

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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July 15, 2010

Marilyn R. Abbott  
Secretary to the Commission  
U.S. International Trade Commission  
500 E Street, SW  
Washington, DC 20436

Investigation No. 332-515

Re: Actual Effects of the Free Trade Agreements  
with Chile, Australia, and Singapore  
(75 Fed. Reg. 28059, May 19, 2010)

To the Commission:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to submit brief comments on the actual effects of the free trade agreements (FTAs) concluded with Chile, Singapore, and Australia.

In this letter, we first summarize key issues in the intellectual property rights (IPR) chapters of these agreements because they afford enhanced protection and enforcement for the copyright-based industries in these markets. Second, we highlight the support that IIPA and its members give to the ongoing negotiations toward a Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam (“TPP FTA”). Enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners (Australia, Singapore, Chile and Peru) would greatly benefit the creative and business communities in the U.S. and in our new FTA partners.

## **About the IIPA**

The International Intellectual Property Alliance (IIPA) is a coalition of seven trade associations -- Association of American Publishers (AAP), Business Software Alliance (BSA), Entertainment Software Association (ESA), Independent Film & Television Alliance (IFTA), Motion Picture Association of America (MPAA), National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA) -- which represent the U.S. copyright-based industries in bilateral and multilateral efforts to open up foreign markets closed by piracy and other market access barriers. These member 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 software and entertainment software (such as videogame discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).

## **The Importance of Strong IPR Chapters in these FTAs**

The IPR chapters in these three FTAs specify and clarify the standards (both of legal substance and enforcement measures) found in the WTO TRIPS Agreement and the two WIPO Internet treaties (WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). For example, several key obligations in these IPR chapters address the following:

- High standards of protection that take into account technological changes and that reflect the global consensus on minimum standards already embodied in international copyright treaty instruments, such as the WIPO Internet treaties, to which all current U.S. FTA partners have adhered. These obligations include, on a technologically neutral basis, a broad right of reproduction, including protection for temporary copies, the right of making available, protection against circumvention of technological protection measures, and protection against tampering with rights management information. While these treaties are not limited to the online environment, they are key to enabling an effective and safe e-commerce environment within the TPP potential member countries. The FTA provisions clarify and extend protections provided in the TRIPS agreement and provide for the implementation of “best enforcement practices” that have developed in the 20 years since the TRIPS enforcement text was developed.
- Obligations regarding copyright enforcement and the scope of criminal penalties and civil remedies are also comprehensive in existing FTAs and will help lower rates of copyright piracy. For example, enforcement actions must be taken *ex officio* in both the criminal and customs areas. Presumptions are added and broadened to speed up copyright infringement proceedings. Parties are obligated to establish a system of pre-established (statutory) damages in civil cases.<sup>1</sup> Criminal and civil remedies are extended to cover circumvention and rights management information violations, as well as to illegal camcording and the unauthorized decryption of cable and satellite signals and their further distribution for commercial advantage.
- Laws, regulations or executive decrees must be issued to prevent the unauthorized use of computer software or other protected materials within government agencies -- a significant source of losses in many countries to, in particular, the business software industry.
- Enforcement measures address online infringement, and mandate deterrent civil and criminal remedies. They provide incentives for online service providers to cooperate with right holders and provide certain limitations on infringement remedies if service providers expeditiously take down infringing material and otherwise operate in a reasonable fashion.

## **Actual Effect of these Three FTAs on the U.S. Economy**

Adequate and effective copyright protection and enforcement in foreign countries -- including the three at issue in this docket -- is critical to the U.S. economy, to U.S. employment, to economic growth and to trade. In fact, the U.S. copyright industries are one of the most vibrant sectors of our economy.

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<sup>1</sup> In the Australia FTA, the statutory damages obligation is a back-up in case Australia’s system of “additional damages” fails to deliver deterrence. See Art. 17.11.7.b of the US-Australia FTA, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file469\\_5141.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf).

On July 20, 2009, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2003 - 2007 Report*, the twelfth 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, economic growth and trade. The latest data show that the “core” U.S. copyright industries accounted for an estimated \$889.1 billion or 6.44% of the U.S. gross domestic product (GDP) in 2007. These “core” industries were responsible for 22.74% of the real economic growth achieved by the U.S. economy in 2006-2007. In addition, the “core” copyright industries employed 5.6 million workers in 2007 (4.05% of U.S. workers) in 2007. The report also provides data on the estimated average annual compensation for a worker in the core copyright industries: \$73,554, which represents a 30% premium over the compensation paid the average U.S. worker. Finally, estimated 2007 foreign sales and exports of the core copyright industries increased to at least \$126 billion, leading other major industry sectors.<sup>2</sup>

In this docket, the Commission has requested information regarding the following: U.S. imports of certain goods and any anomalies in import levels; U.S. exports of certain goods for which the FTA partner agreed to phase out tariffs and any anomalies; and the possible existence of any other anomalous levels of U.S. exports to the FTA partner, including any possible impact on performance involving U.S. service sectors. IIPA does not have specific information on these particular questions on imports and exports.

One of the most damaging market access barriers to the copyright industries is that of copyright piracy. The challenges faced by the copyright industries and national governments to enforce copyright laws have grown dramatically as the forms of piracy shift from hard goods toward digital media and unauthorized electronic transmissions. U.S. companies do suffer losses due to copyright piracy in these three FTA partners, though we are not able to provide a comprehensive estimate to evaluate the depth of such losses. For example, in Chile, the Business Software Alliance (BSA), an IIPA member, has estimated that the business software piracy level is 64%, causing an estimated \$173 million in losses to U.S. companies in 2009.<sup>3</sup> Chile has not yet implemented several of its FTA obligations, including the passage of legislation on technological protection measures, nor has it fully implemented its 2001 software legalization decree.<sup>4</sup>

### **Observations about the TPP**

On December 14, 2009, USTR notified Congress that “the President intends to enter into negotiations of the agreement with the TPP countries with the objective of shaping a high-standard, 21st century agreement with a membership and coverage that provides economically significant market access opportunities for America's workers, farmers, ranchers, service providers, and small businesses.”<sup>5</sup> The initial TPP negotiating partners include Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore and Vietnam. The Administration has indicated its objective to expand on this initial group to include additional countries throughout the Asia-Pacific region.

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<sup>2</sup> This 2009 economic report is posted on the IIPA website at [www.iipa.com](http://www.iipa.com).

<sup>3</sup> See IIPA's chart of June 11, 2010, reflecting BSA's final loss estimates for 2009 in countries identified by USTR's April 30, 2010 Special 301 Report, posted at <http://www.iipa.com/pdf/IIPA2010USTRDecisionsSpecial301TableofEstimatedTradeLossesandPiracyLevels061110.pdf>.

<sup>4</sup> For more details on copyright developments in Chile and its FTA implementation, see IIPA's February 2010 Special 301 submission to USTR, posted at <http://www.iipa.com/rbc/2010/2010SPEC301CHILE.pdf>.

<sup>5</sup> <http://www.ustr.gov/tpp>

As USTR notes, the Asian region accounts for 27% of U.S. jobs from exports and exports account for 40% of real GDP growth in the U.S., and expanding exports in Asia can “contribute significantly to further job growth and economic recovery for America’s working families.”<sup>6</sup> As the statistics for the copyright industries in the preceding section demonstrate, the copyright industries can be a key leader in achieving these goals. With a secure foundation for copyright protection and enforcement in the existing Asian FTA partners, an expansion of these protections to other countries in the region will clearly contribute to the U.S. job growth and economic recovery that is this Administration’s goal.

IIPA fully supports the initiation of negotiations for a TPP FTA and has been a strong supporter of the FTA process from its inception.<sup>7</sup> Not only do the standards required by the FTAs help to ensure free and fair trade in physical copyright-protected products but they also provide the legal infrastructure for protection of those works in the online environment. These agreements have established a benchmark of protection and enforcement that will ensure continued revenue and job growth for the creative industries in the U.S. as well as within each of our FTA partners. Furthermore, the extension of these FTA IPR obligations and standards to Brunei Darussalam, New Zealand and Vietnam will benefit all parties, and establish a trade framework in intellectual property that will link the Asian countries to each other, and to the TPP FTA members from the Americas. For example:

- **On IPR:** The level of IPR protection contemplated for the TPP should be consistent and co-extensive with the current FTAs between the U.S. and its current FTA partners. Half the TPP members already have high-standard FTA obligations to the U.S., and under principles of national treatment, should have no difficulty extending those existing protections to TPP members that are not in a current FTA relationship with the U.S. New Zealand, Brunei Darussalam and Vietnam have not ratified these treaties nor yet implemented all of the treaties’ obligations.
- **On Electronic Commerce:** Existing U.S. FTAs also have a chapter on electronic commerce. These provisions prevent the application of customs duties on electronically delivered digital products, assure the non-discriminatory treatment of digital products, address the valuation of physically-delivered digital products, and provide commitments to cooperate on electronic commerce policy. These critical provisions should be extended to all TPP contracting parties.
- **On Market Access:** IIPA envisions that the TPP would also eliminate many of the market access barriers that now inhibit U.S. copyright-based companies from doing business with at least one of the potential TPP members, Vietnam. Our companies have just begun to enter the Vietnamese market, but unfortunately face quite high piracy rates and many onerous market access barriers.

## **Conclusion**

The IPR Chapters in the Free Trade Agreements are important elements of the U.S. trade policy toolbox, and they have received the support of IIPA and our members for many years. Their full and proper implementation, both in law and in practice, are critical to the viability of U.S. copyright-based businesses here in the U.S.

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<sup>6</sup> <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/december/economic-opportunities-and-tpp>

<sup>7</sup> See IIPA Letter to USTR Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam, January 25, 2010, posted at <http://www.iipa.com/pdf/IIPAWrittenStatementonProposedTransPacFTA012510.pdf>.

In addition, the TPP, if completed in a comprehensive way, would serve as an important milestone for U.S. trade policy, linking all these trading partners to each other in offering the benefits of free trade and significantly improved IPR protection across all their markets. This will set an important precedent for expanding such arrangements among other countries in Asia and Latin America.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Maria Strong". The signature is written in a cursive, flowing style.

Maria Strong  
International Intellectual Property Alliance