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Mr. Probir Mehta
Assistant United States Trade Representative
for Innovation and Intellectual Property
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: IIPA Notice of Intent to Testify and Hearing Statement Regarding *2017 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Notice of Public Hearing*, 81 Fed. Reg. 95722 (Dec. 28, 2016)

To the Special 301 Committee:

The International Intellectual Property Alliance (IIPA) hereby submits its Notice of Intent to Testify and Hearing Statement for the Special 301 Committee Public Hearing scheduled for March 8, 2017.

Under separate cover, IIPA has formally filed our 2017 Special 301 submission concerning intellectual property protection and market access regimes in U.S. trading partners. Our full submission is accessible on our website, www.iipawebsite.com.

This letter also includes an outline of our statement. Participating in the hearing will be:

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Respectfully submitted,

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Hearing Statement of
Steven J. Metalitz
International Intellectual Property Alliance (IIPA)
before the Special 301 Committee
2017 Special 301 Hearing Scheduled for March 8, 2017

Thank you for the opportunity to present the testimony of the International Intellectual Property Alliance (IIPA) in this year's "Special 301" review.

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association of America (www.mpa.org), and Recording Industry Association of America (www.riaa.com). IIPA's five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world.

I. SPECIAL 301 IN CONTEXT

This Special 301 Review launches a crucial annual dialogue on markets that have unfulfilled potential for U.S. creative products, and highlights the changes needed in the legal and enforcement structures in those countries to permit fair and expanding marketplaces both online and offline.

To reach foreign markets through legitimate and state-of-the-art channels, members of the publishing, film/TV, music, and video game sectors rely on consistent, modern standards of copyright protection, efficient copyright enforcement, sound legal structures for licensing, and the elimination of market access barriers. The overarching objective is to promote markets where the creative industries can bring more products and services in an increasing variety of ways from a greater diversity of players before an ever-growing global audience. Special 301 plays a key role in advancing this objective. We applaud USTR for making the Special 301 process a positive catalyst for change to address the challenges creative industries face in key markets around the world, and for maintaining a sharp focus on the goals that led Congress to create the process almost 30 years ago.

This year's IIPA Submission focuses on markets where we believe active engagement by the U.S. Government will reap positive results for creators and the industries that support them. In particular, we highlight key opportunities to enforce specific obligations to the United States that many of these countries have taken on over the past years, in trade agreements and otherwise, but which remain unfulfilled. If the challenges to the creative industries identified in this Submission can be met and addressed, that will create more good jobs, promote exports, and contribute generally to healthy economic growth in the U.S. and abroad.

II. IIPA'S 2017 SUBMISSION—RANKING RECOMMENDATIONS

This year, IIPA recommends that 16 countries be identified in the 2017 Special 301 Report. These recommendations can be summarized in the following chart:



| IIPA 2017 Special 301 Recommendations | |
|---------------------------------------|----------------------|
| Priority Watch List | Watch List |
| Chile | Brazil |
| China | Canada |
| India | Colombia |
| Mexico | Indonesia |
| Russian Federation | Peru |
| Taiwan | Switzerland |
| Ukraine | Thailand |
| Vietnam | United Arab Emirates |
| 8 | 8 |

For some other countries identified in the U.S. Trade Representative's 2016 Special 301 Report, IIPA members were aware of no new developments that would lead us to revisit present designations under Special 301. Instead, in an Annex to our submission, we provide short summaries regarding each of these 10 countries: Argentina; Barbados; Costa Rica; Ecuador; Egypt; Guatemala; Jamaica; Kuwait; Turkey; and Venezuela.

While full details are available in the individual country surveys, for convenience we offer here the following capsule summaries of our filings on Priority Watch List (PWL) recommendations.

- **Chile:** For thirteen years, Chile has flouted major obligations it took on in the U.S.-Chile Free Trade Agreement (FTA), and has not achieved the goal of a copyright law and enforcement regime in line with 21st century norms. Not surprisingly, Chile continues to be a locus of online piracy and trafficking in circumvention devices and services for video games and audiovisual works, including free-to-air boxes, which decode encrypted satellite signals of copyrighted programs and broadcasts, as well as of illicit camcording in theaters. As Chile works to build its local creative industries and its international reputation as a reliable trading partner, it can no longer ignore the basic needs of a robust digital economy, including with respect to its obligations under the FTA.
- **China:** China's rapidly developing marketplace holds enormous potential for the creative industries, and some of that potential is beginning to be realized, thanks in part to improved enforcement efforts, particularly against unlicensed music. But China's legacy of piracy continues to distort the market, including by severely depressing licensing revenues, and its continued pursuit of policies that deny fair and equitable market access to U.S. content producers and distributors threatens to undermine the progress that has been achieved. We urge China to improve enforcement against the piracy app ecosystem, which supports Illicit Streaming Device (ISD) piracy; to address effectively the long-standing issue of online journal piracy, against which little progress has been made; to abandon proposals that discriminate against U.S. creative industries through market access barriers; to swiftly pass copyright reforms that ensure China effectively addresses its piracy challenges and is in compliance with international norms; and to fully implement the 2012 U.S.-China Film Agreement, as well as improving it through this year's scheduled consultations.
- **India:** In order to realize its enormous potential as a digital marketplace, India must first undertake important legal reforms to improve its antiquated regime for the digital age. It also lags behind other countries in adopting basic online enforcement tools and measures to encourage cooperation between rights holders and Internet intermediaries, such as clear third party liability for inducing infringement. And much needs to be done to coordinate and improve India's fractured system of state-level enforcement to address online copyright piracy as well as the hard copy piracy that still plagues book publishers, among others. The long-awaited "National Intellectual Property Rights Policy" could, if well implemented, help to open up the market to U.S. copyright



industries; but many additional changes are needed to allow enforcement actions to be swiftly initiated and resolved with deterrent penalties.

- **Mexico:** There are two significant impediments stifling the development of a vibrant legal marketplace in Mexico for consumers of music, films, video games and books online. First, the Mexican IPR legal regime is outmoded for the digital age. Mexico needs to move forward in order to comply with its existing treaty obligations (WTO TRIPS, the WIPO Internet Treaties, etc.) as well as to catch up to international norms to allow the digital marketplace to flourish in Mexico. Second, Mexican enforcement authorities continue to focus on hard goods, not digital piracy, even though digital piracy is worsening for all copyright sectors. Mexico is also the number one foreign market source for unauthorized camcords that feed Internet piracy of movies.
- **Russia:** Recent legal reforms have improved enforcement in Russia against online piracy within its borders. But Russia has not adequately dealt with sites operating inside the country that target users abroad, resulting in a substantial global piracy problem. Besides overall improvements in enforcement against online piracy, a problem pervasive for all of the copyright industries, Russia needs to address the collective administration problems that have thwarted music rights holders' attempts to exercise effective control over how collecting societies license their works in Russia. A threefold increase in camcording in 2016 calls for legal reforms and a commitment to effective enforcement. Pressing Russia to properly implement the commitments it has made to the U.S. in agreements in 2006 and 2011 will be critical.
- **Taiwan:** The market for creative works in Taiwan continued to deteriorate in 2016 due to the incessant growth of digital piracy, which has created an environment inimical to legitimate content producers. Taiwan lacks any effective mechanism to address foreign piracy websites that target consumers in Taiwan. ISD piracy is rapidly increasing. Websites and apps that facilitate stream ripping are proliferating. And e-book piracy is booming. Although the new Administration has taken some nominally positive steps, the Government of Taiwan has not been willing to adopt measures adequate to address Taiwan's urgent Internet piracy problem. Current draft amendments to the Copyright Law lack adequate anti-piracy tools, move Taiwan further away from international norms and raise questions regarding Taiwan's commitment to its existing international obligations. The judiciary in Taiwan typically views copyright piracy as a minor offense, resulting in suspended sentences in recent criminal cases. The lack of adequate and effective protection and enforcement is at odds with the copyright industry's important contribution to Taiwan's economy.
- **Ukraine:** Ukraine has been on the Priority Watch List since 2015 because the same problems that were the grounds for the PFC designation in 2013 persist today. As identified by USTR, these problems include "long-standing concerns about endemic corruption and mismanagement, including in IPR protection and enforcement." Unauthorized collecting societies "continue to operate, collecting royalties without paying right holders." And legislative reform has stalled while Ukraine "continues to host some of the largest pirate sites in the world serving IP infringing content to a global audience."
- **Vietnam:** Vietnam's market for legitimate creative goods and services remains a fraction of its potential, hampered by Vietnam's mounting piracy problems and its onerous market access barriers. While Vietnam's Government has indicated a willingness to cooperate with rights holders and a recognition of the "sophisticated" and serious nature of its piracy problem, much more needs to be done. As the chair of the Asia-Pacific Economic Cooperation (APEC) for 2017, the time has come for Vietnam to make good on its international commitments, confront its enormous piracy challenges, and remove the remaining barriers to its creative marketplace. Vietnam should build on recent regulatory reform efforts, move to eliminate discriminatory barriers, and take steps to bring its copyright protection and enforcement frameworks into alignment with the Bilateral Trade Agreement (BTA) with the United States and with evolving global norms.



III. DEVELOPMENTS IN INTELLECTUAL PROPERTY RIGHTS PROTECTION AND ENFORCEMENT

Following the lead of USTR itself in its Special 301 report, IIPA devoted a significant portion of its Submission to summarizing some of the overarching trends and challenges confronting the U.S. copyright industries seeking to compete in overseas markets.

First, we highlighted positive developments during 2016 in a number of countries, including Brazil, China, Honduras, India, Indonesia, Israel, Italy and Thailand. While applauding these positive moves, IIPA emphasized that, for each country listed, serious issues remain to be addressed.

Next, we provided the copyright industry perspective on two cross-cutting trends in today's trade and copyright environment.

a. Unfulfilled Obligations to the U.S.

The U.S. has entered into many bilateral and multilateral agreements with enforceable provisions designed to open foreign markets to U.S. goods and services dependent on copyright protection. These provisions implement the long-standing and consistent position of Congresses and Administrations, of both parties, dating back more than 30 years, that stronger copyright laws and enforcement worldwide serve the vital economic interests of the United States. In addition to the WTO TRIPS agreement, to which 164 countries have now acceded, Free Trade Agreements (FTAs) or Trade Promotion Agreements (TPAs) with 20 countries have entered into force, most recently with South Korea, Colombia and Panama in 2012. In addition to these, the U.S. government has entered into a wide range of bilateral agreements with important copyright or market access obligations. While the enforcement mechanisms for this diverse collection of bilateral agreements vary in robustness, each of these agreements represent solemn commitments by our trading partners, entered into after serious negotiations, whose fulfillment is intended to serve the global interests of the United States.

Implementation of these agreements has certainly contributed over the years to more good U.S. jobs and a yet greater contribution from the copyright sector to U.S. economic growth and global competitiveness. But the full benefits of these positive impacts will only be realized if the obligations taken on by our trading partners are promptly implemented in the statutes, regulations and policies of these countries, and if the U.S. Government maintains careful vigilance and active enforcement of compliance with these obligations. Unfortunately, too often in recent years this has not been the case. While there have been some notable enforcement successes, too many of our trading partners have simply ignored these important obligations, or have implemented them insufficiently.

U.S. trade agencies should make it a top priority in 2017 to reverse this unfortunate trend. The inventory of significant gaps and shortfalls in fulfillment of copyright, enforcement, and market access commitments by our trading partners needs to be cataloged, prioritized, and effectively reduced. Implementation of such a trade policy priority will benefit the creative sector in the United States, and advance the overall national economic interest. To assist the U.S. government in this effort, IIPA has identified in each of its country surveys some of the principal unfulfilled commitments to the United States that are most concretely hampering the ability of U.S. copyright industries to compete fairly in the marketplaces of our trading partners.

While it is critical that the U.S. Government ensure in 2017 that our trading partners fully comply with the obligations they have already taken on in bilateral, regional, and multilateral copyright agreements to which the U.S. is also a party, it is also the case that some of these agreements have become outmoded. In particular, the provisions of the North American Free Trade Agreement (NAFTA) were negotiated more than a quarter century ago, before the dawn of the digital age that has so dramatically changed the landscape of the marketplace for goods and services protected by copyright. Any re-opening of NAFTA in 2017 should give high priority to modernizing these



provisions for the digital age, with the goal of further opening the Canadian and Mexican markets for the U.S. copyright industries.

b. *Copyright Principles and Norms Under Threat*

While the U.S. Government should continue to press for reform and modernization of national copyright laws that have failed to keep pace with market and technological trends, recent years have revealed an insidious and disturbing downside to copyright reform initiatives in some countries. In some cases, these reform efforts have become a vehicle for proposals that threaten well-established global norms enshrined in long-standing international instruments that have met the test of time, including, but by no means limited to the requirement to confine exceptions and limitations to copyright protection to those that satisfy the well-established “three-step test” (“certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”). The IIPA Submission discusses, among others, provisions of the recent Copyright Modernization Act in Canada, and proposed copyright reforms in Hong Kong and South Africa, that exemplify this disturbing trend.

Those of our trading partners who have not already done so should be urged to set the term of copyright protection at life of the author plus 70 years (or at least 70 years from publication for products whose terms are not measured by the life of the author), which has become a *de facto* global norm. And the growing global consensus that has emerged on the need to provide legal protection to technological controls that copyright owners use to control access to their works should be respected, by enacting legislation that establishes a practical and enforceable anti-circumvention prohibition independent of copyright infringement. IIPA urges the U.S. Government to remain vigilant on this issue, especially in reviewing legislation purporting to implement the WIPO Treaties and in other national copyright reform contexts, to avoid a repetition of the experience with New Zealand. That country’s recently adopted legislation would be essentially useless in combating the trafficking in tools or services designed to hack these key enabling technologies that have brought more creative works to more consumers in more ways than ever before.

IV. COPYRIGHT INDUSTRY CHALLENGES

The next section of IIPA’s Submission highlights some of the overarching trends and challenges confronting the U.S. copyright industries seeking to compete in overseas markets.

a. *Internet and Mobile Network Piracy*

USTR was correct when it observed in its 2016 Special 301 Report that “piracy over the Internet has become the most challenging copyright enforcement issue in many trading partner markets.” But in a broader perspective, the entrenchment of infringing services is the leading barrier impeding the full access of U.S. creators and rights holders into markets worldwide. Online and mobile network piracy threatens the viability of licensed platforms and erodes the capacity of authors, artists, musicians, filmmakers, publishers, videogame developers, performers and songwriters to earn a living.

The “Special 301 Out-of-Cycle Review of Notorious Markets,” identifying key marketplaces that are involved in IPR infringements, continues to make a significant contribution in combating systematic online copyright theft, as exemplified most recently by the successful international efforts to take down the “Kick Ass Torrents” site (*kat.cr*), one of the most popular and lucrative pirate sites in the world, and arrest its operator. However, when surveying the countries where the operators of notorious market sites can obtain the supporting services they need, ranging from hosting and domain name registration to enabling monetization through payment processing and advertising services, some names recur with troubling frequency. We urge the U.S. Government, in its bilateral engagement with



these countries, to stress the immediate need to ensure that these pirate services either convert to licensed dissemination of works, or else are shut down.

A legal framework that prevents the operation of services that promote or otherwise induce infringement, and that creates incentives for neutral network service providers to work with rights holders to curb the use of their proprietary networks and services for infringing purposes, should be a critical goal for all countries. As entities with a direct stake in a secure and stable Internet, and in the healthy growth of e-commerce, all Internet intermediaries should consider such cooperation against threats to Internet security, stability and health to be part of a sound business strategy. But governments in many countries should be doing much more than they are currently to foster and encourage such cooperation, and to promote the development of best practices to advance the common goal of a safer, legitimate online marketplace. In this regard, while arrangements for notice and takedown of infringing materials are in place in many markets, they are often invoked by clearly pirate services. Clearer primary and secondary liability rules are necessary to discourage such abuse, and to remove the safe harbor as an unjustifiable excuse for inaction. Where infringing activity rises to the level of criminal liability, imposing responsibility for aiding and abetting infringement would also prevent services from basing commercial platforms on copyright theft.

Finally, where notorious online marketplaces are hosted in one country but target consumers in another—or worldwide—the failure of the host country to take effective action against them imposes costs on and pollutes the markets of its neighbors and trading partners. Increasingly, responsible governments are pushing back against this “offshoring” of enforcement responsibility, by developing means and processes for restricting or disabling access to these foreign pirate sites from within their borders. So long as less responsible states fail to institute effective means to crack down on pirate operations based within their borders but readily accessible worldwide, this trend will continue and deserves the close attention of the U.S. Government.

b. Illicit Streaming Devices (ISDs)

The Submission also calls attention to a significant new means through which pirated motion picture and television content is accessed in consumers’ homes in markets around the world. ISDs are media boxes, set-top boxes or other devices that, with corresponding software programs, allow users to stream or download unauthorized content from the Internet. China is a hub for the manufacture of these devices, which are not only distributed domestically but also exported to overseas markets. What was once a problem centered mainly in Asian markets has now proliferated worldwide.

ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, and enforcement against them presents complex challenges. But unless effectively countered with vigorous action against ecosystem participants, the impact of ISDs on the legitimate market for digital delivery of copyright materials will be increasingly destructive.

c. Circumvention of Technological Protection Measures (TPMs)

The widespread use of TPMs is a major reason why more consumers today enjoy authorized access to more copyright works in more diverse ways and at more affordable price points than ever before. A range of innovative new business models depend on access controls. That underscores the need to effectively prohibit the provision of services or the trafficking in tools to circumvent TPMs in order to gain unlawful access to content or to copy it without authorization. Countries that have yet to implement any or adequate protections in this sphere need close scrutiny, starting with China, where a host of circumvention tools are manufactured for worldwide distribution.

d. Stream-Ripping Services

The emergence of “stream-ripping” services, which circumvent the TPMs used to prevent download of streaming music, illustrates the destructive potential of these services, and stands as a global problem undermining



the legitimate online music market. Stream-ripping sites, services and apps inflict damage both on legitimate streaming services and legitimate channels for authorized downloads. We applaud USTR for identifying stream ripping as an “issue focus” for its 2016 notorious markets report, and urge it to give the problem high priority.

e. Illegal Camcording of Theatrical Motion Pictures

Approximately 90% of newly released movies that are pirated can be traced to use of a digital recording device in a movie theater to record the audiovisual work (whether image or sound or both). The resulting copy is uploaded to the Internet and quickly made available around the world. Some countries have successfully implemented a strategy of public education, cooperation with cinema owners, and enactment and enforcement of clear criminal prohibitions against this form of theft. IIPA’s country surveys highlight many other markets where this strategy has not yet been carried out.

f. Piracy of Books and Journals

The book publishing industry continues to be plagued by large scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses; unauthorized translations of popular books; and sophisticated infringing offset print versions of books (essentially akin to counterfeiting). The recent trend in the last area finds counterfeit textbooks being produced, not just for domestic consumption, but for export to the U.S. and other developed markets. The U.S. Government should ensure that such acts of infringement are fully covered in all bilateral, regional, and multilateral engagements, and that educational institutions as well as law enforcement agencies in our trading partners are fully mobilized to deal with the problem.

g. Collective Management Organization (CMO) Issues

Across the copyright industries, but especially in the music sector, the fundamental transition from physical to digital and from ownership to access models have intensified the need for heightened attention to the need for efficient, transparent, and accountable collective management services. Rights holders must be in a position to set up and govern their CMOs themselves, with government interference limited to ensuring efficient, fair and non-discriminatory operations. IIPA’s Submission identifies several countries where there are serious concerns about the operations and governing rules for CMOs, and also reviews the basic principles on which any legislative instruments in this area should focus.

h. Other Challenges

The IIPA Submission also summarizes the challenges of pay-TV piracy and signal theft, mobile device piracy/hard-disk loading, and the persistent problem of hard goods piracy (including pirate optical discs), which continue to inflict losses, especially in markets with lower Internet penetration. China continues to be a leading manufacturing source for pirate high-quality DVDs, Blu-ray discs, and box sets of music or audiovisual materials; and scores of “notorious” physical markets for the distribution of pirate hard goods continue to thrive. Finally, IIPA outlines the key enforcement responses that we should expect from our trading partners in order to effectively deter infringers in each of the areas above.

V. MARKET ACCESS BARRIERS

The U.S. copyright industries suffer from a variety of market access barriers, investment restrictions, and discriminatory treatment that make it difficult to compete on a level playing field in some crucial foreign markets. All efforts to address copyright infringement will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand. Thus, the reduction of market access impediments is a key component of ongoing efforts to combat piracy, as well as a fundamental goal of the Special 301 process. Whatever form they take, all market access restrictions that impede the entry of legitimate products make it easier for pirate operations to fill



the void, and to become *de facto* “exclusive” distributors who can cement strong loyalties with their consumer base that make them even harder to dislodge. U.S. officials should continue to strive to open markets and to eliminate or phase out market access barriers, including those identified in this year’s IIPA Submission.

VI. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates revenues, jobs, and exports. Likewise, the health and competitiveness of our trading partners also depends on promoting and respecting intellectual property rights and opening markets to products and services that depend on copyright. Open markets foster jobs in creative industries, increase cultural diversity, promote international trade and exports, increase tax revenues from legitimate businesses, and attract more foreign direct investment. It is essential to the continued growth and future competitiveness of creative industries around the world that our trading partners provide modern levels of protection for copyright; more effective policies and tools to enforce that protection; and freer, more open markets. Our country must remain committed to flexible and innovative responses to the constantly evolving threats to copyright worldwide. Special 301 remains one cornerstone of the U.S. response. We urge USTR and the Administration to use the Special 301 review and other trade tools to encourage the countries and territories identified in our Submission to make the political commitments, followed by the necessary actions, to bring real commercial gains to the U.S. creative industries through strengthened copyright and enforcement regimes worldwide.

We look forward to our continued work with USTR and other U.S. agencies on meeting the goals identified in this Submission.