

**EFF POSITION PAPER ON FTAA IP ISSUES
FTAA SOC THIRD ISSUE MEETING, JANUARY 28, 2004, SANTO DOMINGO**

The Electronic Frontier Foundation (EFF) appreciates the opportunity to participate in the discussion of intellectual property issues at the FTAA Third Issues Meeting on January 28, 2004.

EFF is a charitable, non-profit legal services and advocacy organization, funded by over 11,000 members, dedicated to protecting consumers' digital rights, freedom of speech on the Internet and technological innovation. Since its founding in 1990, EFF has worked to preserve the copyright balance between rightsholders and the public through policy analysis, submissions to governments around the world and litigation in the United States.

EFF is thankful for the opportunity to submit these comments on the proposed provision for legal protection for technological measures added by rightsholders to copyrighted works in Article 22 of Subsection B.2.c of the third draft of the Intellectual Property chapter of the FTAA agreement. Although this provision would afford legal protection to rightsholders who have a legitimate purpose in protecting their interests, the current draft proposal raises significant concerns for FTAA signatories' national sovereignty, consumers' existing rights and FTAA countries' domestic technology sectors. As the United States' experience with very similar provisions in the 1998 Digital Millennium Copyright Act (DMCA) has demonstrated, overbroad protection like that proposed disrupts the balance of copyright at the expense of the public interest.

EFF recommends that the second formulation of Article 22 should be removed from the draft FTAA text for the following reasons:

1. Article 22 threatens FTAA signatories' national copyright laws.

Article 22 is likely to override FTAA signatories' existing copyright law exceptions and limitations. Article 22 is modeled on section 1201 of the U.S. copyright statute, which was inserted by the DMCA. In the U.S., the DMCA has completely removed the careful balance of rights in copyright law protected over the last 130 years by Congress and the judiciary. It has provided U.S. copyright holders with protection beyond copyright law, by granting a new right to control access to, and not merely use of, copyrighted works. As a result, the DMCA has overridden all limitations and statutory exceptions to copyright law. For instance, U.S. copyright law permits blind persons to make Braille translations of books, but since enactment of the DMCA, blind persons are no longer able to exercise this right for technologically-protected e-books.

The DMCA has also restricted consumers' rights in digital media they own because it has effectively eliminated the ability to make non-infringing "fair use" of protected digital works. The DMCA bans consumers from circumventing technological measures to make a back-up copy of a copy-protected CD or DVD that they have purchased. It also bans technology vendors from producing or selling technologies and devices that consumers need if they are to enjoy copyright exceptions that would otherwise apply to digital media. In effect, this has turned copyright into a system of private law, because rightsholders can determine the level of protection for their works, without taking any account of the public interest or existing exceptions.

Similar results would follow for FTAA signatories if the second formulation of Article 22 is adopted. FTAA parties' existing national copyright limitations and exceptions would no longer apply to technologically protected works unless there was a specific circumvention exemption in Article 22.

2. Potential for Entrenchment of Monopoly-Priced Products and Stymied Technological Innovation

In the U.S., the DMCA has been used by rightsholders to block competition and the development of non-copyrightable consumer products – such as printer cartridges - that interoperate with copyrighted works. This has serious anti-competitive implications for consumers and has stifled technological innovation.

First, citizens of FTAA signatory countries may be locked into purchasing products at higher monopoly-based prices. For instance, Lexmark, the second largest printer distributor in the United States, has used the DMCA to

ban the sale of recycled Lexmark printer cartridges, which were being sold to consumers at lower prices than new cartridges and Lexmark's own "authorized" remanufactured cartridges. Second, copyright owners have used the DMCA to create artificial geographical market segmentation. The motion picture and video game industries have used "region coding" technologies, backed by the DMCA and similar laws, to control the availability and pricing of DVDs and video games in various geographic regions. If Article 22 is adopted, other copyright industries can be expected to follow, potentially discriminating in both price and availability against consumers in the Western hemisphere.

Third, U.S. rights-holders have used technological measures enforced by the DMCA to control the technology on which copyrighted works can be played. Movie studios have used the DMCA to force DVD player manufacturers to sell Region 1-only DVD players in the United States, and claim that multi-region and region-free DVD players are illegal in the U.S. In addition, the DMCA has also severely restricted the ability of technology companies to reverse-engineer computer programs to develop new products, which has stifled the development of innovative new interoperable products.

3. Article 22 Would Impair Access to Information for Education and Research

The second version of Article 22 would also have a substantially detrimental impact on the ability of educators, students and researchers in signatory countries to access digital information and technology. The current draft would require signatories to extend intellectual property protection to facts and data within databases, and to extend the term of copyright protection to 70 years for works created by individuals. As information is treated as a copyrightable product and increasingly becomes available only in a technologically protected form, fair dealing and personal copying exceptions that previously guaranteed access will be technologically precluded. For instance, scientists will no longer be able to make a personal use copy of a scientific research article stored in a technical database. This will increase the cost of accessing information and ultimately result in the widening of the knowledge gap between industrialized and developing countries.

In addition, the U.S. DMCA has had a chilling effect on scientific research and publication. There is growing concern within the United States about the impact of the DMCA on computer security research. In October 2002, the former White House Cyber Security advisor, Richard Clarke, admitted that the DMCA had restricted scientific research and called for DMCA reform. The U.S. Congress is currently considering two legislative proposals to amend the DMCA to permit scientific research. Unlike the DMCA, Article 22 has no exceptions at all so the chilling effect is likely to be broader.

4. Conclusion

The contours of copyright protection necessarily reflect a nation state's domestic policy priorities. Any technological protection measure provision must retain maximum flexibility for FTAA signatory countries to implement entrenchment in a way that is consistent with countries' individual social and economic development goals and their existing national copyright law limitations and exceptions in accordance with Articles 9 and 10 of the Berne Convention and Article 13 of the TRIPs accord. The second formulation of Article 22 should be removed from the draft FTAA because it does not permit FTAA signatories to do so, and is likely to cause harm to FTAA signatories' educational and technology sectors.

Gwen Hinze
Attorney
Electronic Frontier Foundation
Email: gwen@eff.org
Tel: + (1)(415) 436 9333 x110