



Computer & Communications  
Industry Association

666 Eleventh Street, N.W., Sixth Floor  
Washington, D.C. 20001  
202.783.0070 Fax 202.783.0534

## **Computer & Communications Industry Association Comments on the Proposed United States—Bahrain Free Trade Agreement**

These comments of the Computer & Communications Industry Association (CCIA) on the Proposed United States—Bahrain Free Trade Agreement are being submitted in response to the notice published in the *Federal Register*, 68 Fed. Reg. 164, August 25, 2003.

CCIA is an association of electronic commerce, Internet, telecommunications, computer and software companies ranging from small, entrepreneurial companies to some of the largest in the industry. CCIA's members include equipment manufacturers, software developers, telecommunications and online service providers, resellers, systems integrators, and third-party vendors. Its member companies employ well over a half-million employees and generate annual revenues exceeding \$200 billion.

As a general matter, CCIA strongly supports free trade, open markets, and open access. The goals of the already negotiated agreements, and ones such as this that are being proposed, are laudable and mirror our members' interests. CCIA strongly supported and worked with Congress to help ensure passage of Trade Promotion Authority (TPA) in the last Congress. We are firmly committed to the belief that trade measures such as this will allow the United States to have greater access to markets worldwide and benefit American industry and consumers greatly.

However, CCIA and its members have been troubled by recent provisions in other FTAs that in an effort to protect intellectual property (IP) may have the troubling effect of stifling innovation, research, and free expression. We recognize the balance that our domestic and international commitments towards IP strive to achieve. However, in several recent agreements, we have seen the attempted imposition of several elements that lack the benefit of a robust debate domestically or internationally. In other cases, we have seen attempts to codify contentious and unsettled IP principles into international agreements. We respectfully request that the USTR take into account the fact that there is still debate and concern about several of these areas of IP protection before attempting to enshrine them into free trade agreements that are not subject to Congressional revision.

At this stage, the USTR is simply asking for comments on elements to be negotiated in any such free trade agreement. CCIA encourages negotiations to commence, but we bring up several examples from prior free trade agreements (FTAs) to serve as cautionary reminders for avoiding broad IP protection conveyances that may be at odds with sound public policy, US law, or Constitutional safeguards.

## **Database Protection**

The draft agreement for the Free Trade Area of the Americas had a bracketed provision that appeared to refer to *sui generis* property right for the facts contained in a database. This protection is something that the Supreme Court refused to grant in Feist Publication Inc. v. Rural Tel. Service Co. 499 U.S. 340 (1991), holding “sweat-of-the-brow” to be unconstitutional. . Similarly, noting the Supreme Court’s concern, Congress has not enacted legislation granting this protection, despite nearly a decade of intense lobbying by foreign-owned database companies. It is apparent that U.S. case law, statute, and the Constitution permit only the original selection and arrangement of facts to be protected, but not the underlying facts themselves. CCIA is concerned that after failing with the courts and Congress, these foreign database companies are now attempting to accomplish their goals through trade agreements.

Reports filed with The World Intellectual Property Organization (WIPO) have expressed similar concerns:

[A] *sui generis* regime for databases would not aim to protect the databases themselves as new and/or creative products, but the information contained in them, with the consequent risk that restrictions will be placed on the circulation of the information, including that which up to now has been in the public domain. In other words, the creation of new IPRs in databases could skew the balance between protection and dissemination in a dangerously pronounced way in favor of protection. The threats in this area are found not only in the very sensitive areas of science and education, but also in actual trade, particularly in connection with the development of the Internet, for example.

Andrés López, SCCR/8/6, *The Impact of Protection of Non-Original Databases on the Countries of Latin America and the Caribbean*, WIPO (October 15, 2002).

We urge the USTR to reject any attempt to include any language conferring such a right to database owners in any FTA, including this proposed FTA with Bahrain.

## **Exceptions to the Circumvention Prohibition**

CCIA actively participated in the negotiations that led to enactment of the compromise embodied in Title I of the Digital Millennium Copyright Act (DMCA), which implements in U.S. law the circumvention provisions of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. In particular, we worked with Congress and other parties on the various exceptions to the circumvention prohibitions that now appear at 17 U.S.C. Sections 1201(c)-(k).

While we do not agree with all provisions of the DMCA, and we are working to modify the DMCA to correct certain abuses it currently allows, we recognize that the section 1201 exceptions were carefully crafted and represent a bargain made between copyright holders, computer and software engineers, academics, and other interested parties. Therefore, we urge the USTR, if it determines that the Bahrain FTA must include a prohibition on the circumvention of technological protection measures to ensure that it also include the carefully negotiated balances struck by Congress and it remain consistent with U.S. law.

In particular, USTR must take care to preserve the interoperability exception codified at 17 U.S.C. § 1201(f). While we are pleased that the Singapore and Chile FTAs

contain interoperability exceptions, the exceptions could be interpreted as being narrower than that in § 1201(f). The language of the interoperability exception in the Bahrain FTA should be drafted to make clear that it will not require a change to U.S. law.

### **ISP Liability**

Similarly, CCIA strongly urges another balance struck in the DMCA to be imported into this FTA. Title II of the DMCA, codified at Section 512 of the Copyright Act, 17 U.S.C. §512, created a safe harbor from copyright liability for Internet Service Providers (ISPs). This language has been included in previous FTAs, such as the ones with Chile and Singapore, yet were missing from the recent draft text of the Free Trade Area of the Americas. This safe harbor is an important provision to ISPs, who without it could assume broad liability for actions that would be costly, time-consuming, and impractical for ISPs to monitor. We urge the USTR to include this non-controversial provision into the Bahrain FTA.

### **Preclusion of Non-Commercial Compulsory Licenses**

CCIA currently takes no position on the use of non-commercial compulsory licenses for audio-visual works. We strongly oppose the idea of mandatory levies on hardware, software and other innovative technologies such as CD-Rs, Hard-drives, and MP3 players. However, we also believe that copyright holders should be provided with appropriate compensation for the use or distribution of their works. In many cases, a system that automatically provides right holders compensation, such as mechanical licenses for sound recordings, has proven to be effective in promoting the adoption of new technologies and providing additional opportunities and remuneration for all stakeholders.

While taking no position on the underlying merits of such a system, we certainly do not want to preclude any nation, including Bahrain, from adopting a compulsory license system if it determined that this is the best and most effective way of achieving the balance for which IP strives. It is our understanding that other members of the high tech community and the content industry have been working to negotiate a provision precluding these types of non-commercial compulsory licenses in future FTAs. We do not support these efforts.

### **Respecting Fair Use Rights**

As a general matter, CCIA supports U.S.' historic commitment to preserving fair use rights. Without getting into the broad policy rationale for its importance, we urge the Bahrain FTA to echo this policy concern clearly. One recommendation would be to import the criteria spelled out in 17 U.S.C. § 107, the codification of the fair use doctrine in the Copyright Act.

We urge that in future negotiations around these and like provisions, the greatest caution should be taken to assure that the final version will accommodate the doctrines of U.S. copyright law that have contributed so much to the international success of our cultural and technology sectors. In particular, it is critical that if the U.S. ultimately enters into this agreement, it should do so on the basis of an understanding that our

current and evolving domestic standards of "fair use" are fully consistent with its provisions, as contemplated in the "Agreed statement concerning Article 10" that accompanies the 1996 WIPO Copyright Treaty.

We appreciate the opportunity to comment on the concept of a US—Bahrain FTA. In summary, we support negotiations on this FTA, as well as the many other FTAs that your office is currently negotiating and that are on the horizon. We urge that this FTA reflects the careful balance with respect to IP protection that has occurred in past agreements, and look forward to working with you to craft language in this FTA that preserves that vital balance between the interests of copyright owners, legitimate competitors, and information and technology consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed Black". The signature is fluid and cursive, with a large initial "E" and a long, sweeping underline.

Ed Black  
President and CEO  
Computer & Communications Industry Association