- The major forms of piracy afflicting the U.S. book publishing industry in the region are commercial and photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. This problem has been reported throughout much of Central America as well as the Dominican Republic.
- The U.S. entertainment software industry suffers from inadequate enforcement by governmental and judicial authorities. 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 CD-ROMs and multimedia products.

A chart outlining a conservative estimate of trade losses due to piracy of U.S. copyrighted materials in a selected few of the CBERA countries appears below:

2004 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY in SELECTED CBERA COUNTRIES

	Motion Pictures		Records & Music		Business Applications ¹⁰		Entertainment Software		Books	TOTAL LOSSES
	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	
Bahamas	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Costa Rica	2.0	40%	NA	NA	9.0	55%	NA	NA	NA	11.0+
Dominican Republic	2.0	20%	10.3	75%	2.0	77%	NA	NA	1.0	15.3+
El Salvador	NA	NA	NA	NA	3.0	80%	NA	NA	NA	3.0+
Guatemala	2.0	40%	NA	NA	6.0	78%	NA	NA	NA	8.0+
Honduras	NA	NA	NA	NA	2.0	75%	NA	NA	NA	2.0+
Nicaragua	NA	NA	NA	NA	1.0	80%	NA	NA	NA	1.0+

NA: Not Available

Copyright Law Reform in the CBERA Countries

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. In recent years, several Central American and Caribbean nations have taken positive steps toward achieving this goal by amending their copyright laws or passing entirely new laws.

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

¹⁰ BSA estimates for 2004 are final and reflect losses to U.S. publishers only; they do differ from the BSA trade loss numbers which it releases in its global survey. The BSA global numbers reflect losses to (a) all software publishers in that country and (b) losses to distributors/retailers in that country. BSA's latest report is its Second Annual BSA and IDC Global Software Piracy Study (2005), which is available at www.bsa.org/globalstudy.

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. In addition, the recording industry notes that they are interested in including public performance and broadcasting rights for phonogram producers in the Bahamian copyright law; this is important given the tourism industry (cruise ships, resorts) which may use public performances of sound recordings. IN addition, the recording industry reports that the government of Trinidad & Tobago is working on an amendment to its copyright law; that law apparently only protects national repertoire. National treatment should be extended to protect international repertoire.

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) entered into force on March 6, 2002, and the WIPO Performances and Phonograms Treaty (WPPT) entered into force on May 20, 2002, and together they provide the legal infrastructure for this new digital and Internet environment.

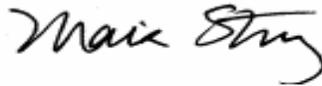
The U.S. government has been working at all levels to encourage countries to sign, ratify and implement both WIPO Treaties.¹¹ Of the CBERA beneficiary countries, so far Costa Rica, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panama and St. Lucia have deposited their instruments of ratification/accession with WIPO and their obligations are in effect. The Dominican Republic joined recently, and its obligations will enter into force on January 10, 2006. All countries must implement these new obligations and IIPA again strongly recommends that the U.S. government strongly urge the other CBERA countries to promptly ratify these two WIPO treaties and implement their obligations into domestic law.

Conclusion

IIPA believes that one of the most immediate, economic problems in this region is the failure of many of the Caribbean region countries to adequately and effectively enforce their current copyright laws. It is important to keep in mind that domestic copyright law reform, while critical to meeting the CBERA IPR standards (as amended), is not sufficient in and of itself. Countries entering FTAs with the U.S. should act to enforce their current IPR laws, and not use the permitted transition periods to slacken those efforts against piracy.

IIPA appreciates this opportunity to provide the TPSC with the copyright-based industries' view on the IPR obligations of the CBERA and the CBTPA. 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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¹¹ Office of the U.S. Trade Representative, 2005 Special 301 Report, April 29, 2005, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file948_7645.pdf.