Fast-Track Trade Authority and the Free Trade Agreements: Implications for Copyright Law

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Introduction

In 2002, Congress passed the *Bipartisan Trade Promotion Authority Act*,[1] which restored the presidential fast-track trade-promotion authority that had lapsed in 1994. Fast-track trade promotion authority is a means by which Congress delegates to the president a portion of its constitutional authority over international trade policy.[2] This paper reviews the development, scope, and application of fast-track trade-promotion authority, evaluates some of the copyright provisions in key Free Trade Agreements, and concludes that the process has been effectively captured by the information and entertainment industries.[3] There are numerous negative consequences that flow from the resulting policy environment. Not only is an expansionary copyright policy imposed on the trading partners of the U.S., but the domestic legislative process with respect to copyright legislation in the U.S. is itself short-circuited. This paper concludes that intellectual property issues should not come within the scope of the fast-track negotiating authority, that Congress should discontinue, or effectively limit, fast-track authority at the earliest opportunity; and in the short term, should reject the flawed agreements that will be submitted for its approval.

Following a general overview of the fast track provisions, the Free Trade Area of the Americas (FTAA), the U.S.–Central America Free Trade Agreement, and key bilateral agreements will be discussed. Two specific digital copyright provisions contained in these agreements, the issue of temporary copying as a reproduction, and the anti-circumvention rules will then be considered.

Fast-Track Trade Promotion Authority

This section will review some of the key provisions of the Act, including the legislative findings, the trade negotiating objectives pertaining to intellectual property and certain of its procedural aspects. The 2002 Act enumerates the trading objectives of the U.S., sets forth the procedures for the negotiation of trade agreements on a "fast-track" basis, and contains certain oversight and sunset provisions. Proponents often refer to trade promotion authority as a "partnership" between the executive branch and Congress. The United States Trade Representative (USTR) calls fast-track authority the "hallmark of America's bipartisan tradition in trade policy", and argues it "enhances the trade-related prerogatives of the legislative branch, while providing a structured and orderly process for the consideration of providentially-negotiated trade agreements".[4]

While proponents of the fast-track authorization argue that meaningful trade negotiations would not be feasible without the delegation of Congressional authority to the Executive branch, opponents maintain that Congress should not concede their constitutional authority to amend trade agreements.

The measure was the subject of intense lobbying on both sides, and the passage of the Act[5] culminated a highly tumultuous and contentious process[6] which pitted leading business establishments and trade associations[7] against a coalition of union, consumer, and anti-globalization activists.[8] In a highly controversial move, President Bush invoked national security in an effort to break the deadlock in the final days before passage,[9] and Congress incorporated this linkage between international trade and national security into the Act by making legislative findings that:

> The expansion of international trade is vital to the national security of the United States. Trade is critical to the economic growth and strength of the United States and to its leadership in the world. Stable trading relationships promote security and prosperity. Trade agreements today serve the same purposes that security pacts played during the Cold War, binding nations together through a series of mutual rights and obligations. Leadership by the United States in international trade fosters open markets, democracy, and peace throughout the world.[10]
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> The national security of the United States depends on its economic security, which in turn is founded upon a vibrant and growing industrial base. Trade expansion has been the engine of economic growth. Trade agreements maximize opportunities for the critical sectors and building blocks of the economy of the United States, such as information technology, telecommunications and other leading technologies, basic industries, capital equipment, medical equipment, services, agriculture, environmental technology, and intellectual property. Trade will create new opportunities for the

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> United States and preserve the unparalleled strength of the United States in economic, political, and military affairs. The United States, secured by expanding trade and economic opportunities, will meet the challenges of the twenty-first century.[11]

According to the CATO Institute's Brink Lindsey, the linkage between international trade agreements and national security considerations is fully justified.[12] But critics felt that raising the specter of national security was overreaching. Russell Mokhiber and Robert Weissman of CorpWatch argued that "[c]orporate interests and their proxies are looking to exploit the September 11 tragedy to advance a self-serving agenda that has nothing to do with national security and everything to do with corporate profits and dangerous ideologies".[13]

Under the Act, the scope of the president's fast-track authority is very broad. The negotiation of trade agreements on a fast-track basis is authorized whether or not trade barriers in the traditional sense of tariffs, import restrictions, or other border measures are present. Section 2103(b)(1)(A) authorizes the president to trigger the procedure whenever he determines that either:

> (i) one or more existing duties or any other import restriction [of any country] or any other barrier to, or other distortion of, international trade unduly burdens or restricts the foreign trade of the United States or adversely affects the United States economy,
>
> or
>
> (ii) the imposition of any such barrier or distortion is likely to result in such a burden, restriction, or effect, and that the purposes, policies, priorities, and objectives of this title will be promoted thereby.[14]

Under this broad authority, any sort of barrier or distortion can be used to justify the commencement of fast-track trade negotiations. Nor do the alleged barriers or distortions even have to be readily present; the likelihood of such effects is sufficient to justify the procedures. Intellectual property law is one of the areas that has been subsumed under the broad definition of trade barriers or distortions. Among the principal negotiating objectives recited in the Act, a section on intellectual property is contained in section 2102(b)(4). The section is not simply a general statement of intellectual property policy intended to provide a general guide for trade negotiators, rather, it is a thicket of specific provisions that appear designed to anticipate specific outcomes. These objectives include:

- ensuring the acceleration and full implementation of the WTO-TRIPS Agreement;[15]
- ensuring that trade agreements reflect the standard of protection similar to that found in United States law;[16]
- providing strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property;[17]
- preventing or eliminating discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights;[18]
- ensuring that standards of protection and enforcement keep pace with technological developments, and in particular ensuring that right holders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works;[19]
- providing strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms.[20]

These objectives guarantee that the outcome of fast-track negotiations, with respect to intellectual property, reflect the interests of rights-owners with little attention paid to the balances and trade-offs that have historically informed intellectual property policies. By entrenching these goals as a structural matter, Congress has ensured that right-holder groups will effectively capture the process from the outset. But the realization of these policy goals may, in many instances, have little to do with international trade, as it has been historically understood. While intellectual property law has traditionally operated on a territorial basis, and has been understood to be a particular exercise of national sovereignty based on the specific national conditions, the drive towards uniform international standards has eroded the significance of particular local conditions and has resulted in a convergence between international trade and international intellectual property laws. The agreements that are being negotiated under the fast-track provisions go well beyond the international intellectual property standards already contained in the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.[21] One of the recurring issues in the agreements is the increased pressure on developing countries to give up the use of options available to them under TRIPS.[22] In some instances, particular provisions also exceed the standards set in the recent World Intellectual Property Organization (WIPO) Copyright Treaty.[23] Two examples of the "TRIPS plus" and "WIPO plus"[24] features of these agreements will be highlighted later in this paper. It is also an oversimplification to assume that the particular copyright provisions are merely an attempt by the United States to raise the level of protection of its trading partners to levels existing under current U.S. law. In several instances, the provisions go beyond the level of protections in current U.S. law and may require legislative changes in the U.S. in order to accomplish full implementation. In addition, to the extent that current provisions of U.S. law are incorporated into the agreements, Congress may consider such international obligations as

an impediment to making otherwise appropriate changes to U.S. law.[25]

Under the Act, any trade agreement must be entered into prior to June 1, 2005,[26] or by June 1, 2007 if the authority is extended.[27] Since fast-track authority is an extraordinary grant of power to the executive branch, Congress has historically included sunset provisions in its fast-track legislation.[28]

FTAA

The ultimate goal of the current U.S. trade agenda is the conclusion of an agreement for the Free Trade Area of the Americas (FTAA) by January 2005. The U.S., Canada and Mexico are currently parties to the North American Free Trade Agreement (NAFTA) and it is the stated policy of the U.S. to extend this agreement to the entire Western Hemisphere (minus Cuba). The FTAA has been described as a "center-piece" of U.S. trade policy.[29]

The preparatory phase of the FTAA dates back to 1994 and the First Summit of the Americas held in Miami.[30] The Declaration of Principles from the First Summit resolved to immediately begin construction of the "Free Trade Area of the Americas, in which barriers to trade and investment will be progressively eliminated, to conclude the negotiations no later than 2005, and to agree that concrete progress toward the attainment of this objective will be made by the end of this century".[31]

There were four ministerial meetings during the preparatory phase of the process: June 1995 in Denver, Colorado;[32] March 1996 in Cartegena, Columbia;[33] May 1997 in Belo Horisonte, Brazil;[34] and March 1998 in San José, Costa Rica.[35] At the San José meeting, the Ministers set forth a structure and general principles under which negotiations would take place. The FTAA negotiations began in April 1998, at the Second Summit of the Americas in Santiago, Chile. At the fifth ministerial meeting, held in Toronto in November 1999, ministers instructed the several negotiating groups to prepare a draft text to be presented at the sixth ministerial meeting in Buenos Aires in April 2001.[36] In Buenos Aires, the ministers recommended adoption of January 2005 as a deadline for the completion of the FTAA process and a deadline of December 2005 for ratifications. While these deadlines were approved at the Third Summit of the Americas, held in Quebec City in April 2001,[37] the draft FTAA agreement was not made available to the public until July 2001. A Second Draft Agreement was released in November 2002.[38]

While the bracketed text in the publicly available Second Draft Agreement does not identify which country has proposed which provision, the Office of the United States Trade Representative has issued a summary of its positions on the Intellectual Property negotiations, beginning with a general statement of objectives:

> The U.S. proposal for the FTAA Chapter on intellectual property complements and adds to obligations that the United States and most FTAA countries have undertaken through the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to protect copyrights, patents, trade secrets, trademarks, and geographical indications and to ensure that they have adequate domestic enforcement procedures in place to protect those rights. The United States is already in compliance with the requirements of the U.S. proposal. FTAA countries will need to make adjustments to their intellectual property rights regime in order to comply.[39]

The public summary touches on specific areas only briefly, the copyright section states:

> In the area of copyright protection, we propose that FTAA countries become parties to the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty. The two copyright treaties establish important rules for the protection of copyrighted works in a digital network environment. For example, the treaties call for governments to: 1) ensure that authors, program writers, and composers have the exclusive right to make their works available online; 2) prohibit tampering with the technology designed to manage access to, and compensation for, music, programs, and literary works provided over the Internet; and 3) prohibit actions to circumvent technology intended to guard against copyright piracy. The U.S. proposal also serves to clarify these treaty obligations to ensure they will be implemented in a balanced manner that takes into account the interests of both copyright holders and the public.[40]

The copyright provisions contained in the intellectual property chapter in the Second Draft agreement has been criticized by a coalition of U.S. library associations, which argued that the "copyright provisions of the draft would serve to unduly extend intellectual property rights beyond what is available under the laws of the United States or what has been granted by other international agreements".[41] The library associations argued that unnecessary institutional duplication would lead to an unwarranted level of complexity and confusion, and that the discretion of individual states to determine their own copyright regime consistent with their obligations under Berne and TRIPS would be unduly constrained. Given the broad reach of the scope and enforcement mechanism of the TRIPS Agreement, the associations questioned whether there were any legitimate interests served by including intellectual property matters in the FTAA regime.[42]

CAFTA

In January 2002, the Bush Administration announced it would commence the process of negotiating a Free Trade Agreement with the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The negotiations, which began in January 2003, are scheduled for completion by the end of the year.[43] One of the underpinnings of the strategy of "progressive liberalization" is that trade talks should proceed in multiple directions on multiple fronts.[44]

Critics and proponents alike concur that the successful resolution of Central American Free Trade Agreement (CAFTA) is an important prerequisite to the conclusion of the broader FTAA. According to one critic of free trade agreements, "a major stumbling block to the creation of FTAA is the many social struggles, left political parties, and strong unions in the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua". For this reason, "(CAFTA) is a vital step to expanding NAFTA [because] without the endorsement of Central American business leaders and government officials (backed by their respective militaries), FTAA will be next to impossible".[45] This linkage is readily conceded by the Bush Administration, which openly states that one of the purposes of the CAFTA negotiations is to create momentum towards the FTAA.[46]

Even though the negotiations are ongoing and draft text of specific provisions is not yet available, it is clear that the agreement will contain an intellectual property section with expansive copyright related provisions. According to the notification letter sent to the U.S. House of Representatives and Senate by the USTR,[47] the agreement will "[s]eek to establish standards to be applied in Central America that build on the foundations established in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) and other international intellectual property agreements, such as the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty and the Patent Cooperation Treaty".[48]

Bilateral Trade Agreements

Bilateral trade agreements have been concluded with Jordan, Chile and Singapore. The U.S.–Jordan Free Trade Agreement was signed on October 24, 2000 and entered into force on December 17, 2001.[49] The Jordan Agreement was very significant beyond its implications for Jordanian law, as it was intended to serve as a model for future agreements. An Oxfam study emphasizes how the Jordan FTA is an example of a broad model agreement containing provisions on trade in goods, in services, intellectual property rights, environment and labour, electronic commerce and government procurement. In contrast to the somewhat soft provisions on environment and labour (e.g., each Party "shall strive to ensure" that its labour standards are consistent with international norms[50]), the provisions on intellectual property are long and detailed.[51]

The agreements with Chile and Singapore are currently pending Congressional approval and implementation. Even though the commencement of negotiations for these agreements predated the passage of the *Trade Promotion Authority Act*, they are covered by its expedited procedures.[52]

The value of these bilateral trade agreements to the copyright industry is underscored by the comments of Jack Valenti of the Motion Picture Association of America (MPAA) applauding the conclusion of the Chilean negotiations:

> The U.S.–Chile Free Trade agreement represents a landmark achievement on market access for the filmed entertainment industry. … In stark contrast to some earlier trade agreements, this Agreement avoids the "cultural exceptions" approach, while demonstrating that a trade agreement has sufficient flexibility to take into account countries' cultural promotion interests. We are grateful to Ambassador Zoellick for his tireless efforts in negotiating this historical Agreement. He and his staff deserve the gratitude of all of us in the American intellectual property community. We are also encouraged by USTR's characterization of the copyright provisions as "groundbreaking" and "state of the art." We understand the Agreement addresses important issues from copyright term extension and the protection of digital works, to strong enforcement provisions.[53]

Nor should the overall strategic importance of the agreements with Chile and Singapore be underestimated, as their implications extend well beyond trade with these nations and the changes that will follow in Chilean and Singaporean laws if the agreements are implemented. According to the *2002 Annual Report on Trade Agreements*, "[t]he U.S.–Chile FTA is expected to spur progress on negotiations of the Free Trade Area of the Americas (FTAA, targeted for completion by 2005), as well as ongoing global trade negotiations".[54] The *2003 Overview of the President's Trade Policy Agenda* also speaks to the cumulative nature of the bilateral agreements in terms of providing a basis on which to negotiate future agreements.[55] The administration is explicit that it views each bilateral agreement as a model for the next.[56]

In April 2002, the Bush Administration announced it would pursue a free trade agreement with Morocco. The negotiations were commenced in January of 2003 with the goal of completion by the end of the year.[57] The announcement drew quick praise from the MPAA, whose members seek easier access to picturesque Moroccan settings.[58] On May 21, 2003, the Bush Administration announced it would commence negotiations towards a Free Trade Agreement with Bahrain.[59] According to the USTR press release, "[a] U.S.–Bahrain FTA could serve as a regional anchor for the Gulf facilitating greater economic integration and reforms, and leading toward the eventual goal of a Middle East Free Trade Area".[60] Other Free Trade Agreements have been proposed for Australia,[61] the South African Customs Union (SACU),[62] the five countries of the Central Africa Common Market,[63] Taiwan,[64] New Zealand,[65] South Korea,[66] the Philippines,[67] Turkey,[68] and Afghanistan.[69]

In March 2003, the formation of the Entertainment Industry Coalition for Free Trade (EIC)[70] was announced. The initial objective of the Coalition is to work towards the passage and implementation of the U.S.–Chile and U.S.–Singapore Free Trade Agreements,

which it also sees as providing baselines for the standards in future agreements.[71] Among those present at the March 13th Washington D.C. launch of the Coalition was U.S. Trade Representative Robert B. Zoellick, who stated that, "[h]aving the support of the entertainment industry for our recently completed free trade agreements with Chile and Singapore, which include state of the art intellectual property protections, will help us set new standards internationally".[72] Also in attendance was Rep. David Dreier (R-CA), Chair of the House Rules Committee, who pointed out that, "[a]s we continue the process of negotiating bilateral and multilateral trading rules, it is absolutely key to the continued success of the entertainment industry that we aggressively ensure strong global intellectual property protections".[73]

Besides the entertainment industry, there is strong support from the broader U.S. business community for the passage of the agreements. The U.S.–Chile Free Trade Coalition is a group of over 250 companies and associations working for the approval and implementation of the U.S.–Chile Free Trade Agreement by the 108th Congress.[74]

Specific Copyright Provisions in the Free Trade Agreements

Temporary Copying as a Reproduction

This section will review the content of the various free trade agreements concerning the question of whether temporary copying is included within the reproduction right. This question has been a contentious issue for several years, and it remains largely unresolved. The treatment of this particular issue in the various Free Trade Agreements is interesting not only because it is an unresolved issue of copyright in the digital environment, but also because it had been the subject of much disagreement at the 1996 WIPO Diplomatic Conference. Yet many free trade agreements contain provisions including temporary copying in the reproduction right as if the matter has been clearly resolved to the point of already being an international standard.

The inclusion of temporary copies within the reproduction right has been high on the wish list of the U.S. copyright industry for several years, but has met with strong opposition from librarians, researchers, user groups, common carriers, legal scholars, and others who have argued that such an expansion of the reproduction right would have substantial negative effects. The inclusion of temporary copies in the reproduction right was a central component of the digital copyright agenda of the Clinton Administration since the mid-1990s. The administration's *White Paper* took the position that temporary copying in Random Access Memory (RAM) was already a relevant event for purposes of triggering the reproduction right under 17 USC section 106, stating, "[i]t has long been clear under U.S. law that the placement of copyrighted material into a computer's memory is a reproduction of that material (because the work in memory then may be, in the law's terms, 'perceived, reproduced, or … communicated … with the aid of a machine or device')".[75] In support of this contention, the *White Paper* cited the case of *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993), cert. denied, 114 S. Ct. 671 (1994). But many commentators have criticized the report for taking the *MAI* holding out of context and failing to account for other authorities holding that a temporary copy in RAM is not a reproduction. Pamela Samuelson argued that:

> … [t]he white paper relies on an appellate court decision that treated the unlicensed loading of a computer program in RAM as an infringing reproduction. But it knowingly omits reference to the legislative history of the current copyright statute, in which Congress specifically stated that the temporary storage of a copyrighted work in a computer's memory should not be regarded as an infringing reproduction. Rather than seek legislative clarification on this issue, the white paper simply pretends that under existing law, browsing is an infringement, hoping thereby to avoid tough questions from senators and representatives whose constituents might be worried about granting copyright owners an exclusive right to control all readings of works in digital form.[76]

Samuelson's reference to legislative history pertains to the "fixation" requirement of the 1976 *Copyright Act*, which indicated that Congress did not consider such temporary versions to be fixed copies. The House Report accompanying the 1976 Act stated that "[T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer".[77]

The same sort of obfuscation of the issue is present today when the temporary storage in RAM is taken as a clear-cut implication of the reproduction right. In a submission to the USTR on the FTAA, the International Intellectual Property Alliance (IIPA) argued that the reproduction right should extend to temporary copies.[78] On its face, the request seems to ask simply for conformance to standards already enumerated in existing treaties. But the IIPA's assumption that temporary copies are already within the reproduction right under Berne, TRIPS and WIPO remains highly problematic.

The proposed U.S.–Singapore Agreement requires that "[e]ach party shall provide that authors, performers, and producers of phonograms and their successors in interest have the right to authorize or prohibit all reproductions, in any manner or form, permanent or temporary (including temporary storage in electronic form)".[79]

The language in the copyright section of the proposed U.S.–Chile Free Trade Agreement mirrors the provision in the Singapore Agreement, providing that "[e]ach party shall provide that authors of literary and artistic works have the right to authorize or prohibit all reproductions of their works, in any manner or form,

permanent or temporary (including temporary storage in electronic form)".[80]

This self-contained language goes beyond a similar provision in the earlier U.S.–Jordan Free Trade Agreement, which provided that "[e]ach Party shall provide that all reproductions, whether temporary or permanent, shall be deemed reproductions and subject to the reproduction right as envisaged in the provisions embodied in WCT Article 1(4) and the Agreed Statement thereto, and WPPT Articles 7 and 11 and the Agreed Statement thereto".[81]

In the Jordan Agreement, the scope of the inclusion of temporary copying within the reproduction right is limited to the extent it is so limited in the WIPO treaties. In this sense, although the text is highly suggestive of the conclusion that temporary copying *is* currently within the reproduction right; the text does not purport to be dispositive of the issue without reference to extrinsic text. In contrast, the Chile and Singapore texts dispense with the extrinsic references and include a self-contained statement that temporary copying IS within the reproduction right.

The Draft FTAA Section on Copyright and Related Rights,[82] contains the following alternative definitions of "reproduction":

> — [Reproduction: the realization, by any medium, of one or more copies of a work, phonogram, or of a sound or audiovisual fixation, either total or partial, *permanent or temporary*, on any type of material base, including storage by electronic media;]
>
> — [Reproduction: the fixation [, by any procedure,] of the work [or intellectual production,] in a [physical support or] medium that makes possible its communication [, including electronic storage, as well as the] [or the] making of [one or more] copies of a work [, directly or indirectly, *temporarily or permanently*, in whole or in part,] by any means [or process] [and in any form known or to be known].
>
> — [Reproduction includes any act designed to accomplish, in any manner or through any procedure, the material fixation of the work, or to obtain copies of all or part thereof, among other means, by printing, drawing, sound recording, photography, modeling, or through procedures using graphic or visual arts, as well as by mechanical, electronic, phonographic or audiovisual recording methods.] (emphasis added).[83]

The first two alternatives include temporary copies in the reproduction right without further limitation. While the text does not identify which country has submitted which bracketed proposals, the inclusion of bracketed alternatives indicates that the differences remain subject to negotiation. These disparate approaches to the reproduction right are also reflected in the bracketed alternatives to the section on the right of reproduction itself:

> [4.1. The author, or his successors in title where applicable, shall have the exclusive right to carry out, authorize or prohibit the reproduction of the work by any means or process.]
>
> [4.1. Each Party shall provide that authors, performers and producers of phonograms and their successors in interest have the right to authorize or prohibit all reproductions, in any manner or form, *permanent or temporary (including temporary storage in electronic form)*.]
>
> [4.1. Each Party shall grant the authors of literary and artistic works [and other holders of exclusive rights], the exclusive right of authorizing the reproduction of their works by any procedure and in any manner, including by digital means. Each Party may determine that the right of exclusivity of reproduction shall not be applicable when that reproduction is temporary and merely for the purpose of making the work perceptible on electronic media or when it is transitory or incidental, provided that it occurs during the course of use of the work duly authorized by the owner. It shall also be lawful to make a single copy of computer programs for security or backup purposes.][84]

While the first alternative is silent as to temporary copies, and best summarizes existing law, the second extends the reproduction right to temporary copies without any further limitation. It tracks the language of the Chile and Singapore agreements. The third alternative would leave parties with the discretion to apply an exception to the reproduction right where the temporary reproduction is either merely for the purpose of making the work perceptible on electronic media or where it is "transitory or incidental". The exceptions would apply only where the copying occurs during the course of a use of the work that has been authorized by the owner.[85] While the Draft FTAA text does not disclose which countries have proposed which bracketed provisions, the inclusion of the second alternative in the Chile and Singapore agreements suggests that it is the position favoured by the United States, in conformity with the wishes of the IIPA and other lobbyists.

Notwithstanding the suggestive language of the IIPA, that temporary copies *are* included as a reproduction under the Berne Convention, TRIPS and WIPO Treaties, the status of temporary copies is not so clear-cut, and has been highly contested. The Berne Convention[86] itself does not expressly recognize temporary copying as part of the reproduction right.[87] While the operative text of the WIPO Copyright Treaty[88] is silent on the question,[89] the Agreed Statement concerning Article 1(4) provides:

> The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.[90]

It is important to note that an earlier version of the draft Copyright Treaty contained such an express recognition of temporary copying. As originally proposed, Article 7(1) provided that "[t]he exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works, in any manner or form, includes direct

and indirect reproduction of their works, whether permanent or temporary".[91]

While Article 7(2) permitted individual countries to formulate exceptions to this right, an affirmative act of legislation would have been required. The provision met with strong opposition, as exemplified by the statement of the Association for Computing Machinery (ACM) emphasizing how the temporary copying right threatens the very nature of Internet browsing.[92] The library community also questioned the need for Article 7:

> We do not believe there is a need to deem all temporary copies to be copies and believe it will cause endless confusion, especially as limitation will be left in the hands of national governments. As it cannot be guaranteed that all nations will implement an exception to authorise temporary reproduction in the digital environment, there appears to be a contradiction to the purpose behind the accompanying notes [which] attempt to justify Article 7 by reasoning that the interpretation of the right of reproduction should be "in fair and reasonable harmony all over the world." The opposite is likely to be the case.[93]

Somewhere between the Jordan text and the Chile and Singapore versions, the not-so-subtle issue of the scope of the reproduction right has become lost, and we are now to read the Chile and Singapore texts as if temporary copying as a reproduction *is* the accepted international standard. If for no other reason, the Chile and Singapore agreements should be rejected because of the inclusion of the far-reaching provisions on the scope of the reproduction right in the digital environment.

Anti-Circumvention Measures

Article 11 of the WIPO Copyright Treaty requires that "Contracting Parties 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 under the Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law".[94] In implementing the Treaty through the 1998 *Digital Millennium Copyright Act* (DMCA),[95] Congress clearly exceeded the minimum requirements necessary for the U.S. to meet its obligations under the WIPO Treaty.[96] In addition to prohibiting direct acts of circumvention, the DMCA contained broad limitations on the manufacture and distribution of devices capable of circumventing technological measures that control access to protected works or that protect the rights of a copyright owner.[97] The subsequent case law arising under section 1201 demonstrates that the concerns of the opponents were not overstated,[98] and the anti-circumvention provisions have been widely criticized by commentators as over-reaching.[99]

Both the U.S.–Chile and U.S.–Singapore agreements contain strong versions of the anti-circumvention measures that are similar to the measure enacted by the United States.[100] The passage of the agreements would do more than impose the U.S. version of WIPO Article 11 on Chile and Singapore. It could impede any effort at reviewing and limiting the scope of the law in the U.S., a requirement that is mandated in the DMCA itself.[101] It could also constrain efforts now underway in the U.S. Congress to reform the DMCA by ameliorating some of its most unreasonable provisions.

For example, the *Digital Media Consumers' Rights Act of 2003* (DMCRA)[102] contains three provisions that would amend the current anti-circumvention rules. The first change expressly exempts from its anti-circumvention prohibitions any persons acting solely in furtherance of scientific research into technological protection measures.[103] The second change specifies that "it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work".[104] The third change adds language expressly providing that "it shall not be a violation of this title to manufacture, distribute, or make non-infringing use of a hardware or software product capable of enabling significant non-infringing use of a copyrighted work".[105]

In his remarks accompanying the introduction of the bill, Rep. Boucher stated that "[t]he [1998 DMCA] tilted the balance in our copyright laws too heavily in favor of the interests of copyright owners and undermined the longstanding fair use rights of information consumers, including research scientists, library patrons, and students at all education levels. With the DMCRA, we intend to restore the historical balance in our copyright law that has served our nation well in past years".[106] Boucher recalled that before the passage of the DMCA, its proponents assured Congress that the measure was not intended to limit fair-use rights while opponents warned that it would have harmful effects. He recounted some of the measures added to the final Bill in order to ameliorate some of the harmful effects, but concluded that:

> . . . [i]n the end, however, these changes were not enough to achieve the appropriate level of balance. In the end, the DMCA dramatically tilted the balance in the Copyright Act towards content protection and away from information availability. Given the breadth of the law and its application so far, the fair use rights of the public at large clearly are at risk.[107]

Boucher concluded his remarks by stressing that:

> . . . for over 150 years, the fair use doctrine has helped stimulate broad advances in scientific inquiry and in education, and has advanced broad societal goals in many other ways. We need to return to first principles. We need to achieve the balance that should be at the heart of our efforts to promote the interests of copyright owners while respecting the rights of information consumers. The DMCRA of 2003 will restore that balance.[108]

Another Bill pending in the 108th Congress, the *Benefit Authors without Limiting Advancement or Net Consumer Expectations Act* (known as the BALANCE Act)[109] contains explicit findings that the scope of the anti-circumvention rules of the DMCA needs to be

reconsidered.[110] The BALANCE Act would permit circumvention of copyright encryption technology if it is necessary to enable a non-infringing use and the copyright owner fails to make publicly available the necessary means for circumvention, without additional cost or burden to a person who has lawfully obtained a copy or phonorecord of a work, or lawfully received a transmission of it.[111]

There is clearly a growing recognition in the United States that the anti-circumvention provisions of the DMCA were over-reaching and that their scope needs to be revisited. Yet under the authority of the anti-circumvention provisions of the Chile and Singapore agreements, such attempts to revisit the scope of the provisions could well be derailed as being inconsistent with the international trade obligations of the United States.[112]

Conclusion: The Endless Ratchet

As Peter Drahos has observed, "[b]ilateral intellectual property and investment agreements are part of a ratcheting process that is seeing intellectual property norms globalise at a remarkable rate",[113] adding that "[f]or the time being at least there appears to be no end in sight to the use being made of this global IP ratchet".[114]

The Office of the USTR has utilized its fast-track authority in a manner that exceeds even the most liberal interpretation of legitimate trade issues. They have become, for all practical purposes, the negotiating arm of the U.S. entertainment and information industries.[115] In doing so, they threaten to short-circuit the democratic legislative process with respect to intellectual property legislation as part of an ongoing effort to ratchet-up existing levels of protection both in the U.S. and on an international basis. In addition to unduly limiting the options of future U.S. policymakers with respect to amendments to intellectual property legislation, the U.S. trade agenda has a corrosive effect on the autonomy and sovereignty of its trading partners who are forced to conform their national laws to the standards sought by the U.S. entertainment and information industries.

The solution to the problem of the endless ratchet can be found at several levels. In the international arena, it is necessary for developing countries to reject pressures from the U.S. to agree to intellectual property standards in excess of their already existing obligations under TRIPS. Peter Drahos and John Braithwaite make the suggestion that:

> [D]eveloping countries should consider forming a veto coalition against further ratcheting up of intellectual property standards. The alliance between NGOs and developing countries on the access to medicines issue and the fact that this alliance has managed to obtain the *Declaration on the TRIPS Agreement and Public Health* at the WTO Ministerial Conference in Doha in November 2001 suggests that this coalition is a realistic possibility. The position of such a veto coalition should be converting the Council on TRIPS from a body that secures a platform to one that polices a ceiling. This bold new agenda for the Council on TRIPS would be standstill and rollback of intellectual property standards in the interests of reducing distortions and increasing competition in the world economy. If developing countries cannot forge a unified veto coalition against further ratcheting up of intellectual property standards, they can be assured that they will be picked off one by one by the growing wave of US bilaterals on both intellectual property and investment more broadly.[116]

In the United States, increased pressure needs to be brought to bear on the Congress by those groups that have been resisting domestic copyright expansion over the past decade, including the library, research, consumer, and educational communities. In the short term, the U.S. Congress should reject the U.S.–Chile and U.S.–Singapore Free Trade Agreements. Since the fast-track provisions preclude any possibility of Congressional amendment, the only reasonable option is for Congress to reject the agreements in whole. In the longer term, Congress should not extend fast-track authorization beyond the current expiration date of 2005. At the very least, they should remove intellectual property matters from the scope of authority given to the executive branch. International intellectual property standards should be decoupled from ongoing trade negotiations and should be left to the appropriate multilateral bodies that are already in place. The Canadian government has made this point, as evidenced by their position on the inclusion of intellectual property provisions in the FTAA:

> Canada has not yet tabled any proposals on intellectual property (IP) within the Free Trade Area of the Americas (FTAA) negotiations. Canada's immediate priority is to ensure that the current international IP rules are fully implemented, rather than to seek an extension on existing IP rights protection.
>
> The World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) establishes comprehensive global standards for IP protection largely based on several widely accepted and well-established treaties regarding IP.[117]

In this regard, the U.S. would do well to emulate the example of the Canadian government.

Appendix A

U.S.–Chile Free Trade Agreement

Article 17.7(5)

In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, and producers of phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances and phonograms, protected by copyright and related rights:

(a) each Party shall provide that any person who knowingly circumvents without authorization of the right holder or law consistent with this Agreement any effective technological measure that controls access to a protected work, performance, or phono-

gram shall be civilly liable and, in appropriate circumstances, shall be criminally liable, or said conduct shall be considered an aggravating circumstance of another offense. No Party is required to impose civil or criminal liability for a person who circumvents any effective technological measure that protects any of the rights of copyright or related rights in a protected work, but does not control access to such work.

(b) each Party shall also provide administrative or civil measures, and, where the conduct is willful and for prohibited commercial purposes, criminal measures with regard to the manufacture, import, distribution, sale, or rental of devices, products, or components or the provision of services which:

(i) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure, or

(ii) do not have a 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 measures.

[(b) cont'd] Each Party shall ensure that due account is given, *inter alia*, to the scientific or educational purpose of the conduct of the defendant in applying criminal measures under any provisions implementing this subparagraph. A Party may exempt from criminal liability, and if carried out in good faith without knowledge that the conduct is prohibited, from civil liability, acts prohibited under this subparagraph that are carried out in connection with a nonprofit library, archive or educational institution.

(c) Each Party shall ensure that nothing in subparagraphs (a) and (b) affects rights, remedies, limitations, or defenses with respect to copyright or related rights infringement.

(d) Each Party shall confine limitations and exceptions to measures implementing subparagraphs (a) and (b) to certain special cases that do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures. In particular, each Party may establish exemptions and limitations to address the following situations and activities in accordance with subparagraph (e):

(i) when an actual or likely adverse effect on noninfringing uses with respect to a particular class of works or exceptions or limitation to copyright or related rights with respect to a class of users is demonstrated or recognized through a legislative or administrative proceeding established by law, provided that any limitation or exception adopted in reliance upon this subparagraph (d)(i) shall have effect for a period of not more than three years from the date of conclusion of such proceeding;

(ii) noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to that person, for the sole purpose of achieving interoperability of an independently created computer program with other programs;

(iii) noninfringing good faith activities, carried out by a researcher who has lawfully obtained a copy, performance, or display of a work, and who has made a reasonable attempt to obtain authorization for such activities, to the extent necessary for the sole purpose of identifying and analyzing flaws and vulnerabilities of encryption technologies;

(iv) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that does not itself violate any measures implementing subparagraphs (a) and (b);

(v) noninfringing good faith activities that are authorized by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;

(vi) noninfringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;

(vii) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, or similar government activities; and

(viii) access by a nonprofit library, archive, or educational institution to a work not otherwise available to it, for the sole purpose of making acquisition decisions.

(e) Each Party may apply the exceptions and limitations for the situations and activities set forth in subparagraph (d) as follows:

(i) any measure implementing subparagraph (a) may be subject to the exceptions and limitations with respect to each situation and activity set forth in subparagraph (d).

(ii) any measure implementing subparagraph (b), as it applies to effective technological measures that control access to a work, may be subject to exceptions and limitations with respect to the activities set forth in subparagraphs (d)(ii), (iii), (iv), (v), and (vii).

(iii) any measure implementing subparagraph (b), as it applies to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to the activities set forth in subparagraph (d)(ii) and (vii).

(iv) Effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to a work, performance, phonogram, or any other protected material, or that protects any copyright or any rights related to copyright, and cannot, in the usual case, be circumvented accidentally.

Source: Online: USTR
http://www.ustr.gov/new/fta/Chile/text/17text.pdf.

Appendix B

U.S.–Singapore Free Trade Agreement

Article 16.4(7)

(a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, producers of phonograms, and their successors in interest use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

(i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter; or

(ii) 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:

(A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure, or

(B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or

(C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;

[(ii) cont'd] shall be liable and subject to the remedies provided for in Article 16.9.5. Each Party shall provide that any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, that is found to have engaged willfully and for purposes of commercial advantage or private financial gain in such activities shall be guilty of a criminal offense.

(b) For purposes of this paragraph, effective technological measure means 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.

(c) Paragraph 7(a) obligates each Party to prohibit circumvention of effective technological measures and does not obligate a Party to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure. The absence of a requirement to respond affirmatively shall not constitute a defense to a claim of violation of that Party's measures implementing paragraph 7(a).

(d) Each Party shall provide that a violation of the law implementing this paragraph is independent of any infringement that might occur under the Party's law on copyright and related rights.

(e) Each Party shall confine exceptions to the prohibition referred to in paragraph 7(a)(ii) on technology, products, services, or devices that circumvent effective technological measures that control access to, and, in the case of clause (i) below, that protect any of the exclusive rights of copyright or related rights in a protected work, to the following activities, provided that they do not impair the adequacy of legal protection or the effectiveness of legal remedies that the Party provides against the circumvention of effective technological measures:

(i) noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in such activity, for the sole purpose of achieving interoperability of an independently created computer program with other programs;

(ii) noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, performance, or display of a work, and who has made a good faith effort to obtain authorization for such activities, to the extent necessary for the sole purpose of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information;

(iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device provided that such technology, product, service or device itself is not prohibited under the measures implementing paragraph 7(a)(ii); and

(iv) noninfringing good faith activities that are authorized by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network.

(f) Each Party shall confine exceptions to the prohibited conduct referred to in paragraph 7(a)(i) to the activities listed in paragraph 7(e) and the following activities, provided that such exceptions do not impair the adequacy of legal protection or the effectiveness of legal remedies the Party provides against the circumvention of effective technological measures:

(i) access by a nonprofit library, archive, or educational institution to a work not otherwise available to it, for the sole purpose of making acquisition decisions;

(ii) noninfringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work; and

(iii) noninfringing uses of a particular class of works when an actual or likely adverse impact on such noninfringing uses with respect to such particular class of works is credibly demonstrated in a legislative or administrative proceeding, provided that any exception adopted in reliance on this clause shall have effect for a period of not more than four years from the date of conclusion of such proceeding.

(g) Each Party may also provide exceptions to the prohibited conduct referred to in paragraph 7(a) for lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, national defense, essential security, or similar government activities.

Source: Online: USTR http://www.ustr.gov/new/fta/Singapore/final/text%20final.PDF.

Notes:

[1] Pub. L. No. 107–210, Title XXI, (Title XXI contained sections 2101–2113, codified at 19 USC 3801, *et seq.*).

[2] Article I, Section 8 of the U.S. Constitution grants to Congress the power "to lay and collect taxes, duties, imposts and excises … [and] to regulate commerce with foreign nations …". The modern equivalent of fast-track authority was first granted to President Ford in 1974 and had since been granted to each successive president. President Clinton's fast-track authority expired in 1994, and an effort to renew it failed in 1997.

[3] This conclusion is not surprising since section 2102(b)(4) of the Act itself sets forth the particular intellectual property related policies that the Office of the United States Trade Representative (USTR) is bound to pursue. See *infra* notes 14 through 19.

[4] U.S., Office of USTR, *Trade Promotion Authority: An Overview* (2001), online: USTR Resources, http://www.ustr.gov/new/2001-12-03-tpa-overview.htm.

[5] The final vote in the House was 215–212 (Roll Call 370, July 27, 2002). The vote in the Senate was 64–34. (Roll Call 207, August 1, 2002). In December 2001, an earlier version of the measure passed the House by a vote of 215-214, but since the Senate passed a measure with different language, the matter was referred to a Conference Committee. The final votes approved the Conference Report (H.R. Conf. Rep. No. 107-624, Conference Report to Accompany U.S., Bill H.R. 3009).

[6] One commentator likened the first House vote to "a Jerry Springer production". Alan Tonelson, "What the Fast Track Vote Really Means," *TradeAlert.org* (December 13, 2001), online: Trade Alert, http://www.tradealert.org/view_art.asp?Prod_ID=52.

[7] After the vote, the U.S. Chamber of Commerce stated, "[the] approval was a huge victory for the U.S. Chamber. … Since TPA expired in 1994, the United States has sat helplessly on the sidelines as other countries have been busy negotiating trade agreements that place American corporations, small businesses, and farmers at a competitive disadvantage. Restoring TPA puts American businesses, workers, and consumers back in the game of international trade. The U.S. Chamber held more than 2,000 congressional meetings — both on Capitol Hill and in congressional districts — and helped organize more than 500 trade events with state and local elected officials and businesses. The U.S. Chamber also spearheaded an aggressive national media campaign and distributed publications and promotional materials to millions of U.S. Chamber members in support of TPA". See online: Capital Advantage, http://capwiz.com/chamber/issues/votes/?votenum=207&chamber=S&congress=1072.

[8] The measure was strongly opposed by the AFL-CIO, Public Citizen and other anti-globalization and trade watch groups. After the House vote, AFL-CIO President John Sweeney stated, "The U.S. House of Representatives showed a disturbing disregard for America's working men and women this morning when it bowed to corporate pressure and passed the Fast Track trade legislation, a decision which will cost millions of family-supporting jobs at a time when America's workers are already struggling in the wake of corporate wrong-doing and greed". AFL-CIO Press Release (July 27, 2002), Statement by AFL-CIO President John J. Sweeney on Passage of Fast Track Trade Legislation in the U.S. House of Representatives, online: AFL-CIO, http://www.aflcio.org/mediacenter/prsptm/pr07272002.cfm. After the final House vote, Lori Wallach, the Director Public Citizen's Global Trade Watch observed, "This travesty of a vote will be remembered as the Midsummer Night's Massacre, where growing popular concern about corporate-led globalization was shot down in favor of a backwards policy combining corporate managed trade and global deregulation of basic consumer, environmental and other public interest standards. Over the past decade, public opposition to NAFTA-style trade deals has grown so strong that now the only way to move this policy is to ram through at 3:00 a.m. in the dark of night 304 pages of legislation combining five different trade bills which was unavailable for public or congressional review until hours before the vote". See online: Wichita Area Globalization Coalition, http://www.ksworkbeat.org/Globalization/Reaction_to_July_Fast_Track_Vo/reaction_to_july_fast_track_vo.html.

[9] Russell Mokhiber and Robert Weissman, *USA: Wartime Opportunists*, online: CorpWatch, http://www.corpwatch.org/news/PND.jsp?articleid=100.

[10] *Bipartisan Trade Promotion Authority Act*, Pub. L. No. 107-210, § 2101(b)(1), (codified at 19 USC 3801).

[11] *Ibid.*, § 2101(b)(2).

[12] Brink Lindsey, "Free Trade, Fast Track and National Security", *Washington Times*, (December 5, 2001), online: CATO Institute http://www.cato.org/dailys/12-06-01.html. Lindsay argues that "During the Cold War, American trade policy pursued aims that transcended merely commercial considerations. Supporters of market-opening trade agreements saw them as a vital adjunct in the larger struggle against communism. In the new era that commenced on September 11, trade policy can once again serve the higher cause of national security. If it fails, an important front in the war against terrorism will have been abandoned … In the wake of September 11, the national-security dimension of trade policy is once again plainly visible. It is now painfully clear that Americans live in a dangerous world — and that the primary danger at present emanates from the economic and political failures of the Muslim world. Those failures breed the despair on which violent Islamist extremism feeds; no comprehensive campaign against terrorism can leave them unaddressed." Lindsey's assessment was shared by Michael H. Armacost, President of the Brookings Institution, who is quoted on the USTR Web site as saying, "… I have long believed, as I think all the economists at Brookings have believed, that the case for this [fast track authority] was pretty well self-evident, a no-brainer. But in the wake of the terrorist attacks on September 11, it is needed now more than ever … [t]he terrorists have supplied an action-forcing event that impels us, over the midterm, to stimulate additional demand for our exports by further reducing barriers to trade and we can't do this without legislative authority." U.S., United States Trade Representative, *What They're Saying About Trade: Highlights from the Fight Back With Free Trade Press Conference* (Sept. 27, 2001), online: USTR Resources http://www.ustr.gov/new/sayings.html.

[13] Russell Mokhiber and Robert Weissman, *USA: Wartime Opportunists*, *supra*, note 9.

[14] *Bipartisan Trade Promotion Authority Act*, Pub. L. No. 107-210, § 2103(b)(1)(A), (codified at 19 USC 3801).

[15] *Ibid.*, § 2102(b)(4)(A)(i)(I).

[16] *Ibid.*, § 2102(b)(4)(A)(i)(II).

[17] *Ibid.*, § 2102(b)(4)(A)(ii).

[18] *Ibid.*, § 2102(b)(4)(A)(iii).

[19] *Ibid.*, § 2102(b)(4)(A)(iv).

[20] *Ibid.*, § 2102(b)(4)(A)(v).

[21] *Trade Related Aspects of Intellectual Property Rights*, Annex 1C of *Agreement Establishing the World Trade Organization*, signed in Marrakesh, Morocco on 15 April 1994, online: WTO http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

[22] The TRIPS Agreement contains several provisions that provide developing countries with options in implementing the agreement as well as concessions pertaining to the timing of the adoption of TRIPS standards.

[23] *Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty*, adopted in Geneva on December 20, 1996, online: WIPO http://www.wipo.int/clea/docs/en/wo/wo033en.htm.

[24] In the terminology of international copyright treaties, "TRIPS plus" means that there are additional provisions beyond those required by the TRIPS Agreement. The TRIPS Agreement incorporates by reference portions of the Berne Agreement, but is said to be "Berne plus" because of additional requirements. The WIPO Copyright Treaty is said to be "Berne plus" and "TRIPS plus" because some of its provisions exceed the requirements of even TRIPS.

[25] The problem of "lock-in" for U.S. policymakers is particularly evident in the case of the anti-circumvention rules enacted as 17 U.S.C. § 1201, *et seq.*, as part of the DMCA of 1998. Measures to amend the provisions are pending in the U.S. Congress (108th Congress, H.R.107). See *infra* notes 99 through 110.

[26] *Bipartisan Trade Promotion Authority Act*, Pub. L. No. 107-210, § 2103(b)(1)(C)(i), (codified at 19 USC 3801).

[27] *Ibid.*, § 2103 (b)(1)(C)(ii). The provisions for the two-year extension are set forth in section 2103(c).

[28] Prior to the 2002 Act, fast track authority last lapsed in 1994. An effort to restore fast track authority failed to pass the 105th Congress in 1998, as H.R. 2621, the *Reciprocal Trade Agreement Authorities Act* was defeated in the House by a vote of 180–243. (Roll Call 466, September 26, 1998).

[29] U.S., Office of USTR, *Free Trade Area of the Americas: The Opportunity For A Hemispheric Marketplace*: "The Free Trade of the Americas (FTAA) is the cornerstone of President Bush's vision for trade in the Western Hemisphere — a plan that would foster economic growth and opportunity, promote regional integration and strengthen democracies. The FTAA would be the world's largest free market, with combined GDP of nearly $13 trillion in 34 countries, and nearly 800 million consumers from Alaska to the tip of South America".

[30] For a concise overview of the internal FTAA processes, see Sherry M. Stephenson, "The Current State of the FTA Negotiations at the Turn of the Millennium" (2000) 6 NAFTA L. & Bus. Rev. Am. 317.

[31] Free Trade Area of the Americas, *Summit of the Americas: Declaration of Principles*, online: FTAA-ALCA http://www.ftaa-alca.org/ministerials/miami_e.asp. The Declaration also recognized "the progress that already has been realized through the unilateral undertakings of each of our nations and the subregional trade arrangements in our Hemisphere. We will build on existing subregional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together". The summit also adopted a *Plan of Action*, online: FTAA-ALCA http://www.ftaa-alca.org/ministerials/plan_e.asp.

[32] Free Trade Area of the Americas, *Summit of the Americas Trade Ministerial, Denver, Colorado, June 30, 1995. Joint Declaration* (1995), online: FTAA-ALCA http://www.ftaa-alca.org/ministerials/denver_e.asp.

[33] Free Trade Area of the Americas, *Summit of the Americas, Second Ministerial Trade Meeting, Cartagena, Colombia, March 21 1996, Joint Declaration* (1996), online: FTAA-ALCA http://www.ftaa-alca.org/ministerials/carta_e.asp.

[34] Free Trade Area of the Americas, *Summit of the Americas, Third Trade Ministerial Meeting, Belo Horizonte, Brazil, May 16, 1997. Joint Declaration* (1997), online: FTAA-ALCA http://www.ftaa-alca.org/ministerials/belo_e.asp.

[35] Free Trade Area of the Americas, *Summit of the Americas Fourth Trade Ministerial San Jose, Costa Rica March 19th, 1998. Joint Declaration* (1998), online: FTAA-ALCA http://www.ftaa-alca.org/ministerials/costa_e.asp.

[36] Free Trade Area of the Americas. *Sixth Meeting of Ministers of Trade of the Hemisphere, Buenos Aires, Argentina, April 7, 2001. Ministerial Declaration* (2001), online: FTAA-ALCA http://www.sice.oas.org/FTAA/BAires/Minis/BAmin_e.asp.

[37] Free Trade Area of the Americas, *Third Summit of the Americas. Declaration at Quebec City* (1997), online: FTAA-ALCA http://www.ftaa-alca.org/ministerials/Quebec/declara_e.asp.

[38] Free Trade Area of the Americas, *Second Draft Agreement*, online: FTAA-ALCA http://www.ftaa-alca.org/ftaadraft02/eng/draft_e.asp. Article 1 recites the purpose of the agreement: "to establish a free trade area in accordance with Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994 and Understanding thereon, and Article V of the General Agreement on Trade in Services (GATS)".

[39] U.S., Office of Trade Representative, *FTAA Negotiating Group on Intellectual Property: Public Summary of U.S. Position*, online: USTR http://www.ustr.gov/regions/whemisphere/intel.html.

[40] *Ibid.* The summary ends with a section on general enforcement: "The U.S. text proposes that FTAA countries significantly bolster their domestic procedures for the enforcement of intellectual property rights. For example, it will require FTAA countries to ensure that: When intellectual property rights holders seek compensation for infringements, they can receive compensation for any harm suffered, based on the retail or other value the right holders have set for their products or works, and also recover profits the infringers made. Government agencies have authority to seize suspected pirated and counterfeit goods, the equipment used to make or transmit them, and documentary evidence. Government agencies are empowered to take criminal action against piracy and counterfeiting without waiting for a formal complaint by a private party or right holder. Maximum criminal fines are high enough to deter and remove the incentive for infringements."

[41] The American Association of Law Libraries, *Supplemental Comments of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries and the Special Libraries Association on the Second Draft Consolidated Texts of the Free Trade Area of the Americas Agreement*, (2003), online: AALL Washington Affairs http://www.ll.georgetown.edu/aallwash/lt02282003.html.

[42] *Ibid.*

[43] For an explanation of the short time frame, see Mark Engler, "CAFTA: Free Trade vs. Democracy", *America's Program* (2003) online: America's Program http://americaspolicy.org/commentary/2003/0301cafta-opp.html. Engler argues: "In another calculated rush, trade ministers want to finish CAFTA negotiations by December 2003, before new elections in Central America that might produce leaders opposed to the pact. One key concern is El Salvador, where pre-CAFTA moves to privatize public services — like health care and basic utilities — have widely discredited the current right-wing regime. Should Salvadorans elect an opposition President in March 2004, the White House would like to have the new government locked in to the same trade policies endorsed by the ousted leaders".

[44] The policy is clearly enumerated by the USTR in a Fact-Sheet on CAFTA: "By moving on multiple fronts simultaneously, we create a competition in liberalization with the United States as a central driving force. This strategy enhances America's leadership by strengthening our economic ties, leverage, promotion of fresh approaches, and influence around the world". U.S., Office of USTR, *Proposed U.S.–Central America Free Trade Agreement Fact Sheet*, online: USTR http://www.ustr.gov/CAFTA-Fact-Sheet.PDF.

[45] Krystal Kyer, "Another Bad Trade Pact: From NAFTA to CAFTA", *CounterPunch*, (September 12, 2002), online: CounterPunch http://www.counterpunch.org/kyer0912.html.

[46] U.S., The White House, *Fact Sheet — U.S.–Central America Free Trade Agreement* (January 16, 2002), online: The White House http://www.whitehouse.gov/news/releases/2002/01/20020116-11.html. "This negotiation will complement the United States' goal of completing the Free Trade Area of the Americas (FTAA) no later than January 2005 by increasing the momentum in the hemisphere toward lowering barriers, opening markets, and achieving greater transparency. The United States already has a free trade agreement with Mexico and Canada, and the Administration expects to complete our negotiation for a free trade agreement with Chile this year. Furthermore, by working together on common disciplines and trade objectives through bilateral negotiations, the United States will enhance the ability of all parties to forge consensus in other multilateral trade negotiations, especially the FTAA."

[47] Pursuant to *Bipartisan Trade Promotion Authority Act*, Pub. L. No. 107-210, § 2104(a)(1), (codified at 19 USC 3801).

[48] Letter from U.S. Trade Representative Robert B. Zoellick to Honorable J. Dennis Hastert, Speaker of the House of Representatives (1 October 2001), online: USTR http://www.ustr.gov/releases/2002/10/2002-10-01-centralamerica-house.PDF. This letter notifies the Speaker of House of the commencement of CAFTA negotiations.

[49] *U.S.–Jordan Free Trade Implementation Act*, Pub. L. No. 107-43. See Christopher M. Bruner, "Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas" (2002) 33 U. Miami Inter-Am. L. Rev.1 at 46–50 (describing the strategic significance of the U.S.–Jordan Agreement in terms of the U.S. global trade agenda).

[50] *U.S.–Jordan Free Trade Implementation Act*, Pub. L. No. 107-43, Article 6.3.

[51] Peter Drahos, "Bilateralism in Intellectual Property" (2001) Oxfam Policy Papers, online: Oxfam http://www.oxfam.org.uk/policy/papers/bilateral/bilateral.html.

[52] Section 2106(a) of the Act provides that "Notwithstanding the prenegotiation notification and consultation requirement described in section 2104(a), if an agreement to which section 2103(b) applies — (1) is entered into under the auspices of the World Trade Organization, (2) is entered into with Chile, (3) is entered into with Singapore, or (4) establishes a Free Trade Area for the Americas, and results from negotiations that were commenced before the date of the enactment of this Act, subsection (b) shall apply".

[53] Motion Picture Association of America, News Release, "Statement by Jack Valenti, Chairman and CEO, Motion Picture Association, on Free Trade

Agreement between the US and Chile" (December 11, 2002), online: MPAA http://www.mpaa.org/jack/2002/2002_12_11.htm. A month later, Valenti offered similar praise for the U.S.–Singapore Agreement: "The U.S.–Singapore Free Trade Agreement (FTA) represents a milestone agreement that secures market access for the U.S. filmed entertainment community. Similar to the historic U.S.–Chile Free Trade Agreement that was announced in December, the U.S.–Singapore FTA again demonstrates that a trade agreement can be achieved by striking an appropriate balance between trade liberalization and the promotion of cultural diversity. By rejecting 'cultural exceptions', the negotiators prove there is adequate flexibility in trade agreements to address specific, cultural related concerns, such as Singapore's interest in television content. We applaud the FTA's strong provisions on intellectual property protection. From commitments such as copyright term extension to strong enforcement measures, Singapore's unparalleled commitments lead the way for effective regulations that will set the standard for efforts to curtail optical disc piracy in Asia. We also commend Singapore for ensuring the protection of creative works in a digital economy. Singapore's embrace of strong copyright protection provisions sets the benchmark in Asia for good protection of content online. We salute Ambassador Zoellick for his work on behalf of the American intellectual property community. We are grateful for his determination to negotiate a strong Agreement to protect America's creative resources." Motion Picture Association of America, Statement by Jack Valenti on the U.S.–Singapore Free Trade Agreement (January 17, 2003), online: MPAA http://www.mpaa.org/jack/2003/2003_01_17.htm.

[54] U.S., Office of Trade Representative, *2002 Annual Report of the President of the United States on the Trade Agreements Program* at 137, online: USTR http://www.ustr.gov/reports/2003Annual/IV-bilateral.PDF.

[55] U.S., Office of Trade Representative, *The President's Trade Policy Agenda for 2003: Overview of the 2003 Agenda Program* at 1, online: USTR http://www.ustr.gov/reports/2003Annual/overview.PDF. The Agenda states: "The Bush Administration looks forward to continuing to work with the Congress in 2003 as together we lay a firm foundation for a more prosperous America by passing the free trade agreements with Chile and Singapore; building upon our proposals to open markets in global trade talks; advancing negotiations on the Free Trade Area of the Americas (FTAA); negotiating new FTAs with the five countries of the Central American Common Market, Australia, Morocco, and the five countries of the Southern African Customs Union; enforcing U.S. trade laws; and monitoring and pressing China's and Taiwan's compliance with their WTO obligations".

[56] *Ibid.* at 10: "These regional and bilateral FTAs will bring substantial economic gains to American families, workers, consumers, farmers, and businesses. They also promote the broader U.S. trade agenda by serving as models, breaking new negotiating ground, and setting high standards. Our agreements with Chile and Singapore, for example, have helped advance U.S. interests in areas such as e-commerce, intellectual property, labor and environmental standards, regulatory transparency, and the burgeoning services trade."

[57] U.S., U.S. Embassy, Rabat, News Release, "U.S., Morrocan Ministers Launch Free Trade Negotiation" (Januay 21, 2003) online: U.S. Embassy, Rabat, http://www.usembassy.ma/Themes/EconomicIssues/Free%20Trade%20Agreement/U.S.%20Moroccan%20Ministers%20Launch%20FTA.htm.

[58] In a press release dated January 23, 2003, MPAA's Jack Valenti said: "We welcome today's news that the United States will begin negotiating a bilateral trade agreement with Morocco. A good trade agreement between the two countries is important to the American movie industry. The MPA supports a free trade agreement that will include an improvement on market access for the American film and television products, as well as a commitment to providing strong copyright protection of our intellectual property. Morocco and the American movie industry have benefited from each other's mutual interest in the movies. Morocco for some time has played an important role on our movie screens by providing a location that is hard to duplicate in the United States. Morocco's unique urban settings and landscapes, along with film-friendly policies, have put her in position to be known as the film production center in the Middle East". Motion Picture Association of America, News Release, "Statement by Jack Valenti, Chairman and CEO, Motion Picture Association, on Free Trade Agreement between the US and Chile" (January 23, 2003), online: MPAA http://www.mpaa.org/jack/2003/2003_01_23A.htm. The text of the draft agreement remains unavailable as of May 24, 2003.

[59] U.S., The White House, News Release, "Statement on Bahrain–US Free Trade Agreement" (May 21, 2003), online: The White House, http://www.whitehouse.gov/news/releases/2003/05/20030521-5.html.

[60] U.S., Office of Trade Representative, News Release, "U.S. and Bahrain Announce Agreement to Seek to Negotiate a Free Trade Agreement" online: USTR http://www.ustr.gov/releases/2003/05/03-32.htm.

[61] U.S., Office of Trade Representative, News Release, "Ambitious Trade Agenda Outlined in Annual Report Submitted to Congress by Bush Administration" (March 3, 2003) online: USTR http://www.ustr.gov/releases/2003/03/03-11.htm. See also International Intellectual Property Alliance *Submission on U.S.–Australia Free Trade Agreement* (January 21, 2003) online: IIPA http://www.iipa.com/rbi/2003_Jan21_AustraliaFTA.pdf. The submission calls for, *inter alia*, full compliance with the World Intellectual Property Organization Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), the removal of impediments to effective enforcement against piracy in Australia, establishing enforcement performance standards, and extending the term of protection for all works and products covered by the copyright law to match the applicable duration under U.S. law.

[62] U.S., Office of Trade Representative, *2002 Annual Report of the President of the United States on the Trade Agreements Program* at 254, online: USTR http://www.ustr.gov/reports/2003Annual/VII-trade_policy_development.pdf.

[63] U.S., Office of Trade Representative, News Release, "Ambitious Trade Agenda Outlined in Annual Report Submitted by Congress to Bush Administration" (March 3, 2003) online: USTR http://www.ustr.gov/releases/2003/03/03-11.pdf.

[64] U.S., H.R. Con. Res. 98, *Expressing the Sense of Congress Relating to a Free Trade Agreement Between the United States and Taiwan*, 108th Cong., 2003.

[65] U.S., Bill S. 943 *A Bill to Authorize the Negotiation of a Free Trade Agreement with New Zealand, and To Provide for Expedited Congressional Consideration of such an Agreement*, 107th Cong., 2001.

[66] U.S., Bill S. 944 *A Bill to Authorize the Negotiation of a Free Trade Agreement with The Republic of Korea, and To Provide for Expedited Congressional Consideration of such an Agreement*, 107th Cong., 2001.

[67] U.S., Bill S. 2005 *A Bill to Authorize the Negotiation of a Free Trade Agreement with the Philippines, and To Provide for Expedited Congressional Consideration of such an Agreement*, 107th Cong., 2001.

[68] U.S., Bill S. 3150 *A Bill to Authorize the Negotiation of a Free Trade Agreement with Turkey and for Other Purposes*, 107th Cong., 2001.

[69] U.S., Bill S. 3151 *A Bill to Authorize the Negotiation of a Free Trade Agreement with Afghanistan and for Other Purposes*, 107th Cong., 2001.

[70] Entertainment Industry Coalition for Free Trade, News Release, "Entertainment Companies and Trade Associations Announce Creation of Entertainment Industry Coalition for Free Trade" (March 13, 2003) online: MPAA http://www.mpaa.org/jack/2003/2003_03_13C.pdf. The coalition includes AOL Time Warner; BMG Music; EMI Recorded Music; Interactive Digital Software Association; Metro-Goldwyn-Mayer Studios Inc.; Motion Picture Association of America; National Association of Theatre Owners; New Line Cinema; the News Corporation Limited; Paramount Pictures; Recording Industry Association of America; Sony Music Entertainment Inc.; Sony Pictures Entertainment Inc.; Television Association of Programmers (TAP) Latin America; Twentieth Century Fox Film Corporation; Universal Music Group; Viacom; Universal Studios; the Walt Disney Company; Warner Bros.; and Warner Music Group.

[71] *Ibid.* "The first objective of the EIC is to educate Members of Congress of the importance that the industry places on the passage of the U.S.–Chile and U.S.–Singapore Trade Agreements. The agreements encompass a number of issues that are vital to the members of the Coalition such as: (1) providing strong protection of intellectual property in the digital age; (2) strengthening copyright enforcement; (3) increasing market access with the elimination of tariffs for all U.S. entertainment products; and (4) proving that by rejecting the 'cultural exceptions' issue, trade agreements can be constructed to incorporate commitments on opening up service markets and address specific cultural related concerns at the same time."

[72] Office of the Trade Representative, News Release, "Zoellick Joins Entertainment Industry Launch of Free Trade Coalition" (March 13, 2003), online: USTR http://www.ustr.gov/releases/2003/03/03-15.pdf.

[73] Office of Congressman David Drier, News Release, "Dreier Applauds Launch of Entertainment Coalition for Free Trade" (March 13, 2003), online: Congressman David Dreier http://dreier.house.gov//releases/pr031303d.htm.

[74] See online: U.S.–Chile Free Trade Coalition http://www.uschilecoalition.com/. Members include the U.S. Chamber of

Commerce, National Association of Manufacturers, Business Roundtable, 3M, UPS, FedEx, Lockheed-Martin, Kodak, Kraft Foods International, Amway, AOL-Time Warner, AT&T, Boeing, Chubb, Deere & Co, Dell, Dow Corning, Eastman Kodak, Exxon-Mobil, Eli Lilly, Fluor, Ford Motor, GE, GM, Hewlett-Packard, Intel, IBM, Xerox, Unisys, JD Edwards, Liz Claiborne, Mattel, Maytag, McGraw-Hill, Merck & Co, NCR Corp, News Corp, Novartis Pharmaceuticals, PepsiCo, Price Waterhouse Coopers, Rockwell Automation, Rohm and Haas, Sony Electronics, Sony Pictures Entertainment, Bechtel, Coca Cola, and Wal-Mart Stores as well as the law firms of Bracewell & Patterson, Wilmer Cutler & Pickering, and Patton Boggs.

[75] Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995) at 64-65, online: U.S. Patent and Trademark Office http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf.

[76] Pamela Samuelson, "Copyright Grab". *WIRED* 4:1 (January 1996).

[77] H.R. Rep. 1476, 94th Cong., 1976.

[78] International Intellectual Property Alliance, *Submission to USTR in Response to Request for Public Comments on the Preliminary Draft Consolidated Texts of the Free Trade Area of the Americas (FTAA) Agreement* (August 22, 2001), online: IIPA http://www.iipa.com/rbi/2001_Aug22_FTAA.pdf. "The right of reproduction, for both works and objects of neighboring rights, should include a specific and express reference to the right including both permanent and temporary copies in line with the Berne Convention, TRIPS and both WIPO Treaties." The same language was included in a subsequent submission dated September 23, 2002.

[79] *U.S.–Singapore Free Trade Agreement*, Article 16.4(1) online: USTR http://www.ustr.gov/new/fta/Singapore/final/text%20final.PDF.

[80] U.S., Office of the Trade Representative, *Draft text of U.S.–Chile Free Trade Agreement*, Article 17.5(1) online: USTR http://www.ustr.gov/new/fta/Chile/text/17text.pdf. Article 17.6(1) reiterates the provision with respect to performers and producers of phonograms: "Each Party shall provide that performers and producers of phonograms have the right to authorize or prohibit all reproductions of their performances or phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form)".

[81] *U.S.–Jordan Free Trade Agreement*, Article 4(10) online: USTR http://www.ustr.gov/regions/eu-med/middleeast/textagr.pdf. The MPAA was quick to praise the agreement: "'The U.S.–Jordan Free Trade Agreement is a milestone in the protection of creative works. We applaud King Abdullah for his vision to make Jordan a safe environment for copyright holders, and we praise the Clinton administration for its commitment to protect American's most cherished possessions: our copyrighted works,' said Jack Valenti, Chairman and CEO of the Motion Picture Association". Motion Picture Association of America, News Release, "MPAA Praised U.S.–Jordan Trade Agreement", (October 24, 2000), online: MPAA http://www.mpaa.org/jack/2000/00_10_24.htm.

[82] U.S., Office of the Trade Representative, *Free Trade Area of the Americas (FTAA) Draft Agreement* (November 1, 2002) online at http://www.ustr.gov/regions/whemisphere/ftaa2002/tnc-w-133-11of12-eng.pdf.

[83] *Ibid.*, Article 1.

[84] *Ibid.*, Article 4.1.

[85] It seems unclear whether the limitation clause "provided that *it* occurs during the course of use of the work duly authorized by the owner" refers to both instances, or only the second one.

[86] *Berne Convention for the Protection of Literary and Artistic Works* (July 24, 1971).

[87] Article 9 of the Berne Convention sets forth the reproduction right and provides: "(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention".

[88] *World Intellectual Property Organization Copyright Treaty* (December 20, 1996) CRNR/DC/94., online: WIPO http://www.wipo.org/eng/diplconf/distrib/94dc.htm.

[89] Article 1(4) of the WCT provides that "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention".

[90] *Agreed Statements Concerning the WIPO Copyright Treaty* (December 20, 1996) CRNR/DC/96., online: WIPO http://www.wipo.org/eng/diplconf/distrib/96dc.htm.

[91] *Partly Consolidated Text Of Treaty No. 1* (December 12, 1996) CRNR/DC/55., online: WIPO http://www.wipo.org/eng/diplconf/distrib/pdf/55dc.pdf.

[92] Letter from Dr. Barbara Simons, Chair, U.S. Public Policy Committee of ACM, to Bruce Lehman, Commissioner of Patents and Trademarks (November 22, 1996), online: ACM http://www.acm.org/usacm/IP/wipo_copyright_letter.html. The letter states, "Article 7(1), creates new liabilities for the creation of temporary, transitory documents. It requires signatories to treat the ephemeral copies of copyrighted documents which move through the network as infringements. This could eliminate browsing on the World Wide Web (e.g., using widely such available software as the Netscape Navigator or the Microsoft Explorer). This is in conflict with the reality of how the Internet and all modern networked systems operate. The design of modern computer and network systems is such that copies of data are automatically made in various parts of the systems for operational efficiency, system reliability, for various technical reasons, and for cost advantages. In particular, copies of extracts from databases would be found in (what is called) the random-access memory and in the cache memory of any computer, and in various part of a telecommunications network. These temporary copies can be stored for varying periods of time, from a few minutes through many months depending upon the operational arrangements of the system." The letter also objected to the language in 7(2) as unduly limiting the circumstances in which national legislation could permissibly limit application of the right established in Article 7(1): "The Article requires proactive legislation to protect browsing. This poses extreme problems in a globally networked environment where information may flow through numerous countries and systems before reaching its destination. Service providers could be held responsible for their users browsing materials stored on machines in countries which have not enacted such legislation."

[93] International Federation of Library Associations and Institutions, News Release, "Comments on the proposed new treaties in the copyright field under discussion within WIPO" (November 1996), online: IFLA. http://www.ifla.org/V/press/pr961115.htm. See also *ARL: A Bimonthly Newsletter of Research Library Issues and Actions*, "Library Associations Address International Intellectual Property Proposals" (December 1996), online: ARL http://www.arl.org/newsltr/189/library.html: "Article 7 would inhibit browsing on the World Wide Web because it extends the right of reproduction to all temporary copies, including ephemeral images captured in a computer's random access memory (RAM). If enacted, this provision, when coupled with Article 10, would have a chilling effect on the ability of libraries and library users to access needed information resources due to serious concerns over liability."

[94] *World Intellectual Property Organization Copyright Treaty* (December 20, 1996) CRNR/DC/94., online: WIPO http://www.wipo.org/eng/diplconf/distrib/94dc.htm.

[95] Pub. L. No. 105-304 (codified at 17 U.S.C. section 1201, *et seq.*).

[96] Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised", 14 *Berkeley Tech. L.J.* 519 (1999) at 520. Samuelson argues that "[a]lthough the WIPO Copyright Treaty requires countries to provide 'adequate protection' against the circumvention of technical measures used by copyright owners to protect their works from infringement, the DMCA went far beyond treaty requirements in broadly outlawing acts of circumvention of access controls and technologies that have circumvention-enabling uses".

[97] While the final version of the DMCA also included compromise language that created limited exceptions for non-profit libraries, archives and educational institutions (s. 1201d), law enforcement activities (s. 1201e), reverse engineering (s. 1201f), encryption research (s. 1201g), devises intended to filter internet content from minors (s. 1201h), and protecting personally identifiable information (s. 1201i), these provisions are extremely narrow and subject to various counter-exceptions.

[98] See *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001), aff'g 111 F. Supp. 2d 294 (S.D.N.Y. 2000); *Felton v. RIAA*, N.J. Case No. CV-01-2669 (D.C.N.J. 2001); *U.S. v. Elcomsoft* (N.D.C.A 2002).

[99] See Pamela Samuelson *supra* note 84. Samuelson argues that "[the anti-circumvention provisions] are unpredictable, overbroad, inconsistent, and complex. The many flaws in this legislation are likely to be harmful to innovation and competition in the digital economy sector, and harmful to the public's broader interests in being able to make fair and other noninfringing uses of copyrighted works". See also "Anticircumvention

Rules: Threat to Science", *Science* 293:5537 (September 2001) 2028, online: Science http://www.sciencemag.org/cgi/content/full/293/5537/2028?ijkey=sJ5V2ve/PTGkU&keytype=ref&siteid=sci. See also Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain". 74 *N.Y.U.L. Rev.* 354. This article discusses the anti-circumvention provisions as a troubling constraint on freedom of speech.

[100] The anti-circumvention provisions of the Chile and Singapore agreements are set forth in Appendices A and B, respectively.

[101] S. 1201(a)(1)(C) directs the Librarian of Congress to conduct periodic studies to determine whether certain classes of users or works should be exempt from the ban because technical protection systems are impeding the ability to make noninfringing uses of copyrighted works. While the periodic review is very limited in its scope, it does demonstrate that Congress understood the need for periodic review of the anti-circumvention measures when passing the DMCA and that they held open the possibility of subsequent regulatory limitations on the scope of the Act. Under section 1201(a)(1)(D), the Librarian shall publish any class of copyrighted works for which it has been determined that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected. In this case, the prohibition against the circumvention of technological measures contained in 1201(a)(1)(A) shall not apply to such users with respect to such class of works for the ensuing 3-year period. It is likely that the existence of additional "international obligations" would be used as justification to limit this rulemaking authority. While the Chile and Singapore agreements make mention of such an exception arising out of an administrative proceeding (see articles 17(7).5(d)(i) and 16(4).7(f)(iii) respectively) the provisions are so fraught with counter-limitations as to be rendered essentially meaningless.

[102] U.S., Bill H.R 107, 108th Cong., 2003. (The bill was introduced on January 7, 2003, and is sponsored by Rep. Rick Boucher (R-Va) and is available online via http://thomas.loc.gov.)

[103] *Ibid.*, § 5(a).

[104] *Ibid.*, § 5(b)(1). Under the current version of s. 1201, there is no requirement of infringing activity for the anti-circumvention and device prohibitions to apply.

[105] *Ibid.* This change would restore the standard enunciated by the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[106] *Congressional Record*, January 8, 2003. Extension of Remarks, E-19.

[107] *Ibid.*, at E-20.

[108] *Ibid.*

[109] U.S., Bill H.R. 1066, 108th Cong., 2003. Rep. Zoe Lofgren, D-CA, introduced March 4, 2003.

[110] *Ibid.*, § 2:

> (6) The *Digital Millennium Copyright Act* (DMCA) was enacted as an attempt to safeguard the traditional balance in the face of these new challenges. It gave copyright holders the ability to fight digital piracy by employing technical restrictions that prevent unlawful access and copying. In practice, however, the DMCA also endangered the rights and expectations of legitimate consumers.
>
> (7) Contrary to the intent of Congress, § 1201 of title 17, United States Code, has been interpreted to prohibit all users — even lawful ones — from circumventing technical restrictions for any reason. As a result, the lawful consumer cannot legally circumvent technological restrictions, even if he or she is simply trying to exercise a fair use or to utilize the work on a different digital media device. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 321-24 (S.D.N.Y. 2000) (DMCA failed to give consumers the technical means to make fair uses of encrypted copyrighted works).
>
> (8) The authors of the DMCA never intended to create such a dramatic shift in the balance. As the report of the Committee of the Judiciary of the House of Representatives accompanying the DMCA stated: "[A]n individual [should] not be able to circumvent in order to gain unauthorized access to a work, but [should] be able to do so in order to make fair use of a work which he or she has acquired lawfully." House Report 105-551, Part I, Section-by-Section Analysis of § 1201(a)(1).
>
> (9) It is now necessary to restore the traditional balance between copyright holders and society, as intended by the 105th Congress. Copyright laws in the digital age must prevent and punish digital pirates without treating every consumer as one.

[111] *Ibid.*, § 5. Other provisions of the Act would include analog or digital transmissions of a copyrighted work within fair use protections; would provide that it is not a copyright infringement for a person who lawfully obtains or receives a transmission of a digital work to reproduce, store, adapt, or access it for archival purposes or to transfer it to a preferred digital media device in order to effect a non-public performance or display; and would allow the owner of a particular copy of a digital work to sell or otherwise dispose of the work by means of a transmission to a single recipient, provided the owner does not retain his or her copy in a retrievable form and the work is sold or otherwise disposed of in its original format. See Congressional Research Service analysis of H.R. 1066 available online at http://thomas.loc.gov. Rep. Lofgren had introduced a similar bill in the 107th Congress, H.R. 5522, the *Digital Choice and Freedom Act of 2002*.

[112] See Brandy A. Karl, "Enforcing the Digital Millennium Copyright Act Internationally: Why Congress Shouldn't Lock in the Current DMCA By Approving the Current Version of the U.S.–Singapore Free Trade Agreement," *FindLaw Legal Commentary* (May 19, 2003), online: FindLaw http://writ.news.findlaw.com/student/20030519_karl.html. Karl argues that while the FTA's DMCA-like provisions deserve to be subjected to democratic debate, the closed-door trade negotiations have instead resulted in a package which Congress must approve on a mere "thumbs up" or "thumbs down" basis.

[113] Peter Drahos, "Bilateralism in Intellectual Property", (2001) Oxfam Policy Papers at 7, online: Oxfam http://www.oxfam.org.uk/policy/papers/bilateral/bilateral.html.

[114] *Ibid.*, at 9.

[115] As noted in footnote 3 and in the text accompanying notes 14 through 19, this result is hardly surprising given the specificity of the negotiating objectives contained in section 2102(b)(4) of the *Act* itself. The close relationship between the USTR and the content industries, reflected throughout this paper, only reinforces the conclusion.

[116] See Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns Knowledge Economy?* (London: Earthscan, 2002) at 208.

[117] Department of Foreign Affairs and International Trade, *Draft Chapter on Intellectual Property: Canada's Position & Proposal*, online: DFAIT http://www.dfait-maeci.gc.ca/tna-nac/IP-P%26P-en.asp.