

Before the
United States Trade Representative
Washington, D.C.

In re

2010 Special 301 Review: Identification
of Countries Under Section 182 of the
Trade Act of 1974

Docket No. USTR-2010-0003

Comments of the Computer & Communications Industry Association

Pursuant to the request for comments issued by the United States Trade Representative (USTR) and published in the Federal Register at 75 Fed. Reg. 2,578 (Jan. 15, 2010), the Computer and Communications Industry Association (CCIA) submits the following comments with respect to the USTR’s 2010 Special 301 Review.

I. Interest of CCIA

The Computer & Communications Industry Association is a nonprofit membership organization for a wide range of companies in the computer, Internet, information technology, and telecommunications industries. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition. While portions of the discussion below focus on the Special 301 process generally, CCIA has focused the nation-specific portion of these comments on Canada, which as USTR has observed, is subject to an additional inquiry into the effect on cultural industries.

II. The Special 301 Process Should Construe “Adequate and Effective Protection” Consistently With the Constitutional Goal of Copyright.

Securing adequate and effective protection of intellectual property rights as set forth in 19 U.S.C. § 2242(1)(A) is an important component of protecting creativity and investment in cultural industries. In addition to their statutory definition (discussed below), the terms “adequate

and effective” must be construed in the context of the Constitutional purpose of promoting the progress of science. The grant of exclusive rights, as the Supreme Court has repeatedly held, is “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public.”¹

In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, a unanimous Court, in an opinion by Justice O’Connor, held that “[f]rom their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.”² Two years later, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, Justice O’Connor, again writing for a unanimous Court wrote: “It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not ‘some unforeseen byproduct of a statutory scheme.’ ... It is, rather, ‘the essence of copyright,’ ... and a constitutional requirement.”³ Three years later, in *Fogerty v. Fantasy, Inc.*, then-Chief Justice Rehnquist – hardly an opponent of property rights – also writing for a unanimous Court, recognized the important role played by those who successfully oppose infringement claims:

While it is true that one of the goals of the Copyright Act is to discourage infringement, it is by no means the only goal of that Act. In the first place, it is by no means always the case that the plaintiff in a copyright infringement action is the only holder of a copyright; often times, defendants hold copyrights too... .

More importantly, the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement. ... We have often recognized the monopoly privileges that Congress has authorized, while “intended to motivate the creative activity of authors and inventors by the provision of a special reward,” are limited in nature and must ultimately serve the public good... .

¹ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994); *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349 (1991); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); accord H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).

² 489 U.S. 141, 146 (1989).

³ 499 U.S. 340, 349 (1991).

Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. ... [A] successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.⁴

A determination of whether a country's laws are adequate and effective, therefore, must be holistic: 'stronger' is not necessarily better or more effective. An adequate and effective law is a balanced law, one that encourages the production of works of authorship that would not have been created but for the grant of rights, but which does not deter others from creating new works, even if based on or copying from prior works, and which does not deter access to information.

In fact, the United States Government recently articulated a similar principle before the World Intellectual Property Organization, rejecting the view that "that any international consensus on substantive limitations and exceptions to copyright law would weaken international copyright law." In stating the United States does not share that point of view, the U.S. delegation expressed its commitment "to both better exceptions in copyright law and better enforcement of copyright law."⁵ The economic logic of protecting both rights and access is evident in the fact that copyright exceptions are serious business. A 2007 study commissioned by CCIA, employing a methodology developed by the World Intellectual Property Organization, found that industries that rely on various limitations and exceptions to copyright add \$2.2 trillion in value to the U.S. economy and employ 17 million Americans.⁶

⁴ 510 U.S. 517, 525-27 (1994).

⁵ Statement of U.S. Delegation, WIPO Standing Committee on Copyright and Related Rights, 19th Sess., Dec. 14-18, 2009, *available at* <<http://www.wo.ala.org/districtdispatch/wp-content/uploads/2009/12/WIPO-Statement.pdf>>.

⁶ Thomas Rogers & Andrew Szamosszegi, "Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use," at 9 (2007).

Fortunately, the USTR’s statutory mandate is not inconsistent with vindicating these important economic interests. The text of the statute defines a nation’s obligation to provide recourse under domestic law “to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights and mask works.” 19 U.S.C. § 2242(d)(2). To sustain the U.S. Government’s commitment to better exceptions in copyright and better enforcement of copyright law – in short, to robust and balanced protection – this obligation should be understood to include not only government-created exclusionary rights, but also the public’s right to access information and ideas to which the monopoly privilege does not extend (including, for example, the “public’s ‘federal right to ‘copy and to use,’ expired copyrights”). *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003).

In short, “adequate and effective” does not mean securing the most extensive grant of rights with the most elaborate penalties conceivable; instead, adequate and effective must be construed in terms of the overall goal of copyright, an overall goal that includes the public and intermediaries. The cultural industries prong of Special 301 is particularly relevant here: cultural industries are particularly reliant on a balanced law that includes adequate and effective limitations and exceptions.

III. The Special 301 Process Should Account for Whether Unbalanced Copyright Law Impairs the Right to Access and Use Information.

As noted above, effective copyright law must entail both robust enforcement and robust exceptions. Copyright’s respect for the public’s right to access information is even enshrined in the Berne Convention itself. For example, Berne mandates that “[i]t *shall* be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form

of press summaries.”⁷ Insofar as the right to make quotations is one of the “rights relating to patents, process patents, registered trademarks, copyrights and mask works,” *id.* § 2242(d)(2), infractions of such rights should also be considered in the Special 301 process.⁸ Thus, if a foreign nation were to prohibit the making of quotations from newspaper articles, for example, this would constitute denial of “adequate and effective protection” under § 2242(a)(1), possibly necessitating identification as “acts, policies, or practices” having actual or potential impact on relevant United States products. *Id.* § 2242(b)(1)(B).

IV. The Legitimacy of Special 301 Depends Upon Differentiating Between Enforcement Gaps and Policy Differences.

The use of Special 301 by various interests to pursue specific policy goals unrelated to the adequate and effective protection of relevant rights delegitimizes the Special 301 process. Not all issues relating to exclusive rights necessarily pertain to adequate and effective protection of rights. The gap evident between U.S. enforcement norms and those of China, for example, should not be conflated with disagreements over whether the WIPO Internet treaties⁹ were prudent policy. If a nation were to conclude that these treaties were long on industry influence and short on evidence-based policymaking, this would not be indicative of “onerous or egregious acts, policies, or practices” relating to intellectual property rights enforcement. Unlike some other nations, U.S. copyright law has long rejected the notion of moral rights, with the exception

⁷ Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), as last revised July 24, 1971, amended Oct. 2, 1979, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (emphasis supplied).

⁸ The fact that such rights are not exercised by constituencies traditionally perceived as “rightsholders” is immaterial. Section 2242 clearly differentiates between “persons that rely upon intellectual property protection” in (d)(1) and the “persons” who seek to “to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights and mask works” in (d)(2). Section 2241(d)(2) must extend beyond (d)(1), therefore, for to construe (d)(2) as synonymous with (d)(1) would impute the same meaning to different text. It is axiomatic, however, that where different words are used in adjacent parts of the same statute, Congress intends a different meaning. *See, e.g., Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152 (1912); *see also Bates v. United States*, 522 U.S. 23 (1997).

⁹ This term is used to refer to both the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). *See* WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76.

of a few narrow circumstances.¹⁰ If mere policy disagreements such as this provided an adequate basis for watch-listing nations, the United States itself would be worthy of such treatment for (quite reasonably) failing to accord independent protection to an author's rights of attribution and integrity as required by article *6bis* of the Berne Convention, *supra*. Therefore, if the Special 301 process is to maintain credibility, it must focus on impediments to effectively exercising rights related to intellectual property.

Moreover, placing IP-respecting nations with whom we differ on policy among IP scofflaws undermines the deterrent effect of such treatment for those nations which genuinely perpetuate the "most onerous or egregious acts, policies, or practices" with respect to rights related to intellectual property. Thus, watch-listing responsible nations not only undermines the weight of the process, but also serves U.S. interests poorly.

A. Watch-listing Canada would undermine Special 301 credibility.

With these principles in mind, CCIA opposes placing Canada on any Special 301 list in the company of nations that genuinely fail to provide adequate and effective protection. Canada's current copyright law and practice clearly satisfy the statutory "adequate and effective" standard. Indeed, in a number respects, Canada's laws are more protective of creators than those of the United States.

1. Non-ratification of favored instruments in otherwise Berne-compliant states cannot form the basis for a Section 301 designation.

In previous submissions, the International Intellectual Property Alliance (IIPA) has placed a great deal of emphasis on Canada's (and some other countries') adherence to the 1996 WIPO Internet treaties, whose negotiation and implementation rightsholder interests campaigned aggressively for in the 1990s. *See, e.g.*, IIPA 2009 Special 301 Report at 13 (Feb. 17, 2009)

¹⁰ 17 U.S.C. § 106A.

(“IIPA 2009 Report”). Non-ratification of a particular international agreement in an otherwise Berne-compliant nation cannot amount to denial of adequate and effective protection within the meaning of the Trade Act. Whether a rightsholder has the means under Canadian law to “secure, exercise and enforce particular rights” as that phrase is used in 19 U.S.C. § 2242 is a function of Canadian law, not whether Canada has ratified a treaty. *Id.* § 2242(d)(2) (“A foreign country denies adequate and effective protection... if the foreign country denies adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such foreign country to secure, exercise, and enforce rights...”).

Moreover, watch-listing one nation for non-ratification of the WIPO Internet treaties would seem to require watch-listing all non-members of the WIPO Internet treaties. The European Union, for example, only just ratified the Internet treaties late in 2009, and by such logic was presumably as much a haven for pirates as Canada until that time.

There is, therefore, no basis for USTR to conclude that any country does not provide adequate and effective protection based on non-ratification of any treaty: “adequate and effective protection” of intellectual property rights, by the plain, defined meaning of those terms, goes to the extent to which there is functional legal protection for particular rights under domestic law, not whether a country has taken action on a treaty. The term “effective”, in particular, indicates a focus on results for the *rightsholder*,¹¹ not on more generalized issues of whether a country has ratified a controversial treaty.

With respect to the 1996 WIPO Internet treaties in particular, it must be noted that Special 301 was enacted *prior* to their negotiation: the Congress could not have intended that failure to ratify non-existent treaties should amount to denial of adequate and effective protection.

¹¹ Including relevant user rights, as described in the example of Berne art. 10(1), *supra* pgs. 3-4.

2. *Policy disagreements over implementation of protection for technological measures do not constitute inadequate or ineffective protection.*

The implementation or non-implementation of legal protection for technological measures (also, ‘technological protection measures’ or TPMs) cannot reasonably be construed to affect the assessment of whether a country provides “adequate and effective protection.” At the time Special 301 was enacted, the United States did not provide the protection for technological measures now found in Chapter 12 of Title 17. In any event, Chapter 12 is not a copyright provision; it is a *sui generis* provision. While TPMs that prevent copying of copyrighted works relate to copyright, the same cannot be said of access TPMs, which have been invoked by original equipment manufacturers of products such as garage door openers and printer toner cartridges to eliminate competition, and by copyright owners to control the design of consumer electronics products. There is no access right in Section 106 of the Copyright Act, and TPMs used to control access cannot be said to be an intellectual property right within the meaning of Section 2242(d)(1) or (d)(2). Whether a country provides legal protection to an access TPM cannot form the basis for an alleged lack of adequate and effective copyright rights.

Furthermore, the lack of a right against circumventing TPMs used to prevent copying of copyrighted works cannot form the basis for a failure to provide adequate and effective rights: TPMs are a means to an end, and it is the end that matters, not the means. If a country, such as Canada, has adequate and effective laws against copying works of authorship – as it surely does – Section 2242 must be satisfied, unless the United States itself was, prior to 1998, applying a standard to foreign nations that it did not itself uphold. Neither Canada nor any other country is required to implement any particular means of preventing copying, and most assuredly not a right once removed from copying: circumventing a technological lock. It is not the lock that is the subject matter of our copyright laws, but the work of authorship and copying that work.

This issue is not merely abstract: one could circumvent a technological lock not for the purpose of violating a copyright right, but rather for the purpose of engaging in permitted behavior, such as fair use, fair dealing, or for educational purposes. The USTR should not entertain the desires of certain rightsholder constituencies which seek to ban activities that are permitted under the copyright laws through the backdoor of a digital technological lock. Neither Canada nor any other country has to agree to such a wrong-headed policy; it is an improper use of the Special 301 Review to place countries on a watch list for refusing to cripple their own industries' innovation and damage the welfare of their own consumers.

3. *Notice and Takedown versus Notice and Notice*

As IIPA has stated, Canada has a notice and notice regime for dealing with copyright owner complaints over the online presence of their works, which the Supreme Court of Canada recently held provides effective remedies to copyright owners, *Society of Composers, Authors, and Music Composers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427, 2004 S.C.C. 45. See IIPA 2009 Report at 15. While providing no evidence that the Court-approved notice and notice system – developed voluntarily by Canadian industry and rightsholders – is ineffective, IIPA has demanded that Canada instead institute American DMCA-style notice and takedown, notwithstanding the widespread criticisms of the shortcomings of the U.S. notice and takedown system, and notwithstanding the fact that rightsholder constituencies have sought to increase notice and notice in the United States.¹² The Special 301 process is not a vehicle to remake the world in the image of the DMCA, a world in which millions of automated cease-and-desist requests based on computer-generated allegations automatically trigger the blocking and take down of material, including of lawfully posted

¹² Elliot Van Buskirk, "RIAA to Stop Suing Music Fans, Cut Them Off Instead," *Wired News*, Dec. 19, 2008, available at <<http://www.wired.com/epicenter/2008/12/riaa-says-it-pl/>>.

material, all without any due process or any judicial involvement.¹³ Concerns about unauthorized use of copyrighted works cannot be allowed to result in the sacrifice of fundamental values that are the hallmarks of civilized countries. Canada's system of dealing with the online use and dissemination of material, including copyrighted material, is more than adequate and effective; it is a thoughtful, and in a number of cases, superior way of resolving disputes.¹⁴ Notice and notice cannot form the basis for invoking procedures in the Trade Act.

4. Statutory Damages

Statutory damages are not required under the Berne Convention or the 1996 WIPO Internet treaties, and the lack of or repeal of enhanced damages cannot therefore constitute a failure to provide adequate or effective protection.¹⁵ Very few countries have such damages. That Canada does so at all is unusual; if it chose to abolish them, it would be entitled to do so without violating Berne or the WIPO treaties. Even in the United States, statutory damages have been subject to challenge and may be subject to reform.¹⁶ Any limits on those damages are, *a fortiori*, consistent with providing adequate and effective protection.

5. Canadian vs. U.S. Copyright Law

In some respects, Canadian law is – for better or worse – more protective of creators than U.S. law: as noted previously, Canada protects moral rights, whereas U.S. copyright law does

¹³ See generally Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295 (2002).

¹⁴ “E-mail warnings deter Canadians from illegal file sharing,” CBC News, Feb. 15, 2007, available at <<http://www.cbc.ca/consumer/story/2007/02/14/software-warnings.html>>.

¹⁵ In a striking departure from evaluating whether legal regimes in other countries provide adequate and effective protection within the meaning of 19 U.S.C. § 2242, IIPA has previously criticized a *proposal* in a bill (since withdrawn under prorogation of Parliament) that would alter Canada's statutory damages regime in the case of copying for private purposes. The proposal would have limited statutory damages to \$500. The bill would not have limited actual damages or lost profits, or injunctive relief. IIPA 2009 Report at 16; compare Bill C-61, *A Bill to amend the Copyright Act*, (June 12, 2008), available at <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3570473&file=4>>.

¹⁶ David Kravets, “Lawyers Challenge Lowered Amount of ‘Shocking’ File Sharing Award,” Wired News, Jan. 25, 2010, available at <<http://www.wired.com/threatlevel/2010/01/lawyers-challenge-files-sharing-verdict/>>.

not. Similarly, Canada's fair dealing law, although construed broadly, is not as innovation-friendly as the U.S. doctrine of fair use. Given these circumstances, placing Canada on a watch list would be manifestly inappropriate.

V. Conclusion

CCIA supports USTR's efforts to ensure adequate and effective protection for creators. CCIA also supports the U.S. Government's commitment to spreading robust, balanced IP norms to our trading partners. Congress properly focused the Special 301 process on establishing whether other nations adequately and effectively protect various rights related to intellectual property, a goal CCIA supports. The continued credibility of the process depends upon close adherence to that inquiry.

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