



**Position Paper of the
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®**
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The International Intellectual Property Alliance® (IIPA®), a coalition of six U.S. trade associations that collectively represent the U.S. copyright-based industries, believes that it is imperative that the FTAA contain a chapter on intellectual property rights which reflects the highest-levels of protection, including those found in the WTO TRIPS Agreement, the North American Free Trade Agreement (NAFTA) and the two WIPO Internet Treaties.

A chapter on intellectual property that incorporates strong substantive standards and enforcement mechanisms is essential so that this hemisphere's creators can turn the tide on the destructive forces of copyright piracy. The FTAA negotiations offer an unparalleled opportunity to articulate strong and unambiguous commitments to fight piracy and to pave the way for growth in the production of cultural materials and new technology, and growth in e-commerce, by creating standards that will ensure their protection in the on and off line environments. Creators, authors, publishers and producers from lesser-developed nations have a particular stake in the outcome of these negotiations as success, or failure, to create and enforce binding rules that foster creativity will determine whether the economics of the industry permit investment in the creation and distribution of their copyrighted materials. IIPA's ABF submission covers two areas. First, IIPA identifies at least nine (9) issues that will improve copyright enforcement measures taken throughout this hemisphere if codified in the FTAA IPR chapter and implemented in national law. Second, we highlight seventeen (17) areas of substantive copyright issues aimed at ensuring comprehensive copyright protection among all the FTAA nations.¹

ENFORCEMENT: Effective copyright enforcement in this Hemisphere remains a high priority for 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 consensus from Cartagena, Belo Horizonte, and Toronto*). IIPA believes that our nine proposals illustrate the kind of measures which will, once implemented at the national level, simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies.

¹ Note: *Italicized* citations herein refer to general sections and/or specific proposals, as appropriate, in the IPR Chapter of the FTAA Second Consolidated Draft Text (Nov. 2002). While this referencing is required by ABF rules, the citation should not be interpreted to indicate any formal IIPA endorsement of the cited material, given that FTAA negotiations are ongoing.

- 1) Provide deterrent levels of criminal penalties and remedies (including as copyright infringements as “serious” offenses and predicate offenses under organized crime provisions): The FTAA IPR Chapter must include provisions requiring imprisonment and monetary fines at least for willful infringement of copyrighted materials for a commercial advantage or private financial gain (*III.4*), including for acts that take place on a large scale even in the absence of any financial incentives, as is the case with most present infringements on the Internet. To be “deterrent,” copyright offenses should be treated as serious offenses, and penalties should be consistent with those accorded to other serious crimes. Furthermore, the FTAA text should encourage member countries to treat copyright offenses as predicate offenses under organized crime provisions of penal codes.
- 2) Provide deterrent levels of civil fines and damages for copyright infringement, including pre-established (statutory) damages: The FTAA IPR chapter should provide that 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 that has a deterrent effect by removing any gain to the infringer (*III.2*). Statutory minimum fines at a deterrent level are also an important part of a deterrent enforcement system (*III.2*). To ensure deterrent civil damages, a system of pre-established damages (also known as statutory damages) should be adopted (*III.2.4*).
- 3) Ensure *ex officio* actions in criminal cases: 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 authorities (such as police, inspectors, administrative officials, and prosecutors) to initiate actions on their own initiative – an essential component of an anti-piracy campaign aimed to “retake” the streets and remove infringing product (*III.4.6*).
- 4) Ensure *ex officio* authority for customs officials: Customs authorities should be primarily responsible for preventing infringing products from entering their 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 (*III.5.6*). Border measures should be applicable to goods in transit and to goods destined for export.
- 5) Execute civil *ex parte* search orders in an expeditious manner and without unnecessary costs: Many countries in this hemisphere have yet to effectively implement and apply their TRIPS Article 50 obligations. 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 (*III.3.2*). Any security or bonding obligations should not result in unreasonably deterring recourse to these procedures (*III.3.3*).
- 6) Extend civil and criminal remedies to cover violations of the technological protection measures and rights management information obligations: All available remedies and enforcement procedures applicable to copyright infringement should apply to the obligations dealing with the circumvention of technological protection measures (TPMs) and with rights management information (RMI). Further negotiations are needed to clarify the relationship between the TPM and RMI obligations and their corresponding enforcement provisions.
- 7) Award fees/costs and require information: Awarding legal fees and costs to the injured party also has tremendous deterrent value. The judicial authorities should also be able to order the infringer to provide any information regarding other persons involved in the infringement and the suspected distribution channels (*III.2*).

- 8) Provide presumptions of authorship and subsistence: To speed up the civil justice system by making it easier for right holders 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. It should also be presumed that the copyright or related right subsists in such subject matter, in the absence of proof to the contrary. Such presumptions should also pertain in criminal cases until the defendant comes forward with credible evidence putting at issue the ownership or subsistence of the copyright or related right. The current FTAA text needs more work to improve the scope of coverage regarding presumptions (*see Article 17.11.6 of the U.S.-Chile FTA IPR Chapter*).
- 9) Provide 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 (*II.13.1*).

SUBSTANTIVE COPYRIGHT PROVISIONS: It is critical that, with respect to copyright, the FTAA IPR Chapter include, on a technologically neutral basis, the obligations in both WIPO Internet Treaties as well as modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. We highlight 17 substantive copyright issues which merit explicit inclusion in the FTAA IPR Chapter:

- 1) 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 Internet Treaties. It is important that clear language indicating that that temporary and transient copies (such as those made in the Random Access Memory (RAM) of a computer) are "copies" and are fully subject to the reproduction right (*see III.4.1, 2nd bracketed text*).
- 2) Right of communication to the public: Copyright holders, and beneficiaries of neighboring rights, 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 WIPO Internet Treaties (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 (*see III.8.2, 8.3*).
- 3) Right of distribution: Copyright holders, and beneficiaries of neighboring rights, should have the exclusive right to authorize 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 the WIPO Internet Treaties, WCT Article 6 and WPPT Article 8 (*III.5.2*). Furthermore, IIPA would like to highlight the fact that countries already should have implemented their rental rights obligations under TRIPS Article 11.

- 4) 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 right holder (*III.5.4*).
- 5) 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 (*III.14.1*).
- 6) 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 (*III.14.1*).
- 7) 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 (*III.14.1*).
- 8) Term of protection: Given developments in communications media that are effectively making cross-border transmissions the norm, it is essential that we further harmonize the term of protection in the hemisphere. We propose that where the term of protection of a work, performance or phonogram is 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. Where the term of such is 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 (*III.10.1; see the Toronto ABF IPR consensus which supported life plus 70 years for works*).
- 9) Technological protection measures: Provisions must be included which implement the two WIPO Internet Treaties' obligations on making illegal the circumvention of technological protection measures that effectively control access to copyrighted materials or materials protected by neighboring rights, and the circumvention of TPMs that effectively control the exercise of exclusive rights. Services, devices and components must be covered. Although the Second Draft Text has the beginnings of good TPM obligations (*see III.21.1abcd*), more work on clarifying the corresponding adequate and effective legal remedies for anti-circumvention in both criminal and civil contexts is needed. Furthermore, any exceptions to liability must be carefully narrowly crafted to preserve the adequacy and effectiveness of the anti-circumvention prohibitions (*see Article 17.11.25 in the U.S.-Chile Free Trade Agreement on limitations on liability for internet service providers*).
- 10) 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 WIPO Internet Treaties. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of protected materials (*III.22*).
- 11) Protection for encrypted program-carrying satellite signals: As provided in the NAFTA, criminal and civil liability should be afforded for encrypted program-carrying satellite signals

which have been decoded without the authorization of the lawful distributor of the signal (*III.20.1abc, the last set of proposals*).

- 12) National treatment: The principle of full national treatment, without exception or derogation, should be the norm in the FTAA IPR Chapter. Stronger proposals should be offered in this context (*see I.6.1*).
- 13) 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 (*III.12.1*). Rights, including rights of communication, must not be subject to compulsory collective administration.
- 14) 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 (*III.11.1*).
- 15) Retroactivity provisions: Each country should apply the provisions of Article 18 of the Berne Convention (and Articles 9.1 and 14.6 of the TRIPS Agreement) to the subject matter, rights and obligations provided for in this FTAA (*III.11.2*).
- 16) 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 FTAA (*III.9.1*).
- 17) Government legalization of software (and more), plus protection against use of public computers and networks against copyright infringement: IIPA supports the FTAA proposal that each country should issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only properly licensed computer software; such instruments should actively regulate the acquisition and management of software for such government use (*III.24*). Furthermore, IIPA believes that this FTAA legalization proposal should be expanded to cover all copyrighted materials (as an example, such legalization could aid in governments procuring legal, not infringing, textbooks and materials for their schools and government-run universities). Finally, IIPA recommends that the FTAA text should obligate countries to adopt provisions ensuring that their government agencies and other publicly-controlled computers, computer systems or networks are not used in ways that infringe, or facilitate the infringement of, all copyrighted materials.

IIPA has two final observations. First, IIPA believes that the inclusion of provisions on folklore in a regional trade agreement is premature and inappropriate at this time (*IV.1*). Second, as FTAA IPR negotiations continue, additional proposals will be offered by FTAA member states after the Third Consolidated Draft Text is released at the Miami Ministerial. IIPA and its member associations intend to monitor closely the future developments of the FTAA IPR chapter.