



Executive Summary and Comments of the  
**INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®**

Submitted to the  
**Americas Business Forum VII**  
**Workshop on Intellectual Property Rights**  
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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 Buenos Aires (2001), Toronto (1999), San José (1998), Belo Horizonte (1997), and Cartagena (1996). IIPA, based in Washington, D.C., is a coalition of six trade associations that collectively represent the U.S. copyright-based industries -- the motion picture, recording, music, business software, entertainment software and book publishing industries -- which create, produce and distribute creative products throughout the world.

The U.S. copyright-based companies and our Latin and Caribbean colleagues involved the creative and cultural industries share 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 two main points. First, we propose six (6) specific measures which will improve copyright enforcement throughout this hemisphere. These proposals 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 fourteen (14) areas of substantive copyright issues which reflect obligations found in TRIPS, NAFTA and the WIPO Treaties, and which we believe will contribute toward ensuring comprehensive copyright protection among all the FTAA nations.

**Comments of the International Intellectual Property Alliance (IIPA)**

**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.**

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

IIPA submits, for ABF consideration and support, six illustrative measures which aim 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 will simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies. In fact, some FTAA countries already have some of these elements in their national laws. These six enforcement-related measures include the following:

- Provide deterrent levels of fines and damages for copyright infringement: The FTAA IPR chapter should include language that 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. This would allow police and prosecutors to initiate actions on their own initiative, a tool not currently available in all countries in this hemisphere.
- 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 rightholders 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.

- 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.
- Extend civil and criminal remedies to cover violations of the technological measures and rights management information (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.

**The FTAA IPR Chapter should include substantive copyright provisions which support adequate and effective copyright protection in an era of technological growth and development. Fourteen specific obligations are outlined below.**

IIPA believes that existing obligations in TRIPS, NAFTA and the WIPO Treaties must be included in the FTAA IPR Chapter. The Americas have been very active in depositing their instruments of ratification for the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaties (WPPT). As a result of the active efforts by many countries in this Hemisphere, the WCT entered into effect on March 6, 2002, and the WPPT entered into effect on May 20, 2002.

It is critical that, with respect to copyright, the FTAA IPR Chapter include, on a technologically neutral basis, the obligations in both WIPO Treaties as well as modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. For your consideration, IIPA highlights 14 specific, substantive issues, which merit inclusion in the FTAA IPR 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.

- 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 protection measures: The FTAA Chapter must include a provision 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 (see Argentina ABF). In addition, 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 forms of piracy are already harming the copyright-based industries.
- Protection of rights management information: Adequate and effective legal remedies should be afforded to protect rights management information from unauthorized

alteration and removal, consistent with the WCT and the WPPT. 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.
- Government legalization of software: Each country should issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only computer software authorized for intended use (see Argentina ABF). 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 Bolivia, Chile, Colombia and Paraguay). Not only is the issuance of such decrees important, but the effective implementation and monitoring of these decrees' implementation are essential.
- Domain name registrant contact data: Unrestricted public access to current and accurate contact information about domain name registrations is a key ingredient in effective enforcement against copyright piracy in the online environment. The FTAA should require signatories to take steps to ensure that the country code domain registries under their control provide this public access, such as by bringing their registration policies into compliance with the WIPO ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes.

### **Conclusion**

IIPA appreciates this opportunity to recommend specific measures on copyright protection and enforcement for the consideration of the participants in the IPR Workshop of the FTAA Americas Business Forum VII. The bottom line is that a legal framework within the FTAA which gives incentives to creativity, encourages responsibility, and rewards respect for property rights, is indispensable to the robust development of the marketplace for creative products throughout this hemisphere.

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