



**Written Submission of the International Intellectual Property Alliance
House Committee on Ways and Means
Hearing on President Obama's Trade Policy Agenda
with U.S. Trade Representative Michael Froman
August 1, 2013**

The International Intellectual Property Alliance (IIPA) – a private sector coalition representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers –¹ appreciates the opportunity to provide this Written Submission in conjunction with the House Committee on Ways and Means Hearing on President Obama's 2013 Trade Policy Agenda.

The Importance of, and Challenges to, the U.S. Copyright Industries

In November 2011, IIPA released the thirteenth in a series of economic reports, *Copyright Industries in the U.S. Economy: The 2011 Report*.² This report details the economic impact and contributions of U.S. copyright industries to U.S. gross domestic product (GDP), employment, and trade. The “core” copyright-based industries in the U.S. continue to be major contributors to the U.S. economy, accounting for an estimated \$931.8 billion or 6.36% of the U.S. GDP in 2010. These industries provided nearly 5.1 million U.S. jobs, which is 4.75% of the entire private sector labor force in 2010, and paid on average over \$78,000, 27% higher than the overall workforce average – a copyright “compensation premium.” Estimated 2010 foreign sales and exports of key sectors of the core copyright industries amounted to \$134 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, automobiles, agricultural products, food, and pharmaceuticals. Linkages between copyright protection and economic development in other countries are documented by the World Intellectual Property Organization's 2012 study, *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, compiling similar studies in 30 countries.³ WIPO reports the publication of a total of 39 country studies, with more in the pipeline. Other studies have measured the contribution of certain sectors to national economies,⁴ the multiplier effects of reducing piracy on contribution to GDP, job growth, and tax revenues,⁵ and the competitive advantage to be gained by properly licensing software.⁶

¹ IIPA's seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software, free software, open source software, and software as a service, entertainment software including interactive games for videogame consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers' Association](#), and [Recording Industry Association of America](#).

² See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report*, November 2, 2011. The entire report as well as summaries can be accessed at http://www.iipa.com/copyright_us_economy.html. Core copyright industries are those whose primary purpose is to create, produce, distribute or exhibit copyright materials. These include books, journals, newspapers, and periodicals; motion pictures; recorded music; radio and television broadcasting; and computer software. IIPA is currently working on release of the fourteenth report.

³ World Intellectual Property Organization, *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, 2012 (on file with IIPA). The WIPO guidelines on surveying the contribution of copyright to the economy have been implemented in over 39 countries around the world, including: Australia (2007), Bhutan (2011), Brunei (2012), Bulgaria (2011), Canada (2004), China (2011), Colombia (2010), Croatia (2010), Finland (2011), Hungary (2006), Jamaica (2008), Kenya (2011), Latvia (2006), Lebanon (2008), Malaysia (2011), Mexico (2008), Netherlands (2011), Pakistan (2011), Panama (2011), Peru (2011), Philippines (2008), Republic of Korea (2012), Romania (2010), Russia (2010), Singapore (2004), Slovenia (2011), South Africa (2012), Thailand (2012), Ukraine (2010), and United States (2011).

⁴ The Motion Picture Association has issued a series of “Economic Contribution of the Film and Television Industry” studies for Indonesia (2012), Japan (2012), South Korea (2012), Thailand (2012), New Zealand (2009, 2012), Australia (2011), India (2010), and Hong Kong (2009).

⁵ See, e.g., BSA (now BSA | The Software Alliance) and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Israel*, 2010, at http://portal.bsa.org/piracyimpact2010/cps/cp_israel_english.pdf.

⁶ See BSA | The Software Alliance, *Competitive Advantage: The Economic Impact of Properly Licensed Software*, INSEAD, 2013, at http://portal.bsa.org/insead/assets/studies/2013softwarevaluestudy_en.pdf (finding that increasing licensed PC software use by 1 percent globally would



While these studies amply demonstrate the contribution of copyright-based industries to the economy, they do not reveal the massive costs imposed by overseas piracy and market access barriers to U.S. copyrighted products and services. U.S. copyright industries face unfair competition from those who engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyright are facing increased threats, as they must compete with the massive proliferation of illegal services unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them. An independent study released by BASCAP (Frontier Economics), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),⁷ estimated the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010, and growing to \$80-240 billion by 2015. Others have issued reports on the economic consequences of piracy for specific industry sectors.⁸ In many countries, rampant piracy is not only impeding the evolution of legitimate channels for distribution, but also threatens to damage permanently or displace existing and authorized distribution channels which are unable to compete with infringing business models.

Copyright and U.S. Trade Policy

The U.S. copyright-based industries represented by IIPA are in accord with the Administration that “trade policy, negotiated and enforced vigorously” to reflect U.S. interests and values gives creators the best chance to compete around the world. We also agree with three methods outlined by the Administration to achieve this policy objective: 1) ensuring that rights and trade rules are fully implemented and enforced; 2) leveling the playing field to allow U.S. interests to compete and win in the global economy; and 3) opening markets around the world so that we can expand our exports. Drawing from these succinct points laid out by the Administration, below we provide some specific examples of how each of these methods can be, and are being, pursued to achieve the overall trade policy objectives. The common goal for all our industries is creating a trade environment that ensures creators can contribute to their fullest potential to our country's overall economic health, the growth of good, highly skilled U.S. jobs, and exports that improve our international competitiveness.

The Continued Vibrancy of U.S. Trade Law and Trade Preference Programs

Almost 30 years have passed since Congress recognized the strong nexus between trade law and intellectual property rights. It remains the case today more than ever that healthy creative industries rely on the maintenance and enforcement of robust trade laws, as well as other tools to ensure proper IP protection and market access through trade preference programs.

Special 301

In the late 1980s, Congress created “Special 301” under the Trade Act of 1974, and required the U.S. Trade Representative (USTR) to identify countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access for persons that rely on intellectual property protection.⁹ While Special 301 is an annual review process from mid-February to the end of April each year, in reality, Special 301 and its leverage are a year-round process for the copyright industries, all of which draw upon local private-sector representatives, the U.S. government, and U.S. Embassy officials to address and resolve copyright and market access problems in scores of countries. Special 301 remains one of the United States' principal trade tools in fighting international copyright piracy and market access barriers. Aggressive action under Special 301 by USTR has been

inject \$73 billion into the world economy, and that developing countries gain a \$437 in additional national production, on average, for every dollar invested in legitimate software).

⁷ Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP)*, February 2011 (on file with IIPA). The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy* (2008)).

⁸The Motion Picture Association has commissioned studies from IPSOS and Oxford Economics on *Economic Consequences of Movie Piracy: Japan* (2011) and *Economic Consequences of Movie Piracy: Australia* (2011). BSA's most recent study estimating the software piracy rate and commercial value of unlicensed software in more than 100 markets is at <http://portal.bsa.org/globalpiracy2011/>.

⁹ Under the Special 301 statute, countries which have the most onerous or egregious acts, policies, or practices and which have the greatest adverse impact on relevant U.S. products may be designated “priority foreign countries,” and at the end of an ensuing investigation, risk having trade sanctions levied against them (19 U.S.C. §2242).



essential in stemming the wave of losses in U.S. jobs and competitiveness that have threatened one of our country's most productive and fastest-growing economic sectors. Over the years, both developed and developing countries have received top attention by USTR in the Special 301 reviews, and the program has been adapted over time to take into account emerging international norms in IP protection and ensure compatibility with international trade disciplines.¹⁰

IIPA has participated in every Special 301 cycle since the 1988 Trade Act created this process, providing public comments on acts, practices and policies regarding copyright law, piracy, enforcement and market access in selected foreign countries and territories. In our February 2013 filing, IIPA reported on 42 countries/territories,¹¹ mentioned 3 countries for positive achievements,¹² and mentioned 6 other countries (mentioned below) for issues related to bilateral, regional, or multilateral IPR obligations.¹³ IIPA also highlighted 12 major cross-cutting initiatives and challenges involved in improving copyright law and enforcement and lowering market access barriers to U.S. copyrighted materials.¹⁴ On May 1, 2013, USTR designated Ukraine as a Priority Foreign Country for its failure to meet adequate and effective intellectual property rights protections or afford equitable market access for U.S. creators. USTR also named 10 countries to the Priority Watch List, signaling the need for heightened scrutiny of their IPR and/or market access practices, and named 30 countries to the Watch List for IPR and/or market access deficiencies.¹⁵

Since 2006, USTR has identified certain "notorious markets" in the Special 301 Report, namely, "Internet and physical markets that exemplify marketplaces that deal in infringing goods and services, facilitating and sustaining global piracy and counterfeiting." Since 2011, USTR has published the Notorious Markets list separately from the Special 301 Report, in order to increase public awareness and guide related trade enforcement actions. USTR published the first stand-alone Notorious Markets list in February 2011, as an "Out-of-Cycle Review of Notorious Markets," the second such report in December 2011, and the third (and current list) in December 2012. IIPA has participated in every Notorious Markets review, and finds that USTR's reports have helpfully identified markets that impede the legitimate development of creative industries in overseas markets due to piracy, and harm their local economies. The reports have highlighted the need for accountability in the online space, vigilance against physical piracy markets, and strong laws against piracy that are strictly enforced against notorious markets. Importantly, the reports also recognize responsible players that take on greater responsibility toward finding solutions to the problem of online and physical copyright theft.

¹⁰ For example, in 1994, when Congress enacted the Uruguay Round Agreements Act to implement the WTO accords, it confirmed that while countries' compliance with WTO TRIPS standards are necessary, such compliance alone does not meet the Special 301 statutory standards of "adequate and effective" protection. Congress also amended Special 301 to extend the time limit for dealing with disputes involving allegations of TRIPS violations from 6 months to the 18-month period required by the WTO Dispute Settlement Understanding

¹¹ IIPA recommended Ukraine for the statutory Priority Foreign Country designation; recommended Argentina, Chile, China, Costa Rica, India, Indonesia, and the Russian Federation for the Priority Watch List; and recommended Belarus, Brazil, Bulgaria, Canada, Ecuador, Egypt, Greece, Israel, Italy, Kazakhstan, Kuwait, Lebanon, Mexico, Pakistan, Romania, Saudi Arabia, Spain, Switzerland, Tajikistan, Thailand (OCR) Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, and Vietnam for the Watch List. IIPA raised issues of concern in Albania, Estonia, Hong Kong, Malaysia, Malta, Moldova, Paraguay, the Philippines, and Taiwan in Special Mention reports.

¹² IIPA noted Brunei for cleaning up the retail piracy market there in May 2012 and for a criminal sentence against the owner of a large piracy retail chain. IIPA also noted Malaysia for the passage of major amendments to its Copyright Act which address copyright protections in the digital and online environment and protect against unlawful camcording of motion pictures and for joining the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA finally noted the Philippines for closing several notorious piracy market and for employing creative and innovative approaches to addressing piracy and transforming an illegal market for the long term.

¹³ See International Intellectual Property Alliance, *IIPA Written Submission Regarding 2013 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing Request to Testify at 2013 Special 301 Hearing* (77 Fed. Reg. 77178, Dec. 31, 2012), February 8, 2013, at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>. Appendices A through C contain the individual country reports, the "Methodology Used to Calculate Value of Unlicensed Software, Other Estimated Piracy Losses, Piracy Levels," and the "Chart of Countries' Special 301 Placement (1989-2012) and IIPA 2013 Special 301 Recommendations," available at http://www.iipa.com/2013_SPEC301_TOC.htm.

¹⁴ The "Initiatives or Challenges for 2013," to "Reduce Copyright Piracy, Remove Market Access Barriers, [and] Strengthen Laws" can be achieved by addressing: 1) The Need for Deterrent Enforcement Responses to Copyright Piracy, 2) Internet Piracy, 3) Enterprise (Including Government) End-User Piracy of Software and Other Copyright Materials, 4) Unauthorized Loading onto PCs (Hard-Disk Loading), Mobile Devices (Mobile Device Piracy) and "Media Boxes," 5) Circumvention of Technological Protection Measures (TPMs), 6) Illegal Camcording of Theatrical Motion Pictures, 7) Piracy of Books and Journals, 8) Optical Disc and Game Cartridge Piracy, 9) Pay-TV Piracy and Signal Theft, 10) Implementation of IPR Provisions in Trade Agreements, 11) Implementation of the WCT and WPPT, and 12) Market Access Barriers.

¹⁵ The Priority Watch List countries for 2013 are: Algeria, Argentina, Chile, China, India, Indonesia, Pakistan, Russia, Thailand, Venezuela. The Watch List countries for 2013 are: Barbados, Belarus, Bolivia, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Finland, Greece, Guatemala, Israel, Italy, Jamaica, Kuwait, Lebanon, Mexico, Paraguay, Peru, Philippines, Romania, Tajikistan, Trinidad and Tobago, Turkey, Turkmenistan, Uzbekistan, Vietnam. See United States Trade Representative, *2013 Special 301 Report*, May 1, 2013, at <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>.



Additional IPR-Related Tools Including Trade Preference Programs

Other U.S. trade tools support strong copyright protection and enforcement abroad. These include the Generalized System of Preferences (GSP), the Caribbean Basin Initiative (CBI), the Andean Trade Preferences Act (ATPA), and the Africa Growth and Opportunity Act (AGOA). The leverage provided by the prospect of the U.S. halting or limiting trade privileges to those beneficiary countries which refuse to stop illegal piracy or fail to provide equitable and reasonable market access to U.S. copyrighted products and services is important to the achievement of the goals of all these programs. Under these laws, the President has the authority to withdraw or suspend the designation of any country as a beneficiary country, or to withdraw, suspend, or limit the application of duty-free treatment under this chapter to any article of any country. These trade programs are compatible with the WTO multilateral regime.

Generalized System of Preferences

The Generalized System of Preferences trade program has since the late 1970s promoted economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories. For almost 30 years, Congress has provided that as a condition for receiving this unilateral, non-reciprocal, preferential benefit, eligible countries must adequately and effectively protect intellectual property rights and afford equitable and reasonable market access to U.S. copyrights.¹⁶ GSP has been an important trade tool to address piracy of U.S. copyrighted works. IIPA and its members have used the GSP petition process as a means to encourage countries with high levels of piracy and market access barriers to improve their copyright protection, enforcement, and market access regimes. Retaining GSP benefits has figured prominently in the decisions by a number of countries over the years to improve their IPR protection and market access. The copyright industries view GSP as a significant part of sound U.S. trade policy. IIPA has filed petitions in numerous countries over the years, and investigations continue into the IPR practices continue in regard to Russia and Uzbekistan, and into the IPR and market access regimes in Indonesia and Ukraine.¹⁷

Congressional authorization for the GSP program expired July 31, 2013. IIPA strongly recommends that the Congress take all necessary steps to re-authorize the program, to minimize unnecessary procedural burdens accompanying its expiration and renewal (such as retroactive application of the trade benefits to eligible beneficiary countries), and to ensure the maximum positive impact of the current country practice reviews underway in Ukraine, Indonesia, Uzbekistan, and Russia.

Caribbean Basin Initiative

Since 1983, the CBI Program, the very first U.S. trade program which explicitly tied trade to IPR protection, has also been useful in encouraging copyright reform in several Central American and Caribbean countries, including the Dominican Republic, Panama, El Salvador, Guatemala, Honduras, Trinidad & Tobago, and Jamaica. The IPR provisions of the CBI were strengthened by the Caribbean Basin Trade Partnership Act (CBTPA) in 2000. There are currently 18 countries that benefit from CBI. The current program continues in effect until September 30, 2020.¹⁸

Andean Trade Preferences Act

The ATPA was enacted in 1991 to combat drug production and trafficking in the Andean countries: Bolivia, Colombia, Ecuador and Peru, and offered trade benefits to help these countries develop and strengthen legitimate industries. The ATPA was expanded under the Trade Act of 2002, the Andean Trade Promotion and Drug Eradication Act. It provides duty-free access to U.S. markets for approximately 5,600 products. Effective May 15, 2012, only

¹⁶ Among the current criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5).

¹⁷ See <http://www.ustr.gov/trade-topics/trade-development/preferenceprograms/generalized-system-preference-gsp>

¹⁸ These countries are: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago. See <http://web.ita.doc.gov/tacgi/eamain.nsf/6e1600e39721316c852570ab0056f719/7c06ed73d7a2d9c585257394004a9a05?OpenDocument>.



Ecuador was eligible for ATPDEA benefits, since Colombia and Peru have free trade agreements with the U.S. The ATPDEA expired July 31, 2013.

African Growth Opportunity Act

In October 2000, the AGOA amended the U.S. trade law to authorize the President to designate sub-Saharan African countries as eligible for duty-free tariff treatment for certain products under GSP and also authorized preferential treatment for certain textile and apparel articles. One of the provisions in the eligibility process is whether the country has established, or is making continual progress toward establishing, the protection of intellectual property. Congress has extended this trade program through 2015. As of July 2013, 40 sub-Saharan African countries were eligible for AGOA benefits.

Ensuring Adherence to World Trade Rules and International Copyright Norms

An essential and critical part of U.S. trade policy must include negotiating strong trade disciplines, including IPR standards adequate to meet the challenges faced by creators and other right holders today, and then monitoring compliance with such international trade norms.

Implementation of the WTO, Including the TRIPS Agreement

Important international trade disciplines are codified in the rules of the WTO, an international trade body created on January 1, 1995, representing the most significant reform of international trade disciplines since the Second World War. There are now 159 WTO member nations and 25 observer nations. Included in the WTO agreements is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which entered into force for the U.S. and developed countries in 1996 and developing countries in 2000.¹⁹ TRIPS obligations on copyright and enforcement are in full effect for developed and developing countries, meaning they are now subject to WTO dispute settlement. TRIPS obligations, both substantive and enforcement, are legally recognized as the minimum standards of IP protection and enforcement that must be afforded. Most developed and developing countries, and countries considered least-developed (LDCs) have amended their copyright legislation to meet the TRIPS standards. Some countries remain out of compliance with the substantive norms of TRIPS. An even larger group of countries do not yet comply, as such or as applied, with the TRIPS enforcement obligations.

The challenge remains to bring countries into compliance with the enforcement norms of TRIPS in practice. The enforcement obligations in TRIPS provide a comprehensive technology-neutral foundation for the development of civil, administrative, and criminal procedures and remedies necessary for effective enforcement against copyright piracy. Specific TRIPS obligations include critical enforcement tools like *ex parte* searches, injunctive relief, damages, effective border enforcement measures, and deterrent criminal penalties. In general terms, TRIPS requires an enforcement system that (1) permits effective action against infringements without regard to how those infringements are effected; (2) provides expeditious remedies which constitute a deterrent; (3) is fair and equitable; (4) is not unnecessarily complicated or costly; and (5) does not entail any unreasonable time limits or unwarranted delays. TRIPS requires member countries to apply their criminal laws in cases of piracy on a commercial scale; it is not enough merely to have laws on the books; those laws must be used effectively.

WTO dispute settlement cases involving copyright and related rights to date have demonstrated and developed important principles, both in terms of substantive protection and enforcement. For example, a case was brought very soon after TRIPS came into force challenging Japan's failure to protect sound recordings retroactively. Cases involving Sweden and Denmark were brought for failure to provide *ex parte* civil remedies, in violation of Article 50 of TRIPS, while cases against Ireland and Greece (the latter for television piracy) were brought for violations of Articles 41 and 61. These cases were all settled satisfactorily, as the governments adapted to provide protections in line with TRIPS. We also note a case brought against the United States regarding music licensing which provides important interpretations on the scope of permissible exceptions and limitations.

¹⁹ The national treatment and most-favored-nation provisions of TRIPS applied as to all WTO members as of January 1, 1996 (and as to newly-acceding members upon accession).



The dominance of piracy and market access barriers in China led certain industries to conclude in 2007 that the best alternative to seek redress was through the WTO dispute settlement process. As a result, two WTO cases were launched, one focused on IPR inadequacies, and one focused on deficiencies in China's compliance with its WTO commitments on market access for published materials and audio and audiovisual entertainment products. In 2009, both cases concluded, with a WTO Dispute Settlement Panel rendering its decision in the IPR case in January 2009, and with the WTO Appellate Body rendering its decision in the market access case in December 2009. In both cases, the U.S. largely prevailed. In the IPR case (DS 362), the WTO Panel set out a comprehensive market-based test for what constitutes "piracy on a commercial scale" which must be subject to criminal penalties under TRIPS.²⁰ In the landmark market access case (DS 363), the United States prevailed on many claims against China's regime restricting the importation (trading rights) and distribution of publications, sound recordings, audiovisual home entertainment, and films for theatrical release. The government of China has implemented changes which address some of the WTO Appellate Body's requirements, and in February 2012, the United States and China concluded the historic U.S.-China Film Agreement, in which the Chinese agreed to: 1) permit 34 foreign films into China annually on a revenue-sharing basis (up from 20 films); 2) increase the percentage of revenue sharing to 25%; 3) open theatrical distribution to competition in the market; 4) introduce transparency to the administration of its content review process; and 5) observe commercial terms, consistent with the terms prevailing in comparable markets, in any contract for the distribution of "films other than revenue sharing films." China must still be held to account for its discriminatory censorship review process with respect to online music, and effectively address unauthorized copying and distribution of publishers' content.

Implementation of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty

The WCT and WPPT, in force since 2002, provide a basic legal framework for the protection of online copyright. The WCT now has 90 adherents, while the WPPT now has 91 adherents. Effective implementation of the global legal minimum standards embodied in the WCT and WPPT is critical to U.S. creators in the fight against online piracy, and is a key element of the "adequate and effective" copyright protection that is demanded under U.S. trade programs. These standards include clarifying exclusive rights for the online world, including protection of temporary copies, providing an interactive communication to the public and "making available" right, requiring Parties to "ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements," and prohibiting through civil and criminal remedies the production of or trafficking in tools that circumvent technological protection measures used by right holders to prevent access to content or the exercise of exclusive rights. A number of key trading partners, including New Zealand and Israel among developed countries, and Thailand among developing countries, have not yet either ratified or fully implemented these treaties. The United States, which was one of the first countries to implement these changes in its laws more than a decade ago, should continue to make it a trade policy priority to encourage other countries to follow this path.²¹

As noted, one of the key aspects of WCT and WPPT implementation involves adequate and effective protection against any act of infringement that takes place over information networks, as well as against the circumvention of TPMs. In order for protection against circumvention to be "adequate and effective," as required by the WIPO treaties, countries must address acts of circumvention, trafficking in circumvention devices, tools, and technologies, and the provision of circumvention services (such as the installing of "mod chips" into game consoles). Countries must also ensure that both TPMs that control access to content as well as TPMs that prevent the unauthorized copying or other exercise of exclusive rights are covered. Exceptions to protection in this area must be narrowly tailored to ensure that prohibitions on circumvention are not rendered ineffective. Civil and criminal (and where available, administrative) remedies should be provided.

²⁰ China must be fully subjected to this market-based test, which we believe continues to require China to examine and lower its current thresholds for criminal liability, in order to criminalize all "copyright piracy on a commercial scale" as required by TRIPS Article 61.

²¹ The United States implemented the WCT and WPPT by enacting Title I of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The United States deposited instruments of accession for both treaties on September 14, 1999.



The importance of proper implementation of the WCT and WPPT for a country's economy and culture cannot be overstated, since it promotes healthy electronic commerce, which can help overcome existing barriers to access to scientific, medical and technical data, educational materials, and technical and productivity software. Trade in these vital resources, needed for prosperity and competitive advantage in the Information Age, will be much cheaper, more efficient, and easier in a digital networked marketplace. Electronic commerce can also help attract higher and more consistent levels of foreign direct investment in high technology and information-intensive businesses, and can help build stronger economic, social, and cultural links in the region, without regard to geographic proximity. Finally, healthy and legitimate electronic commerce can provide an enormous boost to a country's cultural and creative industries. Through digital networks, properly protected, a country's music, art, literature, and folklore can reach new markets and can be delivered directly to paying customers around the globe. For these gains to be realized, countries must do a much better job at rooting out the unfair competition created by the operation of services that operate as distribution hubs for infringing materials.

Negotiation of IPR Provisions, and Market Opening, in Trade Agreements

The negotiation of multilateral trade agreements such as the WTO TRIPS Agreement, as well as regional and bilateral free trade agreements (FTAs) or Trade Promotion Agreements (TPAs) over more than two decades, has proven to be of great value to the U.S. economy. These agreements have in common the introduction and implementation of enforceable obligations for our trading partners to modernize their copyright law regimes and improve enforcement procedures. The agreements have also helped U.S. copyright industries to obtain greater access to foreign markets, so they can compete fairly around the world. They form a critical part of U.S. trade policy in helping U.S. copyright industries compete fairly in foreign markets, and help our trading partners develop their domestic copyright industries, a true win-win for all parties. In addition to TRIPS implementation, which has been completed in virtually all countries/territories that are members of the WTO, FTAs with 20 countries have now entered into force, including the U.S.-Korea FTA (KORUS), the U.S.-Colombia TPA, and the U.S.-Panama FTA in 2012. Regrettably, we continue to confront non-compliance with FTA obligations among many of our trading partners, and USTR needs additional resources so that it can effectively address these critical issues.

The pending negotiations for a Trans-Pacific Partnership (TPP) Agreement presents a significant opportunity to expand the benefits of existing FTAs to a broader range of "trans-Pacific" markets. Japan officially joined the TPP negotiations during the 18th round in Kota Kinabalu, Malaysia in July 2013, bringing the total number of countries negotiating the agreement to twelve.²² IIPA members believe that the TPP IP text should use the KORUS text as a baseline. Enhancement of copyright standards and enforcement consistent and co-extensive with those agreed to by current FTA partners will contribute to U.S. job growth, increased exports, and economic recovery in line with the Administration's goals.

Two weeks ago, negotiations commenced between the United States and the European Union toward a Transatlantic Trade and Investment Partnership Agreement (TTIP). There is already a great deal of commonality and broad agreement (expressed by the High Level Working Group) that "both the EU and the U.S. are committed to maintaining and promoting a high level of intellectual property protection, including enforcement." Thus, any TTIP IP text will by necessity look quite different with respect to copyright than the corresponding chapters of other trade agreements. The copyright commitments of the TTIP should focus on a few critical areas where such an agreement can be effective in advancing important shared goals, including: 1) setting out ways and means for the U.S. and the EU to expand cooperation to advance the shared goal of promoting innovation and trade through strong protection for intellectual property, including more effectively communicating and explaining how copyright protection fosters creativity, enriches society, and protects internationally recognized human rights; 2) providing new mechanisms for coordinating, cooperating, and sharing enforcement expertise in order to help make critical third country markets more hospitable to the production, distribution and licensing of creative works; and 3) identifying key issues on which the U.S. and EU could benefit from sharing information, crafting best practices, and learning from each other regarding our respective implementation of existing international copyright and enforcement norms.

²²TPP negotiating countries now include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. TPP countries now comprise 793 million people with a combined GDP of US\$27.5 trillion, one-third of all global trade.



We note here that the renewal of Trade Promotion Authority (TPA) “fast track” negotiating authority would be helpful in allowing the Administration to conclude existing negotiations and commence new FTAs with key trading partners.

Implementation of In-Force Trade Agreements

IIPA takes notice of the following countries for issues related to their bilateral, regional, or multilateral obligations in the area of intellectual property rights.

- **Chile:** The United States-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004. Unfortunately, major elements of Chile's FTA compliance still remain outstanding, including several that would improve the fight against widespread piracy in the country. Chile is urged to revisit amendments to the copyright law to fully satisfy obligations with respect to: effective ISP liability provisions; deterrent-level civil and criminal sanctions for copyright infringement; an effective civil ex parte search remedy; and the establishment of statutory damages. Chile must also implement protections against the circumvention of technological protection measures. Finally, Chile has yet to fully implement its 2001 Government Software Legalization Decree. Chile's role as an initial participant in the TPP negotiations makes these unmet obligations all the more urgent if the country is to demonstrate a basic commitment to promote the creative sectors among all TPP participating economies, through a strong copyright protection and enforcement regime.
- **Costa Rica:** The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) entered into force for Costa Rica on January 1, 2009. Contrary to the spirit of Costa Rica's commitments regarding the protection and enforcement of U.S. copyright works under that agreement, Costa Rica's President has issued decrees that foreclose important sources of revenue to the recorded music industry. Costa Rica also has not met its obligations to adopt strong ISP liability provisions or to implement in practice the software asset management practices in government agencies called for in a relevant 2002 Decree. IIPA urges the U.S. government to continue in its efforts to bring these concerns to resolution.
- **Colombia:** On May 15, 2012, the United States-Colombia TPA went into force. This agreement contains a comprehensive chapter on intellectual property rights that will raise the level of copyright law and enforcement obligations in Colombia to the benefit of both Colombian and U.S. creators. Colombia has thus far failed to adopt the necessary copyright amendments to its law to achieve compliance with its FTA obligations, and should be encouraged to take effective and immediate steps to implement its TPA obligations and to increase the focus of law enforcement officials on needed anti-piracy actions on the streets of Colombia and online.
- **Korea:** IIPA members were strong supporters of the KORUS FTA due to the strong commitments made in the IP chapter on which industry believes the U.S. government can further build in the TPP and other new, 21st century trade agreements. One important aspect of the IP chapter was the commitment Korea made to ensure that its central government agencies would utilize legitimate software. However, software industry representatives have raised concerns about significant under-licensing of software by certain ministries, and the Korean government has to date not taken sufficient action in response to these concerns. For example, auditing appears not to follow best practices in many circumstances and to be nonexistent in others. Korea also fails to provide adequate funding for at least some Korean agencies to purchase the software they actually use. U.S. industry has tried to work with individual ministries, such as Korea's Ministry of Defense, to address problems of substantial under-licensing, but so far without success, despite Korea's FTA obligations and the value of eliminating piracy to advance public security. IIPA urges the U.S. government to work to ensure that trade agreement obligations related to government software legalization are further strengthened in the TPP and other future trade agreements, to give industry enhanced protection and recourse to deal with shortfalls in meeting these obligations.
- **Peru:** The United States-Peru Trade Promotion Agreement (PTPA) entered into force on February 1, 2008. Peru was afforded transition periods to come into compliance with some provisions of the PTPA, but those transition periods have expired as to Peru's outstanding obligation to provide statutory damages (which expired September 1, 2009, per TPA Article 16.11.8) and obligations related to service provider liability (which expired February 1, 2009, per TPA Article 16.11.29). Meanwhile, Peru now has the worst problem of unauthorized camcording of



U.S. motion pictures in all of Latin America. IIPA appreciates the cooperation of the Peruvian government in trying to address the camcording problem, and has called upon the Peruvian government to work to effectuate changes to fully implement its PTPA obligations. The U.S. government has to date been very supportive of efforts to seek full implementation of the PTPA and this should remain an important part of the U.S. trade policy agenda.

- **Singapore:** While the copyright law and enforcement provisions of Singapore's FTA with the United States, which came into force in 2005, have been largely successful, several significant shortfalls remain. Online piracy continues to threaten Singapore's market for copyright works, especially music, movies, and television programs. The government has thus far refused to bring public prosecutions of online music pirates²³ or to bring Internet service providers into a cooperative stance with right holders to combat online piracy. Both these shortfalls, in addition to some others (e.g., Singapore law still makes no provision for agents or authorized representatives acting on behalf of copyright owners to apply for pre-trial discovery in order to identify online copyright infringers) raise FTA compliance issues. Singapore should also join the global trend and outlaw camcording in its cinemas, before a festering problem becomes more serious, and should consider upgrading to deterrent levels its criminal penalties for trafficking in circumvention devices and services. We urge the U.S. government to continue engaging with its counterparts in Singapore to ensure that compliance with the FTA remains an important part of the U.S. trade policy agenda.
- **Antigua and Barbuda:** In January 2013, the government of Antigua and Barbuda informed the World Trade Organization (WTO) of its intention to cross-retaliate against U.S. intellectual property rights worth \$21 million a year as a remedy in an unrelated trade dispute. IIPA remains of the firm view that suspending intellectual property rights is not the right solution, and that state-sanctioned theft is an affront to any society. Should the government of Antigua and Barbuda determine to move forward in this manner, it would be in violation of its obligations under international instruments not administered by the WTO (e.g., the Berne Convention), and would – by definition – fail to provide adequate and effective IPR protection as required under U.S. trade laws governing unilaterally-granted trade benefits such as CBI. In the event that Antigua and Barbuda proceeds in this manner, we believe that the U.S. should take appropriate, immediate, and robust action to uphold U.S. trade laws.
- **Brazil:** In 2010, the United States and Brazil averted the imposition of countermeasures of more than \$800 million, including the possibility of cross-retaliation in the area of intellectual property, in a trade dispute at the WTO involving U.S. agricultural support payments and guarantees found to be inconsistent with WTO agreements. IIPA understands that since that time, the affected industries in the dispute have been working toward a mutually agreeable solution. We hope for this agreeable outcome, as suspending intellectual property rights would not be the right solution. Not only is state-sanctioned theft an affront to any society, but should the government of Brazil suspend intellectual property rights, it would be in violation of its obligations under international instruments not administered by the WTO (e.g., the Berne Convention), and would, by definition, fail to provide adequate and effective protection for intellectual property as required by U.S. trade law.

Market Access Barriers

The Administration states as two of its key trade policy agenda goals 1) leveling the playing field to allow U.S. interests to compete and win in the global economy, and 2) opening markets around the world so that we can expand our exports. The U.S. copyright industries suffer from myriad market access barriers, investment barriers, and discriminatory treatment that, if addressed, would satisfy these goals. Such barriers and discriminatory treatment make it difficult for creators to compete in foreign markets on a level playing field. All efforts to crack down on piracy will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand. Thus, the reduction of market access impediments is a key component of ongoing efforts to combat piracy. Stifling market access barriers hinder the U.S. creative industries' growth in China, Vietnam, Indonesia, Ukraine, India, and elsewhere. Among other forms, market access barriers include:

²³Article 16.9.21.b of the FTA provides that "Each Party shall ensure that non-private criminal actions are the primary means by which it ensures the effective enforcement of its criminal law against willful copyright or related rights piracy. In addition, each Party shall ensure that its competent authorities bring criminal actions, as necessary, to act as a deterrent to further infringements."



- ownership and investment restrictions on copyright-related businesses;
- discriminatory or onerous content review/censorship systems;²⁴
- discriminatory restrictions including on the ability to fully engage in the development, creation, production, distribution, promotion, and publication of copyright materials;
- the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising;
- periods during which governments prevent U.S. producers from opening their films, or onerous restrictions on the window for theatrical distribution (including booking competing motion pictures simultaneously or unfairly shortening the run of a theatrical motion picture);
- local print requirements;
- onerous import duties or the improper assessment of duties on an *ad valorem* basis;²⁵ and
- government procurement preferences for domestic products or those with locally-owned or locally-developed IP.²⁶

Whatever form they take, whenever such market access restrictions impede the entry of legitimate products, they make it easier for pirate operations to fill the void, become de facto “exclusive” distributors of the products, and cement strong loyalties with their consumer base that make them even harder to dislodge. U.S. officials should continue to strive to open markets and to eliminate or phase out market access barriers as a critical component of its trade policy agenda.

Concluding Remarks

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates jobs and exports. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide modern and effective levels of protection for copyright and freer, more open markets. To meet the constantly evolving threats to copyright worldwide, our country should remain committed to a flexible and innovative response to this threat, and this should be reflected in the Administration's trade policy agenda. We greatly appreciate your Committee's focus on this important part of U.S. policy, and appreciate USTR's and the Administration's continued use of all tools available to encourage countries to make the political commitments, followed by the necessary actions, to bring real commercial gains to the United States through strengthened copyright and enforcement regimes worldwide. We look forward to our continued work with your Committee, USTR, and other U.S. agencies on meeting these important trade policy goals.

²⁴In China, for example, music and entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of their music and videogame products. Further, while piracy enters freely in these markets, countries like China and Vietnam impose content review processes which clear the way for further piracy and, adding insult to injury, are discriminatory to foreign content, further skewing the playing field.

²⁵*Ad valorem* duties are based on potential royalties generated from a film rather than the accepted practice of basing duties on the value of the carrier medium (i.e., the physical materials which are being imported). This is a growing, dangerous, and very costly phenomenon to the film industry. The International Chamber of Commerce recognized in a policy statement, *The Impact of Customs Duties on Trade in Intellectual Property and Services*, that such a practice distorts markets, increases costs for suppliers and buyers, depresses commercial activity, and impedes the availability of intellectual property in the country imposing the tariffs.

²⁶As an example, over the past several years, China has been rolling out a series of policies aimed at promoting “indigenous innovation.” The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. These include policies providing government procurement preferences for goods or services with locally-owned or locally-developed IP. The Chinese government has made a series of commitments in bilateral negotiations with the United States, including at the U.S.-China Joint Commission on Commerce and Trade (JCCT) and the U.S.-China Strategic and Economic Dialogue (S&ED), to eliminate such policies that link government procurement to where IP is owned and developed.