August 17, 2001

Ms. Gloria Blue
Trade Policy Staff Committee
Office of the U.S. Trade Representative
1724 F Street, N.W., Fifth Floor
Washington, D.C. 20508

Attn: FTAA Draft Text Release

Dear Ms. Blue:

As the Co-Chairs of the U.S. Public Policy Committee of the Association for Computing Machinery (ACM), we are writing to express our concerns regarding the draft Free Trade Area of the Americas (FTAA) treaty's intellectual property provisions. We are particularly concerned that the draft treaty requires nation-signatories to pass copyright legislation in each of their national forums that mandates strict anti-circumvention measures similar to or even expanding similar restrictions imposed in the U.S. by the Digital Millenium Copyright Act (DMCA). The anti-circumvention provisions of the draft FTAA treaty unjustly harm the freedom of computer scientists to engage in research fundamental to the progress of innovation. As such, they should be removed from the treaty language.

ACM has consistently opposed the anti-circumvention provisions of the DMCA. In our view, the overly-broad provisions impede the progress of research in cryptography and other computer security areas by criminalizing multi-use technologies rather than narrowly penalizing infringing behavior. Absent some clear criminal intent, technologists should not be penalized for conducting research that is crucial to developing and testing copyright protection systems, security software, and better software engineering tools.

During consideration of the DMCA by the U.S. Congress and the subsequent rulemaking process, ACM recommended that the anti-circumvention provisions of the legislation be revised to restrict only circumvention directly involved in infringement. We further elucidated other flaws of the Act, including:

- failure to permit circumvention for "fair-use" purposes is inconsistent with the fundamentals of copyright law and deters individuals from conducting bona fide forms of science and technology research that is fundamental to innovation;
- exempting encryption research from the anti-circumvention provisions is too limited as the majority of computer security research does not involve encryption;
- permitting reverse engineering for the sole purpose of interoperability may criminalize development of software engineering tools and technology with other uses; and,

- anti-circumvention exemptions that permit circumvention to obtain authorized access to a work are meaningless if access mechanisms and tools cannot be used to do so.

Unfortunately, our concerns were not satisfactorily addressed as the DMCA was enacted. As a result, scientists are now finding themselves in a position where they must consult attorneys to determine if their previously legitimate research might be in violation of the DMCA. In some instances, the threat of legal action under the Act has deterred scientists from publishing scholarly work or even publicly discussing their research. Certain foreign scientists and international members of ACM have indicated they will not attend conferences in the U.S. while the law is in force.

Because its broad prohibitions on disseminating information and technology restrict speech protected by the First Amendment, the DMCA is currently under legal challenge in the U.S. ACM, the Computing Research Association, and numerous distinguished computing experts have advised the court that the anti-circumvention provisions of the DMCA have proven to have a chilling effect on U.S. scientific and research enterprise. As such, we believe it would be a poor idea to include similar restrictions in the FTAA treaty. Should the DMCA be ruled unconstitutional in the U.S., it would be unable to agree to the treaty.

We urge you to remove the onerous anti-circumvention provisions from the FTAA treaty language. Failure to do so could prove to be disastrous. Please contact Jeff Grove, Director of the ACM Public Policy Office at (202) 659-9711, if you have any questions.

Sincerely,

Barbara Simons, Ph.D.
Eugene H. Spafford, Ph.D.

Co-Chairs
U.S. ACM Public Policy Committee (USACM)
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