



September 23, 2002

Ms. Carmen Suro-Bredie
Chairman
Trade Policy Staff Committee
Office of the U.S. Trade Representative
1724 F Street, 5th Floor
Washington, DC 20508

Re: Request for public comments concerning
market access and other issues in the Free
Trade Area of the Americas negotiations, 66
Fed. Reg. 49732 (July 31, 2002)

To the Committee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the July 31, 2002 Federal Register a notice requesting public comment on certain issues in the Free Trade Area of the Americas (FTAA) negotiations. While the notice focused on market access tariffs and non-tariff barriers, comment also was requested specifically on the following:

"(d) Economic benefits and costs to U.S. producers and consumers of strengthening the protection and enforcement of intellectual property rights (IPR) in FTAA countries and improving market access for products subject to IPR protection."

The International Intellectual Property Alliance (IIPA) hereby submits our comments related to the economic costs and benefits of strengthening IPR protection and improving market access for copyrighted products in the FTAA.

The 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 six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,100 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).

I. ECONOMIC COSTS OF PIRACY

Let us begin with an overview of the current costs of copyright piracy among some of the FTAA countries. IIPA members estimate that their industries lost an approximate **\$2.5 billion** in the following 15 countries in this hemisphere due to copyright piracy during 2001 alone. (Estimated losses due to other market access barriers other than piracy are not readily available). Note that these losses are occurring in a day and age when the WTO TRIPS Agreement already is in effect for all countries in this hemisphere (with the exception of Haiti).

***ESTIMATED U.S. TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars) and LEVELS OF PIRACY for 2001
in 15 COUNTRIES in LATIN AMERICA***

	Motion Pictures		Records & Music		Business Software ¹		Entertainment Software		Books	2001 TOTAL LOSSES
	Loss	Video Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	Piracy Level	Loss	
Argentina	30.0	45%	78.2	47%	72.5	62%	NA	95%	8.5	189.2
Bolivia	2.0	100%	15.0	85%	4.9	77%	NA	NA	5.5	27.4
Brazil²	120.0	33%	302.0	55%	272.3	56%	NA	99%	14.0	708.3
Chile	2.0	40%	12.2	35%	46.3	51%	NA	NA	1.1	61.6
Colombia	40.0	90%	73.0	65%	19.5	52%	NA	NA	5.3	137.8
Costa Rica	2.0	40%	4.8	40%	6.9	64%	NA	NA	NA	13.7
Dominican Republic	2.0	60%	7.7	65%	4.0	64%	NA	NA	1.0	14.7
Ecuador	NA	95%	18.0	90%	6.9	62%	NA	NA	2.3	27.2
El Salvador	2.0	30%	5.0	40%	7.4	73%	NA	NA	1.0	15.4
Guatemala	2.0	60%	NA	NA	14.1	73%	NA	NA	2.5	18.6
Mexico	50.0	40%	366.8	61%	146.9	55%	202.5	83%	40.0	806.2
Paraguay³	2.0	80%	253.6	99%	3.5	72%	NA	NA	3.0	262.1
Peru	4.0	50%	57.8	97%	11.2	60%	NA	NA	9.0	82.0
Uruguay	2.0	40%	4.0	50%	6.4	63%	NA	NA	2.0	14.4
Venezuela	25.0	65%	54.0	62%	25.7	55%	NA	NA	20.0	124.7
TOTALS	285.0		1252.1		648.5		202.5		115.2	2503.3

1 BSA's trade loss estimates (cited above) represent losses to U.S. publishers only, and differ from the BSA trade loss numbers generally released by that association which reflect global losses to (a) all software publishers in that country and (b) losses to distributors/retailers in the country in question. The numbers above reflect BSA's finalized estimates for 2001.

2 Brazil: RIAA reports its 2000 and 2001 levels of recording piracy reflect amalgamated rates. Specifically, Brazil's 2001 level of audiocassette piracy was 99% and the level of CD piracy was 47%.

3 Paraguay: RIAA reports that its estimated losses to the sound recording/music industry include both domestic piracy in Paraguay and estimated losses caused by transshipment.

To compound matters, as the forms of piracy continue to shift from hard-goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. In addition, CD-R burning is fast becoming a piratical tool of choice in the Americas. Without modern laws, effective criminal and civil justice systems and strong border controls, it is quite possible that the piracy losses will increase, more American jobs will be lost and economic growth in the copyright-based sector will slow.

II. ECONOMIC BENEFITS OF STRONG COPYRIGHT PROTECTION

Strong and comprehensive copyright protection and enforcement are the 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 rising costs of producing and distributing motion pictures; developing, testing and maintaining computer software; scouting, recording, and promoting musical talent; and all the other activities that are indispensable to bringing creative products to the public.

In sum, 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 structure of commercial practices; and it supports integration with the world trading system.

Here in the United States, the copyright industries are one of the most vibrant sectors of our economy. In April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth 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 that in 2001, the U.S. copyright industries accounted for 5.24 percent of U.S. Gross Domestic Product (GDP), or \$535.1 billion – an increase of over \$75 billion from 1999 and exceeding 5 percent of the economy and one-half trillion dollars for the first time. Over the last 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7 percent vs. 3 percent). Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5 percent of total U.S. employment, and the U.S. copyright industries' average annual employment grew more than three times as fast as the remainder of the U.S. economy (5 percent vs. 1.5 percent). In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors, including: chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector.

IIPA believes that similar positive results will be true in many of these Latin countries if the requisite economic studies were conducted. For example, a recent 2002 study co-sponsored by WIPO on the economic importance of copyright industries in the Mercosur countries and

Chile found similar results – that 3 to 5% of these countries' gross domestic product was contributed by those local copyright-based industries.⁴

III. STRONG COPYRIGHT PROVISIONS IN THE FTAA IPR CHAPTER

IIPA supports an FTAA IPR Chapter which is a forward-looking, technologically neutral document that sets out the most modern copyright obligations. The IPR Chapter in the proposed FTAA should contain the highest levels of substantive protection and enforcement provisions possible. In other words, this means that the IPR Chapter should, at a minimum: (a) be TRIPS- and NAFTA-plus, (b) include, on a technologically neutral basis, the obligations in the WIPO Copyright and Performances and Phonograms Treaties (WCT and WPPT),⁵ and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, a large number of countries in this region fail to comply with the TRIPS enforcement obligations. Furthermore, it is in the area of enforcement that some of the greatest gains can be achieved, particularly since we hope the FTAA text will take the rather general TRIPS obligations and make them more specific and clear, as well as adding new specific obligations. IIPA and its member associations believe this effort will have a direct benefit in improving the enforcement landscape throughout the Americas.

IIPA has provided our recommendations on both copyright substantive obligations and enforcement obligations which should appear in the FTAA IPR Chapter in prior public submissions to USTR. Stated again are some of the key elements which IIPA believes should be included in the FTAA IPR Chapter.⁶ For example, the following substantive obligations should be included 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 importation: Copyright holders (which include authors, performers, producers of phonograms and their successors in interest) should have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the rightholder.

⁴ Organización Mundial de la Propiedad Intelectual and Universidade Estadual de Campinas, Estudio sobre la importancia económica de las industrias y actividades protegidas por el derecho de autor y los derechos conexos en los países de MERCOSUR y Chile, 2002. This study was conducted by economic experts from these countries and does not necessarily represent the position of OMPI (WIPO).

⁵ The Americas have been very active in depositing their instruments of ratification for both Treaties with WIPO in Geneva. As a result, the WCT entered into effect on March 6, 2002, and the WPPT entered into effect on May 20, 2002.

⁶ IIPA reserves the right to provide additional comments to U.S. government officials and negotiators on any specific matters related to the copyright and enforcement provisions of the FTAA IPR Chapter.

- Right of communication to the public: Copyright holders should have the exclusive right to authorize or prohibit the communication to the public of their works, performances and 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 distribution: Copyright holders should have the exclusive right authorizing the distribution to the public of the original and copies of their works and phonograms through sale or other transfer of ownership, as provided in WCT Article 6 and WPPT Article 8.
- 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 the FTAA should not be subject to any formality.
- Term of protection: The term of protection of a work, performance or phonogram should be calculated on the basis of the life of a natural person; the term shall be not less than the life of the author and 70 years after the author's death; and where the term of protection of these are calculated on a basis other than the life of a natural person, 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.
- Retroactivity provisions: Each country should apply the provisions of Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (and Articles 9.1 and 14.6 of the TRIPS Agreement) to the subject matter, rights and obligations provided for in this FTAA.
- Technological protection measures: A provision must 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. 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.
- 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.
- Narrow exceptions to protection: Each country should confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.
- Moral rights: IIPA supports Article 9.1 of the TRIPS Agreement which provides that the rights conferred, or derived from, Article 6*bis* of the Berne Convention are not applicable in the TRIPS environment. Said another way, IIPA believes that moral rights should not appear in the trade context contemplated by the FTAA. We do note, for example, that there are some FTAA countries which do include varying levels of moral rights in their domestic laws. In those circumstances, IIPA believes the laws should make expressly clear that moral rights should be waivable (or to rephrase, an author should be able to exercise his or her moral rights by consenting to acts that might otherwise violate moral rights). Such waiver is essential to provide the owner of the economic right with the ability to finance, market and update the copyrighted product. Furthermore, because we believe that moral rights are 'personal' rights, they should not subsist after the author's death, nor should they be transferred to other entities, including government agencies.
- Definitions: The copyright section includes lengthy proposals involving the definitions of particular terms on copyright (as well as trademark and patent) matters which may appear throughout the rest of the text. While it may be a valid exercise to include some copyright terms in a definitional section, IIPA is concerned that some terms may not be so easily defined at a regional level and instead should be left to national implementation. We will revisit this issue with our U.S. government colleagues as the negotiations progress.
- Folklore: IIPA notes that the 2001 draft consolidated FTAA IPR Chapter public text proposed a separate subchapter for the protection of folklore. IIPA believes that the

inclusion of provisions on folklore in a regional trade agreement is premature. While folklore is an important issue to many cultures, the protection of such under a trade instrument is not appropriate at this time.

Turning to enforcement, the TRIPS Agreement was the first international treaty ever to deal with the enforcement of intellectual property rights. Despite the existence of these enforcement-related obligations, a large number of FTAA nations fail to comply with these enforcement obligations. It is in the area of enforcement that some of the greatest gains can be achieved, given that piracy is our industries' key market access barrier in this region. Below are a few key, illustrative (non-exhaustive) issues in the enforcement area that should appear as specific obligations in the FTAA:

- Civil *ex parte* cases: 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 time period. Any security or bonding obligations should not unreasonably deter recourse to these procedures.
- Level of fines and damages: 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. To ensure such deterrent civil damages, a system of pre-established damages should be adopted. Statutory minimum fines at a deterrent level should also be considered as an important part of an enforcement system with deterrent capability.
- 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 FTAA should provide that 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 shall, in the absence of proof to the contrary, be presumed to be the lawful right holder in same. 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 to criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right.
- Civil and criminal remedies should be expressly extended 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.
- Customs: Customs authorities should be primarily responsible for preventing infringing products from entering that 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.

- 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.
- Government legalization of software: IIPA supports the obligations that 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. Such instruments should actively regulate the acquisition and management of software for such government use.
- 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 comment on the costs of copyright piracy, the economic benefits of strong copyright protection, and our views on the substantive issues which should be included in the FTAA IPR Chapter.

Respectfully submitted,



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