

April 24, 2003

Ambassador Robert B. Zoellick
United States Trade Representative
600 17th Street, NW, Room 209
Washington, DC 20508

Dear Ambassador Zoellick,

As you know, we have been concerned that American substantive law in the areas of immigration, antitrust and intellectual property might be impacted by trade treaties. As I'm sure you will recall, Congresswoman Lofgren expressed these concerns to you prior to the vote on "fast track" last year. She was quite surprised to learn from you during your briefing of the New Democrats last month that negotiations in these substantive law areas had, indeed, taken place without her knowledge or consultation. We now have concerns about these substantive law areas as they relate to provisions in the Singapore and Chile Free Trade Agreements (FTA).

The FTA's, only recently made public, contain provisions that essentially mimic the Digital Millennium Copyright Act (DMCA), a law that is currently being litigated and whose scope is as yet unclear. As you know, the DMCA, while intended to protect the legitimate interests of copyright holders, may also be endangering the rights and expectations of legitimate consumers. Contrary to the intent of Congress, as expressed by Judiciary Committee Chairman Henry Hyde at the time of the adoption of the DMCA¹, section 1201 of title 17, United States Code, has been interpreted to prohibit all users--even lawful ones--from circumventing technical restrictions for any reason, including non-infringing uses of purchased content. There is substantial reason to believe that the DMCA is having an adverse impact on technological innovation. There are numerous cases in court or on appeal that would utilize this act to stifle competition and technological innovation.

This situation has stimulated vigorous debate both in America and in the Congress about what changes should be wrought on the existing DMCA. If Congress decides to clarify the DMCA to strike the correct balance between copyright holders and the interests of society, as intended by Congress, would the United States be in violation of the FTA's?

When your staff met with Congresswoman Lofgren two weeks ago, she specifically asked your staff whether adoption of H.R. 1066 or H.R. 107 would result in breach of our treaty obligations if these negotiated treaties are adopted. She was advised orally that the treaties would be

¹ As the report of the Committee of the Judiciary of the House of Representatives accompanying the DMCA stated: '[A]n individual [should] not be able to circumvent in order to gain unauthorized access to a work, but [should] be able to do so in order to make fair use of a work which he or she has acquired lawfully.' House Report 105-551, Part I, Section-by-Section Analysis of section 1201(a)(1).

breached by the enactment of these bills into law. Since that time, various interested persons in the technology sector of our economy have indicated their hope that these treaties would permit the Congress to amend the DMCA.

We understand from your staff that you intend to seek the signature of the President on both FTA's in the early part of May. In order to consider what legislative action we should take, we wanted to give you the opportunity to clarify, if you wish, the clear direction received by your staff that these treaties would be breached if Congress amends the DMCA as outlined in H.R. 1066 and H.R. 107. If we do not hear from you when Congress reconvenes next week, we will conclude that your staff's oral presentation of American law relative to the DMCA is, in fact, the position of the USTR.

Sincerely,

ZOE LOFGREN
Member of Congress

RICK BOUCHER
Member of Congress