

The Real Pirates of the Caribbean:
U.S. High Tech Industry's False CAFTA Promises
Disguise Bad Policy

Washington Alliance of Technology Workers (WASHTECH)
Society of Professional Engineering Employees in Aerospace (SPEEA)
American Ingenuity Alliance (AIA)

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The Washington Alliance of Technology Workers (WASHTECH), was formed in 1998 by Microsoft contract employees in Redmond, Washington, and is an affiliate of the Communications Workers of America. Since 1998, WASHTECH has expanded to become a national alliance, representing and advocating on behalf of technology workers from Silicon Valley to Boston.

The Society of Professional Engineering Employees in Aerospace (SPEEA) represents over 20,500 engineers and other aerospace professionals in seven different states. SPEEA is an affiliate of the International Federation of Professional and Technical Engineers (IFPTE).

The American Ingenuity Alliance allies intellectual property creators and the labor movement in order to protect the fruits of American ingenuity and to utilize them in forging an anchor for good jobs in America.

Contents

Introduction	4
Why CAFTA Does Not Help Intellectual Property-Dependent Industries	6
CAFTA Would Set a Bad Public Policy Precedent	12
Conclusion	15
Notes	16

Introduction

Today, workers in the U.S. high technology industry are experiencing the failures of U.S. trade policy first-hand. In spite of this experience, the U.S. high tech industry, with Microsoft playing a prominent role, is lobbying Members of Congress to vote for the Central America Free Trade Agreement (CAFTA), claiming the agreement will boost U.S. high tech exports and thus U.S. jobs.¹ This report demonstrates that CAFTA will not lead to a significant boost in U.S. high tech exports, and instead could, through the expansion of highly controversial copyright rules, undermine innovation and freedom of expression.

In recent years, the loss of good jobs, downward pressure on wages, and deterioration of working conditions traditionally experienced in non-high tech manufacturing due to the North American Free Trade Agreement (NAFTA) has increasingly spread to the high tech sector, in part as a result of international trade and investment agreements that increase global competition in a sector the United States has long dominated. U.S. high tech workers have seen the U.S. high tech industry ship hundreds of thousands of jobs off shore in the past few years, have had to bargain with increasingly mobile employers who use global competition as a justification for keeping down wages and benefits, and have decried employer abuse of temporary visa programs to bring lower wage workers from abroad into the United States to perform work once done by U.S. residents.

Additionally, individual inventors and other creators of intellectual property (IP) in the U.S. have experienced the expropriation, infringement and piracy of their intellectual property rights by global corporations that in turn utilize this IP overseas in offshoring strategies that result in significant job loss in the U.S.

Now, despite this record of off shored jobs and stagnant U.S. high tech wages, the U.S. high tech industry has launched a campaign to push Congress into approving the same failed trade policies that contributed to the current problems. Namely, they are trying to sell Congress on an expansion of the NAFTA trade model to six additional countries through CAFTA. Given the fact that CAFTA's text is nearly identical to NAFTA's, the results, if CAFTA is implemented, are foreseeable: higher trade deficits, more lost jobs, and continued downward pressure on wages and working conditions.

Industry lobbyists argue that they need CAFTA in order to increase exports to an important market and to counter copyright piracy in Central America. But the facts do not support the industry claims:

- Sales to *all* CAFTA countries comprise little more than one percent of U.S. high tech exports, and over 60 percent of U.S. high tech exports to the region – those to Costa Rica and El Salvador – *already* go duty-free under World Trade Organization (WTO) rules.
- Neither the U.S. industry nor administration officials have identified high tech piracy in Central America as a significant problem in dollar terms, or as a priority for stronger enforcement relative to other countries. This is probably because piracy costs from all CAFTA countries comprise less than two percent of losses in China, seven percent of losses in Mexico, and only 0.8 percent of U.S. and Canadian losses due to piracy.

- Meanwhile, under the copyright rules in NAFTA, the piracy problem in Mexico – a country long on industry and government enforcement priority lists – has increased, not abated. CAFTA contains similar language to NAFTA, bringing into question industry claims that the trade agreement is a “silver bullet” for solving international piracy problems.

Furthermore, some of the CAFTA copyright requirements – such as criminalizing unknowing end use of pirated goods and defining willful infringement to include non-commercial use of copies – are the same as aspects of the Digital Millennium Copyright Act (DMCA) that members of Congress representing high tech districts have sought to amend, as those rules stifle innovation and undermine consumer rights.

America’s high tech workers question how the recipe that failed to deliver promised benefits under NAFTA will succeed under CAFTA. Thus, they are joining forces with workers in other manufacturing and service industries, with trade unions throughout Central America, and with allies in the inventor, consumer, farm, faith and environmental communities to oppose CAFTA.

We are urging our representatives who do care about the health of the high tech industry to reject CAFTA and start revising U.S. trade policy to address the real high tech crisis. Urgent reforms are needed to ensure that our trade laws are effectively enforced, to address blatant currency manipulation that undermines U.S. production, to end employer abuse of temporary visa programs, and to protect the rights of high tech workers overseas. The integrity of the U.S. patent system also needs to be defended and strengthened to ensure that the rights of U.S. inventors and other intellectual property creators are protected from infringement, piracy and expropriation by global corporations. CAFTA achieves none of these goals. In fact, key aspects of CAFTA would worsen the status quo.²

In this report, we investigate the actual provisions of CAFTA and compare them to the already-existing trade provisions which apply to U.S. high tech exports to Central American countries so as to determine the factual basis for high tech industry claims that passage of CAFTA would provide meaningful gains for the U.S. industry. Attempts by the U.S. high tech industry to sell the agreement as a boon to the industry need to be examined carefully, both regarding how real the touted gains would be, and against which large CAFTA-caused problems any small gains must be measured.

Why CAFTA Does Not Help Intellectual Property-Dependent Industries

Reason #1: The CAFTA Countries Offer a Very Limited Market, and Nothing in CAFTA Would Serve to Significantly Boost U.S. Information Technology Exports to Central America

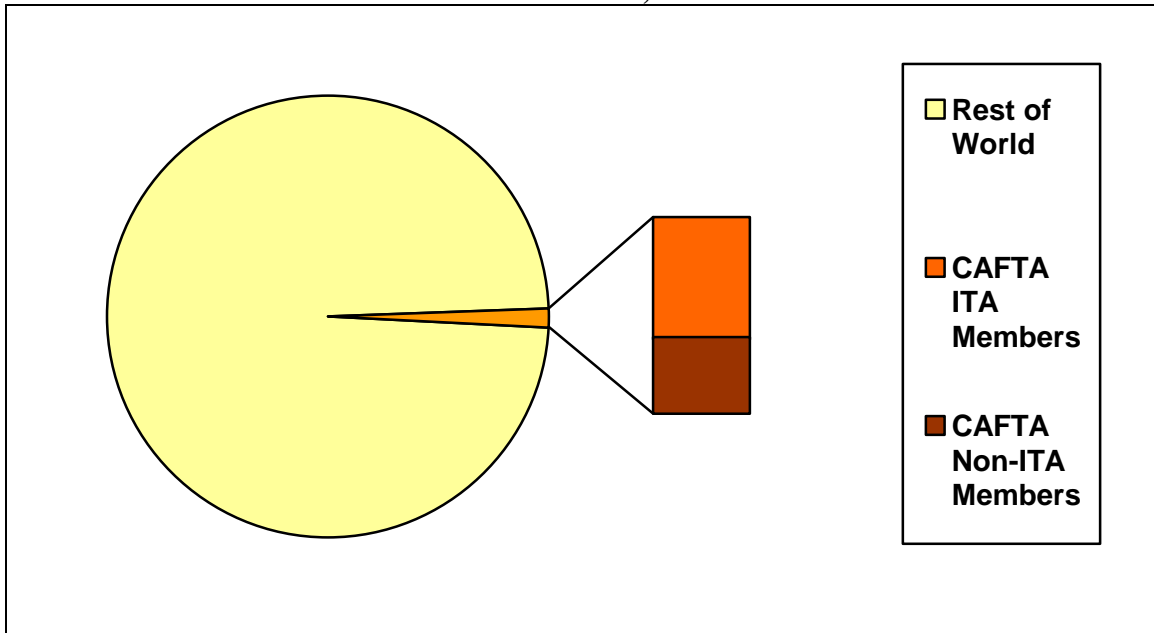
In a January 26, 2005 letter to Representative Dennis Hastert, the U.S. High-Tech Trade Coalition claimed that the Central America Free Trade Agreement (CAFTA) will boost information technology (IT) exports to the region and “make U.S. technology exports more competitive internationally.”³ Yet the Coalition’s claims are not supported by the facts:

- The CAFTA countries – Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua – account for a miniscule portion of U.S. IT exports worldwide. In 2004, *IT exports to CAFTA countries accounted for a mere 1.4 percent of all U.S. IT exports to the world.*⁴
- *The vast majority of our IT exports to the CAFTA countries already enter duty free.* Costa Rica and El Salvador, which absorb 62 percent of our IT exports to the CAFTA region,⁵ are already members of the Information Technology Agreement (ITA) at the World Trade Organization (WTO) and thus already provide completely tariff-free access to IT exports from the United States.⁶
- Ratification of CAFTA would therefore grant additional access for American IT products to only four countries – the Dominican Republic, Guatemala, Honduras and Nicaragua. U.S. combined IT exports to these countries in 2004 was just \$687 million – *a paltry one half of one percent of U.S. IT exports worldwide.*⁷
- Twenty-five countries *each* have individual markets for U.S. IT exports that dwarf the \$687 million *combined* market for IT products in those CAFTA countries not already members of the ITA. In 2004, *we exported more IT products to Belgium than we did to the combined CAFTA countries* that don’t already give us tariff-free access under the ITA.⁸
- The additional access U.S. industry would be granted in even these four CAFTA countries is minimal. The U.S. High-Tech Trade Coalition claims that they currently pay \$75 million in tariffs on their exports to the four CAFTA countries who are not ITA members. *These tariffs amount to less than 0.06 percent of the global market for American IT exports*, and their elimination will not even be a blip on the radar screen of the American information technology industry – much less the boon that would lead to increased U.S. high tech employment levels.⁹

While the U.S. high tech industry argues that CAFTA is needed to make U.S. exports competitive, CAFTA also would establish duty-free access into Central America for high tech goods from China and scores of other nations. Perhaps most worrisome is the manner in which tariffs on IT exports in those four CAFTA countries would be eliminated under CAFTA. Rather than simply require these CAFTA countries to all drop their tariffs on U.S. IT exports to zero, CAFTA would require the countries to become members of the WTO’s ITA. This could actually *disadvantage U.S. information technology producers by granting new, tariff-free access to all of the members of the*

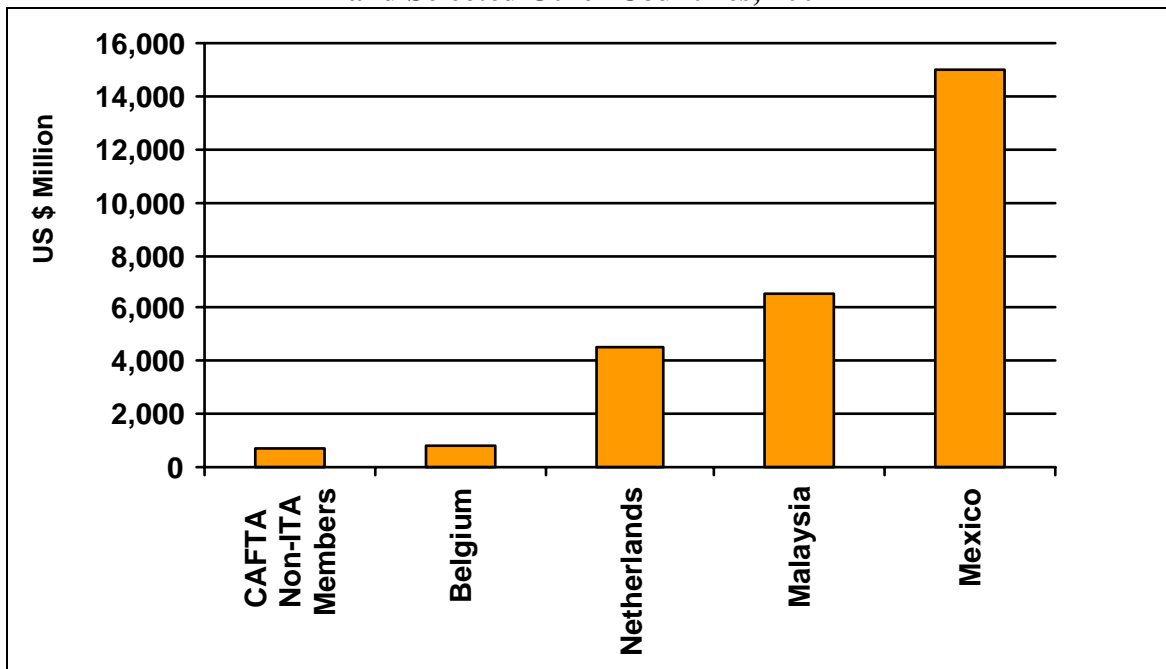
WTO's ITA, not just to U.S. IT exports to Central America. The 63 countries who are members of the ITA, including China, account for more than 95 percent of IT exports to the world, according to the WTO,¹⁰ and CAFTA would provide these nations with the gift of duty-free access for their U.S.-competing goods to the Central American market.

Figure 1. U.S. IT Exports to CAFTA Countries and the World, 2004



Sources: World Trade Organization, U.S. International Trade Commission's Interactive Tariff and Trade DataWeb.

Figure 2. U.S. IT Exports to Non-ITA CAFTA Countries and Selected Other Countries, 2004



Sources: U.S. Department of Commerce, USITC Trade Dataweb, World Trade Organization

Given the points above, it is clear that there is little new tech industry business to be generated by the paltry amount of new market access granted under the proposed CAFTA. On the contrary, the United States already enjoys duty-free access to the bulk of the CAFTA target country markets, and the negligible new access that would be gained would come through WTO channels, where the U.S. high tech industry would risk being displaced by lower cost IT-exporting countries. For U.S. high tech workers, this would sustain the pattern of job losses already experienced due to offshoring of U.S. high tech jobs.

Reason #2: Central America is the Wrong Target for Anti-Piracy Efforts Given Total CAFTA Piracy Losses are 2% of Chinese Losses and 0.8% of U.S. and Canadian Losses

Industry representatives, such as the International Intellectual Property Alliance (IIPA), have argued that CAFTA’s intellectual property rules would combat piracy in the region, and that this is the basis for their support for CAFTA.¹¹ Yet research published by the IIPA demonstrates that piracy levels in the CAFTA target countries are not economically significant.

- Currently, losses to software piracy within the United States and Canada are estimated by the industry to be \$7.2 billion, or about 23 percent of total software usage¹² and about one percent of the industry’s total \$626.6 billion of value-added in 2002.¹³
- At the same time, the IIPA estimates that copyright piracy in CAFTA countries accounted for only \$62.7 million in lost sales.
- This industry estimate is less than a 0.01 percent loss of the industry’s total value-added in 2002,¹⁴ or about 0.07 percent of the industry’s \$89.26 billion in foreign sales and exports in 2002.¹⁵
- China, by comparison, accounted for \$2.86 billion in piracy losses, over 45 times the losses due to Central America.¹⁶ The IIPA’s estimates are shown in the table below.

Table 1

Table 7-1 Central America and the Dominican Republic: Estimated U.S. trade losses due to copyright piracy, 2003						
Industry	Costa Rica	Nicaragua	El Salvador	Guatemala	Honduras	Dominican Republic
	<i>Trade losses (in million of dollars)</i>					
Motion pictures	2.0	(¹)	2.0	2.0	2.0	2.0
Records and music	7.2	1.0	1.5	5.0	1.0	9.9
Business software applications	4.8	1.2	4.0	10.6	1.8	3.7
Books	(¹)	(¹)	(¹)	(¹)	(¹)	1.0
Total	14.0	2.2	7.5	17.6	4.8	16.6

¹ Not available.

Sources: Adapted from the following sources with permission from the International Intellectual Property Alliance (IIPA): "IIPA 2002-2003 Estimated Trade Losses Due to Copyright Piracy" (App. A table for "The Americas"), *IIPA 2004 Special 301 Report*, Feb. 2004; and IIPA, "2003 Estimated Trade Losses Due to Copyright Piracy and Estimated Piracy Levels in the Six CAFTA Countries," IIPA posthearing brief, May 4, 2004, p. 3.

Source: U.S. International Trade Commission, "U.S.-Central America-Dominican Republic Free Trade Agreement: Potential Economywide and Selected Sectoral Effects (Investigation No. TA-2104-13)," Publication 3717, Aug. 2004, at 142.

Indeed, the Central American countries have not been deemed major U.S. intellectual property violators in the annual presidential intellectual property protection review process. Under the Trade Act of 1974 and its subsequent modifications, the president has the power to draw up an annual list of countries that are not effectively protecting intellectual property rights.¹⁷ This mechanism in U.S. law is commonly called the “Special 301” procedure, after the provision in U.S. trade law that establishes this mechanism. The “Special 301” list that the president draws up annually ranks countries, in descending order of concern, ranging from a “Priority Watch List,” to a “Watch List,” to a list of countries that merit some “other observations,” and finally to a category of countries excluded from the list altogether.

Both industry and government sources deem CAFTA countries as being of relatively little importance in terms of market size and priority for international piracy monitoring. The IIPA has recommended that only the Dominican Republic be put on the U.S. Trade Representative’s (USTR) Priority Watch List for 2005. As Table 2 shows, the Dominican Republic is the only country that the USTR has considered to merit consistent “Priority Watch List” status since 1992, due to concerns over the unauthorized rebroadcast of television content.¹⁸

Table 2

Evolution of Special 301 Status of CAFTA Countries, 1992-2004						
	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
1992	N/A	N/A	WL	WL	N/A	N/A
1993	N/A	N/A	WL	WL	N/A	N/A
1994	N/A	N/A	WL	WL	N/A	N/A
1995	WL	N/A	WL	WL	N/A	N/A
1996	WL	OO	WL	WL	N/A	N/A
1997	WL	WL	N/A	WL	N/A	OO
1998	WL	PWL	N/A	WL	N/A	OO
1999	WL	PWL	N/A	PWL	N/A	N/A
2000	WL	PWL	N/A	PWL	N/A	N/A
2001	PWL	PWL	N/A	WL	N/A	N/A
2002	WL	PWL	N/A	WL	N/A	N/A
2003	WL	PWL	N/A	WL	N/A	N/A
2004	WL	PWL	N/A	WL	N/A	N/A
<i>Source: International Intellectual Property Alliance, "2005 Special 301: Historical Summary," IIPA Report, 2005.</i>						
<i>Code: PWL=Priority Watch List; WL=Watch List; OO=Other Observations</i>						

The evolution of these designations shows that – in economic terms – neither the U.S. government nor industry has seen CAFTA countries as significant copyright violators.

Reason #3: CAFTA-Style Copyright Protections Under the 1994 NAFTA Did Not Solve Problem of Piracy in Mexico, and Current Trade Law for CAFTA Target Countries Already Provides Industry-Praised Enforcement Mechanisms

When industry lobbyists are confronted with the data showing that Central America does not represent a significant share of U.S. piracy losses, the stock response is to note that CAFTA is an “important precedent for trade agreements currently in negotiation, such as a free trade agreement with the Andean nations and the Free Trade Area of the Americas (FTAA).”¹⁹ They add that obtaining new copyright protections *vis-à-vis* these nations would represent real economic gains. However, there is no evidence that inclusion of the CAFTA-style copyright rules would result in such gains.

NAFTA’s copyright rules contain many of the same provisions as CAFTA. These include the guarantee of civil judicial procedures for copyright holders seeking to claim damages against copyright violators (NAFTA Article 1715), as well as criminal procedures and penalties for copyright violators (Article 1717). Also, like CAFTA, NAFTA contains some language for criminal prosecution of copyright violators who may not have been aware of their violation (Article 1717 (4)).

Despite the adoption in 1994 of NAFTA, U.S. NAFTA partner Mexico now accounts for \$870.2 million of U.S. industry losses due to copyright piracy, or fourteen times that lost in CAFTA target countries.²⁰ In fact, far from eliminating or even reducing piracy, the amount of damages from copyright violations in Mexico tripled between 1992 and 2004.²¹

The eleven-year record of the NAFTA-style copyright provisions now included in CAFTA contradicts the industry claim that passage of CAFTA would result in significant gains for the industry, even when one considers the industry’s response – that at issue with CAFTA is not the piracy losses in those nations but the model that would be established for future agreements – to the fact that the CAFTA countries do not represent a significant share of U.S. piracy losses.

In fact, current trade law covering CAFTA target country imports into the United States already provides a tool for combating piracy that has won praise from the U.S. high tech industry. Currently, U.S. trade relations with the CAFTA target countries are governed under the rules of the Generalized System of Preferences (GSP) and the Caribbean Basin Initiative (CBI), a preferential trade access program that combines the Caribbean Basin Economic Recovery Act (CBERA) of 1983 and the U.S.-Caribbean Trade Partnership Act (CBTPA) of 2000. This combination of policies offers strong protection for intellectual property rights and public enforcement and punishment against violators.

Specifically, the CBERA intellectual property rights state that, “In determining whether to designate any country a beneficiary country under this chapter, the President shall take into account [...] the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights.”²² This was expanded in CBTPA, which said the President will consider, “The extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the [WTO’s] Agreement on Trade-Related Aspects of Intellectual Property Rights.”²³ The GSP conditions a country’s preferential access to U.S. markets on “the extent to which such country is providing adequate and effective protection of intellectual property rights.”²⁴

To ascertain whether countries are living up to the requirements of each of these programs, the USTR's office accepts public comments and petitions from those concerned with intellectual property protection in Central American and Caribbean beneficiary countries through the "Special 301" annual review process. Typically, the U.S. copyright-dependent industry will petition offending countries for review under all of these programs during the annual review period.

The CBI statute gives the U.S. president the power and discretion to withdraw duty-free treatment benefits to the copyright-violating country as a whole, or focus the penalty only on a specific industry or even commodity from that country. It even allows the president to withdraw the country from the list of the CBI beneficiary countries permanently.²⁵ Such a course of action can be initiated by a public petition filed by the high-tech industry, a high-tech union, or any other concerned member of the public, and could also be initiated by the Executive branch itself.²⁶ Under CAFTA, there is no mechanism for industry self-initiation of such a process.

Even if the United States never exercises this CBI "nuclear option" (perhaps because of the same countervailing economic or political considerations noted above), the credible threat that it might be used, as well as the pressure of the "Special 301" process, has led to much reform of copyright law and enforcement in Central America. Indeed, the industry trade association IIPA confirmed the importance of current policy when it made the following two statements:

"Special 301 [...] is a *major trade tool* in fighting international copyright piracy -- a scourge which continues to cause an estimated \$25-\$23 billion in annual losses to the U.S. copyright industries (this estimate excludes losses due to internet piracy). Aggressive action under Special 301 by USTR *has been essential* in stemming the tidal wave of losses in U.S. jobs and competitiveness that have threatened one of our country's most productive and fastest growing economic sectors. Special 301 and its leverage are a full time process for the copyright industries which work with local private sector representatives, U.S. government officials, and U.S. Embassy officials to address and resolve copyright problems in scores of countries [italics added]."²⁷

"Increasingly, many copyright sectors look to grow their markets overseas. As a result, the IPR standards in the CBERA (as amended) have provided, and can continue to provide, a good foundation for these eligible countries to improve both their copyright laws and enforcement mechanisms, in order to protect both their domestic right holders as well as foreign right holders."²⁸

The NAFTA record shows that "free trade" agreements are not a silver bullet to cut down on copyright piracy in U.S. export markets, while the experience of CBI shows that the United States has been able to leverage current policy to force meaningful changes in copyright law and enforcement in CAFTA target countries.

CAFTA Would Set a Bad Public Policy Precedent

The signing of the U.S. Digital Millennium Copyright Act (DMCA) in 1998 set off a fierce public debate that has not subsided to this day. Inventors, researchers, journalists, “fair use” advocates and others criticize the act for upsetting the balance between the rights of copyright holders and users that had governed U.S. copyright law for over a century. In particular, they contend that the DMCA has a chilling effect on free expression and scientific research, and may actually stifle innovation and competition through its overly broad protections for copyright holders.

One such example occurred in September 2000, when Princeton professor Edward Felten and a group of colleagues took up and succeeded in a music industry challenge to defeat certain watermarking technologies intended to protect digital music. According to one account:

“When the team tried to present their results at an academic conference, however, [industry] representatives threatened the researchers with liability under the DMCA. The threat letter was also delivered to the researchers’ employers and the conference organizers. After extensive discussions with counsel, the researchers grudgingly withdrew their paper from the conference. The threat was ultimately withdrawn and a portion of the research was published at a subsequent conference, but only after the researchers filed a lawsuit. After enduring this experience, at least one of the researchers involved has decided to forgo further research efforts in this field.”²⁹

Opposition extended even to the White House security expert Richard Clarke, who called for DMCA reform, saying, “I think a lot of people didn’t realize that it would have this potential chilling effect on vulnerability research.”³⁰

Many of the flaws of the DMCA are enshrined in CAFTA’s intellectual property chapter – threatening to lock in these problems *vis-à-vis* the United States’ policy and to spread the problems to additional countries. For instance, some high tech industry interests oppose the amendments to the DMCA proposed by Reps. Zoe Lofgren (D-CA) and Rick Boucher (D-VA) that seek to restore a proper balance between the interests of consumers and innovators versus copyright owners.³¹ By getting the copyright provisions that are contested in the U.S. Congress by Reps. Lofgren and Boucher into CAFTA, these specific business interests would not only ensure that this policy is adopted in Central America, but also that the U.S. Congress would lose its ability to later change the U.S. law to a form that would not comply with the provisions of CAFTA.³²

What policy precedent is the industry trying to lock in with CAFTA? Some of CAFTA’s copyright problems are the same as the overreach of the DMCA:

- **CAFTA criminalizes unknowing, unintentional copyright circumvention.** CAFTA’s Article 15.7 states that “any person who circumvents [a copyrighted item] without authority” will be liable to civil penalties and possibly criminal penalties, and does not require that person to have had knowledge of their copyright circumvention. This provision would allow an individual to be prosecuted for simply making a copy for themselves of their favorite music CD for their car versus home stereo collection.

- **CAFTA would impose criminal penalties on unknowing end users of pirated materials.** CAFTA's Article 15.11.26, which deals with criminal penalties and procedures, allows for criminal prosecution even in cases of copyright infringements where there is "no direct or indirect motivation of financial gain," as long as the copyright holder can show that there has been "de minimis financial harm." This provision would criminalize the action taken by someone who innocently clicked on a file that had been illegally downloaded and e-mailed to them, even if the individual had no idea that he/she were receiving illegally downloaded material.
- **CAFTA does not have a general, non-infringing, legitimate purposes exception.** CAFTA, like the DMCA, goes to great lengths to specify which non-infringing uses are exempt from civil and criminal penalties. However, it does not have a general exemption for legitimate and non-infringing uses.³³ This omission means that classes of copyright users to which CAFTA purports to offer fair use protection – such as universities or governments – may find themselves straddled with onerous and costly procedures to be able to prove, if challenged, that individuals in their employ were using copyrighted materials as part of their office duties and not personal usage – a distinction which may in practice be difficult to draw.
- **CAFTA does not limit criminal and monetary liability for scientific and others uses.** In the United States, the DMCA has had the impact of chilling important research advances. A recent case under the DMCA is instructive. Dmitry Skylarov, a Russian scientist visiting the United States in June 2001, was arrested after speaking at a conference. The U.S. Department of Justice alleged that Skylarov had infringed the copyright of U.S. software company Adobe by merely working for a company that allegedly had in its possession a program which allegedly allowed users to convert copyrighted Adobe "e-books" to Adobe "pdf" format, even though neither the scientist nor his employer were ever accused of actually infringing on any copyrighted "e-book." The Electronic Frontier Foundation has documented cases of scientists that have pointed to the Skylarov case as a reason for withholding from publication the results of important research findings. Some foreign scientists have declined to visit the United States because of what they perceive to be the unlimited criminal and monetary liability of the strict DMCA.³⁴ As CAFTA also does not place meaningful limitations on such liabilities, the agreement might extend these stymieing effects to the poor CAFTA countries, while setting a poor public policy precedent in international trade law.
- **CAFTA does not carve out civil liability for non-profit libraries, archives and educational institutions.** While CAFTA's article 15.7(a) specifies a carve-out from criminal procedures and penalties for non-profit libraries, archives and educational institutions, it does not provide a similar blanket carve-out from civil penalties, doing little to protect legitimate uses by organizations that serve the public interest.
- **CAFTA limits the legislative review and exemption process for innocent copyright users.** CAFTA's Article 15.7(e)(iii) allows for exceptions to civil and possibly criminal penalties for non-infringing uses of a copyright material, provided that it is "demonstrated in a legislative or administrative proceeding by substantial evidence" that complying with the

copyright would adversely impact the innocent user. But as noted by the Electronic Frontier Foundation, “To create meaningful exemptions for the majority of consumers who do not have the technological expertise to create their own technologies and tools, the legislative or administrative process should permit exemptions to be granted for both the acts *and tools* necessary to facilitate a permitted [copyright] circumvention [italics added].”³⁵ CAFTA fails to provide for a legislative or administrative review and exemption process that would permit exemptions to be granted for both the act of circumvention and the tools necessary to do so. In addition, it does not provide for any public legal or financial resources to assist those wrongfully penalized for innocent copyright uses.

Ironically—and instructively—many of the high-tech firms lobbying for CAFTA because of these intellectual property provisions are simultaneously urging Congress to undermine the IP rights of inventors within the United States. In April, hearings were held in both the U.S. House and Senate on major proposals to “reform” patent law. If these industry proposals from Microsoft (and many of the other tech industry proponents of CAFTA) become law, they would result in wholesale changes to the structure of U.S. patent system that will severely undermine the incentive inventors have to innovate as granted by the U.S. Constitution (Article 1, section 8, clause 8). Several provisions in the committee print specifically *reduce* protections afforded to intellectual property creators. In fact, industry observers have noted that one of the primary purposes of this proposed legislation seems to be saving Microsoft from a half a billion dollar judgment against it for patent infringement.³⁶

U.S. members of Congress are now regularly criticizing the overly broad provisions of the DMCA, boding ill for efforts to extend these provisions into international trade law. Rep. Lofgren, whose district covers part of Silicon Valley, argued that the DMCA “lopsidedly extended the rights of works owners, and Congress should redress the balance by enacting provisions recognizing consumers' rights such as fair use and free expression [while suggesting that] lesser punishments could be tailored to noncommercial violations by individuals.”³⁷ The Bush administration should have thought to listen to the Congressional debate over the DMCA, innovation, and free expression before it negotiated CAFTA. Now, unfortunately, because of the fast-track negotiating procedures, it is too late to change the agreement.

Conclusion

Given that off shoring and the trade deficit have dominated much of the public debate over trade in recent years, CEO's and lobby arms of the U.S. High Tech industry are attempting to sell the CAFTA/NAFTA expansion on the basis that it will help correct these problems and combat piracy in the Central American region. When it is shown that Central America represents neither an important market nor source of copyright piracy, industry representatives attempt to switch the debate to one about achieving other important policy reforms.

This report has shown that, rather than solving the problem of piracy, the NAFTA model has presided over a time of growing piracy in Mexico, and that the CAFTA expansion fails to create sustainable public policy solutions to the problems of the U.S. high tech industry.

Rather, CAFTA extends a model of intellectual property that favors certain corporations at the expense of the U.S. high tech industry as a whole, and at the expense of high-tech workers, engineers, and inventors in particular. For two hundred years patents have been granted to individuals in accordance with Article 1 of the U.S. Constitution. In the recent past, however, control of intellectual property rights has moved steadily from the hands of individual innovators to large companies, which continue to consolidate great power over markets, distribution and prices and which consider labor arbitrage rather than innovation the best source of competitive advantage. CAFTA would continue this disturbing trend.

Public opinion polls show that a majority of U.S. and Central American citizens are against CAFTA. When Central Americans are asked why they oppose CAFTA, two issues arise. First, CAFTA's intellectual property drug patent provisions limit access to cheap, essential medicines necessary to battle HIV-AIDS, malaria, tuberculosis and more. Second, Central Americans rightly fear that the devastation to food systems visited on Mexico by NAFTA could be repeated in their countries, particularly in the rice sector. For U.S. respondents, U.S. job loss and wage stagnation are given as reasons for their opposition to the agreement.³⁸

Rather than address these realities and concerns, the U.S. high tech industry appears more willing to mislead the public. While piracy in China, Mexico, and our own country skyrockets, Microsoft and others have attempted to redirect attention to one of the poorest parts of the planet – a region whose development may depend on striking the correct balance between the rights of users and holders of intellectual property, as well as between the rights of large and small holders of intellectual property.³⁹ To the extent that this is a ploy to “harmonize” the increasingly controversial domestic reforms of intellectual property law with international trade law and perhaps make a few more bucks, U.S. workers, inventors, small businesses and Central American consumers gain nothing, while the U.S. high tech industry will be seen for what it is: modern day pirates, raiding the Caribbean while ignoring the real U.S. trade policy failures that CAFTA will expand even further.

Notes

¹ Companies and high tech associations from Microsoft to Intel to the International Intellectual Property Alliance are pressuring members of Congress to pass CAFTA, taking out pro-CAFTA ads in the Congressional Roll Call newspaper and even the New York Times. (Appeared on February 10, 2005. Available on Microsoft website.) "It's a good market, but we want more access," explained Melika Carroll, Intel's trade policy director, in an interview with reporters. Jim Puzzanghera, "Silicon Valley pushing for Central American free-trade deal," *San Jose Mercury News*, April 20, 2005.

² In particular, the current Caribbean Basin Initiative (CBI) legislation, which has been consistently renewed by Congress and has strong supporters that would likely see it renewed again, unlike CAFTA allows for meaningful trade sanctions to be imposed on countries that fail to protect workers' rights – a measure which has led to the few marginal labor reforms that have taken place in Central America over the last several decades. Additionally, unlike the CBI, CAFTA would impair access to essential medicines for poor HIV-AIDS patients in Central America, while establishing a far reaching investor-state mechanism that would give foreign investors greater rights than those enjoyed under U.S. law.

³ Letter from U.S. High Tech Trade Coalition to Rep. Dennis Hastert, dated Jan. 26, 2005, on file with Public Citizen.

⁴ U.S. International Trade Commission's Interactive Tariff and Trade DataWeb, accessed April 2005.

⁵ U.S. International Trade Commission's Interactive Tariff and Trade DataWeb, accessed April 2005.

⁶ List of ITA Participants taken from WTO website, accessed April 2005.

⁷ U.S. International Trade Commission's Interactive Tariff and Trade DataWeb, accessed April 2005.

⁸ U.S. International Trade Commission's Interactive Tariff and Trade DataWeb, accessed April 2005.

⁹ U.S. International Trade Commission's Interactive Tariff and Trade DataWeb, accessed April 2005.

¹⁰ Bijit Bora, "Information Technology Agreement and World Trade," Presentation by WTO Secretariat's Economic Research and Statistics Division, Oct. 2004.

¹¹ "IIPA acknowledges the strong provisions on copyright and enforcement in the U.S.-Dominican Republic-Central American FTA but cautions that the Dominican Republic government must take swift and immediate actions to correct longstanding problems of widespread broadcast piracy and delays in criminal copyright cases," IIPA Press Release, Aug. 5, 2004.

¹² "First Annual BSA and IDC Global Software Piracy Study," Business Software Alliance Report, July 2004, at 9.

¹³ Stephen E. Siwek, "Copyright Industries in the U.S. Economy: the 2004 Report," International Intellectual Property Alliance Annual Report, at 7.

¹⁴ Stephen E. Siwek, "Copyright Industries in the U.S. Economy: the 2004 Report," International Intellectual Property Alliance Annual Report, at 7.

¹⁵ Stephen E. Siwek, "Copyright Industries in the U.S. Economy: the 2004 Report," International Intellectual Property Alliance Annual Report, at 8.

¹⁶ International Intellectual Property Alliance, "2005 Special 301 Report: People's Republic of China (PrC)," IIPA Report, 2005. The USTR put China on its Special 301 list in 2005.

¹⁷ "Trade Act of 1974: Identification of countries that deny adequate protection, or market access, for intellectual property rights," at 19 U.S.C. § 2242 (Chapter 12, Subchapter I, Part 8).

¹⁸ International Intellectual Property Alliance, "2005 Special 301 Report on Global Copyright Protection and Enforcement," IIPA Report, 2005.

¹⁹ Letter from U.S. High Tech Trade Coalition to Rep. Dennis Hastert, dated Jan. 26, 2005, on file with Public Citizen.

²⁰ International Intellectual Property Alliance, "2005 Special 301 Report: Mexico," IIPA Report, 2005.

²¹ In 1992, IIPA estimated that they lost \$263 million to Mexican piracy. In 2004, piracy was \$870.2 million, or 3 times as much. For 1992 number, see Jeffrey-Jolson Colburn and David Kelly, "IIPA report pegs yearly bootleg haul at \$ 15 bil; 22 problem countries cited at piracy summit," *The Hollywood Reporter*, April 14, 1992.

²² 19 USC § 2702(c)(9).

²³ 19 USC § 2701(b)(5)(B)(ii).

²⁴ 19 USC § 2462(c)(5).

²⁵ See "Withdrawal or suspension of duty-free treatment to specific articles," 19 U.S.C. § 2702 (e) (Chapter 15).

²⁶ The channel for this evaluation would be the USTR's Special 301 process, which would be combined with the enforcement capabilities of CBI for CBI beneficiary countries, unlike the mere fact-gathering functions of the 301 process for non-CBI countries such as Mexico.

²⁷ International Intellectual Property Alliance, "Copyright and Trade Issues: Special 301," IIPA Website, accessed March 29, 2005.

²⁸ International Intellectual Property Alliance, Response to USITC's Request for Comments on its Annual Report on the Impact of the Caribbean Basin Economic Recovery Act on U.S. Industries, Consumers and Beneficiary Countries, 68 Fed. Reg. 19847 (April 22, 2003), Submission dated June 30, 2003.

²⁹ "Unintended Consequences: Five Years under the DMCA," Electronic Frontier Foundation Briefing Paper, Sept. 24, 2003.

³⁰ Hiawatha Bray, "Cyber Chief Speaks on Data Network Security," *The Boston Globe*, Oct. 17, 2002.

³¹ "We view the legislation unveiled today as a vehicle that would ultimately weaken, not strengthen, the important balance that was established under the Digital Millennium Copyright Act," wrote the Business Software Alliance in a March 4, 2003 statement. "Business Software Alliance Shares Rep. Lofgren's Objective, But Opposes Proposed Copyright Legislation," BSA Statement on Rep. Lofgren's Digital Copyright Bill, March 4, 2003.

³² CAFTA requires that all nations conform their domestic laws to the terms of the agreement. CAFTA Article 1.4, "Extent of Obligations."

³³ CAFTA's Article 15.10 specifies that exceptions to the most important parts of the intellectual property chapter must be limited to "special cases," which falls short of the need to have a broader allowable exception.

³⁴ "Unintended Consequences: Five Years under the DMCA," Electronic Frontier Foundation Briefing Paper, Sept. 24, 2003.

³⁵ Gwen Hinze, "Seven Lessons from a Comparison of the Technological Protection Measure Provisions of the FTAA, the DMCA, and recent bilateral Free Trade Agreements," Electronic Frontier Foundation Briefing Paper, 2004.

³⁶ See Frank Hayes, "Patently Fair," *Computerworld*, April 25, 2005. Also see the patent law blog of attorney Dennis Crouch which states that the proposed legislation "would essentially overrule" the \$521 million judgment for infringement against Microsoft (http://patentlaw.typepad.com/patent/2005/04/patent_reform_o.html). Also see Hayes' follow up column which provides an inventor perspective on patent "reform" legislation, "Patent Pending," *Computerworld*, May 2, 2005

³⁷ Louis Trager, "Silicon Valley Lawmaker Says IP Law Needs Fair-Use Balance," *Washington Internet Daily*, May 31, 2002.

³⁸ "CAFTA Poll," Ayres McHenry and Associates, reported in *Nationaljournal.com*, March 2005.

³⁹ Pamela Samuelson, "Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Production," *University of Chicago Law Review* 2003.