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Computer & Communications Industry Association Comments on the Second Draft Consolidated Texts of the Free Trade Area of the Americas

These comments of the Computer & Communications Industry Association on the Second Draft Consolidated Texts of the Free Trade Area of the Americas (Draft Text) are being submitted in response to the notice published in the *Federal Register*, 67 Fed. Reg.249, December 27, 2002.

The Computer & Communications Industry Association (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 $300 billion.

As a general note, CCIA strongly supports free trade, open markets, and open access. The goals of the Free Trade Area of the Americas (FTAA) are certainly worthwhile and laudable. 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.

While we do support the FTAA in general form, and many of its specific provisions outlined in the Draft Text, we must take exception to several points. CCIA provided comments on the original Draft Text in response to the notice published in *Federal Register*, 66 Fed. Reg.134, July 12, 2001. Many of the concerns outlined in

those comments still pertain, and we would like once again to underscore these issues while also addressing several others.

I. Database Protection

We are very concerned with Article 5.1(m) which requires all parties to "give effect to … Articles x to xx of Treaty for the Protection of Non-Copyrightable Elements of Databases[.]" The referenced treaty has not even been considered, let alone adopted by the World Intellectual Property Organization. Moreover, the terms of this draft treaty contravene unambiguous precedent of the United States Supreme Court, which provides that raw facts cannot be owned. In Feist Publication Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991), the Court held that the copyright in a compilation applies only to the original selection and arrangement of the facts, and not the facts themselves. Facts cannot receive protection because they do not meet the constitutional requirement of originality in authorship. Despite nearly a decade of intense lobbying by foreign owned database companies, who have pursued legislation to provide a *sui generis* property rights in the facts that underlie databases, Congress has refused to create new rights for database publishers.

In light of this, CCIA is troubled that United States Government would agree to the inclusion of this section even as a placeholder. CCIA urges removal of this subsection.

II. 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 potentially affected parties on the various exceptions to the circumvention prohibitions that now appear at 17 U.S.C. Sections 1201(c)-(k).

We strongly believe that any free trade agreement that the U.S. enters into should reflect the balance Congress struck in Title I of the DMCA. Unfortunately, the Draft Text does not fully reflect this balance. Specifically, the Draft Text incorporates the prohibitions set forth in Title I, but not the carefully crafted exceptions to the prohibitions, which were critical to congressional approval of Section 1201. To be sure, the Draft Text need not incorporate the detailed statutory language of these exceptions, but it should include language sufficiently explicit to ensure that the Draft Text is consistent with U.S. law, and that the Draft Text provides adequate guidance to other signatories concerning this issue.

Accordingly, we again recommend that language similar to following lines should be included in the Draft Text:

> Each party shall confine limitations to the prohibition referred to in Article 21 to the following activities, provided that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures: traditional non-infringing activities undertaken by nonprofit libraries, archives and educational institutions; law enforcement, intelligence and similar government activities; non-infringing reverse engineering activities carried out with respect to computer programs for purposes of achieving interoperability; encryption research; testing of the security of computer systems or networks; protection of minors from inappropriate content; protections against violations of privacy; and, when an actual or likely adverse impact on non-infringing uses with respect to a particular class of works is demonstrated in a judicial or administrative proceeding by substantial evidence, non-infringing uses of such works.

This language closely follows the text of Section 1201, and thus will not harm the legitimate interests of rights holders. In particular, this language accurately reflects the statutory standards set forth for the Section 1201(a)(1)(C) rulemaking for adopting additional exceptions. We understand that language of this sort was included in the Free Trade Agreements with Singapore and Chile, and we urge its inclusion in the FTAA and any other trade agreement that addresses circumvention of technological measures.

While article 21 refers to obligations concerning technological measures, it is important that the exception language must refer to the entire provision concerning circumvention, and not only the prohibition on the act of circumvention. This will permit the development and distribution of circumvention devices – which are obviously necessary to facilitate the exercise of the rights protected under the exceptions to Section 1201 – to the extent allowed by Sections 1201(f), (g), and (j). At the same time, it will not require the broadening of the other 1201 exceptions.

III. ISP Liability

Another aspect of the DMCA's balance missing from this draft is Title II of the DMCA, which creates safe harbors from copyright liability for Internet Service Providers (ISPs). Title II is codified at Section 512 of the Copyright Act, 17 U.S.C. §512. We understand that language reflecting the Section 512 safe harbors was included in the FTAs with Chile and Singapore. The same language should be included here and in any other trade agreement that addresses circumvention of technological protection measures.

IV. The "No Mandate" Provision

Furthermore, we believe it is important for the treaty to reflect the carefully balanced "no mandate" provision adopted by Congress as section 1201(c)(3) of the DMCA. We are concerned that the draft of the treaty creates ambiguity by stating in paragraph 21.1(c) (labeled as "(a)") that the Article "does not provide a defense to a claim of violation of Article 21.1(b)." We cannot believe that this provision is intended to nullify a statutory exception by declaring in a treaty that it does not provide a "defense." Nor do we think that any such declaration would be effective under U.S. law. Accordingly, the text of the Draft Text should be modified to make clear that Article 21.1(b) does not provide a defense in only those specific and limited instances when a specific design mandate has been imposed under domestic law, or in those instances of alleged circumvention outside the no-mandate clause.

As was made clear in the extensive legislative history underlying the provision, the purpose of the "no mandate" clause was to make sure that the design decisions of manufacturers of consumer electronics, telecommunications, and computer products, made with respect to such products and their components, were recognized as remaining outside the scope of Section 1201, except in the case of the specific design mandate imposed by Section 1201(k).

Senator John Ashcroft offered the amendment containing the "no mandate" clause when the bill was pending in the Senate. In a floor statement prior to adoption of the conference report, never contradicted by either the Chairman or Ranking Member of the Judiciary Committee prior to adoption of the conference report, he clarified that its one limitation – "so long as [the device or component] does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1)" – did not weaken the general force of the "no mandate" provision. Rather, it recognized a specific, singular exception:

> As my colleagues know, there had been some concern expressed that the "so long as" clause of section 1201(c)(3) made the provision appear to be circular in its logic. In other words, there was concern that the entire provision could be read to provide in essence that manufacturers were not under any design mandate to respond to technological measures, as long as they "otherwise" designed their devices to respond to existing technological measures. I never shared that perspective. To eliminate any uncertainty, the House Commerce Committee simply deleted the "so long as" clause. As I explained on the floor in September, that change merely confirmed my original conception of the amendment. Now that the conferees have adopted a provision requiring certain analog videocassette recorders to respond to certain existing analog protection measures, the "so long as" clause has a meaning that all should agree is logical: Manufacturers of consumer electronics, telecommunications, and computer products are not under a design mandate generally, but they are otherwise subject to a single, very limited, and carefully defined mandate to design certain analog videocassette recorders to respond to existing analog protection measures.
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> (Cong. Rec. S11887-88) (daily ed. Oct. 8, 1998)

Similarly, Congressman Rick Boucher said on the floor of the House:

> Read together with other provisions of the measure and other parts of the relevant legislative history, the 'no mandate' provision confirms that Congress does not intend to require equipment manufacturers to design new digital telecommunications equipment, consumer electronics and computing products to respond to any particular copy protection technology.
>
> (Cong. Rec. E2166) (daily ed. Oct. 14, 1998).

The provision referred to by Senator Ashcroft and Congressman Boucher specifically mandates a response to a particular analog anti-copy encoding. Section 1201(k)(5) provides that a failure of a covered device to respond to such encoding shall be treated as a violation of subsection (b)(1), and hence as "circumvention." Thus, only a specific, statutory exception to the "no mandate" clause was judged to be warranted.

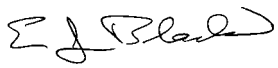
V. Restriction of User Privileges

Finally, and more generally, we note with concern that among the various formulations in the Draft Text there are a number of other provisions that might significantly expand rights now available to rights holders or restrict privileges now available to consumers under U.S. copyright law. Primarily, we refer to the failure to reference the criteria of 17 U.S.C. Sec. 107 in the definition of "fair use" (at Section 3, Art 1).

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 look forward to working with you to craft language in the FTAA that preserves the vital balance between the interests of copyright owners, legitimate competitors, and information and technology consumers.

Sincerely,



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