

**COMMENTS OF
THE AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH
LIBRARIES, AMERICAN ASSOCIATION OF LAW LIBRARIES, SPECIAL
LIBRARIES ASSOCIATION AND MEDICAL LIBRARY ASSOCIATION
CONCERNING THE
PROPOSED UNITED STATES-MALAYSIA FREE TRADE AGREEMENT**

The American Library Association, Association of Research Libraries, American Association of Law Libraries, Special Libraries Association and Medical Library Association jointly submit these comments in response to the notice and request for public comments on the proposed United States-Malaysia free trade negotiations (Malaysia FTA), published by the Office of the United States Trade Representative (USTR) in the *Federal Register* on March 22, 2006 (71 Fed. Reg. 14558). These comments address, in particular, chapters that may impact intellectual property rights and services.

The American Library Association (ALA), the oldest and largest library association in the world, is a nonprofit organization of over 66,000 librarians, library trustees, and other friends of libraries dedicated to the development, promotion, and improvement of library and information services to enhance learning and ensure access to information for all.

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship and community service.

The American Association of Law Libraries (AALL) is a nonprofit educational organization with 5,000 members dedicated to providing leadership and advocacy in the field of legal information and information policy.

The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 11,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives.

The Medical Library Association (MLA), a nonprofit, educational organization, comprises health sciences information professionals with more than 4,500 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.

The ALA, ARL, AALL, SLA and MLA (collectively, "Library Copyright Alliance") seek to ensure that the Malaysia FTA will not interfere with the ability of

libraries to support education and research by providing unrestricted access to information in any form and by whatever means technology may allow in coming years. Specifically:

- With respect to intellectual property rights protections, the Malaysia FTA must not impair the ability of the U.S. government to enable libraries to preserve intellectual works, share them with one another, and provide public access to them including through lending and the Internet. Further, the United States must continue to have the flexibility to enable libraries to keep pace with developments in information technology. This means that the FTA must not impinge the ability of Congress and U.S. courts to adjust copyright law to maintain an appropriate balance between the interests of rights holders and the public to benefit from creative works.
- With respect to services disciplines, the Malaysia FTA must allow local, state and federal government support for libraries to continue through subsidies and other forms of public assistance, and for this support to evolve in light of technological developments.

To help ensure the agreement does not negatively impact America's libraries—and also to help ensure the meaningful, transparent, public participation so important to the success and integrity of the negotiating process—we request that USTR timely publish both the draft text for public comment and the comments received in response. In addition, we ask that USTR contact us in the event that it is considering any obligations that could impact the interests of libraries under U.S. domestic law.

A. The Critical Role of America's Libraries

America's libraries provide extraordinarily valuable services, essential to our nation's basic social goals and to the proper functioning of our democratic and open governmental system. Through our libraries we ensure all Americans access to the myriad sources and types of information that convey our collective knowledge, values and diversity of views.

Our libraries help educate our children and our work force. Libraries help us maintain a well-informed citizenry able to perform effectively its responsibilities as an electorate. They help us meet life's challenges at work, in our families, as entrepreneurs and as business people. They support teaching, research and scholarship, the operation of our legal system, the provision of medical care, and the general, efficient functioning of our economy. They help us fully realize our potential as human beings.

Today, there are over 117,000 libraries nation-wide serving the American public. Americans on average borrow more than six books per year. Americans go to school, public and academic libraries more than twice as often as they go to the movies. Reference librarians answer more than 8 million questions each week. As technology has changed, so have the services of libraries. Today, public libraries are the number one point of online access for people without Internet access at home, school or work.

For a society and economy increasingly and extraordinarily reliant upon efficient and broad access to information, libraries play a crucial role. Not only do libraries assemble and organize information for ready access, they often provide the only practical access to the vast majority of books and to other information sources that are no longer available for sale.

Each year, federal, state and local governments reaffirm through appropriations their appreciation and support for the role of America's nonprofit and public libraries, as do millions of American citizens through charitable donations.

B. The Need to Protect the Ability of Libraries to Provide Core Library Services

The principal concern of the Library Copyright Alliance is to ensure the continuing ability of America's libraries to provide the "core" library services they currently offer to our nation. The basic mission of libraries is to provide unrestricted access to information resources. The core services libraries provide in pursuing this mission are:

- Collection, cataloging (whether manually or computer-aided) and storage of information sources, including books, maps, periodicals, films, records, tapes, compact disks, digital video disks, electronic books, and such other information sources as may become available;
- Archiving, preserving and providing long-term access to information, including the use of current and future technologies to reformat information to facilitate storage and retrieval;
- Providing access to information through lending and inter-library loans as well as through reading, listening and viewing rooms equipped with whatever technology may be needed to access the information from the information source; and
- Information retrieval services, whether with the assistance of professional librarians, through Internet access to databases, or by such other means as may become available.

In providing these services, our nation's libraries bestow an extraordinary and cost-effective social good. Yet, maintaining our libraries necessitates a substantial investment of societal resources. Physical infrastructure must be maintained and updated to accommodate new information technologies. Obsolete technologies must be replaced. Collections must be preserved and augmented. Each year, America's libraries expend hundreds of millions of dollars in fees for databases and electronic library materials alone.

To meet our nation's needs, libraries depend on the rights they enjoy under U.S. law to access, preserve and share information, and on the financial and other forms of government support they receive.

C. The Malaysia FTA Must Permit the United States to Protect the Right of Libraries to Access, Preserve and Provide Public Access to Information

Through copyright law, the United States protects the interests of authors and creators and of society as a whole in intellectual works. It is essential to the societal function of libraries that U.S. copyright law retains the flexibility to maintain this balancing of private and public rights. The Library Copyright Alliance urges USTR to exercise great caution in addressing this complex, delicate and evolving area of law.

U.S. copyright law in its origins and as it has evolved has always sought to balance these interests “to promote the Progress of Science and useful Arts” as the Constitution provides. Authors and creators receive certain monopoly rights (which they can transfer to publishers) to provide an adequate reward for their efforts and, thereby, stimulate the creation of intellectual works. These monopoly rights are circumscribed in various ways, however, to ensure society can fully realize the benefits of these works.

Various limitations on copyright established under U.S. law enable libraries to provide their core services. Explicit limitations authorize libraries to preserve and distribute intellectual works and to lend them to other libraries. In addition to updating these preservation, distribution and sharing rights to take into account more recent technological needs and resources, the Digital Millennium Copyright Act of 1998 (DMCA) limited the liability to which online service providers might be exposed due to online copyright infringement. These liability limitations offer protection to the thousands of libraries that provide their patrons access to the Internet.

The more broadly stated Fair Use Doctrine protects libraries and their patrons from liability for copyright infringement when reproducing intellectual works to advance purposes such as scholarship, research, teaching, news reporting and criticism. In addition, the Fair Use Doctrine (codified in the U.S. Copyright Act) serves an important “gap-filler” function. For example, as new technologies give rise to new rights and protections for intellectual works, corresponding expansion of Fair Use rights for the public can provide a means to maintain an appropriate balance. This evolutionary process must be able to continue.

It is critical to appreciate that this ongoing evolution of copyright law is no mere abstraction. It continues to be the focus of intense legislative debate and costly, time-consuming litigation. Congress and the courts must retain the flexibility to adjust U.S. copyright law as appropriate to balance the needs of rights holders and the public. Accordingly, USTR must take great care to ensure that this agreement and all the others it negotiates do not impinge this flexibility.

At the international level, a framework and process for addressing intellectual property rights already exist, under the Berne Convention for the Protection of Literary and Artistic Works (Berne) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Establishing additional regimes increases complexity and

uncertainty, and could produce unintended inconsistencies. The severe time and resource constraints under which USTR must operate, combined with the limited opportunity for Congressional review and oversight under Trade Promotion Authority, only increase the risk. Accordingly, the Library Copyright Alliance strongly recommends that USTR avoid unnecessary negotiation outside the Berne-TRIPS framework.

Should USTR, nonetheless, choose to address intellectual property rights in the Malaysia FTA negotiations, the Library Copyright Alliance calls upon it to ensure that the agreement does not, even inadvertently, restrain Congress or the courts from giving full force to the rights of the public, even when asserted against the intellectual property owner. At a minimum, the agreement must:

Not expand copyright and related protections for works beyond those protections currently granted under U.S. law or diminish existing exceptions to these protections;

Not interfere with the authority of Congress to adjust the DMCA or otherwise implement as it sees fit the treaties of the World Intellectual Property Organization or the TRIPS Agreement;

Not address the Fair Use Doctrine except to state that the FTA does not in any way affect the full application of the doctrine; and

Otherwise be consistent with existing U.S. copyright law and not impinge the flexibility of Congress and the courts to develop U.S. law in accordance with the existing international obligations of the United States.*

D. The Malaysia FTA Must Permit Local, State and Federal Government Support for Publicly Supported Libraries

Currently, American publicly supported (nonprofit, public and publicly funded) libraries rely upon government assistance of various kinds to support their operations. Local and state governments provide much of this support in such forms as subsidized or free use of building space, funding of operations, and tax exemptions. Federal support also plays an important role. This support includes funding from the Department of

* In this regard, we note with approval the limitations and exceptions recognized under article 14.4.10 of the United States-Bahrain Free Trade Agreement, article 17.4.10 of the United States-Australia Free Trade Agreement, article 17.7.3 of the United States-Chile Free Trade Agreement and article 16.4.10 of the United States-Singapore Free Trade Agreement, respectively, that apply to all copyright and related rights established under these agreements, enabling Congress and the courts to adjust U.S. copyright law consistent with the Fair Use Doctrine and other limitations and exceptions established under U.S. law. It is essential that such limitations and exceptions be included in all international agreements binding upon the United States that address copyright or related rights.

Education, the Institute of Museum and Library Services and other agencies, tax exemption, nonprofit status to receive tax-exempt contributions, special postage rates, and subsidized access to modern telecommunications and information services, including Internet services, under the Universal Service Support Mechanism.

The government support that these libraries receive is essential to their ability to provide their core services. The forms of support have changed over time in light of technological and other developments relating to these core services, and will likely continue to evolve in tandem with future developments. Local, state and federal governmental bodies must continue to have the ability to provide support to enable these libraries to offer their core services to the public without charge.

The Library Copyright Alliance calls upon the USTR to ensure that governmental support for core library services does not become subject to disciplines under the Malaysia FTA. This will require a firm understanding of the core services provided by publicly supported libraries and the interrelationships between these services and other services that may be addressed in the agreement.

E. USTR Must Provide for Timely, Informed and Transparent Public Comment on the Draft Text

USTR's request for these comments, and its policy and practices more generally, reflect its understanding that sound U.S. trade policy requires consideration of the diverse views of interested stakeholders. We request that, consistent with this appreciation, USTR:

- At least 30 days prior to the conclusion of the negotiation phase, post on USTR's website the proposed agreement text and request through the *Federal Register* public comment upon it; and
- Post on the USTR website all comments received in electronic format and a listing of all comments received, updated promptly as new comments arrive.

As discussed more fully in the letter of October 29, 2003 to former Ambassador Zoellick (a copy of which is enclosed for your reference), adopting these procedures here, and generally, will enable meaningful participation in the trade negotiating process by all interested parties, reduce the potential for drafting and other error, and, most fundamentally, help ensure the integrity of these trade negotiations.

In addition, we respectfully request that USTR keep the library community informed of relevant developments and seek our input as appropriate to ensure that negotiators are fully informed of our needs and any potential risks posed by the Malaysia FTA.

ALA, ARL, AALL, SLA and MLA call upon USTR to ensure the Malaysia FTA does not undermine the existing ability of libraries to preserve, share and provide public access to intellectual works; interfere with government support for publicly supported

libraries; or impede the evolution of library services and public support as technology advances. We appreciate the opportunity to provide these comments and look forward to working closely with USTR as negotiations proceed for the FTA and for other bilateral, regional and multilateral agreements relating to intellectual property rights and services, to ensure the favorable management of specific issues of critical importance to libraries.

Submitted to USTR on behalf of the Library Copyright Alliance
(<http://www.librarycopyrightalliance.org>) by:

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October 29, 2003

VIA FACSIMILE AND U.S. MAIL
202-395-4549

The Honorable Robert B. Zoellick
United States Trade Representative
Winder Building
Room 209A
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Zoellick:

We are writing to you on behalf of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, and the Special Libraries Association. We seek your assistance to improve opportunities for stakeholder participation in the trade negotiation process. Most urgently, we request that, for all bilateral and regional trade negotiations, the Office of the United States Trade Representative:

- At least 30 days prior to the conclusion of the negotiation phase, post on USTR's website the proposed agreement text and request through the *Federal Register* public comment upon it; and
- Post on the USTR website all comments received in electronic format and a listing of all comments received, updated promptly as new comments arrive.

As discussed more fully below, adopting these procedures will enable meaningful participation in the trade negotiating process by all interested parties, reduce the potential for drafting and other error, and, most fundamentally, help ensure the integrity of these trade negotiations.

The American Library Association ("ALA"), the oldest and largest library association in the world, is a nonprofit organization of over 65,000 librarians, library trustees, and other friends of libraries dedicated to the development, promotion, and improvement of library and information services to enhance learning and ensure access to information for all.

The Association of Research Libraries ("ARL") is a nonprofit association of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service.

The American Association of Law Libraries ("AALL") is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

The Special Libraries Association ("SLA") is a nonprofit, educational organization serving more than 13,000 members of the information profession, including special librarians, information managers, brokers, and consultants.

USTR's policy and practice reflect its appreciation that sound United States trade policy requires consideration of the diverse views of interested stakeholders. USTR's efforts to seek necessary input include both requests in the *Federal Register* for stakeholder comment prior to initiating trade negotiations and informal consultations with stakeholders prior to taking action that might negatively impact domestic policy affecting them. In particular, we greatly appreciate the efforts your staff has made to meet with us to hear and address our concerns regarding existing and proposed obligations. While important and valuable, USTR's current overall approach, however, has clear practical limits that pose significant risks.

USTR's current approach leads to imprecise and unbalanced public input. No stakeholders can provide precise, informed comments if they cannot review proposed text, but USTR has generally made proposed text available, if at all, on an informal, unpublished basis through its *ad hoc* consultation procedures. In addition, these same *ad hoc* procedures depend on USTR's identifying and contacting interested parties, and USTR does not always know all the parties whose interests might be impacted. As a result, these procedures do not ensure USTR's exposure to the multiple perspectives needed for it to have a balanced understanding of the ramifications of the rights and obligations it negotiates. Further, such procedures can create an appearance of unfairness and bias even if USTR succeeds in eliciting widely representative views.

The limitations of USTR's current approach pose particularly significant risks, of inadvertent and inappropriate interference with domestic policy-making, when trade negotiations address areas of policy that are in flux domestically. This is especially true when negotiators attempt to establish detailed rights and obligations relating to these areas, as USTR continues to do, for instance, with respect to copyright and related intellectual property rights. Even seemingly minor drafting changes to such provisions might inadvertently limit the flexibility of lawmakers to adjust existing law.

Regardless of a negotiation's topic or level of detail, however, it remains essential that the stakeholders most deeply affected by, and intimately familiar with, the area of law and policy have the opportunity to provide timely, informed comment. The need for greater public participation becomes ever more obvious as the issues addressed in trade negotiations implicate an ever wider array of domestic laws and policies. The severe time and resource constraints under which USTR must operate only increase the risk of inadvertent oversights and errors, which informed, balanced public input can help prevent.

More fundamentally, failure to provide for timely, informed and transparent comment from all interested stakeholders threatens the integrity of the trade negotiating process. Promotion of robust, transparent opportunities for comment is essential to enable, and to demonstrate a commitment to, balanced consideration of the impacts that international rights and obligations might have. Allowing for transparent review of draft text, in particular, is consistent with the usual rights afforded to the public of notice and comment for draft regulations and legislation. The actual and perceived limitations that Trade Promotion Authority imposes on after-the-fact congressional review of free trade agreements makes enhancement of stakeholder participation opportunities all the more critical.

We applaud USTR's successful efforts to encourage the publication of draft texts for the Free Trade Area of the Americas Agreement, and USTR's subsequent posting of these drafts on its website and requesting of public comment on them in the *Federal Register*. We believe the United States can and should foster similar transparency and public participation in all trade negotiations. We appreciate that USTR faces a significant challenge in pursuing public participation in multilateral trade negotiations due to the concerns of other governments. However, at least in bilateral and regional negotiations, the United States should be able to mandate a more open negotiating process. At a minimum, USTR can and should immediately establish that governments must agree to the timely publication of draft texts as a precondition for entry into bilateral or regional trade negotiations with the United States.

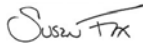
Helping maintain a well-informed citizenry able to perform its civic responsibilities and exercise its public rights is central to the mission of America's libraries. The United States has long acted as a leading advocate of transparency and public participation at the international level, and as a staunch supporter of equivalent domestic reforms by governments throughout the world. We value this

commitment and appreciate the efforts USTR has made to enable civil society to monitor, inform and participate in the development of international trade law and policy.

Ambassador, you have the opportunity to enhance productively and importantly the role of the public in trade negotiations. We urge you to act expeditiously to ensure all stakeholders will be able to provide informed and transparent comment for the multiple regional and bilateral negotiations currently underway, as well as for future negotiations.

We thank you for your attention to this important issue and look forward to an ever more productive relationship with USTR.

Respectfully,



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