

# AIPLA

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AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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The Honorable Robert B. Zoellick  
The United States Trade Representative  
600 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20506

October 11, 2001

Dear Ambassador Zoellick:

The American Intellectual Property Law Association (AIPLA) has serious concerns regarding the Work Program set forth in the draft Ministerial Declaration submitted by the Chairman of the WTO General Council and the WTO Director-General for the consideration of the delegations at the Fourth Session of the Ministerial Conference scheduled for Doha, Qatar next month. We believe that paragraphs 14, 15 and 16 could undermine the patent protection afforded inventions in the biotechnology and pharmaceutical fields and permit barriers to be created to the export of goods and services bearing established United States trademarks.

The AIPLA is a national bar association of nearly 14,000 members engaged in private and corporate practice, in government service, and in the academic community. The AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property.

The AIPLA believes that the mandated negotiations, reviews, and work programs presently called for in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs) presents the United States Government with a number of very difficult unfinished tasks. The United States should not make fulfillment of these tasks even more difficult by acquiescing in the agendas of other trading partners to pursue their goals which are contrary to the interests of American industry.

## PATENT PROTECTION

Paragraph 16 of the draft Ministerial Declaration provides:

“We instruct the TRIPS Council, in pursuing its work programme, to give due attention to the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Convention on Biological Diversity, the protection of traditional knowledge, non-violation complaints, and keeping the TRIPS Agreement abreast of new technological and other developments. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles of the TRIPS Agreement and shall take fully into account the development dimension.”

We respectfully but strongly disagree with the notion of carrying out the important tasks of fully implementing the obligations of all nations under TRIPs giving “due attention” to a supposed relationship between TRIPs and the Convention on Biological Diversity and the protection of traditional knowledge. Based on our observations, the objective of the proponents of according such recognition appears to be to graft certain principles onto the interpretation of TRIPs’ obligations to allow nations to evade their responsibilities for protecting technological innovations, especially in the field of biotechnology. What many of those who in the pursuit of the “protection of traditional knowledge” refer to as “bio-piracy” turns out in more rational discourse merely to be an inflammatory label placed on the occasional issuance of a patent claim covering an aspect of an invention later found to be in the public domain. Such rhetoric should not be permitted to misguide the negotiating objectives for intellectual property in the draft Ministerial Declaration.

We also see no justification for the emphasis placed on guiding the TRIPs Council’s work by the Objectives of Article 7 and the Principles of Article 8. While these two articles are clearly to be observed by the TRIPs Council, so too are the commitments nations have undertaken in the remaining 71 articles of TRIPs. Most importantly, the proviso in Article 8. 1. is paramount: Members are free to take measures to protect public health or promote the public interest, “provided that such measures are consistent with the provisions of this Agreement.”

In this regard, we note that the footnote to the section of the draft Declaration that deals with TRIPs proposes that “the issue of the relationship between intellectual property and [access to medicines][public health] be addressed in a separate declaration.” Given that Article 8.1. specifically recognizes that Members may, in formulating their laws, adopt measures necessary to protect health, subject to the proviso noted in the preceding paragraph, we can only see this reference as creating confusion and mischief, and thus strongly recommend that it be deleted.

## **GEOGRAPHICAL INDICATIONS**

We are equally troubled by negotiating objectives in paragraphs 14 and 15:

“14. We agree to complete negotiations on the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits.

“15. We agree [that the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) shall examine issues related to possible negotiations on][to negotiate] the extension of the protection of geographical indications provided for in Article 23 to additional product areas.”

The Uruguay Round negotiations reflect a delicate balance between the laws and traditions of the Members. The United States was not willing to place at risk the trademark rights of its nationals to accommodate the European Commission's desire to obtain the exclusive right to use geographic indications for wines and spirits that had long since either become generic or had been validly used and registered as trademarks in the United States. Similarly, the European Commission did not agree to share the revenues it was receiving from the blank tapes sold in Europe on which American music was being recorded by members of the public. The negotiating objective in paragraph 14, should it go beyond the registry proposal made by the United States and Japan in 1998, would unilaterally surrender this status quo and potentially place at risk literally thousands of United States trademark registrations.

The implications of paragraph 15 pose a far greater risk for American trademark owners. Article 23.1. mandates that Members shall provide the legal means to prevent the use of a geographical indication on wines or spirits even where the indication is accompanied by an expression that avoids any confusion as to the true origin of the product. This has been described as a monopoly on a word. The negotiating objective in Article 15 would have the Members either 1) agree to examine the issues related to negotiations or 2) actually negotiate extending this unparalleled protection to “additional product areas.” The prospect of bringing the names used for cheeses, teas, coffees--and perhaps even non-food products where a given reputation is attributable to its geographical origin—is at odds with American practice and legal tradition. Moreover, it would exponentially increase the risk for American trademark owners that their marks could be sacrificed to the forced importation of legal regimes at odds with those of the United States.

## CONCLUSION

The AIPLA does not underestimate the challenges that the United States will face in Doha to achieve a balanced and effective Ministerial Declaration. Clearly our negotiators will face relentless pressures from our European and developing country trading partners to modify and interpret the TRIPs obligations in ways inimical to U.S. interests. We urge you and your U.S. negotiating colleagues to resist the proposals to embark on new ventures to expand TRIPs in ways injurious to American intellectual property interests. There is a great deal of work ahead before the goal of fully implementing the obligations undertaken in the Uruguay Round will be realized. We should not waiver from that goal.

Sincerely,

A handwritten signature in black ink, reading "Michael K. Kirk". The signature is written in a cursive style with a large, sweeping initial "M".

Executive Director  
AIPLA