



August 22, 2001

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
1724 F Street, 5th Floor
Washington, DC 20508

Re: Request for Public Comments on the Preliminary
Draft Consolidated Texts of the Free Trade Area of
the Americas (FTAA) Agreement, 66 Fed. Reg.
36614 (July 12, 2001)

To the Committee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the July 12, 2001 Federal Register a notice requesting public comment on the Draft Consolidated Texts of the Free Trade Area of the Americas (FTAA) Agreement. The International Intellectual Property Alliance (IIPA) hereby submits our comments on the draft consolidated text of the Chapter on Intellectual Property Rights.

The International Intellectual Property Alliance

IIPA is a coalition of seven trade associations (listed below) that collectively represent the U.S. copyright-based industries -- the motion picture, music and recording, business and entertainment software, and book publishing industries -- in bilateral and multilateral efforts to improve copyright laws and enforcement around the world. These associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world -- all types of computer software including business applications and entertainment software (such as videogame CD-ROMs and cartridges, personal home computer CD-ROMs 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).¹

¹ In December 2000, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2000 Report, the eighth 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 the "core" U.S. copyright industries (those industries that create copyright materials as their primary product) accounted for 4.9% of U.S. GDP, or \$457.2 billion in value-added in 1999. In the last 22 years (1977-1999), the core copyright industries' share of GDP grew more than twice as fast as the remainder of the economy (7.2% vs. 3.1%). During these 22 years,

COPYRIGHT PROTECTION IN THE INTELLECTUAL PROPERTY RIGHTS CHAPTER OF THE FREE TRADE AGREEMENT OF THE AMERICAS (FTAA)

IIPA believes that the IPR Chapter in the proposed FTAA should contain the highest levels of substantive protection and enforcement provisions possible. 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 soon-to-enter-into-force WIPO Copyright and Performances and Phonograms Treaties (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. In fact, twelve (12) FTAA nations were signatories to both the WCT and the WPPT in 1996, and to date 12 have deposited with WIPO their instruments of accession or ratification for the WCT, and 11 for the WPPT.

There appears to be increasing consensus among the 34 nations involved the FTAA negotiations that the FTAA intellectual property rights chapter must be a forward-looking, technologically neutral document that sets out the most modern copyright obligations. IIPA supports the efforts of the U.S. negotiators to press for an IPR Chapter which meets these objectives.

A. Substantive Copyright Obligations Must Be at a High Level

Stated briefly below are some of the key elements which IIPA believes should be included in the FTAA IPR Chapter. For the purpose of our public comments, this list identifies the most important areas that must be covered. These points should not be interpreted as defining exact treaty language.² The draft FTAA IPR Chapter contains many proposals in its 106 pages, and it is IIPA's intent in this submission to comment on the basic principles which we support.

Simply put, existing obligations in TRIPS and the soon-to-enter-into-force WCT and WPPT.³ should be included in the FTAA IPR Chapter, and there should be other specific provisions such as the following:

- **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.

employment in the core copyright industries more than doubled to 4.3 million workers (3.2% of total U.S. employment) and grew nearly three times as fast as the annual rate of the economy as a whole (5.0% vs. 1.6%). In 1999, the U.S. copyright industries achieved foreign sales and exports of \$79.65 billion, a 15% gain from the prior year. The copyright industries' foreign sales and exports continue to be larger than exports of almost all other leading industry sectors, including automobiles and auto parts, aircraft and agriculture.

² IIPA reserves the right to provide additional comments to U.S. government officials on any specific matters related to the copyright and enforcement provisions of the FTAA IPR Chapter.

³ As of this filing, 27 countries have deposited their instruments of accession/ratification for the WCT, and 24 for the WPPT. Thirty (30) countries are needed for each treaty to enter into force.

- 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.
- 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.

- 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.
- 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.⁴
- 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.
- 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. IIPA does not support the bracketed proposals contained in the draft FTAA text. 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

⁴ IIPA is aware that some who lobbied against the enactment of similar provisions in U.S. law (specifically 17 USC 1201 et seq., as added by the Digital Millennium Copyright Act [DMCA] in 1998), are now urging submission of public comments opposing the draft FTAA provisions on technological protection measures, apparently because they are generally consistent with the provisions of U.S. law. This consistency with U.S. law is, of course, a strong reason to support the draft provisions in question, not to oppose them. In fact, these provisions are particularly important because they reflect Congress' view of what is required to implement the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, which 12 FTAA member countries signed in 1996, and because Congress specifically intended the U.S. law to serve as a model for other nations in implementing those treaties (see statement of Sen. Hatch, Cong. Rec. Oct. 12, 1998, S12376, "By enacting this legislation in a timely fashion, the United States has set the marker for the rest of the world with respect to the implementation of the new WIPO treaties."). It is also worth noting that the arguments now being offered in the context of the FTAA are the same arguments that were rejected by Congress in 1998, when it acted unanimously to pass the DMCA, and by the federal courts since that time. IIPA urges the TPSC to bear this context in mind when reviewing any such comments.

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.

B. Effective Remedies for Piracy and Other Infringements In-Law and In-Practice

The TRIPS Agreement was the first international treaty ever to deal with the enforcement of intellectual property rights. Of course, these TRIPS obligations must be the baseline of any enforcement provisions in the FTAA. Despite the existence of these international obligations, a large number of countries in this region fail to comply with these 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.

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.

CONCLUDING REMARKS

IIPA would like to address one additional issue in the draft consolidated text which does not appear explicitly in the copyright section per se, but may have an impact on the scope of copyright protection:

- Folklore: We note that the draft consolidated IPR Chapter text proposes a separate subchapter for the protection of folklore (see page 8.42). 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. There is no international consensus on how to address this issue. For example, WIPO has been studying the issue of folklore and traditional knowledge for a long time, and in recent years has held regional consultations on the protection of folklore in conjunction with UNESCO.⁵

In summary, IIPA appreciates this opportunity to provide public comments on the key elements on substantive copyright protection and effective enforcement which should be included in an FTAA IPR Agreement.

Respectfully submitted,

Eric H. Smith
President
International Intellectual Property Alliance

⁵ For further information on WIPO activities on folklore, visit the WIPO website at <http://www.wipo.int/globalissues/tk/>. In sum, WIPO's website states the following: "In the 2000-2001 biennium the exploratory work is focused on the development of practical activities designed to test current approaches to, and future possibilities for, managing the interfaces between intellectual property protection and TK. The work also seeks to facilitate dialogue between relevant stakeholders, provide training and information, and examine other specific issues identified during 1998 and 1999. In particular, WIPO will organize intellectual property training workshops for TK stakeholders and conduct case studies and pilot projects regarding the interfaces between IP and TK. Since 2000, WIPO's activities on intellectual property and TK extend beyond the exploratory program into WIPO's cooperation for development, training and technical assistance programs. These activities are undertaken in the context of several Main Programs of the WIPO Program and Budget for 2000-2001. At the World Intellectual Property Organization's (WIPO) General Assembly, Twenty-Sixth (12th Extraordinary) Session, held from September 25 to October 3, 2000, Member States decided to establish a special body to discuss intellectual property issues related to genetic resources, traditional knowledge and folklore. This body, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, held its first session in Geneva, from April 30 to May 3, 2001."