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DAN GLICKMAN
Chairman and
Chief Executive Officer

November 6, 2008

Dear Ambassador Schwab:

The creativity and magic of American motion pictures continue to delight audiences worldwide, in addition to providing powerful stimulus to the U.S. and global economies. The six major studios of the Motion Picture Association of America (MPAA) member companies generate billions of dollars annually from filmed entertainment distributed to more than 150 countries around the globe, returning a positive balance of trade in nearly every country in which the companies do business. Notwithstanding this singular achievement, the U.S. movie industry faces daunting barriers in many markets as well as relentless challenges to the integrity of its product, challenges extracting an increasingly unbearable cost.

On behalf of MPAA and its members, I want to express our appreciation for the critical assistance the U.S. government provides to the industry's efforts to grow its foreign sales. We welcome this opportunity to present our assessment of priority foreign trade barriers for consideration as you and your staff compile the National Trade Estimate Report on Foreign Trade Barriers. In reviewing our submission, I note that while we have made substantial progress over the last year -- and I heartily applaud the commitment you and your colleagues in the Administration have made to protecting our members' content -- many barriers identified in this report we have identified in past years' reports.

Before highlighting key points in MPAA's annual assessment of trade barriers facing its members, which MPAA is filing electronically today, let me elaborate on the unprecedented threat piracy continues to pose to MPAA members, and all U.S. creative industries. The economic and cultural vitality of the creative industries is, I believe, one of our nation's most valuable assets; however, its unique value is under attack by thieves, at home and abroad. Thievery, particularly in the form of illegal camcording in theaters and the expanding scourge of peer-to-peer file-sharing on the Internet, can devastate the creation and innovation of new works, and in turn the nation's economic growth.

In attacking movie theft, MPAA is committed to a strategy that couples anti-piracy enforcement with improving market access. In many important markets, pirates have, effectively, a significant competitive advantage over MPAA's member companies and other legitimate businesses; the pirates operate unencumbered by quotas, duties, internal



taxes, distribution restrictions, licensing requirements, and other government policies which impose a cost of doing business on legitimate companies. Moreover, market access restrictions that limit the ability of MPAA members to enter markets have absolutely no effect on restricting the availability of pirate content in the market: pirates freely supply the market without heed to or burdened by the policies applied to legitimate businesses. Indeed, one of the most effective tactics in fighting piracy is ensuring that pirates do not have the market to themselves.

As you develop your strategy for the coming year, the MPAA offers its full assistance and cooperation toward combating the threat of theft of intellectual property, securing effective copyright protection, and ensuring a competitive global market. MPAA believes the following issues merit priority attention:

- CANADA: Canada has taken almost no steps toward bringing its copyright laws up to date with the realities of the global networked environment. Unlike its major trading partners, Canada does not have any legislation or developed jurisprudence which clearly provides an effective means for copyright holders to protect themselves from on-line piracy and enable the legitimate market place to develop. This legal void has made Canada an attractive location for illicit websites and Canada has regrettably become known as a “safe haven” for Internet pirates. There is an urgent need for amendments to the Copyright Act to comply with the WIPO Internet Treaties and to ensure copyright owners can effectively combat online piracy by enacting an effective legal framework governing ISP liability and responsibility.
- CHINA: China remains one of the most restrictive markets in the world for the US entertainment industry, as well as being one of the worst offenders in failing to provide adequate protection to copyrighted audio-visual works. MPAA remains committed to the actions you have taken at the WTO that would open the Chinese market and liberalize the most restrictive of the measures limiting our access to this market and that would ensure that China meets its international obligations with respect to measures to deter copyright infringement on a commercial scale.
- INDIA: India’s market is plagued with a patchwork of restrictions, particularly on the television side, which holds enormous potential for the US industry. In addition, the disparity between the policies of the various states and the national government imposes a bureaucratic burden that greatly disadvantages the industry. Indian tax and customs policies often discriminate against the US industry. Nonetheless, the MPAA believes India will emerge in importance to the US industry.
- MEXICO: Optical disc piracy in Mexico is among the worst in the world and getting worse. Disturbingly, Mexico has also become the Western Hemisphere’s leading source of films illegally recorded in theaters negatively impacting not just



the Mexican market, but markets throughout Latin America. It is imperative that Mexico pass its long pending anti-camcording legislation.

- RUSSIA: The November 2006 US-Russia IP Side Agreement constructively articulates the areas where Russia must improve its intellectual property regime in order to be compliant with the WTO TRIPS Agreement and before Russia can accede to the WTO. While Russia has made some progress, much work remains, particularly with regard to enforcement, i.e. systematic raids resulting in lasting plant closures and deterrent sanctions consistently imposed against the owners, and implementation of an optical disc licensing regime that provides effective control over plants' operations.
- SPAIN: U.S. and Spanish creators are gravely concerned about Spain's rampant Internet piracy problem. Peer-to-peer (P2P) piracy is widely perceived as an acceptable cultural phenomenon and this situation is exacerbated by the Spanish government's policy of decriminalizing illicit P2P file sharing. Moreover, Spain has not properly implemented minimum EU-level requirements regarding ISPs under the E-Commerce Directive. Spanish ISPs, far from showing willingness to collaborate in the fight against Internet piracy, instead make use of their file sharing and downloading service capabilities to promote their businesses. The government of Spain must foster legitimate on-line commerce and improve the protection of intellectual property rights in Spain.

In addition to these specific barriers, I want to draw your attention to an increasingly worrisome trend that potentially presents a new guise for a familiar barrier: protectionism against MPAA's products cloaked in the name of cultural promotion. While I firmly believe international trade disciplines will prevail, I am concerned that in some quarters, governments may attempt to use other international agreements as justification for erecting new barriers to the U.S. filmed entertainment industry. This protectionist inclination has striking implications for our member companies' evolving business models, which are increasingly utilizing electronic commerce to deliver digitally MPAA products. We are committed to countering those possibilities, just as we are committed to the promotion and protection of cultural diversity; indeed, I believe the wealth and scope of the diversity of the filmed entertainment the U.S. produces each and every year is prima facie evidence of that commitment.

On behalf of the millions of men and women MPAA member companies employ, the companies and their investors, the staff of MPAA, and the billions worldwide who continue to thrill at the enduring genius of the U.S. film industry, I extend our collective deepest appreciation for the invaluable assistance of the dedicated men and women at USTR. While USTR spearheads these efforts, I am not unmindful of the valuable contribution of so many others in the Executive Branch: The Departments of Commerce and State, which negotiate and enforce market access and high standards of intellectual property protection and are the industry's frontline advocates. The copyright experts in the Patent and Trademark and Copyright Offices, and the enforcement agencies, are



critical to the important gains we have made improving intellectual property enforcement around the globe.

As always, the Motion Picture Association of America and I look forward to continuing to work with these friends and supporters in confronting the challenges that lie ahead. If we can assist you in this work, please let me or my staff know.

With best personal regards, I am

Sincerely

Dan Glickman
Chairman and Chief Executive Officer

The Honorable Susan Schwab
United States Trade Representative
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GLOBAL ISSUES 2009

This submission is the Motion Picture Association of America's (MPAA) twenty-sixth contribution to the National Trade Estimate Report on Foreign Trade Barriers. The filing is based on reports from MPAA's member companies, MPAA's global network of offices, and information from entities with whom MPAA collaborates. This year's report provides an overview of those measures and trade practices that most distort international trade in audiovisual entertainment and that most negatively impact MPAA's member companies and the livelihoods of hundreds of thousands of American men and women who work in the filmed entertainment industry.

Two of MPAA's priorities for its own operations in 2009 include:

One, enhance the protection of the intellectual property that fuels this American industry by of developing more innovative strategies and tactics to detect, stop, and deter Internet piracy and encouraging cooperation with Internet Service Providers.

Two, redouble efforts to enhance the industry's access to foreign markets and prevent the erosion of current terms of access, particularly with regard to electronic commerce. MPAA and its members depend upon and greatly appreciate the active and energetic cooperation of the US government.

To help MPAA meet its objective to improve the protection of American intellectual property in international markets, MPAA directs US government attention to the following priorities:

- attacking peer-to-peer (P2P) Internet piracy and piracy through video streaming and user generated content sites by encouraging governments to establish and enforce legal protections for copyright that will be effective in the modern digital environment;
- facilitating ISP-rights holder cooperation, fostering implementation of the Graduated Response mechanism, and technological controls as appropriate;
- ensuring the data protection rules do not prevent the implementation of meaningful cooperation with ISPs;
- encouraging adoption of effective anti-camcording legislation to make the illicit camcording of motion pictures in theaters, which is the source of 90% of available pirated motion pictures, a criminal offense;
- encouraging adoption of optical disc legislation in key countries; and
- ensuring that new trade agreements contain high standards of intellectual property protection appropriate to the digital environment, that governments comply with the terms of existing trade agreements, and that countries comply with the World Intellectual Property Organization (WIPO) agreements.



Internet Piracy

MPAA and its member companies place the highest priority in securing both the legal and practical tools necessary to protect intellectual property rights in the digital age. Internet piracy has emerged as the fastest growing threat to the filmed entertainment industry; particularly in key markets where broadband infrastructure is spreading rapidly including North America, Europe, South Africa, South Korea and Taiwan.

The entertainment industry is working with consumer electronics companies, software developers, and computer manufacturers to create an environment that will provide producers technological protection of their content. In addition, the MPAA and its members are investing tens of millions of dollars each year to investigate piracy of filmed entertainment.

At the same time, however, MPAA believes government has a vital role to establish adequate legal protections for copyright owners, and to enforce those laws in an aggressive and effective manner, including:

- adequate notice and takedown provisions,
- clearly defined Internet service provider (ISP) liability guidelines,
- protection of temporary copies,
- “making available” right, and
- provisions against circumvention of technological protection measures.

These protections are essential elements of a legal framework capable of responding to the demands of the digital environment. Without these protections, the industry’s viability will be undermined, no matter what it might do on its own. These protections serve both to protect an important US economic asset, and deter harmful activity in host countries, including tax evasion, consumer fraud, and unfair competition – activities that threaten local cinema owners, video store proprietors, and broadcasters, too.

Camcorder Piracy

The illicit recording of a movie at a theater remains the single most prolific source of movie piracy and pirate copies available for sale within hours of a movie’s theatrical release, or even prior to its official release. As a result of camcorder piracy, illegal copies of many motion pictures become available over the Internet, as well as on street corners and flea markets around the world, within days of US theatrical release. Camcorder pirates are often sophisticated criminals who sell the master recordings to illicit source labs which illegally duplicate the films to optical discs, then package and distribute them to bootleg dealers around the world. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy the producer’s ability to recoup the investment made in its production. Put another way, the losses are exponentially greater than the selling price of a pirate product or single act of theft; the economic harm affects the complete lifecycle of a film, eroding all aspects of the



economic value chain and impacting the thousands of jobs that produce and distribute the product.

MPAA expects illegal camcording to continue to increase outside the United States due to three factors:

- its illicit lucrative nature – for example, a camcorder caught in the US confessed that he was offered \$2,000 by a source in Asia to camcord a movie still showing in the theaters;
- current marketing practices are reducing the time between US and international theatrical release of movies; and
- camcording is now a federal offense in the US and in over two-thirds of the states.

To facilitate enforcement and prosecution of illegal camcording, MPAA has set as one of its own 2009 strategic objectives the adoption in priority countries of effective anti-camcording legislation, which includes jail sentences, preferably up to a year or longer for the first offense, and a higher penalty for any subsequent offense.

Optical Disc Piracy

Large-scale pirate replication of optical discs (OD) remains a serious problem. Asia continues to be the leading region for factory production of pirate optical discs and China, Pakistan and India specifically are significant sources of export piracy. Russia is also a major center for pirate OD production.

MPAA urges the US government to add its support and influence to the global campaign MPAA has undertaken to encourage governments to regulate optical disc production as a tool for controlling piracy and to mount intensive operational enforcement efforts against illegal replication facilities. The keys to attacking this problem include:

- centralized licensing of all optical media mastering or manufacturing facilities;
- centralized licensing of imports, exports, and internal transfer of optical disc mastering or manufacturing equipment and machinery;
- centralized licensing of imports of optical grade polycarbonate, the key raw material used to produce optical media products, as well as any other grade of polycarbonate or any other material capable of being used as the raw material for the manufacture of optical discs;
- requirements for the placement of a licensed secure unique identifier -- such as source identification (SID) code -- including mastering code numbers and a separate and unique mould code number for each mould used, to identify the source of manufacture of all optical media mastered, manufactured or reproduced by any licensed establishment or entity on all masters (stampers) and finished products produced within the country;
- licensee record keeping requirements, including a requirement that optical disc production plants retain exemplars of all discs produced;
- inspection, search and seizure authority;



- government record keeping requirements; and
- criminal penalties, including individual liability.

While large-scale replication in factories, often controlled by organized criminal groups, remains a major threat, MPAA has also noted the emergence of optical disc burning operations. These burning labs are individually smaller in scale and more local in their business plans than the factory-replication problem. However, the sheer number and coordination of such operations confirm that elements of organized criminal activity are often still present.

Optical disc piracy is also directly linked with Internet piracy. Pirates can copy feature films, each representing an enormous investment approaching \$100 million, when the films are first released, whisked via digital networks to clandestine production facilities, duplicated by the millions, and then distributed to consumers through Internet sites that allow customers to order their pirated DVDs for home delivery. A comprehensive approach to fighting piracy requires addressing both the replication of digital content in hard goods formats while also addressing Internet piracy.

WIPO Internet Treaties

New digital technologies, including the Internet, offer growth and opportunity for creative industries on a global scale; however, the creative industries can thrive only if the intellectual property rights are respected. As described above, the plague of digital piracy threatens to blight this new marketplace.

The World Intellectual Property Organization Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) provide essential tools for ensuring the protection of copyrighted content in the digital age. The treaties help ensure that creators, performers, producers and the public benefit fully from the development of new means of disseminating creative works. To date, 67 countries have adhered to the WCT and 66 have adhered to the WPPT. MPAA is actively working with governments around the globe to bring them into compliance with the terms of these important treaties.

The treaties require countries to provide adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures that are used by copyright holders in the exercise of their rights. The treaties also require countries to protect copyright management information embedded in copyrighted materials, both electronically and physically and to enable creators, performers and producers on a national treatment basis to control the use of their property in electronic commerce, regardless of the means used to make these products available.

Customs Duties Valuation

MPAA's members frequently find that customs officers assess *ad valorem* duties based on potential royalties generated rather than solely on the value of the carrier medium, i.e. the physical materials which are being imported. The economic consequence of such



policies can mean hundreds of thousands of dollars per film. For example, if a country levies a 12.5 percent *ad valorem* duty on a US blockbuster film expected to generate US\$2 million in that country's theaters, that duty could exceed US\$250,000. This is a far cry from a duty levied solely the value of the carrier medium, which generally would be US \$200 for each copy of the film imported. This is, unfortunately, not an uncommon practice. Acceding WTO members, such as Russia, and WTO members, such as Argentina and Uruguay, currently apply *ad valorem* duties on projected revenues.

In addition to the financial implication of an *ad valorem* duty applied to expected royalties, such policies are burdensome, subjective, and create unfair taxation. Because royalties are subject to remittance, withholding and income taxes, such duties are a form of double taxation. The International Chamber of Commerce recognized in a policy statement, *The Impact of Customs Duties on Trade in Intellectual Property and Services*, that such a practice distorts markets, increases costs for suppliers and buyers, depresses commercial activity, and impedes the availability of intellectual property in the country imposing the tariffs.

Electronic Commerce

Electronic commerce is integral to the emerging business models of MPAA's member companies and MPAA's members' efforts to respond to consumers' consumption demands. MPAA places high priority on ensuring that this critical means of distribution is not jeopardized by discriminatory regulations nor prejudiced by initiatives that aim to exclude audiovisual products under the guise of cultural promotion.

It is priority that audiovisual goods are included in any market opening disciplines and negotiations for digital media and electronic commerce. This is particularly important as regards US trade policy, both Free Trade Agreements (FTA) and the WTO, as well as more narrow bilateral initiatives. Locking-in the film industry's market access for electronically delivered products is all the more important given the global trend towards cultural protectionism most recently exemplified by the UNESCO cultural diversity convention.

Trade Negotiations

MPAA strongly supports the US Government's free trade agenda, from its pursuit of bilateral and regional FTAs to its pursuit of global trade reform within the World Trade Organization (WTO). In particular, MPAA notes and supports the provisions in recent FTAs that effectively raise international standards of legal protection for copyright in the digital age, and note that it is critical that countries adhere to FTA commitments regarding copyright protection in their implementation of the FTA.

Examples of key areas where the FTAs are raising the bar for legal protection of intellectual property well above the standards set in the WTO agreements include: 1) extending the term of copyright protection; 2) providing explicit legal protection for the technological protection measures that content owners employ to safeguard their



content; 3) setting clear rules governing cooperation between content owners and Internet Service Providers in the fight against Internet piracy; 4) regulating the production of optical discs in regions where there is a high risk of this form of piracy; and, 5) making the possession or use of recording equipment and devices in movie theaters a crime, that is, anti-camcording disciplines.

Trade negotiations are critical in lowering market access barriers which, in a multitude of forms, continue to restrict and encumber the free flow of commerce in US-produced filmed entertainment. In particular, while MPAA strongly supports the promotion of local cultural expressions, MPAA notes that some governments may seek to mask trade barriers and protectionist measures behind a veil of promoting cultural diversity. These protectionist tendencies have the potential to undermine MPAA member companies' emerging business models.

Integral to these emerging business models is electronic commerce, which has transformed MPAA member companies' production and distribution processes. MPAA places high priority on ensuring that this critical means of distribution and production is not jeopardized by regulations that purport to promote cultural diversity. Central to this effort are the FTA and WTO negotiations and MPAA strongly supports USTR's efforts to secure the film industry's market access for digitally delivered products.

CONCLUSION

The main challenges facing the entertainment industry, which MPAA seeks to call to the attention of the US government in this submission, include the need to establish measures to confront rampant piracy on the Internet, stop the proliferation of illegal optical discs, and prevent the illegal camcording of motion pictures in theaters.

The tenets of free trade in audiovisual works should be promoted and defended, as they are challenged under the guise of culture protection and through national protectionist policies that threaten to undermine the distribution of American film exports throughout the world. The US motion picture industry will continue to take every opportunity to advise and to seek the assistance of US trade negotiators to anticipate unforeseen difficulties and to act expeditiously to meet these continuing challenges.