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

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The American Association of Law Libraries (AALL), the American Library Association (ALA), the Association of Research Libraries (ARL) and the Special Libraries Association (SLA) submit these supplemental comments in response to the notice and request for public comments on the Second Draft Consolidated Texts of the Free Trade Area of the Americas Agreement (FTAA), published by the Office of the United States Trade Representative (USTR) in the *Federal Register* on December 27, 2002 (67 Fed. Reg. 79,232). These comments supplement those previously submitted by AALL, ALA and other organizations, and address, in particular, the FTAA provisions on copyright within the section on intellectual property rights. We appreciate the open process for reviewing and commenting on the draft FTAA. However, we are very concerned that certain 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. We therefore believe that the copyright chapter of the draft agreement should be deleted from the FTAA in its entirety.

The American Association of Law Libraries is a nonprofit educational organization with over 5,000 members dedicated to promoting and enhancing the value of law libraries to the legal and public communities, fostering the profession of law librarianship, and providing leadership and advocacy in the field of legal information and information policy. The American Library Association, the oldest and largest library association in the world, is a nonprofit organization of over 64,000 librarians, library trustees, and other friends of libraries dedicated to the development, promotion, and improvement of library and information services to enhance learning and ensure access to information for all. The Association of Research Libraries (ARL) is a nonprofit organization of 124 research libraries in North America. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship and community service. The Special Libraries Association (SLA) is an international professional association serving more than 14,000 members of the information profession, including special librarians, information managers, brokers, and consultants. The AALL, ALA, ARL and SLA (collectively, "Library Associations") seek to ensure that the FTAA will not interfere with the ability of libraries to support education and research by providing unrestricted access to information in any form and by whatever means technology may allow in coming years.

The Library Associations maintain an active interest in copyright policy and are guided by the belief that an equitable balance between the rights of users of information and the rights of copyright owners and licensors is essential to the free flow of information. We believe that copyright policies must not impair the ability of the United States government to enable libraries and users of information resources to preserve intellectual works, share them with one another, and provide public access to them, including through lending and the Internet. Furthermore, the United States must continue to have the flexibility to enable libraries to keep pace with developments in information technology.

In light of these policy goals, the Library Associations are deeply concerned that the expansive language in the FTAA seeks to raise the level of copyright protection above and beyond the international standards currently evidenced by the Berne Convention for the Protection of Literary and Artistic Works (Berne) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) annexed to the agreement establishing the World Trade Organization. There is a delicate balance between the ability of sovereign nations to implement appropriate copyright policies and the desirability of harmonization on an international level. Because the Berne-TRIPS framework already provides an international standard for the realization of the latter goal, we are concerned that unnecessary institutional duplication of the framework will only increase complexity and uncertainty. At the same time, any departures from the Berne-TRIPS standards in terms of particular provisions, especially as part of an international trading agreement with independent enforcement mechanisms, should be viewed with caution lest it be disruptive of the first goal. Our review of the copyright chapter of the draft agreement leads to the conclusion that the section should be deleted from the FTAA in its entirety. Although we suspect that the same conclusion should be reached with respect to the intellectual property chapter in its entirety, we will limit most of our specific observations to particular copyright-related provisions. One exception to that is the following comment on Article 5.2 (m) of the General Provisions:

1. The FTAA process should not support the inclusion of draft database treaty language.

Article 5.2 (m) of the General Provisions and Basic Principles would require all parties to give effect to Articles x to xx of the Treaty for the Protection of Non-Copyrightable Elements of Databases.

We do not support inclusion of this proposed language. The Treaty for the Protection of Non-Copyrightable Elements of Databases has not been adopted by the World Intellectual Property Organization (WIPO). Indeed, the 1996 WIPO Diplomatic Conference did not approve a treaty on database rights.

2. The FTAA Copyright Agreement expands the scope of protectable subject matter.

The FTAA Copyright Agreement specifically expands the scope of protectable subject matter to include some compilations.

Article 2 of the FTAA Copyright Agreement definition states:

> [2.1. The following are not subject to copyright:
>
> a) ideas, regulatory procedures, methods, systems, mathematical designs or concepts per se;

b) outlines, plans or rules for conducting mental processes, games or business,
c) blank forms to be completed with any type of information, scientific or otherwise, and instructions thereon;
d) texts of treaties or conventions, laws, decrees, regulations, judicial decisions, and other official records;
e) information for everyday use such as calendars, diaries, official land registers, or diaries, and keys;
f) individual names and title;
g) industrial or commercial exploitation of the ideas in the work]

A specific list of what is *not* protected, like the one above, has the effect of expanding the scope of protectable subject matter, contrary to the broader, less specific language that is currently recognized in the United States under *Feist Publications, Inc. v. Rural Tel. Serv., Inc*., 499 U.S. 340 (1991), as well as in various international agreements.

Article 2(5) of the Berne Convention provides:

> "(5) Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections."

Article 10(2) of the TRIPS agreement provides:

> "(2) Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. *Such protection, which shall not extend to the data or material itself*, shall be without prejudice to any copyright subsisting in the data or material itself." (emphasis ours).

Article 1705 (1)(b) of the North American Free Trade Agreement (NAFTA) provides, in pertinent part:

> "(b) compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such.
>
> The protection a Party provides under subparagraph (b) *shall not extend to the data or material itself*, or prejudice any copyright subsisting in that data or material." (emphasis ours)

Read together, these standards recognize the possibility of copyright subsisting in compilations where the selection or arrangement of their contents constitutes an intellectual creation. At the same time, both TRIPS and NAFTA specifically exclude the data itself from the subject matter of copyright. The language in both agreements is in the nature of a blanket exclusion. The FTAA language departs from this blanket exclusion and specifically limits copyright coverage as to specific classes of compilations. But after excluding the subject matter specifically enumerated in subsections 2(1)(a) through (g), a

large residual universe of facts and data remains. By specifically enumerating the exclusions instead of continuing the general blanket prohibition, there is a strong suggestion that certain classes of data are or may be appropriately within the scope of protectable subject matter. The residual category includes scientific and technical data, bio-information, health, and genomic data, compilations containing government publications that are not enumerated primary materials, and other compilations. The exclusion in subsection (e) with respect to information for everyday use is rather vague, and leaves open the question of whether compilations such as the directories litigated in *Feist* and *Tele-Direct Publications, Inc. v. American Bus. Info., Inc*., [1998] 2 F.C. 22, are included or excluded.

The failure to specifically exclude such broad classes of data strongly suggests that the intent of the FTAA definition is to open the door to the inclusion of facts and data within copyright protection without regard to originality or indicia of authorship. Rather than argue that additional categories should be excluded, the better policy would be to continue the current blanket prohibition that exists under current standards. To date, attempts to enact a *sui generis* database right have failed outside of the EU. In 1996, the WIPO Diplomatic Conference considered, and rejected, such a treaty as part of the WIPO system. In the United States, efforts to enact *sui generis* database legislation failed in the 104th, 105th, 106th and 107th Congresses. The Library Associations have opposed efforts to enact database protection legislation because it serves to restrict access to materials that are rightfully in the public domain. Such legislation has not even been considered in Canada to date, and the recent Section 92 Report submitted to Parliament by Industry Canada and Canada Heritage rejected the inclusion of database legislation in the listing of matters to be considered in the near term on the Copyright Reform agenda.

The FTAA process should not be used as a device for undermining the *Feist* doctrine. Nor should the vitiation of the originality requirement for certain classes of compilations be used as a back-door manner of bringing *sui generis* protection for databases within the scope of copyright law under the guise of an international obligation.

3. The FTAA Copyright Agreement unduly locks in and expands the scope of the Anti-Circumvention Rules.

The FTAA text anticipates the inclusion of the anti-circumvention rules in the new agreement. Article 11 of the WIPO Copyright Treaty (WCT) includes the general requirement 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 this 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."

Article 18 of the WIPO Performances and Phonograms Treaty (WPPT) mirrors the language with respect to performers or producers of phonograms.

In implementing these treaties in the United States, section 1201 of the Digital Millennium Copyright Act (DMCA) went well beyond the requirements of these sections. Indeed, section 1201 as enacted by Congress bore greater similarity to earlier versions of the WCT and WPPT that were rejected by the delegates to the 1996 Diplomatic Conferences. Most notably, section 1201 contains broad device prohibitions that exceed the requirements of the treaties.

Inasmuch as the Berne Convention, TRIPS, and NAFTA do not contain these provisions, the FTAA Copyright Agreement represents a marked expansion of coverage in this area. Section 21.1 of the Agreement provides two options. The first option generally mirrors the language of the WCT/WPPT treaties:

> [21.1. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, producers of phonograms, or broadcasting organizations in connection with the exercise of their rights under this Agreement or the Berne Convention and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.]

This option, while extending coverage to the rights of broadcast organizations, otherwise only attempts to incorporate by reference the existing WIPO obligations into the new FTAA. But many countries in the Western Hemisphere that are also members of the Berne Convention (including the Bahamas, Belize, Bolivia, Brazil, Dominican Republic, Canada, Cuba, Grenada, Suriname, Uruguay, and Venezuela) have not implemented the WCT to date. The inclusion of any requirement to implement those portions of the WCT/WPPT that extend the existing Berne-TRIPS-NAFTA framework should be rejected. The FTAA process should not be taken as an occasion to alter the internal decision-making process of sovereign states with respect to the implementation of such copyright provisions. It should be kept in mind that the WCT and WPPT were only designed as independent treaties because of the unlikelihood of their incorporation into either the Berne or TRIPS agreements themselves. It is not surprising that to date, only 39 states have implemented the WCT and WPPT (collectively, the WIPO Treaties). Given the strong division existing within the western hemisphere over issues surrounding the implementation of the new WIPO treaties, the FTAA should delete this area from consideration altogether. The sovereign states of the western hemisphere should be left to their own internal processes to determine whether and how the WIPO treaties should be implemented without interjecting the further imperative of compliance with a yet another trade-related treaty.

But even if the controversial digital copyright issues brought about by the WIPO Treaties should be included within the FTAA Agreement, great care should be taken to include language which constitutes the least interference with national decision making as possible. The second option provided in Article 21.1 goes much further than the bare requirements of the WIPO treaties; approximating, even exceeding, the expansionary version enacted in the United States as the DMCA. The second alternative provides:

"[21.1. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, by performers, by producers of phonograms and their successors in interest 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

a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure; or
b) 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:

i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
ii) have only a limited 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 measure; shall be guilty of an offense, and shall be liable, upon the suit of any injured party, to relief by way of damages, injunction, accounts or otherwise."

Even if one were to accept the questionable assumption that the FTAA agreement should act as inducement to implement the WIPO treaties, the second option is still excessive. By going well beyond the minimal requirements of the WIPO Treaties, the second option must be rejected as an unwarranted attempt to direct the implementation of national copyright policies in a maximal direction.

In fact, the second option under Article 21.1 extends the scope of the anti-circumvention rules even beyond the manner in which they are implemented in DMCA section 1201.

- The draft does not distinguish between access and copy controls, applying generally to measures that are used in connection with both the exercise of rights and with the restriction of unauthorized acts. In contrast, Section 1201(a)(1)(A) of the DMCA applies the general prohibition on acts of circumvention only to access controls.
- The draft contains none of the exceptions contained in section 1201(d) through (j) of the DMCA, as limited as those exceptions may be.
- The draft does not even purport to contain the potentially narrowing interpretation clause as in section 1201(c).
- The draft contains no provision for administrative review with the corresponding possibility of additional exceptions through the regulatory process as contained in DMCA section 1201(a)(1)(C) & (D).
- With respect to the device prohibitions, the draft apparently deletes the knowledge requirement with respect to marketing the devices (compare subsection 21.1(b)(i) with DMCA sections 1201(a)(2)(C) and (b)(1)(c).

As overbroad as the U.S. implementation of the WIPO Treaties may have been, the second option of FTAA Copyright Agreement 21.1 is even broader. This language would not only provide an extraordinary impetus for the non-ratifying countries to conform to the WIPO treaties in a manner not necessarily in their national interests, but it would lock in those countries that have already ratified. In the case of the United States, there is a growing awareness that section 1201 of the DMCA may have overshot the mark in terms of what was necessary and appropriate in order to implement the WIPO Treaties. Several measures have been introduced by the Congress that seek to ameliorate some of the harsher aspects of the DMCA**.** For instance, H.R. 107, the Digital Media Consumers' Rights Act (DMCRA), introduced in January 2003, would amend the anti-circumvention provision of section 1201 of the DMCA to provide for limited fair use exceptions.

The adoption of the second option noted above would entrench potentially destructive copyright polices under the guise of promoting international trade. Such an outcome would deprive American policymakers of the opportunity to adjust and fine tune copyright policies to meet the needs of a changing environment and to maintain the appropriate balances that copyright policy has historically addressed.

4. The FTAA Copyright Agreement would expand the duration of copyright protection beyond the current Berne standard.

In Article 10, two options are proposed. The first option simply restates the existing standard under Berne/TRIPS of life + 50 years. The second option incorporates the life + 70 standard which has been enacted by the United States. The Library Associations are opposed to using the FTAA process to increase the term of protection beyond what is already recognized as the international minimum standard**,** life + 50 years. Extending the term of protection beyond this recognized standard should remain a question of national discretion.

5. The FTAA Copyright Agreement unduly limits the definition of fair use.

Article 1 provides a new definition of fair use:

> [Fair use: Use that does not interfere with the normal exploitation of the work or [unreasonably] [unjustifiably] prejudice the legitimate interests of the author [or the right holder;]
> [Personal use: Reproduction or other use of the work of another person in a single copy, exclusively for an individual's own purposes, in cases such as research and personal entertainment;]

This narrow definition of fair use is not consistent with the broad and open-ended nature of section 107 of the U.S. Copyright Act. While this proposed language is framed in terms of a definition, we are concerned that it could be given substantive effect. The Berne/TRIPS framework already creates substantive limitations on the scope of fair use rights and we are opposed to expanding this exclusionary language in a new agreement.

It is unclear why the attempt to define "personal use" is included, and it is clear that the current fair use doctrine is much broader than "personal use." The language, as proposed, would be a source of confusion and uncertainty that we believe is unwarranted. The definition of fair use should remain a subject of national discretion subject only to constraints that already exist.

Our view of the fair use doctrine is that it provides substantive rights for users that flow from the limited nature of the copyright monopoly. It is an essential component of the overall copyright regime that is required in order to ensure that an appropriate balance between the rights of owners and users is maintained.

6. The FTAA Copyright Agreement threatens to extinguish authors' rights of termination.

Article 12.1 (b) of the draft purports to create an absolute, non-terminable interest in certain assignments:

> "any person acquiring or holding [any] such economic rights [by virtue of a contract, including contracts of employment underlying the creation of [any type of] works and phonograms,] shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.]

This clause, if read literally, would conflict with existing rights now held by an author (and certain successors) by virtue of section 203 of the U.S. Copyright Act. The reversionary rights granted under that section could be construed to so limit an assignee's "full benefits derived from those [assigned] rights." Section 203 is based on legitimate policy considerations within the scope of national discretion and should not be disturbed.

Conclusion

The Library Associations are concerned that the FTAA Copyright Agreement repeats some standards already in existence under the Berne-TRIPS framework. We view the institutional duplication as unnecessary and likely to lead to an unwarranted level of complexity and confusion. In addition, we are equally concerned that it incorporates new rules and standards that have not been adopted by any state or international organization. This approach to the development of new international copyright standards would place an undue constraint on the discretion of individual states to determine their own copyright regime consistent with their obligations under Berne and TRIPS. Given the broad reach of the scope and enforcement mechanism of the TRIPS agreement, it is not clear what legitimate interests would be served by including intellectual property matters in the FTAA regime. Should affected parties believe that there is a need for revision to the TRIPS agreement, the matter can be presented to the appropriate WTO body for review. At the same time, individual nations already have the discretion to implement the WIPO treaties as they see appropriate.

The Library Associations appreciate this opportunity to offer additional feedback on an area of policy that is of strong concern to our members and the patrons whom they serve.

We welcome the opportunity to engage in further discussion with the Office of the United States Trade Representative, members of Congress, and other interested parties on this matter.