

**IP JUSTICE WHITE PAPER**  
**on the**  
**Draft Intellectual Property Rights Chapter**  
**in the**  
**Free Trade Area of the Americas (FTAA) Treaty**

*"FTAA: A Threat to Freedom and Free Trade"*  
By Robin D. Gross, Esq.

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# ***"FTAA: A Threat to Freedom and Free Trade"***

By Robin D. Gross, Esq.

## **I. Background Information on Free Trade Area of the Americas Treaty**

The Free Trade Area of the Americas (FTAA) Treaty<sup>1</sup> is a comprehensive regional trade agreement between all 34 democracies in the Western Hemisphere, including the US, and covering a population of over 800 million people. Similar to the North America Free Trade Agreement (NAFTA), FTAA will compel the nations of the Americas to pass new laws on a broad range of issues, including intellectual property rights.

In order to get the trade benefits from membership in the world's largest trading bloc, FTAA countries must amend their domestic laws to be in compliance with the treaty's requirements. The US government can bring economic trade sanctions against FTAA countries that refuse to adhere to treaty obligations. The US wields enormous economic power to compel other nations to amend their internal laws and comply with trade agreements.

Negotiations over the subject matter and text of the FTAA Agreement began in 1994 at the Summit of the Americas in Miami and will conclude by January 2005, with the Treaty to take force by the end of 2005. From November 16-21, 2003 FTAA Trade Ministers from across the Hemisphere will meet in Miami for the next Ministerial to debate the current draft of the treaty.<sup>2</sup>

The Office of the US Trade Representative (USTRO) negotiates on behalf of the US in the FTAA Treaty negotiation process.<sup>3</sup> In 2003 US President Bush has been granted "fast track" authority on international trade agreements in 2003, so members of US Congress, who are more directly accountable to the public, no longer hold power over trade agreements such as FTAA.

The FTAA Treaty is already controversial for its treatment of human rights, labor, and environmental issues.<sup>4</sup> An analysis of the Treaty's draft chapter on intellectual property rights<sup>5</sup> reveals equally extreme and unbalanced provisions that dramatically expand

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<sup>1</sup> Official Website of the Free Trade Area of the Americas Treaty: [http://www.ftaa-alca.org/alca\\_e.asp](http://www.ftaa-alca.org/alca_e.asp)

<sup>2</sup> The second and current draft FTAA Treaty is available at [http://www.ftaa-alca.org/ftaadraft02/eng/draft\\_e.asp](http://www.ftaa-alca.org/ftaadraft02/eng/draft_e.asp)

<sup>3</sup> US Trade Representative Office website on FTAA Treaty process: <http://www.ustr.gov/regions/whemisphere/ftaa.shtml>

<sup>4</sup> See <http://www.stopftaa.org/> and <http://www.globalexchange.org/campaigns/ftaa/> and <http://www.sierraclub.org/trade/ftaa/>

<sup>5</sup> FTAA Draft Chapter on IP Rights available at [http://www.ftaa-alca.org/ftaadraft02/eng/ngipe\\_1.asp#IPR](http://www.ftaa-alca.org/ftaadraft02/eng/ngipe_1.asp#IPR)

intellectual property rights at the expense of civil liberties.<sup>6</sup> For example one proposed clause threatens to fill the Americas' prisons with people who share music over the Internet. Unless the draft intellectual property chapter is substantially reformed or deleted in its entirety, the treaty will grant even greater control to major intellectual property holders to chill freedom of expression, prevent competition, restrict consumer rights, and stifle innovation.

## **II. Misguided Provisions in FTAA Chapter on Intellectual Property Rights<sup>7</sup>**

### **1. Expanded Criminal Penalties Would Send Non-commercial Infringers to Prison**

Article 4 of the Intellectual Property Chapter's Section on Enforcement would dramatically expand criminal procedures and penalties in cases of intellectual property infringement throughout the hemisphere. One of the most important sections, Article 4 defines the circumstances under which a person should be criminally prosecuted and imprisoned for intellectual property infringements. FTAA nations will be forced to amend their domestic laws to provide for imprisonment in accordance with Article 4.1 of the section. Several dramatically different clauses have been proposed for Article 4.1 and it will make a drastic difference in the lives of millions of people which option is ultimately chosen. The chapter's copyright section also creates a new "right of communication to the public" that will also create greater liability for P2P file-sharers.

#### **a) Threatens to Mandate Prison for P2P File-Sharing**

##### **i) First Article 4.1 Option: GATT Standard – Jail for Commercial Infringers**

Among the possible clauses under consideration that provide for criminal penalties against infringers of intellectual property, the first would require countries to apply Article 61 of the GATT/TRIPS Agreement<sup>8</sup>:

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<sup>6</sup> See also the Official Comments of the American Library Association and other librarians at [http://www.ftaa-alca.org/spcomm/SOC/Quito/AnnexD/soc-civ-70\\_e.asp](http://www.ftaa-alca.org/spcomm/SOC/Quito/AnnexD/soc-civ-70_e.asp) and see also the Comments filed by the Consumer Project on Technology at <http://www.cptech.org/ip/ftaa/cptech02282003.html> and see also letters sent by the Association for Computer Machinery (ACM) on the FTAA at <http://www.acm.org/usacm/IP/ftaa-rep-letter.html> and <http://www.acm.org/usacm/IP/ftaa-letter.html>.

<sup>7</sup> *This Paper only analyzes the general intellectual property provisions and the Copyright and Related Rights Section of the FTAA draft Chapter on Intellectual Property Rights. This Paper does not analyze the Sections on Trademarks (except Article 13.1), Geographical Indicators, Patents, Industrial Designs, Plants, Trade Secrets, Unfair Competition, Anti-competitive Practices in Contractual Licensing Issues, and Industrial Designs in the FTAA draft Chapter.*

<sup>8</sup> GATT / Trade Related Aspects of Intellectual Property Rights (TRIPS), text available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)

[4.1. Each Party Shall apply Article 61 of the TRIPS Agreement.]

TRIPS Article 61<sup>9</sup> is the internationally recognized law on the issue and supports criminal sanctions in cases of willful infringement done on a commercial scale with penalties to include imprisonment:

“Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. ...” GATT/TRIPS Article 61

**ii) Second Article 4.1 Option: Prison for ‘Significant Willful Infringements’**

The second possible Article 4.1 clause<sup>10</sup> in the FTAA Treaty would also provide criminal procedures and penalties in cases of willful infringement on a commercial scale with penalties to include imprisonment. But the second proposed clause further provides that:

“... significant willful infringements of copyrights ... that have no direct or indirect motivation of financial gain shall be considered willful infringement on a commercial scale.  
...”

Under the second proposed Article 4.1 clause, a “significant willful infringement” is enough to warrant imprisonment, losing the GATT’s requirement that an infringement be commercially or financially motivated before someone should be imprisoned. The proposed text provides no definition for the term “significant,” although it is the key term that will trigger criminal penalties under this clause.

Peer-to-Peer (P2P) file-sharing could easily fall into this broad definition of what could constitute a criminal offense worthy of imprisonment since sharing dozens or hundreds of MP3 songs could be considered a “significant willful infringement.”<sup>11</sup> Simply by

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<sup>9</sup> GATT/TRIPS Article 61 on Criminal Procedures available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm#5](http://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm#5)

<sup>10</sup> 2<sup>nd</sup> proposed Article 4.1 clause states: [4.1. Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or infringement of copyrights or neighboring rights on a commercial scale. Each Party shall provide that significant willful infringements of copyrights or neighboring rights that have no direct or indirect motivation of financial gain shall be considered willful infringement on a commercial scale. ...]

<sup>11</sup> Sharing only 10 MP3 files is enough to warrant the stiffest criminal penalties under the No Electronic Theft Act of 5 years in prison on the first offense and 10 years on the second occurrence.

redefining what constitutes a commercial offense as including noncommercial offenses, noncommercial infringers will be sent to prison as if they were commercial infringers under this FTAA clause.

Only very recently in the US has imprisonment been possible for infringements that involve no financial gain or motivation. The US 1997 No Electronic Theft (NET) Act changed the legal definition that triggers criminal penalties (including jail) to include the trading of one MP3 song for another over the Internet.<sup>12</sup> So in the US, it is already the law that a person can go to jail for swapping copyrighted songs over the Internet in some cases.

In November of 1999 an Oregon college student was convicted of sharing music over the Internet under the NET Act. Facing three years in prison and hefty fines, Jeffrey Levy, pleaded guilty to the charges. In late 2002 Members of US Congress called upon US Attorney General John Ashcroft to punish file-swappers and the US Department of Justice announced plans to begin criminal prosecutions under NET.<sup>13</sup> Now, FTAA threatens to spread to half of the world with one trade agreement the new lower 'US standard' of sending noncommercial infringers such as P2P file-swappers to prison.

Both the US NET Act and FTAA's second proposal for Article 4.1 criminalize more activity than is supported by international treaty obligations such as GATT/TRIPS Article 61. FTAA's second proposal threatens to export the US domestic policy choice of continually "lowering the bar" for criminal sanctions to apply to non-commercial infringements.

The second proposed Article 4.1 threatens to enable the US recording industry to require other countries to imprison their citizens for Internet music sharing without any domestic debate in those countries. Individual nations must retain the power to remain autonomous in setting domestic intellectual property laws and public policies. Perhaps Brazil or Jamaica wishes to devote its limited law enforcement and judiciary resources to public objectives other than ensuring Hollywood's profits. Unfortunately, national sovereignty is sacrificed, as countries are forced to spend scarce public resources and amend their domestic laws to adopt the new US policy of imprisoning P2P file-swappers.

As of October 2003, an estimated 60 million Americans use P2P file-sharing software in the US alone and the number of overseas users is even higher. This level of civil disobedience sends the crystal clear message that intellectual property laws are in stark contrast with the will of the people and should be changed to clearly legalize P2P file-sharing. Without the consent of the governed, FTAA's policies have no legitimate place in an international treaty between democracies.

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<sup>12</sup> 1997 No Electronic Theft Act, available at <http://www.virtualrecordings.com/net.htm>

<sup>13</sup> See "DOJ to Swappers: Law's Not on Your Side" by Declan McCullagh, August 20, 2002 at <http://news.com.com/2100-1023-954591.html>

One of the fundamental principles of a democracy is self-government, where the laws reflect the will of the public and people govern themselves. Yet in the case in intellectual property laws, Hollywood buys its way into the position of drafting the laws under which the people are forced to live. Democracy is yet another casualty in the FTAA Treaty process, which exemplifies a form of corporate tyranny, as the fundamental right to self-government is lost, and will of a powerful minority becomes the law in half of the world. One would expect that an agreement among the hemisphere's 34 'democracies' would find greater value in protecting democratic values than what the FTAA's chapter on intellectual property rights proposes.

The heavy-handed and extreme approach of imprisoning millions of otherwise law-abiding citizens for file-sharing will neither compensate artists nor solve the entertainment industry's underlying business model problems. And it would certainly create an unprecedented crisis for the criminal justice and judiciary systems to enforce the law in any meaningful way. Unless the second proposed clause to Article 4.1 is deleted from the final FTAA Treaty, Internet music swapping will be a felony throughout the Western Hemisphere in 2005.

### **iii) New Right of Communication to the Public Outlaws P2P File-Sharing**

Article 8 of the section on copyrights creates a new right of communication to the public that further threatens to outlaw P2P file-sharing. Although this right is supposed to track an author's existing right to authorize public performances or public displays of a copyrighted work, it actually goes much further, even over-lapping on an author's right of reproduction.

Article 8.1 grants to copyright holders the exclusive right to "authorize or prohibit the communication of the work to the public by any means serving to convey the words, signs, sounds or images thereof."<sup>14</sup> Article 8.2 of the copyright section gives copyright

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<sup>14</sup> [8.1. The author, or his successors in title where applicable, shall have the exclusive right to carry out, authorize or prohibit the communication of the work to the public by any means serving to convey the words, signs, sounds or images thereof. Communication to the public shall be understood to mean any act by which two or more persons, whether or not gathered together in the same place, may have access to the work without the prior distribution of copies to each one of them, and especially the following:

- a) stage presentations, recitals, dissertations and public performance of dramatic, dramatico-musical, literary and musical works, by any means or process;
- b) the public projection or display of cinematographic or other audiovisual works;
- c) the transmission of any work by broadcasting or by any other means of wireless dissemination of signs, sounds or images;
- d) the concept of transmission shall likewise include the sending of signals from a ground station to a broadcasting or telecommunication satellite;
- e) the transmission of works to the public by wire, cable, optic fiber or other comparable means, whether free or by subscription;
- f) the retransmission, by any of the means specified in the foregoing subparagraphs, and by a broadcasting organization different from the original one, of the work broadcast by radio or television;

holders the exclusive right to authorize or prohibit any communication of their works to the public by wire or wireless means.<sup>15</sup> This includes making the works available such that members of the public may access them from a place and at a time individually chosen by them. P2P file-sharers generally make songs available to others by storing the MP3 files of the songs in a shared directory on their computers. Since other users of the network download the songs at their discretion, P2P users risk liability under the new right of communication to the public.

This adds yet another powerful weapon to the arsenal of the recording industry to prosecute citizens for P2P file-sharing of music. Under current US law, it is possible that a P2P user who shares a song without the record label's permission violates the distribution and reproduction copyrights. But it would not also be a violation of the public performance right to that song under traditional US copyright law. Article 8's broadening of the scope of the traditional public performance right to the new right of communication, means P2P file-sharers will be on the hook to the recording industry for yet a third violation of copyright if this provision is enacted into law.

There does not have to be any underlying infringement for someone to face liability under this new communication right. Even if no one ever accesses and downloads a song from a person's shared directory, that person is still liable for violating this new right of communication, simply by storing a music file in that publicly accessible directory. So even if there is no distribution or no reproduction of any songs at all, a P2P file-sharer is still be liable to the record companies under this new right of communication.

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- g) the emission or transmission in or to a place accessible to the public and by means of any appropriate apparatus, of a work broadcast by radio or television;
  - h) the public display of works of art or reproductions thereof;
  - i) public access to computer data bases by telecommunication, by means of telecommunication, when said data bases incorporate or constitute protected works;
  - j) in general, the dissemination of signs, words, sounds or images by any known or future process.
  - k) The making available to the public of their works, in such a way that members of the public may access them from a place and at a time individually chosen by them.]

<sup>15</sup> First option proposed to the copyright section's Article 8.2:  
[8.2. [Authors of literary and artistic works shall enjoy] [Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 14(1)(ii), and 14bis(1) of the Berne Convention, each Party shall provide to authors, to performers and to producers of phonograms and to their successors in interest] [the exclusive right to authorize [any] [or prohibit the] communication to the public of their works [, performances or 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.]]

Second option proposed to the copyright section's Article 8.2:  
[8.2. Each Party shall grant the authors of literary and artistic works the exclusive right to authorize any communication of their works to the public by wire or wireless means, including the making available to the public of their works, such that members of the public may access them from a place and at a time individually chosen by them.]

## **b) Article 4.2 Permits Additional Criminal Procedures and Penalties Against Non-Commercial and Non-Willful Infringers**

In addition to the proposed clause for Article 4.1 that would send P2P file-sharers to prison, several other provisions contained in Article 4 would increase a criminal court's power to prosecute noncommercial intellectual property offenses.

In a grand "catch-all" clause, Article 4.2 of the enforcement section permits criminal prosecution against individuals for intellectual property offenses other than those provided for in Article 4.1:

[4.2. A Party may provide criminal procedures and penalties to be applied in cases of infringement of intellectual property rights, other than those in paragraph 4.1, [in particular,] where they are committed willfully and on a commercial scale.]

One proposal for Article 4.2's wording would permit additional criminal prosecutions and penalties *only* in cases of willful commercial infringement. But, the other proposed wording for the text of Article 4.2 would permit criminal prosecution *particularly* in cases of willful commercial infringement -- *leaving the door open for criminal prosecution of non-commercial and non-willful infringers as well*. Without any type of limiting clause, this Article 4.2 would permit countries to criminalize much activity that Article 4.1 would not support criminalizing, and non-commercial or non-willful infringers could be sent to prison under either Article 4.1 or 4.2 of the enforcement section.

## **c) Articles 4.3 and 4.4 Permit Seizure and Destruction of Property and Assets**

There are several possibilities within Article 4 of the enforcement section that would permit judges to seize and destroy infringing goods and any assets traceable to an infringement of intellectual property.

One proposed wording to the first option for Article 4.3 requires countries to give judges the authority to seize infringing goods and any related materials or implements predominantly used in the infringement.<sup>16</sup> Another proposed wording to this clause

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<sup>16</sup> The first option proposed to Article 4.3 of FTAA's Enforcement Section:

[4.3. Each Party shall provide that its judicial authorities may order the seizure [, forfeiture and destruction] of infringing goods and of any related materials and implements the predominant use of which has been in the commission of the offense [, and documentary evidence, even where such product is not specifically named in a search warrant. Each Party shall further provide that its judicial authorities shall order the forfeiture and destruction of all such infringing goods, materials

would also permit ordering the forfeiture and destruction of such infringing goods and materials and implements.

The most extreme proposal to the first option for Article 4.3 would require judges to order the forfeiture and destruction of all infringing goods, materials, and implements used in an infringement. It would also permit the seizure and destruction of documentary evidence not named in the search warrant and states that defendants must go uncompensated for the destructions of this property.

A second possible option for Article 4.3 is even more extreme. It would give all judicial authorities the power to seize goods *suspected* of infringement and any materials and implements *suspected* to be used in the commission of the offense, as well as any traceable asset. This is much broader than the first option proposed for Article 4.3 where a suspicion is insufficient and there must be an actual finding of infringement before a judge is permitted to order the seizure of a citizen's personal property. By permitting the seizure of property based on a suspicion alone, this second Article 4.3 clause ignores US citizens' Constitutional Due Process Rights that guarantees personal property cannot be taken without due process of law.

This second option to Article 4.3 also loses the requirement of the first paragraph 4.3 that goods seized must have been *predominately used* to infringe. Under this second clause proposed for Article 4.3 any use connected to an infringement would permit the seizure of property.

Article 4.4 grants judges the authority to order the forfeiture of any personal assets traceable to unlawful activity and the forfeiture or destruction of all infringing goods. It would also require judges to order the forfeiture or destruction of any materials or implements used in the commission of copyright infringement. Judges would be permitted to order such forfeiture and destruction of related materials and implements for other infringements of intellectual property as well.

#### **d) Article 4.6 Permits Criminal Charges Without the Need for a Private Complaint**

Article 4.6 requires FTAA signatory countries to grant criminal law enforcement agencies the power to initiate criminal prosecutions for infringement without the requirement that the rightsholder or an injured party file a complaint about the infringement.<sup>17</sup> A requirement that an injured party must file a complaint before the government prosecutes an infringement ensures that the rightsholder retains an incentive to protect his own interests. Article 4.6 effectively shifts the burden of protecting

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and implements except in exceptional cases. All such seizure, forfeiture and destruction shall be without compensation to the defendant of any kind].

<sup>17</sup> Proposed Article 4.6 of the Enforcement Section in FTAA's intellectual property chapter: [4.6. Each Party shall provide that its authorities may initiate legal action *ex officio*, without the need for a formal complain by a private party or right holder.]

Hollywood's interests over to the public, since North and South American taxpayers must pick up the tab for the increase in criminal infringement prosecutions in cases where no complaints were made.

## 2. Controversial "DMCA-Like" Anti-Circumvention Measures

The FTAA Treaty's intellectual property rights chapter also includes prohibitions against the circumvention of technological restrictions that control copyrighted works. Since the 1998 Digital Millennium Copyright Act (DMCA) outlawed circumvention in the US, the DMCA has consistently been used to thwart competition in industries unrelated to copyright,<sup>18</sup> prevent legitimate fair use of DVD videos, music CDs and eBooks,<sup>19</sup> and chill freedom of expression and scientific research worldwide.<sup>20</sup>

Since its enforcement began, the US is reconsidering the wisdom of broadly outlawing circumvention and two bills are pending before the US Congress that would repeal the DMCA's harshest provisions.<sup>21</sup> In late 2002 a US jury refused to convict the Russian company Elcomsoft for selling eBook decryption software in violation of the DMCA.<sup>22</sup> The jury foreman told reporters that the jury was concerned about the public's inability to make fair use of eBooks under the prosecutor's theory of the case.

Since foreign governments have witnessed several years of the US' enforcement of anti-circumvention laws, they are beginning to recommend the rejection of passing similar anti-circumvention laws in their own countries. In 2003 a Canadian Heritage study rejected the need to pass anti-circumvention measures in Canada.<sup>23</sup> And in 2002 the

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<sup>18</sup> See "Lexmark Wins Injunction Against Competitor's Printer Toner Cartridges" Mar. 3, 2003, available at <http://www.ipjustice.org/030303.scc.shtml> see also: *Chamberlain Group v. Skylink Technologies* Legal Case Archive available at: <http://www.ipjustice.org/skylink.shtml>

<sup>19</sup> 321 Studios v. MGM, see <http://www.protectfairuse.org> see also "Movie Studios Attack Distributors of DVD Copying Software: New DMCA Lawsuit Filed to Prevent Fair Use of DVD Movies" Sept. 18, 2003, available at <http://www.ipjustice.org/091803.shtml>

<sup>20</sup> See EFF White Paper, "Unintended Consequences: Five Years Under the DMCA" By Gwen Hinze, October 2003, available at: [http://www.eff.org/IP/DMCA/unintended\\_consequences.php](http://www.eff.org/IP/DMCA/unintended_consequences.php)

<sup>21</sup> Digital Media Consumers' Rights Act of 2003 (DMCRA) available at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:h107ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h107ih.txt.pdf) Benefit Authors without Limiting Advancement of Net Consumer Expectations Act (BALANCE) available at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.1066>

<sup>22</sup> "Russian Software Firm Found Innocent in Copyright Violation Trial" By Bob Porterfield, Associated Press, Dec. 17, 2002, available at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2002/12/17/state1319EST0063.DTL>

<sup>23</sup> Canadian Heritage Study on Technological Restrictions, Part II of the Report available at: [http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/index\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/index_e.cfm)

Official Report of the UK Commission on IP Rights warned developing nations against passing broad DMCA-like anti-circumvention laws.<sup>24</sup> Heavy public criticism convinced the Finnish legislature to reject a proposal in January 2003 that would have outlawed circumvention in Finland in accordance with the European Union Copyright Directive.<sup>25</sup>

A vast difference in opinion continues to mount among nations about the wisdom of outlawing circumvention and many wish to resist making the US' mistake. The other 33 FTAA countries should not be required to follow in the muddled steps of the US in broadly outlawing circumvention, particularly when the DMCA is increasingly viewed as a dangerous mistake and faces repeal.

## **a) Dangers of Anti-Circumvention Measures Generally**

### **i) Shown to Limit Fair Use Rights**

Since the DMCA forbids people from bypassing technological restrictions, US consumers are unable to copy or even play "restricted" CDs using their personal computers, or archive DVD movies, or excerpt text from eBooks -- even though American consumers have fair use rights to engage in these activities under US copyright law.

Copyright law's fair use privilege grants consumers the right to make unauthorized copies of copyrighted works for socially beneficial purposes or personal uses. Hundreds of American consumers, librarians, and civil liberties groups petitioned the US Copyright Office under its 2003 triennial rulemaking and requested exemptions to the DMCA's ban on circumvention due to consumers' inability to make fair use or other lawful uses of copyrighted material.<sup>26</sup>

The US Supreme Court has stated that fair use provides the 'necessary breathing space' so that copyright does not conflict with freedom of expression rights since it limits a copyright holder's right to control copying.<sup>27</sup> But when we outlaw the ability to engage in fair use by forbidding legitimate consumer circumvention, we have effectively

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<sup>24</sup> UK Commission on Intellectual Property Rights, Final Report: "Integrating Intellectual Property Rights and Development Policy," Summer 2002. Available at: [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm)

<sup>25</sup> "Grassroots Effort in Finland Defeats EU CD's Broad Bans" Jan. 31, 2003 available at <http://www.ipjustice.org/013103.shtml>

<sup>26</sup> US Copyright Office DMCA Rulemaking website: <http://www.copyright.gov/1201/>. See also IP Justice Comments in DMCA Rulemaking available at <http://www.ipjustice.org/051503.shtml> and [http://www.ipjustice.org/IPJ\\_1201\\_Comments.shtml](http://www.ipjustice.org/IPJ_1201_Comments.shtml) and <http://www.ipjustice.org/030620.shtml>

<sup>27</sup> *Harper & Row v. Nation Enterprises* 471 US 539 (1985) available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=471&invol=539>

outlawed fair use in the process. Without legal access to the tools that are necessary to engage in fair use, promises of retaining traditional fair use rights in a meaningful way are empty.

## ii) Chill Freedom of Expression and Scientific Research

Freedom of expression is also harmed by outlawing the dissemination of technical information that could assist in a circumvention. By banning the expression of certain technical ideas, anti-circumvention measures violate the US Constitution's guarantee to researchers and scientists of the right to freely express their ideas.

The extraordinary chill felt worldwide on freedom of expression and scientific research since the enactment of anti-circumvention measures in the US is well documented. Prominent foreign scientists have publicly stated that they are afraid to travel to the US or publish scientific results out of fear of liability for trafficking in circumvention devices; and a Princeton research team was formally threatened by the RIAA over its publication of a scientific paper in 2001.<sup>28</sup> Open source advocate Bruce Peren's technical presentation was canceled by organizers out to fear of DMCA liability at a 2002 O'Reilly Open Source Conference.

In October 2003, SunnComm threatened to sue another Princeton researcher under the DMCA after its stock price dipped when the researcher discovered that simply holding down a keyboard's shift-key bypasses the company's technological restriction scheme. SunnComm's CEO claimed the research paper's revelation damaged the company's market value by \$10 million and threatened to sue, although the public backlash persuaded him to withdraw his plans his lawsuit.<sup>29</sup>

Scientific conferences are moving to jurisdictions outside the US where anti-circumvention laws are not in place, since both scientists and conference organizers risk criminal prosecution for providing information (technical papers) that could help someone to circumvent restrictions.<sup>30</sup> The scientific journal published by the Institute of Electrical and Electronics Engineers (IEEE) temporarily required authors to indemnify the organization in case of DMCA liability over the journal's publication of technical papers.

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<sup>28</sup> "Dutch Cryptographer Cries Foul" Wired News, Aug. 15, 2001 By Steve Kettmann, available at <http://www.wired.com/news/politics/0,1283,46091,00.html> see also Legal Declaration of Ross Anderson, available at [http://www.eff.org/IP/DMCA/Felten\\_v\\_RIAA/20011022\\_anderson\\_decl.pdf](http://www.eff.org/IP/DMCA/Felten_v_RIAA/20011022_anderson_decl.pdf)

<sup>29</sup> "Student Escapes Shift-Key Lawsuit" from Out-Law.com, available at: [http://www.out-law.com/php/page.php?page\\_id=studentescapesshif1066051051&area=news](http://www.out-law.com/php/page.php?page_id=studentescapesshif1066051051&area=news)

<sup>30</sup> "Computer Scientists Boycott US Over Digital Copyright Law" New Scientist, July 23, 2001 By Will Knight, available at <http://www.newscientist.com/news/news.jsp?id=ns99991063>

Since anti-circumvention measures outlaw software, technical papers, and other information that could help someone to bypass technical restrictions, they also undermine existing international treaty obligations. Article 19 of the United Nations Universal Declaration of Human Rights guarantees that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Countries that pass broad anti-circumvention measures violate their UN treaty obligations by failing to protect the freedom of expression rights of their citizens.

### **iii) Restrain Trade and Create Monopolies for Large Incumbents**

The FTAA Ministerial Declaration lists as its first objective for the intellectual property rights chapter:

“To reduce distortions in trade in the Hemisphere and promote and ensure adequate and effective protection to intellectual property rights.”

Ironically, if anti-circumvention measures are included in this “free trade” treaty, they will have a largely anti-competitive effect and will restrain trade and create monopolies for incumbents at the expense of small start-ups and innovators.

Since laws against circumvention forbid people from bypassing technological restrictions, they also make it illegal to bypass trade barriers such as DVD region-code restrictions. In an effort to restrict the global flow of goods to maximize consumer prices, DVD movies are designed to refuse to play on DVD players that are sold in different regions of the world. As a direct result of these anti-circumvention measures, trade is restrained, consumers pay higher prices, and have less choice of DVD movies available to them.

Anti-circumvention measures are also easily abused to prevent competition and create a monopoly over compatible devices and aftermarket replacement parts. Leading US copyright law scholars pointed out at the May 2003 US Copyright Office’s DMCA Rulemaking that anti-circumvention measures could be used by an auto manufacturer to prevent competitors from selling compatible tires or other aftermarket replacement parts, simply by embedding a computer chip in an automobile component.<sup>31</sup>

Technological restrictions are employed on a growing number of consumer products such as DVDs, printer toner cartridges, and garage door openers, etc., that prevent competitors from building interoperable components. Anyone who builds an interoperable device must bypass the technological measure, triggering circumvention liability.

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<sup>31</sup> See US Copyright Office DMCA Hearing transcript, Testimony of Columbia Law Professor Jane Ginsburg available at <http://www.ipjustice.org/transcript-may15.pdf>

In the US, printer manufacturing giant Lexmark has used the DMCA to obtain a court order that prevents its competitor Static Control Components from selling printer toner cartridges that are compatible with Lexmark printers. Static Control argues that Lexmark is not protecting copyright, but is using the DMCA to shore-up its business model of selling toner replacement cartridges. Even a manufacturer of garage door openers sued a competitor under anti-circumvention measures for selling compatible “universal” garage door openers.<sup>32</sup>

Hollywood movie studios asked a court to prevent 321 Studios from selling software that can archive DVD movies under the DMCA, despite consumers’ legitimate needs and lawful right to make fair use of their DVD movies.<sup>33</sup> A small cartel of Hollywood studios and device companies through their licensing entity, DVD-CCA, claim exclusive right to decide who may build DVD players and have legally pursued open source software developers for independently reverse-engineering DVD technology and building DVD players that are compatible with alternative computer operating systems, such as Linux or FreeBSD.

If anti-circumvention provisions are included in the final FTAA Treaty, the ability to misuse them as an anti-competitive weapon will spread to half of the world. Considering the chilling and anti-competitive effects created by the DMCA, the inclusion of any clause in the FTAA treaty that supports outlawing circumvention of technological restrictions seems wholly misguided.

#### **iv) Stifle Innovation and Inhibit Independent Development**

Anti-circumvention measures have also been shown to stifle innovation in the development of new consumer products. Since companies can use anti-circumvention laws to prevent others from building interoperable devices, they are able to prevent the development of countless new and innovative uses of media.

The lessons of history reveal that the entertainment industry has tried to ban every single new communicative technology invented for over one hundred years on the grounds that it enables infringement. History also teaches that courts and legislatures have resisted the attempts to ban new technologies, and the industry has consistently come out the winner financially, as it was forced to evolve and adapt to the new circumstances.

Today is no different. Anti-circumvention measures should not be permitted to stifle innovation and inhibit the development of new technologies that are not controlled by today’s industry incumbents. Yet Sony used anti-circumvention measures to threaten a hobbyist who developed a program to customize his toy dog. Vivendi Universal filed a

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<sup>32</sup> *Chamberlain Group v. Skylink Technologies* available at <http://www.ipjustice.org/090203.shtml>

<sup>33</sup> Motion for Summary Judgment filed against 321 Studios available at [http://www.ipjustice.org/20030114\\_321\\_studios\\_mtn\\_sj.pdf](http://www.ipjustice.org/20030114_321_studios_mtn_sj.pdf)

lawsuit against open source software developers for reverse-engineering and building a game server that allows lawful video game owners to play against each other on an open source network.

Hollywood's relentless prosecution of Norwegian teen Jon Johansen for independently writing a software program to watch his DVD movies on Linux demonstrates that Hollywood will not tolerate the development of new and innovative products that it does not control.<sup>34</sup> Consumers must retain the 'freedom to tinker' with technology in order to remain in control over their personal experiences with ideas and their own lives.

#### **b) First Article 21.1 Option: Imposes WIPO Standard – “Adequate and Effective Protection” Against Circumvention**

There are two dramatically different clauses under consideration for Article 21.1 in the FTAA Treaty's copyright section that would require countries to outlaw circumvention of technological restrictions used to protect copyright.

Many FTAA nations have not chosen to ratify either of the WIPO Treaties, including Canada, Brazil, Venezuela, Belize and most Caribbean nations. *Any clause in the FTAA Treaty that requires these countries to outlaw any circumvention of technological restrictions undermines the national sovereignty and domestic policy choices of those nations.*

The first possible FTAA clause to Article 21.1 would require all 34 countries to enforce the standard set forth by the World Intellectual Property Organization (WIPO) Treaties:<sup>35</sup>

[Article 21.1. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors ... in connection with the exercise of their rights ... and that restrict acts ... which are not authorized ... *or permitted by law.*]

Since fair uses are explicitly *permitted by law* under the WIPO standard, it is possible that consumers could still circumvent for fair use purposes if this clause is finally chosen for Article 21.1. This standard does not require a ban against tools and information that could help another to circumvent as the DMCA does. The DMCA admittedly went much further than what WIPO requires in broadly outlawing circumvention.

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<sup>34</sup> See “Norwegian Appeals Court Orders Johansen Retrial: Hollywood Pushes to Outlaw Competing DVD Player Software” March 3, 2003, available at <http://www.ipjustice.org/030303.dvd.shtml>

<sup>35</sup> WIPO Copyright Treaty, Article 11 and WIPO Performances and Phonograms Treaty, Article 18. The WIPO Treaties have been ratified by 42 countries including many FTAA nations. View the WIPO IP treaties at <http://www.wipo.org/treaties/ip/index.html>

### **c) Second Article 21.1 Option: Broad “DMCA-Plus” Prohibitions Against Circumvention**

The second option for Article 21.1 in FTAA’s copyright section is even more prohibitive than the controversial US DMCA. The second clause proposed for Article 21.1 requires all countries to outlaw the act of circumventing technological restrictions used to protect copyright. And it also flatly bans tools, including devices, software, and technical information that are capable of circumventing technological measures “that restrict unauthorized acts”:

- [21.1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures used ... in connection with the exercise of their rights and that restrict unauthorized acts ... each Party shall provide that any person who
- a) knowingly or having reasonable grounds to know, circumvents without authority any effective technological measure; or
  - b) manufactures, imports, distributes, offers to the public, provides or otherwise traffics in devices, products or components or offers to the public or provides services, which:
    - i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
    - ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
    - iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure; shall be guilty of an offense, and shall be liable...]

Subheading (a) of the second proposal to Article 21.1 outlaws the act of circumvention on a “reasonable grounds to know” basis, lowering the DMCA’s “intentional” standard for liability for the act circumvention. Under the DMCA, one is liable for intending to circumvent technological restrictions. But if this clause is enacted, one will be held liable if there was any reasonable grounds to know that he or she was circumventing a copyright holder’s technological restrictions.

Subheading (b) of the second proposal to Article 21.1 is even more unforgiving, and creates strict liability for anyone who makes or provides tools (including software or technical information) or services that can circumvent technological restrictions. This means people will be strictly liable even if they even did not know or had no reasonable

grounds to know that they were providing tools or services capable of circumventing technological restrictions.

The FTAA draft treaty proposes a definition for “effective technological measure”:<sup>36</sup>

“Any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter, or protects any copyright or any rights related to copyright.”

FTAA’s definition provides for anti-circumvention measures that broadly regulate all technological access controls and use controls protecting copyrighted works; and in 2005 it will be illegal for anyone in the Western Hemisphere (including the owner of the media) to bypass the controls.

### **i) Exercise of Fair Use Rights Further Restricted**

This second option to FTAA’s Article 21.1 leaves little room for individuals to make fair use of their digital media collections. By outlawing the tools capable of circumventing technology that prevents “unauthorized acts,” we lose the ability to engage in any unauthorized act with our media, even though a wide range of unauthorized acts are lawful. Fair use by definition is lawful but unauthorized use of a copyrighted work. But since all unauthorized acts are prevented by the second option to Article 21.1, fair use is restricted in the process.

An argument could be made that subheading (a) of this provision would permit the act of circumvention in cases such as fair use since it forbids circumventing “without authority;” and traditional copyright law provides the legal “authority” to engage in fair use. Practically however, since all of the tools necessary to engage in that circumvention are flatly outlawed under subheading (b), any hope of preserving fair use under this reading of the clause is meaningless.

### **ii) Rightsholders Usurp Control Over Private Performances**

Individuals are unable to remain in control over the private performances of copyrighted works under the second Article 21.1 proposal. Many DVD movies have technological restrictions that do not permit consumers to fast-forward through advertisements or the misleading FBI warnings at the beginning of a DVD movie. And an increasing number of musical CDs are released with restrictions that prevent them from being played on personal computers or car stereos.

Enforced by the anti-circumvention measures, these restrictions enable rightsholders to usurp control over the private performance of music or movies and threaten individual

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<sup>36</sup> FTAA Chapter on IP Rights, Part II on IP Rights, Section 3 on Copyright and Related Rights, Article 1 Definitions. Available at: [http://www.ftaa-alca.org/ftaadraft02/eng/ngipe\\_1.asp#IISec.3Art.1](http://www.ftaa-alca.org/ftaadraft02/eng/ngipe_1.asp#IISec.3Art.1)

liberty. Copyright law only permits rightsholders the control of public performances of their works. The right to control the private performance, the private experience of a work, however, remains within the individual's lawful control. If the second proposal is chosen for Article 21.1 in the Treaty, rightsholders will be granted total control over individuals' private experience of movies, music, and books throughout the Western Hemisphere.

### **iii) Prejudice Against Free Software and Open Source Software Developers**

The second option for Article 21.1 in FTAA's copyright section also contains an explicit bias against the development of open source and free software alternatives to proprietary systems.

Subheading (b)(ii) flatly outlaws software that has "only a limited commercially significant purpose or use other than to circumvent ...".

Although frequently not created for commercial purposes, free and open source software development has provided countless useful and legitimate tools. If any of those tools are capable of circumventing a technological restriction, its creator's risk of liability for trafficking in circumvention devices is greater because of the software's "limited commercially significant purpose or use".

This clause's prejudicial treatment of free and open source software developers will surely curtail development, since free and open source software programmers face greater risks than proprietary programmers for building tools. This proposal's policy makes little sense considering the well-recognized societal value of free and open source software to advance science and the economy.

The UN body that oversees intellectual property laws, the World Intellectual Property Organization (WIPO), is considering holding a meeting to discuss "open and collaborative projects to create public goods," although Microsoft and others are heavily lobbying to cancel the WIPO meeting.<sup>37</sup> Considering the growing importance of free and open source software development to provide affordable and customizable tools to the public, this clause's explicit bias against noncommercial software is impossible to justify.

### **iv) Forbids More Legitimate Conduct and Tools Than DMCA**

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<sup>37</sup> See "Lawrence Lessig: The BBC's Lessons for America" By Financial Times, September 8, 2003, available at

<http://news.ft.com/servlet/ContentServer?pagename=FT.com/StoryFT/FullStory&c=StoryFT&cid=1059479642853> See also "Open Source – Closed Minds" by Lawrence Lessig, October 1, 2003 available at <http://www.eweek.com/article2/0,4149,1309535,00.asp>

Despite the DMCA's controversial standing in the US and several efforts to repeal it, the second proposed Article 21.1 is even broader in its prohibitions than the DMCA. For example it makes no distinction between circumventing copy controls, which the DMCA (theoretically) permits to allow fair use, and circumventing access controls, which the DMCA does not permit. FTAA's second Article 21.1 proposal flatly bans circumvention of all types of controls.

The US Congress recognized in 1998 that the DMCA's anti-circumvention measures could injure computer security, reverse-engineering, and encryption research. So Congress attempted to create "safe harbors" in order to permit those well-recognized legitimate activities under the DMCA.<sup>38</sup> While the DMCA's exceptions to the general ban on circumvention are extremely narrow and of limited practical use, FTAA's proposal makes no attempt to permit circumvention for even these legitimate purposes.

#### **d) Article 6.1 Prevents Fair Use Services From Hitting the Market**

FTAA's current draft chapter on intellectual property contains additional provisions to ensure consumers will be unable to circumvent technical devices to make unauthorized uses of their property. Article 6.1 of the intellectual property rights enforcement section outlaws services that assist others in making fair use of restricted media.

[6.1. Each Party shall provide adequate legal protection and effective legal remedies against any of the following acts, when undertaken for economic gain:

...

b) The alteration, removal or the rendering inoperable, in any way, of technical devices designed to impair or limit reproduction of a work or protected production;

...]

Subheading (b) of this proposed FTAA article bans enterprises that assist in bypassing technical devices designed to prevent works from being copied. This clause would outlaw many legitimate businesses, such as those that provide services to librarians' or that assist the public in archiving personal media collections.

This clause would also forbid much encryption research and computer security since cryptographers and computer security professionals are in the business of rendering technical devices inoperable in order to demonstrate to the public the truth about technical systems.

The proposal ignores the important fact that consumers often have a fair use right to make copies of music, movies, and text, and makes it practically impossible for consumers to obtain needed services to enjoy those lawful fair uses.

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<sup>38</sup> 17 USC Section 1201(d) through (j).

### **e) Article 20.1 Forbids Satellite Decoding Tools or Systems**

There are three options for Article 20.1 in the FTAA's copyright section that would outlaw devices capable of decrypting satellite programming without authorization.

The first option for Article 20.1 would mandate that countries make it be both a criminal and civil offense to make or provide a device or system that is "primarily of assistance in decoding an encrypted program carrying satellite signal without the authorization of the lawful distributor" of the signal. It also makes it a civil offense to "receive, in connection with commercial activities, or further distribute, an encrypted program carrying satellite signal that has been decoded without authorization." And these civil charges may be filed by any person who holds an interest in the content of the signal, not just the copyright owners. Individuals will be held strictly liable for making or providing satellite decryption tools under civil proceedings brought pursuant to this option.

The second Article 20.1 proposal makes it civil offense to make, provide, or permit the use of "devices or systems that are primarily of assistance in decoding an encrypted program carrying satellite signal without authorization." It also provides that countries *may* make this a criminal offense in addition to making it a civil offense, but does not mandate that countries make this a crime. Individuals would be held strictly liable in civil proceedings under this second proposal as well.

The third and most extreme option for Article 20.1 would mandate that countries lower the standard for criminal liability for making or distributing satellite decoding tools. It would make it a criminal offense to make or provide these tools "having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal." Thus, criminal penalties could apply to someone who did not actually know that the tool he or she provided could decode a satellite signal if this proposal is finally chosen. It would also require countries to make it "a criminal offense willfully to receive or further distribute an encrypted program-carrying satellite signal that has been decoded without authorization". In addition to the criminal provisions, this final option also makes it a civil offense (with strict liability) to make or provide satellite decryption tools or to receive or distribute a signal decoded without authorization.

### **f) Article 22.1 Forbids Bypassing Digital Management Information**

Article 22.1 of the enforcement section forbids removing otherwise circumventing a product's digital management information without "authority."<sup>39</sup> It makes it illegal to

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<sup>39</sup> Article 22. [Obligations concerning rights management information]

[22.1. In order to provide adequate and effective legal remedies to protect rights management information

a) each Party shall provide that any person who without authority, and knowingly, or, with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right,

i) knowingly removes or alters any rights management information;

remove or alter rights management information or to distribute products with the information removed. This provision is similar to Section 1202 of the US Digital Millennium Copyright Act.

Under this provision criminal liability attaches for knowingly altering or removing the management information or knowingly distributing copies of works where the information has been removed without authority. Civil liability attaches when there is a reasonable grounds to know that the removal or distribution of the information “will induce, enable, facilitate, or conceal an infringement of any copyright or related right.”

### **3. Traditional Fair Use Rights and Personal Use Rights Substantially Narrowed**

#### **a) New Definition Limits Consumers’ Fair Use Rights**

Article 1 of the copyright section in the draft FTAA Treaty proposes the following new definition for “fair use”:

“Use that does not interfere with the normal exploitation of the work or [unreasonably] [unjustifiably] prejudice the legitimate interests of the author [or right holder]”.

FTAA’s proposed definition is dramatically narrower than the current open-ended definition of fair use guaranteed by the US Constitution and codified in Section 107 of the US Copyright Act.<sup>40</sup> The US Supreme Court stated that fair use must be decided on a “case-by-case basis” and that there can be no “bright line rules” for deciding matters of fair use. Fair use is intended to permit unauthorized, but socially beneficial, copies of copyrighted works in cases such as personal use, research, and criticism.

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- ii) distributes or imports for distribution rights management information knowing that the rights management information has been removed or altered without authority; or
  - iii) distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works or phonograms, knowing that rights management information has been removed or altered without authority, shall be guilty of an offense, and shall be liable, upon the suit of any injured party, to relief by way of damages, injunction, accounts or otherwise.]

<sup>40</sup> 17 USC Section 107. - Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

In determining whether a particular use would be fair, traditional US copyright law focuses the question primarily on the *use* engaged in. In contrast, FTAA's definition for fair use focuses solely on the *commercial interests of the copyright holder* in determining whether a particular use would be ruled fair. No consideration is given to the social benefits of the use under the proposed FTAA Treaty.

FTAA's narrow definition of fair use also gives short shrift to Americans' freedom of expression rights guaranteed by the US Constitution. For example, copying something in order to criticize it can easily prejudice the rightsholders' interests (since it could discourage patronage); and traditional fair use, which accounts for free speech interests, would permit such copying. But under FTAA's definition, copying for critical purposes will count against the use being considered fair, chilling freedom of expression throughout the hemisphere.

FTAA's new definition would only permit fair use tools that do not diminish commercial opportunities for the rightsholder. Many traditional fair uses would fail to meet FTAA's threshold since under traditional fair use standards, the effect on the market is only one of four factors to be considered and is not given any more weight than the other factors for determining whether a particular use is considered fair.

The FTAA's proposed definitions threaten to stifle new and innovative uses of technology by giving too much control to copyright holders to prevent tangential businesses. Peer-to-Peer (P2P) software would surely fail as a fair use tool under FTAA's proposed definition, since the ability to freely share sound recordings of music could prejudice a record label's ability to sell identical copies for a fee.

Under the US Supreme Court's 1984 landmark ruling in the "Betamax" case, which upheld the legality of VCR's against identical claims, copyright law does not forbid devices that merely assist in infringement if the devices are capable of significant non-infringing uses.<sup>41</sup> FTAA's definition does not consider whether technologies are capable of non-infringing uses at all, the core of the US Supreme Court's "Betamax" doctrine. Companies will be unable to build new and innovative devices under such a narrow definition for fair use. The VCR turned out to be the movie industry's top earner, but only because contributory infringement claims were rejected by the US Supreme Court.

## **b) Personal Use Rights Restricted to a Single Copy**

Personal use is one type of fair use that permits individuals to make unlimited copies of works for personal use purposes, such as watching a movie at another time or listening to music on a different player. Despite this broad personal use right historically enjoyed by

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<sup>41</sup> *Sony v. Universal City Studios* (aka "Betamax case") 464 US 417 (1984) available at <http://www.virtualrecordings.com/betamax.htm>

US citizens, Article 1 of the FTAA Treaty copyright section attempts to narrowly define “personal use” as:

“Reproduction or other use of the work of another person in a single copy, exclusively for an individual’s own purposes, in cases such as research and personal entertainment.”

Personal use has never been hemmed in by a definition nor limited to only a single copy in US copyright law. And no legal precedent or justification is provided by treaty drafters for the proposed narrowing of consumer “personal use” rights to a single copy. Nor is an explanation given for the need to contrive any definition of personal use.

The suggested FTAA definition would make illegal many commonly engaged in, but lawful fair use activities. For example it would forbid making a personal use copy of archives or other back-up copies of one’s music or video collections, even after the originals are lost. It would also make illegal making a “mix-tape” of favorite songs to give to that special someone, since that copy is not for the individual’s own purposes. Nor could a husband and wife (or other family member) both copy music from their shared home entertainment system to play in their own individual car stereo systems or portable MP3 players under FTAA’s limited definition of personal use, since more than one single copy is made of a song and more than one individual uses the music.

FTAA’s proposed definition only mentions personal use applying to cases such as research and personal entertainment. Section 107 of the US Copyright Act also lists activities such as copying for purposes of criticism, commentary, news reporting, teaching, and scholarship as presumptively permitted fair uses, but these are not provided for in either of the FTAA’s proposed definitions.

FTAA’s flagrant attempt to restrict consumers’ fair use and personal use rights without justification and then impose those restrictions on half of the world should be rejected in its entirety. Traditional fair use rights are designed to be broad and open-ended, and any attempt to box them in with such narrow definitions will chill freedom of expression and stifle innovation throughout the hemisphere. In order to maintain any traditional balance between copyright restrictions and freedom of expression, the proposed definitions for fair use and personal use must be completely deleted from the FTAA Treaty.

#### **4. Requires Countries to Increase the Length of Copyright Protection**

There are two possible clauses under consideration for inclusion in the FTAA copyright agreement that would standardize the length of the term for copyright protection in signatory countries. The first possible clause for Article 10.1<sup>42</sup> applies the internationally

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<sup>42</sup> First option: [10.1. With respect to the term of protection, the provisions of the Berne Convention shall be applicable.]

recognized Berne Convention standard of the “life of the author + 50 years” as the appropriate term for copyright protection.<sup>43</sup>

The second possible Article 10.1 clause<sup>44</sup> would require all countries to adhere to “no less than” the new US term of “life of the author + 70 years” for exclusive expropriation rights over a work. This means all other countries in the hemisphere would have to amend their domestic copyright laws and increase the length of the term of protection to, at a minimum, “the life of the author + 70 years,” the new US standard.

This would send money and other resources flowing out of developing nations and into the coffers of US entertainment giants such as Disney, since developing nations are overwhelmingly importers of intellectual property; and licenses will have to be obtained for at least an additional 20 years in order to use works that would otherwise be in the public domain for all of society to use and freely benefit from.

It makes little sense for the FTAA Treaty to force the other 33 countries to increase their term for copyright protection, especially since the Public Domain Enhancement Act<sup>45</sup> is currently pending before US Congress that would repeal the 1997 Sonny Bono Copyright Term Extension Act. The Bono Act increased the term of copyright protection in the US from 50 to 70 years after the author’s life (generally). And while the US Supreme Court upheld a court challenge to the Bono Act in 2002, the Court criticized Congress’ wisdom in granting the increase since no showing was made that the additional 20 years of protection provides any social benefit.<sup>46</sup>

## 5. Expands Scope of Copyright to Permit Copyrighting of Facts and Data

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<sup>43</sup> WIPO Berne Convention on Copyright, available at <http://www.wipo.org/treaties/ip/berne/> Article 7.1 “(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death. ...”

<sup>44</sup> Second option: [10.1. Each Party shall provide that:

- a) where the term of protection of a work (including a photographic work), performance or is to 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;
- b) where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated on a basis other than the life of a natural person, the term shall 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.]

<sup>45</sup> H.R. 2601, available at <http://www.eldred.cc/eablog/TheBill.pdf>

<sup>46</sup> *Eldred v. Ashcroft* 239 F.3d 372 (2003), available at <http://www.supremecourtus.gov/opinions/02pdf/01-618.pdf> see also dissenting opinions at <http://supct.law.cornell.edu/supct/html/01-618.ZS.html>

Article 2.1 of the FTAA Treaty's proposed copyright section would dramatically expand the scope of the subject matter that is eligible for copyright protection in the US.

[2.1. The following are not subject to copyright:

- a) ideas, regulatory procedures, methods, systems, mathematical designs or concepts per se;
- b) outlines, plans or rules for conducting mental processes, games or business,
- c) blank forms to be completed with any type of information, scientific or otherwise, and instructions thereon;
- d) texts of treaties or conventions, laws, decrees, regulations, judicial decisions, and other official records;
- e) information for everyday use such as calendars, diaries, official land registers, or diaries, and keys;
- f) individual names and title;
- g) industrial or commercial exploitation of the ideas in the work].

By defining a finite list of items that are *not* subject to copyright protection, Article 2.1 permits the copyrighting of everything not on the narrow list. A vast universe of technical and scientific data would be roped off from the public under this definition. Large classes of facts such as compilations would also fall into this broad category of works subject to copyright protection.

FTAA's expansive "reverse-definition" would grant large media companies control over data and information without meeting the usual threshold requirement for copyright protection in the US of originality or indicia of authorship. The US Supreme Court flatly rejected such an expansive scope for the subject matter of copyright in *Feist Publications v. Rural Tel. Service*: "To qualify for copyright protection, a work must be original to the author. ... The originality requirement is constitutionally mandated for all works."<sup>47</sup> If included in the final treaty, Article 2.1 would force all countries in the Americas to expand the scope of copyright protection beyond what the US Constitution permits.

Copyright extremists should not be permitted to use the "free trade" agreement as an opportunity to unconstitutionally expand the scope of protectable subject matter beyond its current bounds in such a sweeping fashion. Copyright's scope must not be so expansive so as to stifle the free exchange of ideas and information as proposed by Article 2.1. This section must be rejected if copyright incentives are to serve as an "engine of free expression," rather than a roadblock to progress and innovation on the information superhighway.

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<sup>47</sup> *Feist Publications v. Rural Tel. Service*, 499 US 340 (1991), available at <http://laws.findlaw.com/us/499/340.html>

## **6. Beefed-Up Border Measures Sacrifice Consumer Privacy and Due Process Rights**

Article 5 of the enforcement section of the FTAA intellectual property chapter expands border measures to give customs authorities power to inspect and hold property that is evidenced to be infringing. It also permits customs agents to violate the privacy and due process rights of people passing through customs who the agents suspect of infringement and it grants Hollywood special assistance and privileges.

### **a) Customs Agents to Turn Over Personal Information to Rightsholders**

Article 5.5 requires FTAA countries to grant customs officials the authority to inform a right holder of the names and addresses of people importing goods that they have determined to be infringing.

[5.5. Where the competent authorities have made a determination that goods are counterfeit or pirated, a Party shall grant the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee, and of the quantity of the goods in question.]

Since no definition is provided for “competent authority,” presumably any border patrol agent or customs official would be empowered to turn over personal information to rightsholders under Article 5.5. The discretion of a judge to determine if a person’s liberty may be invaded and her personal information sent to prosecutors is unaccounted for FTAA’s proposal to Article 5.5.

Without a *judicial* determination, turning over personal information to rightsholders violates the privacy and due process rights of the suspected infringer. Border patrol agents and customs officials are not directly accountable to the public to the extent that judges are. Nor are they equipped to make legal determinations about whether an item violates intellectual property law.

Such “special treatment” granted to the entertainment industry under this agreement to have customs and law enforcement agencies at their disposal to police and enforce their claimed rights. Opportunity for unprecedented preferential treatment of a single industry to coddle lazy dying companies at the public’s expense.

### **b) Border Patrol and Customs Agents Deputized as ‘Copyright Cops’**

Article 5.6 of the enforcement section would grant border patrol and customs agents the power to initiate legal proceedings for infringement, without needing to receive a complaint from the right holder or other injured private party.

[5.6. [According to its national legislation] each Party shall provide that the competent authorities may initiate border measures *ex officio*, without the need for a formal complaint from a private party or right holder.]

A requirement that an injured party must file a complaint before the government prosecutes an infringement ensures that the rightsholder retains an incentive to protect his own interests. By not requiring a complaint from the rightsholder, the burden is shifted to the public to protect the rightsholders' interests, and the costs are shifted to the taxpayers.

## **7. Expanded Civil Provisions Give Rightsholders Access to Local Courts**

Article 2 of the enforcement section in FTAA's intellectual property chapter would expand civil judicial procedures and penalties for infringement throughout the hemisphere. It will also shift the burden and cost over to the public of protecting the private interests of the entertainment companies.

### **a) Article 2.1 Requires Tax-Payers to Subsidize Private Interests**

Article 2.1 ensures public courts are available to rightsholders to file civil proceedings to enforce their rights under intellectual property law.

[2.1. Each Party shall make available to right holders civil judicial [and administrative] procedures for the enforcement of any intellectual property right provided in this Chapter. ...]"

The Recording Industry Association of America (RIAA) has filed thousands of lawsuits against individuals in the US for using file-sharing software to trade music over the Internet (including cases against a 12-year-old girl who lives in New York public housing and a 71-year-old grandfather). This provision would ensure the foreign courts are open to them to file lawsuits against citizens in other countries as well.

Article 2.1 ensures that American tax-payers will largely subsidize the enforcement of the rights of a select few corporations. It forces countries to spend additional public resources to protect the private interests of foreign media giants.

### **b) Article 2.2 Enforces Anti-Circumvention Provisions**

Article 2.2 gives rightsholders use of the courts for the enforcement of any intellectual property right including the unauthorized circumvention of technological restrictions.<sup>48</sup>

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<sup>48</sup> [2.2. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Chapter. Such rights include the prohibition against the unauthorized circumvention of technological measures and harm to the integrity of rights

It provides for provisional measures such as temporary restraining orders and preliminary injunctions and for awarding money damages to compensate the rightsholder for infringements.

**c) Article 2.3 Requires Innocent Copyright Infringers to Pay Money to Rightsholders**

Sub-heading (d) of the first proposed Article 2.3 requires infringers to pay money to rightsholders to compensate for injuries suffered in cases where the infringer had reasonable grounds to know of the infringement.<sup>49</sup> At least with respect to copyrighted works and sound recordings, judges may order a recovery of any profits or statutory damages, or both, *even where the infringer did not know or had no reasonable grounds to know that he or she was infringing*, under this clause.<sup>50</sup>

**d) Article 2.6 Permits the Destruction of Property**

Article 2.6 of the enforcement section provides for the destruction of infringing goods and related materials and implements predominantly used to create infringing goods. In the first option to Article 2.6, judges are authorized to order their destruction. The second option to Article 2.6 requires judges to destroy the property at the rightsholder's request, except in exceptional cases.

**e) Jail For Failing to Turn Over Another's Personal Information Under Article 2.10**

Article 2.10 would empower judges to order infringers to identify third-parties who are involved in any infringement and to turn this personal information over to the rightsholder.<sup>51</sup> Another proposed clause to Article 2.10 allows judges to fine or imprison an infringer who fails to turn over a third-party's personal information.

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management information set forth in Article 21 (Section on Copyright and Related Rights) of this Chapter. Redress for violations of these prohibitions shall include all of the relief required to be granted for copyright infringement under this Article, including, without limitation, the right to provisional measures and adequate compensation for the harm caused to the author or right holder by such unauthorized circumvention or harm to the integrity of rights management information.]

<sup>49</sup> First option for Article 2.3 in Enforcement Section of FTAA Intellectual Property Chapter:  
[2.3. Each Party shall provide that its judicial authorities shall have the authority:

...  
d) to order the infringer of an intellectual property right to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of the infringement where the infringer knew [or had reasonable grounds to know] that it was engaged in an infringing activity;  
...”

<sup>50</sup> “ ... With respect to the authority referred to in subparagraph d), each Party may, at least with respect to copyrighted works and sound recordings, authorize the judicial authorities to order recovery of profits or payment of pre-established damages, or both, even where the infringer did not know or had no reasonable grounds to know that it was engaged in an infringing activity.]”

<sup>51</sup> Proposed Article 2.10 of Enforcement Section in FTAA Intellectual Property Chapter:

## **8. Requires Countries to Send Internet Domain Name Disputes to ICANN**

Article 13 of the trademarks section in the FTAA intellectual property chapter deals with the administration of Internet domain names and the adjudication of domain name disputes, usually based on trademark claims.

The first option proposed for Article 13.1 of the trademarks section would require all countries to send domain name disputes to the Internet Corporation for Assigned Names and Numbers (ICANN) for adjudication.

[13.1. Each Party shall participate in the Government Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) to promote appropriate country code Top Level Domain (ccTLD) administration and delegation practices and appropriate contractual relationships for the administration of the ccTLDs in the Hemisphere. Each Party shall have its domestic Network Information Centers (NICs) participate in the ICANN Uniform Dispute Resolution Procedure (UDRP) to address the problem of cyber-piracy of trademarks.]

The first option for Article 13.1 threatens to set a dangerous legal precedent by removing the administration of Internet domain names, a crucial public service, away from public entity. ICANN is a private corporation that is unaccountable to the public and thus inappropriate to be adjudicating issues of freedom of expression and the scope and breadth of intellectual property rights. The first proposed Article 13.1 would grant an organization notorious for favoring large intellectual property claimants the power to make global public law and set global public policy. Individuals must retain the right to seek redress from a public court for proper adjudication of rights to use Internet domain names. Further, intellectual property rights are only one among many legitimate policy considerations dealing with the proper adjudication and administration of Internet domain names and should not be given dominance and jurisdiction over the matter.

The second proposed Article 13.1 would provide for the adequate administration of domain names without favoring an unaccountable private corporation:

[13.1. Each Party shall make efforts, to the extent possible, to promote an adequate administration of domain names.]

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[2.10. In civil judicial proceedings, the judicial authorities shall have the authority to order the infringer to identify third parties that are involved in any violation of the intellectual property right and to provide this information to the right holder. [Judicial authorities shall have the authority to fine or imprison in appropriate cases persons who fail to abide by orders issued by such authorities.]]

### **III. Conclusion: Delete Entire FTAA Chapter on Intellectual Property Rights to Protect Freedom and Free Trade**

The draft FTAA intellectual property chapter reads like a “wish list” from RIAA, MPAA, and Microsoft lobbyists, with provisions that vastly expand both criminal and civil powers against infringers throughout the Americas.

- ~ It threatens to send millions of Internet music swappers to prison.
- ~ It undermines fundamental freedom of expression rights guaranteed by the UN Declaration of Human Rights and the First Amendment to the US Constitution.
- ~ It would make it illegal for people to bypass the controls on their own digital media collections.
- ~ It contains definitions that would substantially restrict traditional fair use and personal use rights.
- ~ It threatens to outlaw critical scientific research and technical information.
- ~ It threatens to force 33 other countries to adopt the new US standard for the term of copyright protection, 70 years after the life of the author, even though the internationally recognized standard is 50 years after the life of the author.
- ~ It permits the copyrighting of facts, data, and other information for the exclusive ownership and control by a few corporate media giants.
- ~ It allows law enforcement and border patrol agents to prosecute infringements without the need for a complaint filed by an injured party.
- ~ It would also force every citizen in the Americas to send Internet domain name legal disputes to a private corporation that is unaccountable to the public or resolution.
- ~ It ignores the privacy and due process rights of suspected infringers.
- ~ It threatens to expand courts’ power to seize and destroy personal property that is suspected of being connected to an infringement.
- ~ It forces infringers to turn over personal information about third parties or be sent to prison, no matter how small or insignificant of an infringement.

On every topic proposed to the chapter, the draft FTAA treaty attempts to ratchet up the rights of corporate entertainment giants and law enforcement to control individual behavior with digital media. Sacrificed by the treaty's excessive provisions are the individual liberties and consumer fair use rights of all 800 million citizens in the Americas. Also lost are innovation and competition as over-reaching intellectual property laws prevent the creation of software and devices that benefit consumers and artists. National sovereignty is also forfeited as countries lose the ability to decide intellectual property policy matters domestically. Instead, fundamental public policy decisions are dictated to countries by un-elected foreign treaty negotiators.

FTAA's chapter on intellectual property rights is overloaded with numerous provisions that developing nations, most notably Brazil, are strongly opposed to. Late September 2003 trade talks in Trinidad revealed FTAA negotiators are still far apart on the issue of intellectual property rights.<sup>52</sup> In September 2002 over 10 million Brazilian citizens' signatures were collected on a petition to reject Brazil's entire participation in the FTAA process. Earlier this year, Brazil called for a complete revamping of the treaty that would send trade negotiations over intellectual property rights back to the World Trade Organization (WTO), where the US has less power to force developing nations to change their laws.

It comes as no surprise that developing countries want nothing of these provisions. The draft intellectual property rights chapter is so bloated and extreme that the best course of action is to delete the entire chapter from the final FTAA Treaty. Otherwise, the chapter would require substantial reform before it would even pass 'Constitutional muster' in the US.

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<sup>52</sup> "FTAA: US-Brazil Standoff Dims Prospects For Miami Ministerial" from Bridges, October 8, 2003, available at <http://www.ictsd.org/weekly/03-10-08/story4.htm>