

IP Justice Santo Domingo Statement – 28 January 2004

Why the Americas Should Resist Pressure to Adopt the FTAA's Intellectual Property Rights Chapter

Despite enormous pressure from the United States on countries to adopt the intellectual property rights chapter in the Free Trade Area of the Americas (FTAA) Treaty, nations must reject the chapter's dangerous provisions that threaten traditional civil liberties, endanger public health, undermine democracy and national sovereignty, and place a chokehold on competition and innovation.

It makes little sense to extend intellectual property monopolies in the context of a "free trade agreement", which should work toward eliminating trade barriers, not increasing them. The FTAA's IP chapter creates greater barriers to knowledge, information and technology, particularly for developing countries. The FTAA's IP chapter enables the building of a "new colonialism" designed for the information age that will only increase the concentration of wealth in the North at the expense of the economies in the South.

The FTAA's intellectual property rights chapter is bloated with new mandates to increase intellectual property holders' rights at the expense of traditional civil liberties such as freedom of expression and fair use rights.

"Anti-Circumvention" Laws that Threaten Freedom of Expression, Innovation, and Competition

The FTAA's draft intellectual property rights chapter contains broad anti-circumvention measures that restrict the public's private copying rights (fair use / fair dealing) and unfairly give copyright holders total control over the experience of music, movies, books and other types of intellectual property. Since the technological restrictions protected by anti-circumvention laws do no track the balance struck under copyright law, they circumvent the public's rights.

These anti-circumvention laws, similar to the controversial Digital Millennium Copyright Act (DMCA) in the United States, also create monopolies over devices and equipment that handle digital media. In the US, the DMCA's anti-circumvention laws have been used to prevent a competitor in the printer toner cartridge business from selling replacement toner cartridges (*Lexmark .v Static Control Components*). And they were used to sue a manufacturer of garage door openers for selling interoperable replacement garage door openers (*Chamberlain Group v. Skylink*). Hollywood's DVD cartel has even used the DMCA's anti-circumvention laws to sue 321 Studios for selling software that helps people make lawful backup copies of their DVD

movies. FTAA's IP chapter prevents industry in developing countries from competing on a level playing field with the US, instead giving entrenched companies an enormous advantage over small business and local industry in crucial technology sectors.

Stifling scientific research, these anti-circumvention laws have been used to stop numerous scientists and journalists from reporting truthful information about the weaknesses of technological restrictions. (Ex: Princeton student threatened by SunComm for revealing copy protection technology can be defeated by holding down a keyboard's 'shift key' in 2002; Prof. Felten's research team threatened by Recording Industry Association of America in 2001; *2600 Magazine* banned from publishing or hyper-linking to DeCSS computer code in 2000 under DMCA, etc.).

Both the DMCA and the FTAA propose anti-circumvention measures that exceed countries' obligations under the World Intellectual Property Organization (WIPO) to enact anti-circumvention laws. *WIPO does not require countries to outlaw circumvention in order to engage in a non-infringing use, nor does it require outlawing all tools that are necessary for consumers to exercise their lawful rights under copyright.*

A 2002 UK Commission on IP study warned developing countries away from passing extreme "DMCA-like" anti-circumvention laws.¹ And a UK Royal Society report from 2003 calls for a re-examination of the balances struck in international intellectual property regimes – particularly anti-circumvention laws.² A Canadian Heritage Study from 2002 also rejects the need for enacting anti-circumvention laws.³ Indeed, two bills are currently pending before the US Congress to amend the DMCA's anti-circumvention laws due to public outrage in the US over their impact on civil liberties, innovation, scientific research, and competition.⁴

Unconstitutional Copyright Protection for Facts, Reduction of Private Copying Rights

The FTAA's IP chapter would also require countries to enact laws creating copyright protection for facts, data, and other information. This provision conflicts with the US Constitution, which forbids copyright protection for facts and data and it violates existing international obligations such as Article 19 of the Universal Declaration of Human Rights, which guarantees freedom of expression. The IP chapter proposes to substantially limit traditional private copying rights, such as personal use, fair use, or fair dealing privileges without providing any justification.

¹ 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

² The UK Royal Society (April 2003) "Keeping science open: the effects of intellectual property policy on the conduct of science" available at <http://www.royalsoc.ac.uk/files/statfiles/document-221.pdf>

³ Read Part II of the Canadian Heritage Study available at http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/index_e.cfm

⁴ "Digital Media Consumers' Rights Act (DMCRA)" at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h107ih.txt.pdf and "Benefits Authors without Limiting Advancement of Net Consumer Expectations Act" (BALANCE) at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.1066>

Criminalizes Non-Commercial Infringement, Ignoring Democratic Will of Public

The proposed IP chapter would require revamping of most FTAA nations' political and legal structures dealing with intellectual property rights, triggering key changes to the Constitutions, laws and institutions throughout the Americas. However, the public will never be given the opportunity to openly debate and discuss the treaty's substance before it is finalized. Without the consent of the governed, intellectual property laws lack democratic legitimacy.

The IP Chapter's extreme provisions undermine democracy, national sovereignty and contradict the clear will of the public. For example, although millions of citizens in the Americas use P2P file-sharing software, the FTAA's IP chapter threatens to criminalize such non-commercial copying and jail millions of people for swapping music over the Internet. This will create an enormous burden on the Southern states and local governments to ensure Hollywood's maximum profits.

Endangers Public Health and Reduces Access to Medicine

The FTAA's IP chapter endangers public health by placing commercial interests above public health. The proposed IP chapter increases protection for large multi-national pharmaceutical companies and reduces the ability of countries to take necessary measures to protect public health. Its provisions on drug patents dangerously undermine the World Trade Organization's "Doha Agreement," which permits countries to over-ride drug patent laws when necessary to promote public health and provide necessary medicines. The proposal creates a new exclusive right on pharmaceutical test delay that delays the public's access to generic medicines even when no patent barriers are in place. The FTAA Treaty's IP chapter proposes to increase the term for patents beyond the 20 years required by international obligations such as TRIPS/WTO.

Exceeds Existing International WTO/TRIPS in Burdens and Obligations

The FTAA's IP chapter attempts to exceed all current international obligations under WTO/TRIPS for all types of intellectual property. It threatens to extend the term of copyright, patent, and trademark protections, and to expand the scope on what can be protected by intellectual property rights, while simultaneously eliminating traditional limitations and restrictions on those grants intended to promote the public interest.

The IP chapter dangerously threatens the ability of countries to provide their people with an education, schoolbooks, and accessible medicine. It would subject the Americas to the most stringent and burdensome regime for intellectual property rights in the world. Countries should avoid signing away their future and steer clear of the FTAA's IP chapter altogether.