

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Written Testimony of

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Before the

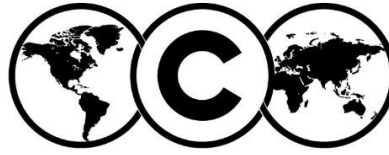
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Hearing on

“The Trans-Pacific Partnership: Outlook and Opportunities”



Thank you for this opportunity to present the views of the International Intellectual Property Alliance (IIPA) on progress toward a Trans-Pacific Partnership Agreement (TPP).

IIPA represents the U.S. copyright-based industries that seek to open up foreign markets closed by piracy and other market access barriers. We are a coalition of seven trade associations, representing over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. For nearly 30 years, this coalition has worked to ensure that U.S. trade policy fully reflects the importance of copyright-based industries to the U.S. economy, jobs and international competitiveness. Members of the IIPA include the Association of American Publishers (AAP); BSA | The Software Alliance; Entertainment Software Association (ESA); Independent Film & Television Alliance (IFTA); Motion Picture Association of America (MPAA); National Music Publishers' Association (NMPA); and Recording Industry Association of America (RIAA).

Over the past five years, IIPA has followed closely and with great interest the progress toward a TPP agreement. Such an agreement has enormous potential to open up important foreign markets to the products and services that are the fruit of American creativity, ingenuity, and talent. Opening up these markets can mean more and better U.S. jobs for men and women involved in creating, marketing, distributing and disseminating these works. But these gains can only be achieved if the TPP embodies both high standards of copyright protection and enforcement, and strong compliance mechanisms to ensure that our trading partners deliver on their obligations.

It is well established that industries dependent on copyright protection are critical to our country's economic health, to our international competitiveness, and to a growing and more highly skilled U.S. workforce. A long series of economic studies commissioned by IIPA has quantified this conclusion, using well-accepted methodologies endorsed by the World Intellectual Property Organization and employed in similar studies across the globe. The most recent IIPA study, released two years ago, found that the "core" copyright industries – those primarily engaged in creating, producing, distributing or exhibiting copyrighted works – accounted for over 6.3% of U.S. GDP in 2010, or more than \$930 billion in economic activity. These industries provided nearly 5.1 million U.S. jobs, or 4.75% of the entire U.S. private sector workforce; and those jobs paid, on average, 27% more than the overall workforce average. The latest edition of the study is in preparation, and we are confident that when it is released later this year, it will once again show how critical the copyright industries are to the American economy and to good U.S. jobs. The basic conclusions of these studies are also consistent with those from many other sources, including the comprehensive study of U.S. intellectual property-intensive industries released last year by the U.S. Department of Commerce.

These economic studies also underscore the growing importance of international trade to the copyright sector, and therefore to the economy as a whole. The most recent IIPA study

concluded that, in 2010, the core copyright industries collectively are responsible for foreign sales and exports of \$134 billion, well exceeding the corresponding figures for major industry sectors such as automobiles, agricultural products, food or pharmaceuticals. Businesses and consumers around the world have demonstrated an insatiable appetite for U.S. books, movies, music, and software applications, both for business uses and for entertainment and games.

Those foreign sales figures would be even larger were it not for the barriers that our industries encounter in many overseas markets. One of the most virulent and troubling of these barriers is pervasive piracy of copyrighted materials of all kinds. The widespread availability, both in physical marketplaces and in the online environment, of unauthorized, illicit copies of U.S. works makes it difficult for legitimate distributors to gain a foothold in overseas markets; and even where there are well-established legitimate distribution channels, their growth is inevitably stunted when they must compete with pirates who pay nothing for the content they distribute or make available, who flout local rules and requirements with which legitimate market entrants must comply, and who pay no taxes on their ill-gotten gains.

These facts underscore why the U.S. has long included strong copyright rules and enforcement obligations within our agreements with major trading partners, and why building on that progress is so critical. Because trade in copyrighted materials is vital to U.S. economic interests, and because piracy in overseas markets is a major obstacle to growth of that trade, it must be a top priority to get our trading partners to ensure the adequacy of their copyright laws and their regimes for enforcing those laws. This has been a cornerstone of U.S. trade policy for more than two decades, under both Republican and Democratic Administrations, and with strong and consistent bipartisan support from Congress. This policy has helped to grow our economy, support millions of U.S. jobs, nurture our creative spark, and, not incidentally, foster the growth of the copyright sectors within our trading partners, thus building a global constituency for copyright protection and enforcement. The KORUS FTA, which was approved last Congress, was in many ways the culmination of this effort. It includes a state-of-the-art copyright chapter that we have urged U.S. negotiators to employ as a benchmark in the TPP.

A TPP agreement provides an important opportunity to build upon this long-standing policy. Four of the seven trading partners with whom the initiative was originally launched have already signed bilateral Free Trade Agreements with the United States, and all of those FTAs – with Australia, Chile, Peru and Singapore – included strong intellectual property chapters with meaningful copyright provisions. A successful TPP will build on and extend these achievements, by bringing the copyright law and enforcement regimes of countries like New Zealand, Vietnam, Brunei and Malaysia into compliance with these best practices.

In recent months, three of our country's four largest trading partners – Canada, Mexico and Japan – have joined the TPP negotiations, thus dramatically expanding its importance. Each of these countries is a critically important export market for the U.S. copyright industries; and each has a relatively modern copyright law. Yet in each of these countries there are also important and in some cases long-standing gaps, either in legal protections under copyright or in enforcement standards (or both), which hamper our industries' ability to fully compete in these markets. Their engagement in TPP offers the potential to resolve some of these problems. Moreover, the TPP countries hope that other nations will join the finished agreement. It is critical that we get it right.

Let me offer a few examples of the kinds of specific improvements in the laws and enforcement practices of our trading partners that IIPA hopes will be achieved in the TPP negotiations. In each of these areas, the status quo falls short of meeting the current global norms, as embodied in KORUS FTA and other instruments, in ways that are damaging to U.S. copyright industries. Of course it is not possible here to provide a comprehensive list, but the following may hit some of the high points.

Term of Copyright Protection. Over the past couple of decades, most major economies have moved to extend the term of copyright protection beyond the minimum levels required by the WTO TRIPS Agreement, to reflect longer life-spans and the need to maintain incentives for investment in the conservation and dissemination of older works. Many TPP partners have extended term for at least some types of works, but there are some important outliers, notably Canada, New Zealand, and Japan (other than for films). Greater harmonization of term will facilitate international commerce by minimizing the friction that occurs when a work is still under copyright protection in one country but not in another. The TPP agreement should commit all participants to adhere to the evolving global norm of longer terms.

Technological Protection Measures. The Internet has opened up new and exciting ways of delivering content to consumers, using a variety of business models and price points. The viability of these innovative means of delivery – notably including cloud computing services – depends directly on the ability to use technology to manage access to these services and the underlying content. For this reason, strong legal protections for technological measures employed by rights holders to protect their works, and meaningful civil and criminal remedies against trafficking in tools or services aimed at circumventing these technological controls, are critical features of all 21st century copyright laws. While those TPP partners that have recently entered into FTAs with the U.S. have taken on (and in most cases implemented) detailed obligations in this field, the other partners generally have not, and in a number of cases there are significant gaps to be filled. Few improvements are more critical to growing international digital marketplaces for copyrighted materials in the years ahead.

Government Legalization. Governments are among the world's biggest consumers of software, but problems persist with high levels of unlicensed software use by government agencies. The KORUS FTA and other U.S. trade agreements impose obligations on governments to ensure that their software use is legal. The TPP should build on and strengthen these obligations on government legalization programs, both to ensure legal software use in the public sector and to encourage governments to set a strong example for the private sector on the need to address IP infringement and implement best practices in IT management.

Civil and Criminal Remedies. To provide the right incentives for creation and dissemination of works within the economies of all our TPP partners, their enforcement regimes must also be strong, comprehensive and up-to-date, and they must deliver fully compensatory and deterrent remedies. Among other requirements, TPP should address:

Pre-set (Statutory) Damages. Traditional formulations for calculating civil compensatory damages for copyright infringement too often fall short of deterrent levels. This is not a theoretical problem: in many markets, very low damages awards allow infringers to treat liability (if one gets caught) as simply a cost of doing business. A key

element of solving this problem is to establish pre-set damage levels that can be chosen by right holders in lieu of proving actual damages. Such a regime provides needed deterrence, and responds effectively to scenarios (such as illicit Internet uploading and streaming) in which calculation of actual damages is extremely difficult. While statutory damages are a well-established feature of U.S. law, most of our TPP partners do not yet provide this important enforcement tool.

Camcording. The great majority of pirate movies distributed via the Internet are sourced to cinemas where high-quality digital copies are surreptitiously recorded off the screen, usually in the first few days of theatrical release. While technically this constitutes copyright infringement, few countries have effectively combatted illicit camcording without putting a specific law on the books against it. Experience has demonstrated that when specific anti-camcording laws are enacted and are vigorously enforced, they are extraordinarily effective in choking off this supply channel for Internet audio-visual pirates. As many of our current FTAs predate the proliferation of high-quality camcording, this gap remains to be filled among several of our TPP partners, although important markets such as Japan, Canada and Malaysia are already largely in compliance.

Criminal Remedies. Piracy remains a big business; but the Internet has brought with it high-volume piracy operations in which money does not directly change hands between supplier and customer. There is also the pervasive problem of enterprises that gain commercial benefit from using unlicensed software and other copyright products to conduct their business. It is thus essential that criminal remedies be available for all piracy carried out “on a commercial scale,” whether for direct or indirect commercial benefit, as defined in part by the volume of infringement. This is particularly important in the many TPP countries in which the civil courts are unlikely to be effective in imposing deterrent remedies.

Other important copyright issues at play in the TPP negotiations include providing a strong framework for enforcement against online piracy, including effective incentives for cooperation among all participants in the digital networked environment, as well as ensuring that exceptions and limitations to copyright protection conform to well-established international norms.

The issues summarized above are technically complex, and we recognize that negotiations on these issues with such a large group of major trading partners is challenging. While we appreciate the challenges that U.S. negotiators face, and are grateful to them for their hard work and unstinting dedication, the end goal for our industries remains the same: negotiation of a high standard agreement that provides for strong protections and enforcement of copyrighted products and services.

Despite some claims to the contrary, strong copyright protection and enforcement is critical to bolstering innovation, the growth of the Internet and free expression. The copyright industries represented by IIPA depend upon freedom of speech, which is the lifeblood of creators everywhere. As the Supreme Court has acknowledged, “copyright is the engine of free expression.” Companies that are members of IIPA’s associations are also at the forefront of

innovation in the delivery of content – providing more creative works to more people in more ways at more price points and on more devices than ever before in human history. U.S. copyright law has made a huge contribution to achieving this result; and a TPP that adopts provisions similar to prior U.S. FTAs such as KORUS – which are fully consistent with U.S. law – will help spread this creativity and innovation throughout TPP markets.

Finally, it is important to note that while my remarks today have focused on the copyright elements of the TPP given the focus of IIPA’s work, many other aspects of the agreement are critically important to allowing U.S. copyright industry companies to access and compete in TPP markets. Among other features, TPP must provide non-discriminatory market access for companies, products and services, including provisions to enable cross-border data flows and prohibit local server requirements. Addressing these issues, along with strong copyright protection and enforcement, is key to the success of this agreement for the copyright industries.

Whatever emerges from the TPP process, a good outcome will depend on a vigorous, prompt and consistent compliance effort. While most of our trading partners have done a good job of living up to the commitments they have made in previous FTAs to upgrade their copyright law and enforcement regimes, some have not. Realistically we must anticipate that concluding a successful TPP agreement is only the first chapter, and the rest of the story will be written in the legislatures, ministries and marketplaces of our trading partners, where these critical commitments must bear fruit. The U.S. government needs to redouble its efforts, and its commitment of personnel, intellectual bandwidth, and other resources, to the proactive enforcement of our trade agreements, including what IIPA hopes will be a strong and comprehensive copyright chapter in the TPP.