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FINDING AND FIGHTING FAKES: REVIEWING THE STRATEGY TARGETING ORGANIZED PIRACY

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

JUNE 14, 2005

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FINDING AND FIGHTING FAKES: REVIEWING THE STRATEGY TARGETING ORGANIZED PIRACY

TUESDAY, JUNE 14, 2005

U.S. SENATE,
OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE
DISTRICT OF COLUMBIA SUBCOMMITTEE,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:20 a.m., in room SD–562, Dirksen Senate Office Building, Hon. George V. Voinovich, Chairman of the Subcommittee, presiding.

Present: Senators Voinovich, Akaka, Levin, Carper, and Pryor.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. The hearing will please come to order I want to apologize to the witnesses and to Mr. Evans for the delay. We were scheduled with a vote this morning at 10 o'clock. One thing that someone asked me a long time ago, what is the difference between Governor and being a Senator, and I said, when you are Governor, you control your schedule. When you are a Senator, somebody else does, so I again apologize for the lateness of beginning this hearing.

Thank you all for coming. Today, the Subcommittee on the Oversight of Government Management, the Federal Workforce, and the District of Columbia will examine the Administration's Strategy Targeting Organized Piracy, also known as STOP!, which was announced last October to combat the growing international trade in counterfeit and pirated goods.

This is the fourth hearing in a series of trade-related hearings by this Subcommittee going back to the 107th Congress. The prior hearings were held on April 22, 2002, December 9, 2003, and April 20, 2004. So we have been on this now for a while.

International trade in counterfeit and pirated goods now account for an estimated 7 percent of all global trade. The impact of this trade on the American economy is substantial, with the trade in counterfeit goods alone costing U.S. industries between $200 and $250 billion, according to the U.S. Trade Representative's (USTR) most recent Special 301 Report.

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Moreover, the problem is getting substantially worse. Since 2000, the number and value of intellectual property seizures by the U.S. Bureau of Customs and Border Protection have more than doubled.

As these statistics show, thanks to modern communications and travel, intellectual property thieves can sell fakes around the globe, operating from nearly any country in the world. And thanks to the efficiency of modern means of production, they can produce as many fakes as they can find buyers. Some thieves are so skilled that their fakes are, in some cases, indistinguishable from the authentic products. Even the producers of authentic goods cannot tell them apart.

Such pervasive and sophisticated intellectual property theft poses a direct threat to the health of the United States economy. Intellectual property is the last bastion of our competitiveness. It is the one area where the United States has an absolute advantage in global trade. China, along with some of the other countries that are competing with us, has cheaper wages, cheaper health care costs, cheaper energy costs, but our economy is still vastly more productive than China's and other countries because of our intellectual property.

What is very troubling to me is that the growth in intellectual property theft abroad, especially in China, is occurring despite the fact that many of the countries where such theft is rampant, including China, have agreed to enact intellectual property rights legislation as part of their trade agreements with the United States and the World Trade Organization (WTO). For example, as a condition to its entry in the WTO, China agreed to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS, which set minimum standards for intellectual property protection for WTO members.

Yet, while China did enact the requisite intellectual property legislation, enforcement of the law has been severely lacking, allowing intellectual property theft to flourish within its borders. And frankly, some parts of the Chinese economy are just built on trademark violations and infringements on intellectual property rights.

Recognizing the need to combat the burgeoning of intellectual property theft abroad, in October 2004, the U.S. Trade Representative and the Departments of Commerce, Homeland Security, and Justice initiated the Strategy Targeting Organized Piracy, or STOP!—I love it. STOP! is a coordinated government-wide initiative designed to empower American businesses to secure and enforce their intellectual property rights in overseas markets, to stop fakes at U.S. borders, and to reach out to our trading partners to build an international coalition to stop piracy and counterfeiting worldwide.

I was very pleased with the announcement of STOP!. As someone who has worked with several Ohio companies that have had their product counterfeited, I can testify to the pressing need for more action to help American companies, especially small- and medium-sized companies, fight intellectual property theft abroad. In one of the hearings we had a year or so ago, the big companies said, they can take care of it themselves. They have lawyers over there. They can spend thousands, in some cases millions, of dollars taking care of the problem. But the little guy can't afford it.

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I am presently working with three Ohio manufacturing companies that have had their products counterfeited by firms operating in China: Gorman Rupp, which produces pumps, Step 2, which produces toys, and the Will-Burt Company, which produces telescoping masks, and whose CEO and President, Jeff Evans, will be testifying today. Mr. Evans, thank you for being here today.

This past April, I traveled to China and had the opportunity to meet with Premier Wen. During our meeting, I brought these three cases to the attention of Premier Wen and told him that China was being short-sighted in not helping these companies, because eventually, such rampant intellectual property theft would deter innovation in China and hurt its economy. I want Mr. Evans to know that I will continue fighting for the Ohio manufacturing companies and I am not going to stop, sir, until we get something done.

It is my hope that STOP! can provide American companies with the help they need to protect their intellectual property rights abroad as well as improve the Federal Government's overall efforts to fight intellectual property theft. I look forward to learning today about STOP!'s accomplishments and what the Administration's long-term plans are for this initiative.

I believe the ultimate success of STOP! depends on its implementation of two important and interrelated issues. First, how STOP! improves the coordination of the numerous departments and agencies responsible for protecting intellectual property rights; second, whether the Federal Government is able to recruit, train, and retain the workforce necessary to implement STOP!. There is a human capital part of this. How many people do you have? How good are they? That has a lot to do with whether or not this is going to be as successful as we want it to be.

Any effective campaign against intellectual property theft requires proper coordination of numerous departments and agencies. Especially when the perpetrators are overseas, Federal employees must work as a cohesive team to maximize their effectiveness. However, I am concerned that coordination of intellectual property enforcement has not received the attention it demands, and I have talked about this with Rob Portman, who is the new head of the USTR.

In addition, in prior hearings by this Subcommittee, it was revealed that several human capital issues were significantly hindering the ability of the Federal Government to enforce our trade laws. In particular, high turnover and a lack of formal training of personnel were identified as significant problems. Because the success of any initiative depends on the people charged with its implementation, I hope to learn today whether these problems have been addressed so that STOP! can fulfill the ambitious goals, the Bush Administration, has set forth.

I also hope to learn today what we in Congress can do to assist the Administration in implementing STOP!. Is there additional legislation that we need to pass to facilitate and move on this?

I am interested in knowing if more personnel are needed, if our trade and IP laws are strong enough to deter intellectual property theft, and if steps can be taken to reduce the cost to private parties to protect their intellectual property rights.

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I look forward to hearing the testimony of today's witnesses and I thank Senator Akaka for being here. It seems you and I are the ones that just keep working on this, don't we? I am so glad that you are here this morning and I would like to call on you for your opening statement.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. It is a pleasure to work with you. Thank you for calling this morning's hearing. Mr. Chairman, you have been an important advocate for the U.S. manufacturing sector, and I know Ohio's businesses and workers appreciate your efforts in seeking a more level playing field with some of our trading partners.

Today's hearing, which will review the government's efforts to target organized piracy, builds on two other hearings I have attended over the past few weeks. The first hearing discussed the possible links between counterfeit goods and organized criminal and terrorist organizations. The second hearing, while focusing on cargo security and weapons of mass destruction, touched on problems with the counterfeit goods.

As our witness from Ohio, Mr. Evans, will testify, the sale of counterfeit goods is not a victimless crime. And as Mr. Huther of the U.S. Chamber of Commerce knows, counterfeit goods or intellectual property crime is a national problem that affects all segments of our economy.

Our hearing will help us pull together the pieces of this problem by examining the government's coordinated strategy for combatting the piracy of intellectual property known as STOP!, or the Strategy Targeting Organized Piracy. This program began in October 2004 and brings together government, private industry, and U.S. trading partners. It is run by the Commerce Department and the Office of the U.S. Trade Representative, which in addition to developing and coordinating U.S. international trade policy is also responsible for conducting an annual review of global intellectual property challenges. That report, known as the Special 301 Review, identifies countries with the most significant problems, and I am sure Ms. Espinel of USTR will discuss some of the findings of the 2005 report.

IP counterfeiting and piracy is a global problem. According to Interpol, "counterfeiting is so widespread that few legitimately manufactured goods are not copied in one form or another."

The USTR estimates that the sale in counterfeit goods is $512 billion annually, or 7 percent of global trade. Given the increased scope and magnitude of counterfeiting, especially in the areas of CDs, DVDs, and digital information on the Internet, the member countries of the Organization for Economic Cooperative and Development have requested a study of this issue which is due next year. As the U.S. economy evolves from manufacturing focused to knowledge-based. This issue is more important than ever to America's economic well-being.

Our national IP strategy must ensure that U.S. businesses can compete fairly in the global market. Simply stated, American brand names, ideas, and innovations must be protected. In certain countries, IPR issues compete with other U.S. policy objectives or with

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the country's own economic interests. China, for example, is reported to be the leading exporter of counterfeit and pirated goods, manufacturing two-thirds of all counterfeit goods that come into the United States. I am pleased that through programs such as Operation Spring, which involved ICE, China's Ministry of Public Security and the Motion Picture Association of America, some progress has been made.

Much more needs to be done to protect American businesses, especially small businesses and consumers. I look forward to learning how the various agencies involved in IPR issues are coordinating their efforts. At this point, however, there does not appear to be a clear, systematic means for law enforcement agencies to share information, nor does there appear to be a systematic means for the law enforcement community to share information with the policy makers. This was one of the lessons from September 11, and I hope that we are applying this lesson to the growing problem of IPR crime.

Again, I thank you, Mr. Chairman, for holding today's hearing and I complement you on bringing together a broad range of witnesses who will present their views, concerns, and, I hope, recommendations to us this morning. Thank you very much, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator Akaka.

We have three excellent panels of witnesses this morning and I look forward to good discussion. All witnesses' statements will be entered into the record in their entirety and I would appreciate if you could please summarize your statements in the allotted 5 minutes that we have given you.

It is the custom of this Subcommittee to swear in all of the witnesses, and if all of them are here, I would appreciate if you all would stand up and I will administer the oath of office.

Do you swear that the testimony you are about to give this Committee is the truth, the whole truth, and nothing but the truth, so help you, God?

[Chorus of "I do."]

Senator VOINOVICH. Let the record show they all answered in the affirmative.

Testifying on our first panel is Jeff Evans, President and CEO of the Will-Burt Company, which was recently recognized as Ohio's Exporter of the Year for 2004. Congratulations.

As I mentioned in my statement, Will-Burt has had horrible problems with intellectual property thieves in China. I have a strong personal connection to Will-Burt's case. When I was Governor of Ohio, the Will-Burt Company traveled to China with me on a trade mission. We set out with the best of intentions, to help an Ohio manufacturing company expand its market base. Suffice it to say, Will-Burt's experience has forever changed that company.

In fact, when I spoke with Premier Wen in April, I told him how embarrassed I was that the Will-Burt Company that I had brought to China in 1995 had been a victim of intellectual property theft in China, and I pointed out to him that I was a great supporter of normal trade relations with China. I was outspoken for it, and just how disappointed I was that they weren't doing what they promised to do in terms of their WTO commitments.

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Since Mr. Evans has a very compelling story to share with us this morning, I felt it was important for him to testify first. Mr. Evans, thanks for making the trip from Orrville, Ohio. Orrville, Ohio, is the home of Smucker's, which we hear about every morning on the "Today" program. But there are a few other companies in Orrville, aren't there, Mr. Evans?

Mr. EVANS. Yes, there are.

Senator VOINOVICH. Thank you very much, and we look forward to your testimony.

TESTIMONY OF JEFFREY O. EVANS,[1] PRESIDENT AND CHIEF EXECUTIVE OFFICER, THE WILL-BURT COMPANY, ORRVILLE, OHIO

Mr. EVANS. Thank you. Good morning, Senator Voinovich and honorable Members of the Subcommittee. On behalf of the employees at the Will-Burt Company, and in support of other companies like ours, I appreciate and am thankful for the opportunity to address you here today.

Will-Burt, 87 years old, is a 100 percent employee-owned company located in Orrville, Ohio, and employs approximately 270 people. In 2004, Will-Burt was selected as Ohio's Exporter of the Year, and approximately 25 percent of its sales come from abroad. Will-Burt manufactures a variety of mast products for military and commercial sales. In particular, Will-Burt developed, manufactures, and distributes a mast that sets atop police and rescue vehicles, called "Night-Scan." Will-Burt has secured both patent protection and trademark protection in China for its Night-Scan products.

Will-Burt had been successful in marketing its products for a number of years, but its approach was not focused. A Chinese company, Shenzhen Superway, approached Will-Burt promising larger sales volumes if Will-Burt granted an exclusive license agreement to the company to act as Will-Burt's sole distributor throughout China. Will-Burt did agree to this arrangement, but only after securing a contract whereby Shenzhen Superway agreed not to steal Will-Burt's product or violate its protected interests. At first, sales increased dramatically. However, it was not long until the distributor determined that there was more money in the transaction by knocking off the product and bypassing Will-Burt completely.

The agreement reached with the Chinese company, which called for certain sales goals, contained language to protect the confidentiality of Will-Burt's product information and also contained a noncompete clause. Unfortunately, the Chinese company was aware of a fact unknown to Will-Burt. The Chinese company knew that it could steal, appropriate, knock-off a U.S. company's product and engineering, and steal the intellectual property associated with that product, with the knowledge that such action could be done with virtual impunity. The Chinese company got what it wanted, the product, knowing that its promises would not be enforced.

Within a year, Will-Burt noticed the distributor was not meeting its sales goals. Will-Burt came to learn that sales were off because the product had been reverse-engineered and was being sold out-

[1] The prepared statement of Mr. Evans with attachments appears in the Appendix on page 40.

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side of the contractual agreement. Will-Burt discovered this fact shortly after a visit to China to determine why sales were down. During this visit, Will-Burt discovered its mast had been counterfeited and was being marketed in China under the same trade name, and then under a different name, by companies affiliated with its prior distributor.

Once the Chinese company learned how to manufacture the product on its own, it entirely disregarded the contract and Will-Burt's patent and trademark rights and proceeded to manufacture and sell the product as its own. We have copies of pictures which clearly illustrate the knock-off as a copy of the Will-Burt product, which can be seen on the side here. The pictures to the left are the Will-Burt product. The pictures on the right are the Chinese counterfeits, and as you can see, they are virtually identical.

We also have sample pages from the manual for this Chinese knock-off, which remarkably contained pictures from Will-Burt's manual and Will-Burt's web address. Of particular interest might be the picture of the Ohio Highway Patrol vehicle in the Chinese knock-off manual.

Like many U.S. companies, the Will-Burt Company had a business relationship with a Chinese entity that pirated Will-Burt's technology and confidential information. Will-Burt was victimized by a Chinese business climate and legal system that fosters and condones the illegal appropriation of another's product, but makes any attempt to remedy this wrong a practical impossibility. In fact, Will-Burt's end customer, the Chinese Police Security Bureau, in effect, the National Police Department, is purchasing illegal counterfeit products from Chinese companies, which directly violates several of the laws there in existence to enforce.

Prior to the pirating, Will-Burt had sold about $1 million of product through a Chinese distributor in China in 2001, and then saw a decline to a little over a half-million in 2002 when the pirating was initiated. Sales declined further, to about a quarter-of-a-million dollars, in 2003, and lower yet last year. We believe that the pirated product now has a market in excess of $2 million per year in China.

There are now at least two more companies that are violating Will-Burt's rights in China with counterfeit products. Worse, these illegal Chinese products are now being marketed outside of China, threatening Will-Burt's markets worldwide in countries such as Taiwan and Israel.

After learning of the counterfeiting, Will-Burt, at considerable expense, employed a law firm in China to investigate and recommend a course of action, whether political or legal. The conclusion can be summarized quite simply. Even though everything you say is true, there is no effective remedy.

Will-Burt has recently entered into another arrangement with a distributor in China in effect to recapture the sales lost to the counterfeiting company. Unfortunately, Will-Burt's product must now compete against itself.

Will-Burt has undertaken great expense in its attempt to be competitive in the Chinese market. As an example, ten separate Will-Burt employees have traveled to China over the past 5 years for

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a total of more than 35 trips, and at a significant cost to the company.

I can tell you that the fight is not over. Will-Burt is currently deploying other tactics and strategies focused on regaining Chinese market share through its current distributor while working to contain the problem within the borders of China. Given the nature of the legal and economic system in China, both tasks will be difficult. This is particularly true when the playing field is uneven and the political processes employed by our government have not yet been successful in addressing this injustice.

Thank you for this opportunity to testify.

Senator VOINOVICH. Thank you, Mr. Evans. I appreciate your participation today. Your testimony powerfully exemplifies the damage that can be done by intellectual property thieves and on the pressing need to crack down on counterfeiting and piracy abroad.

I want to commend you for your willingness to talk about this issue publicly. Where is Mr. Dudas? I called the STOP! hotline this morning. After the last hearing, Senator Akaka, remember when they gave us a number for STOP!? I called the number and nobody even knew what I was talking about.

Today, I got hold of a woman by the name of Amy Cotton and she just was a cracker jack. She met all of my expectations. She didn't know I was a Senator to begin with. At about the end of 15 minutes, I told her who I was.

But one of the things that she mentioned is that there are many businesses who have had their trademarks infringed upon and they are afraid to have their name mentioned for fear that there might be some retaliation. And I asked the question, are you aware of that? She said, well, we think there is, and certainly some of the bigger companies are concerned about retaliation.

So the fact that you are here and testifying today is very important and, of course, since I gave Premier Wen the information on you, they know firsthand who you are.

When you discovered that your technology was being—that you were being knocked-off, did you seek immediate help from the Federal Government?

Mr. EVANS. We did, and at the time, the most obvious solution was to find an attorney in China, which we did, and pursue our rights in China. What we found at the time was that the amount of money that we would have had to expend would have probably been close to $50,000 to come to any kind of a solution, and we were told that the solution would be that the company would just shut down and reopen as another company, so we didn't find any effective remedy that direction.

Senator VOINOVICH. In other words, you did call for Federal assistance, though, is that right?

Mr. EVANS. Yes.

Senator VOINOVICH. And they said what?

Mr. EVANS. At the time, the advice was principally to fight it through an attorney in China.

Senator VOINOVICH. So get yourself a lawyer over there and fight it?

Mr. EVANS. Yes.

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Senator VOINOVICH. Were you able to get any—did you seek any assistance from the embassy, from the Foreign Commercial Office of the embassy in China?

Mr. EVANS. We did do that and it was pretty much the same answer as to how best to fight it. There are legal proceedings you can go through and there are administrative proceedings we were told that we could pursue. But again, the cost of doing any of those was pretty onerous for a company our size.

Senator VOINOVICH. OK. It was how long ago that you first discovered this?

Mr. EVANS. In 2001, 2002, somewhere in that range.

Senator VOINOVICH. So it has been, what, 3 years, at least?

Mr. EVANS. Three years, yes.

Senator VOINOVICH. Do you have any idea of the expense that you have incurred as a result of this in terms of people going over there——

Mr. EVANS. Oh, I am sure it has been several hundred thousand dollars, just in terms of legal fees, in terms of the people we have sent over, the trips, the 16-hour flights to Beijing. Yes, it has been considerable.

Senator VOINOVICH. If you can get that information to me, if you feel you could share it, I would be appreciative. You say how much, a couple hundred thousand?

Mr. EVANS. I would say, yes.

Senator VOINOVICH. That is a lot of money for a small company.

Mr. EVANS. It is a lot of money.

Senator VOINOVICH. But you felt that it was worth your while to pursue it?

Mr. EVANS. That would include the money that we are spending on continuing to market ourselves there and continuing to fight. What we eventually concluded in 2002 was that we would not prevail on a legal or political solution. The only way to compete—the only way to win was to out-compete them, and that is the direction we have chosen to go.

Senator VOINOVICH. So you are going to make your product different and compete?

Mr. EVANS. We are currently working with our distributor in China whereby he will make the product for us in China, and he is then competing in China with the knock-off products. Our product is still more expensive than the knock-offs that we are competing against, but there is a premium that companies are willing to pay, albeit somewhat small, for the original, authentic U.S. product.

Senator VOINOVICH. So the fact of the matter is that prior to that time, you were manufacturing in Orrville, Ohio?

Mr. EVANS. That is right.

Senator VOINOVICH. So as a result of this, because of the way this has worked out, you are now having to manufacture over there and compete against your own product?

Mr. EVANS. We had no choice but to move these products and the manufacturing of them to China, that is correct.

Senator VOINOVICH. Based on your experiences, what lessons would you like to pass on to other American businesses?

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Mr. EVANS. I guess the first would be to take a long view of what is going on, because I started off my career as a CPA and one of the accounting principles is that of matching. You match expenses and revenues. What we are getting today in the United States is the benefit of inexpensive goods coming into the country, and what China is getting is the benefit of jobs and foreign exchange. What will happen in the future is that our manufacturing base will be impaired, and to China, they will eventually see a drying up of proprietary product coming in. Companies will eventually stop shipping to China if they are just going to see it come back as a knock-off. So looking longer view rather than trying to make some additional sales in the short-run would be one of the points of advice I would like to give.

The other is to work very closely with the Federal agencies that we have now come to know quite well. Early on, we didn't really work with some of these other offices, USTR, some of the others, when we first went into China and they have been providing us a good deal of support lately in some of the ways that we are trying to fight it now. So I would say that would be a second thing I would recommend.

Senator VOINOVICH. So right now, they are giving you a hand with the China crack-down on the outfit that has counterfeited your product?

Mr. EVANS. Exactly, as well as some good hard action items as to how to keep the product in China and how to attempt to avoid having to compete worldwide against the counterfeits.

Senator VOINOVICH. Thank you. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Thank you for your response, Mr. Evans, and for sharing some of your experiences in China.

I know it is difficult to gain market entry into a Communist country. But China has been evolving and changing so rapidly that I am beginning to become concerned about how much the central government is able to regulatre businesses. It is obvious that the companies that you are dealing with are running their businesses, in some instances, without regard to government regulations.

I was glad to hear that you did seek a Chinese lawyer to help you. I just want to share with you that I knew the President of Sony way back when he first began to sell in the United States and he did the same thing. He hired a U.S. attorney to help him do business in the United States, and it worked well.

Today's hearing is examining the Federal Government's initiative to help businesses like yours protect their intellectual property. My question to you is, if a similar thing were to happen today, who would you look to for help in our Federal Government?

Mr. EVANS. I believe the USTR has been very helpful to us, as well as the Department of Commerce, Under Secretary Aldonis's office. We found some pretty good support from both those offices. And a lot of the references that we got to those came from the Senator's office, Senator Voinovich. He pointed us in the right direction and it did help us to find those two agencies in particular that are helping us.

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Senator AKAKA. The Chairman asked you whether you received any help from the embassy. Did you receive any help from the embassy?

Mr. EVANS. Not a significant amount, other than, as I said, the discussions of how to go about the legal proceedings in China.

Senator AKAKA. Mr. Evans, before you were asked to testify at this hearing, did you know about the STOP! program, and if so, how did you learn about it?

Mr. EVANS. I am sorry to say I did not know of the STOP! program or the acronym. I was aware of some of the initiatives, I believe, that are coming from it, but not of the program itself.

Senator AKAKA. From what you know about that program now, is it one that would have made a difference if you knew about it?

Mr. EVANS. Again, I haven't learned a great deal about it in the meantime. That will be my homework for next week.

Senator AKAKA. Thank you very much for your responses. The Chairman and this Subcommittee is really looking hard at this issue. If you can tell us how to make it better, we would certainly appreciate it, and that is our effort now.

Thank you very much, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator.

Senator AKAKA. I yield back my time.

Senator VOINOVICH. Senator Pryor.

OPENING STATEMENTOF SENATOR PRYOR

Senator PRYOR. Thank you, Mr. Chairman, and thank you for continuing to focus on this important issue.

Let me ask a question of the witness, if I may. I am trying to get a sense of the scope of the problem in China. What is your sense of the scope of the problem there?

Mr. EVANS. My thought is that when you send a product to China, the question is not will this be knocked-off or not. The question is, will we have a good 5 years of making the product before it gets knocked off? It is pervasive.

Senator PRYOR. I know you are not a complete expert on this, but is it your impression that it covers pretty much every product type there?

Mr. EVANS. I believe it does. For example, looking at the Will-Burt Company, you can see our products here. They are not everyday products. They are not well known. The market over there is very small. And yet there are two or three companies counterfeiting it right now. If they will do that for a market our size, clearly, larger markets would entice them even more. And it is a technical product. There is circuitry. There is programming. There is a lot of mechanics. It was a difficult product to reverse engineer.

Senator PRYOR. I was going to say, this is all based on reverse engineering. They get a hold of one of your products and they just figure out how it works and they start making it?

Mr. EVANS. That is correct.

Senator PRYOR. Do you know, by comparison, how does it operate and function as compared to your product? Is it virtually the same?

Mr. EVANS. It is virtually identical. The quality isn't as good, and we have won some contracts against them because of that. But the

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quality is not poor and the pricing is such a differential that it is difficult to sell against.

Senator PRYOR. That was actually my next question related to the purchasers of these knock-off products. Do they clearly understand that they are buying a knock-off or do they think that they are buying your product?

Mr. EVANS. At this point, they no longer think they are buying our product because the names have changed. It doesn't say Will-Burt Night-Scan. It has a different name.

Senator PRYOR. But originally, it actually had your name on there?

Mr. EVANS. Originally, it had our name, yes.

Senator PRYOR. OK.

Mr. EVANS. The manual has Xeroxed copies of pages from our manual. It was virtually billed as our product. The website for this company used the name "Will-Burt" in their address.

Senator PRYOR. Just out of curiosity, how much do these products sell for in China?

Mr. EVANS. Somewhere between $1,500 and $4,000.

Senator PRYOR. Is it your impression that the product that has been knocked-off in China is being sold only in China, or is it being exported out of China? Are you seeing it around the world?

Mr. EVANS. We haven't seen the product elsewhere yet, but it is being marketed. We have notification from several other countries that they are attempting to market it outside of China now.

Senator PRYOR. I want to ask you, if I may, about China's legal system. You have had some experience with that, it sounds like, being advised to hire a Chinese lawyer and fight. What is your impression of China's legal system?

Mr. EVANS. Well, my impression is that they have a conundrum going on where they are attempting to enforce their laws, but at the same time they are attempting to enforce public policy of creating jobs and creating foreign currency exchange, and the two are colliding in such a way that the reparations you can get through the legal system aren't too spectacular. Our understanding is that at the end of a long, drawn-out process, one might expect to receive a very small dollar award and potentially just the fact that the knock-off company would go out of business and then would come back in business as another name.

Senator PRYOR. In the United States under a situation like this, you might be entitled to monetary reward for loss of market share, etc., and loss of profits, etc., but you also might get injunctive relief where the court would actually prevent the company from knocking off your product in the future. Is that remedy available to you in China, the injunctive relief?

Mr. EVANS. My understanding is no, because even if it did occur, a new company could open up with the same people, perhaps the same address, manufacture the same product. So you could injunctively close down the first company, but then its predecessor would come into being.

Senator PRYOR. And again, I know I am asking for your perception based on your experience there, you don't hold yourself out to be an expert. But, is it your perception that the problem with China's legal system, as it related to your product and knock-offs gen-

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erally, is the problem that China does not have sufficient law to cover this area, or is the problem more one of enforcement?

Mr. EVANS. Again, I am not an expert, but my impression is it is the enforcement rather than the lack of law.

Senator PRYOR. And the last question I had was about the STOP! program that Senator Akaka asked you about a few moments ago. As I understand it, you went through this entire process without really being aware that the STOP! program existed?

Mr. EVANS. That is true.

Senator PRYOR. How can the government do a better job of letting companies like this one know about the resources and the programs available in China and, I guess, around the world? What can the government do to do a better job of informing you of your options under Federal law?

Mr. EVANS. That is a very good question. I would expect that most larger companies are well tied in and would know about it. So it would seem to me that it is the smaller companies that don't have the resources that you need to get to. And whether you do that through an enhanced communication program, working with State agencies—as Senator Voinovich mentioned, we got our start in China through working with the Governor's office at the time. He was the Governor of Ohio. There are a lot of companies going that route because you can find your State Government helping you to make contacts and find distributors. Perhaps some communication there with, say, the State Department of Development would be of some benefit.

Senator PRYOR. Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator Pryor.

As you know, this STOP! program kicked off in October of last year. You might be interested that I voted against the last two trade agreements and basically did so on the grounds that they weren't enforcing our trade laws and WTO rules. Secretary Zoellick at the time, the U.S. Trade Representative, came in with this sort of a one-stop-shop program. What we are hoping to do today is to find out how much coordination is going on and whether it is staffed or not.

One thing I did find out, they do have some good people because I called the number this morning.

Mr. EVANS. I heard you say that. I think that is good.

Senator VOINOVICH. I have to say, I was genuinely impressed with the person on the other end of the line, but I will say, and will bring this up with Mr. Dudas when he comes in, she said, we have this China specialist and the China specialist is in Detroit talking to some folks there about the program. So we are going to want to find out how many people do you have working there in that shop.

I think your suggestion, Mr. Evans, is a good one in response to Senator Pryor's question, and that is that the State Governments should be very familiar with this program. When we went over with you folks, we should have had everything worked out, and hopefully it will be a lot better.

Thank you very much for being here today. We are going to keep working with you.

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One last thing is do you think we will ever be able to close down the operation that is counterfeiting you?

Mr. EVANS. I am not sure, and at this point, I am less concerned about remedying our own situation and more concerned with just raising this issue so that we can stop others in the future. I would be happy if we could close it down. I will be even happier if we just contain it to China. That is my bigger concern at this point.

Senator VOINOVICH. Where is it located, the company? What town?

Mr. EVANS. Shenzhen, a couple-hours drive from Shanghai.

Senator VOINOVICH. Well, thank you very much for being here today.

Mr. EVANS. Thank you.

Senator VOINOVICH. Our next panel is the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, Mr. Dudas. I want to welcome you back to the Subcommittee.

Victoria Espinel is the Acting Assistant U.S. Trade Representative for Intellectual Property. I understand that Ms. Espinel traveled to Europe last week with several Federal officials to discuss ways of strengthening the STOP! initiative. Hopefully, Ms. Espinel, we are going to get some of the other countries that are WTO signatories to help us put pressure on particularly the Chinese and I would be interested to hear your assessment of the trip.

Dan Baldwin is the Acting Assistant Commissioner of the Office of Strategic Trade in the Department of Homeland Security. I think when we first had our hearing, I don't think we had a Homeland Security Department.

Laura Parsky is the Deputy Assistant Attorney General for the Criminal Division at the Department of Justice.

Loren Yager is the Director of International Affairs and Trade at the Government Accountability Office. Dr. Yager, welcome back to the Subcommittee. You have always provided insightful comments and I look forward to your testimony.

I think we are down far enough on the chain in terms of operation of the Departments that we have got some real practitioners here that are testifying before us.

Mr. Dudas, before you begin, one of the things when I talked with Ms. Cotton was that she said that people have to hire a trademark specialist in China in order to register their trademarks. One of the thoughts I had was that is it possible that we could have somebody do that, or would you have to have a law changed to do it? And also, perhaps in terms of the Chinese Government, if they are sincere about this, one of the ways you could expedite some of these cases would be to get their permission to go ahead and handle it in that way. I don't know how feasible that is.

I really am interested in looking at the whole procedure that you are going through and have you analyze it to let us know if there is something we can do to be of help, either through legislation or whatever to expedite this thing as quickly as possible. So thank you for your testimony and thanks for being here.

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TESTIMONY OF JON W. DUDAS,[1] UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY, AND DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE

Mr. DUDAS. Thank you, and I will respond early to that question you had. Would you like me to respond now or in the hearing?

Senator VOINOVICH. Whenever you would like.

Mr. DUDAS. That is fine. I think there are things that can be done. In fact, we have certain limitations. I am glad you had such a good experience with the line. Our goal is to get an intellectual property expert with regional expertise on the line who can either help you or get you the person that can help. We have had over 400 calls and they have been largely successful when we have worked with folks.

We cannot give legal advice or act as a person's attorney because we are securing intellectual property rights in our office. I am glad you raised what you raised. We are working with other agencies within the Department of Commerce to find out if there is a way to give legal assistance to small businesses, or ways we can partner with the private sector in order to give this kind of legal assistance, so that we are not at odds with people trying to get intellectual property rights in the United States but at the same time giving them legal advice elsewhere. I would like to explore that further and come back to you with some ideas we might have within the Department of Commerce on how we might be able to get that done.

I will also tell you the United States is pushing very hard. Our office led negotiations on a treaty called the Madrid Protocol that the United States has joined that makes it very easy for small businesses, for any business, to get a trademark in one country and then hopefully get it in 50 countries. We need to work with China and other nations to make it that simple. You apply in the United States and then you just choose a certain number of countries. We are not completely there yet, but we do have a great number of countries that are already organized and are able to do that.

I will be happy to go further and answer more questions you have along those lines. Thank you for having this hearing and it is a pleasure to be here. This is an opportunity to discuss the progress made by the Bush Administration in combatting intellectual property theft. Since my testimony before you last year, the Administration generally and the Department of Commerce specifically have developed a multi-faceted approach within our agencies to protect IP both here at home and in other countries.

Piracy and counterfeiting affect all Americans, as you noted, on many levels. As I testified last year, IP theft is not solely an economic issue. It is an incredibly important economic issue, but it can also harm consumers' health and safety. Everyone is affected, from the hard-working parent buying medicines or baby formula, as you have heard today from the private sector to the small business trying to make a payroll, a tight payroll at times in light of unfair competition from overseas and fakes in the streets. Most seriously, intellectual property theft can involve organized crime as well as

[1] The prepared statement of Mr. Dudas appears in the Appendix on page 56.

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possible terrorist funding, who use the ill-gotten proceeds to fund horrific acts against humanity.

STOP! is the most comprehensive U.S. Government-wide effort ever taken to put an end to pirated and counterfeited goods. The explicit goal of STOP! is helping American businesses secure and enforce their IP rights at home and abroad. Issues surrounding counterfeiting and piracy are being raised at the highest levels within the Executive Branch in the United States. Putting an end to IP theft is a priority of this Administration, with the NSC coordinating the Departments before you today in the STOP! effort. Already, the Administration's direction has resulted in vigorous cooperation among us and tangible results.

Secretary of Commerce Carlos Gutierrez is keenly aware of the significance of IP protection for U.S. businesses. Secretary Gutierrez has emphasized that combatting IP theft is a top Commerce priority across the Department. The Secretary could not have been more direct or clearer when he stated during his recent trip to China that "intellectual property rights violations are a crime, and we don't believe we should be negotiating crimes with our trading partners."

As Under Secretary of Commerce for Intellectual Property and Director of the Patent and Trademark Office, I share the Secretary's sentiments and am dedicated to reducing the toll that IP theft takes on all Americans, particularly with a focus on small businesses and independent inventors.

The USPTO has a unique role in the Federal Government, being the only executive agency that exclusively focuses on IP, including the examination of patent and trademark applications in the United States and advising fellow Administration departments and agencies on U.S. IP policy and IP protection in other countries. Because I am most familiar with the USPTO's own activities for STOP!, I will take just a moment to share some of them. I know you will want to explore further activities of other agencies, as well.

Under the auspices of STOP!, the USPTO maintains the STOP! hotline, that you called today. One of the things we can do best is to advertise that, so I will take a moment to note that the hotline number is 1–866–999–HALT. We couldn't get STOP!. We would have had to steal the name. HALT is close enough, since someone already had the number STOP!.

Hotline callers receive information from USPTO's IPR attorneys with regional expertise, and IPR attorneys who have regional expertise on securing patents, trademarks, and copyrights on enforcing those rights. If they don't have the answer because it involves another agency, they will give you the name of a person in another agency and the caller can follow up. Since October 2004, we have received more than 400 phone calls and we are working to try to increase the number of phone calls we receive by making businesses more aware.

The USPTO has also launched an intensive communications campaign to educate small businesses on protecting their IPR, both in the United States and abroad. Earlier this year, the USPTO inaugurated a conference series targeting small businesses by providing grassroots-level education on securing rights for copyright,

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patent, or trademark, with an emphasis on protecting IP overseas. The first program was held in Salt Lake City last month. There was an intense interest from small businesses. We have also planned at least three more seminars through September.

In addition, some of our other programs focus exclusively on doing business in China. Our next event, as you mentioned, is tomorrow in Detroit. We had great registration from Midwestern small businesses wishing to secure their rights.

The Department of Commerce is also working broadly to expand awareness of IP risk and protection. Another initiative of STOP! is a gateway website, **www.stopfakes.gov.** This website features specialized information, including IP tool kits designed to help small businesses protect their IPR in other countries such as China, Korea, Mexico, and others. This is another cooperative effort among agencies within the Administration.

A tremendous benefit of STOP! is heightened cooperation among the agencies in our mutual goal of fighting piracy and counterfeiting. For example, our colleagues at the Department of Homeland Security and Customs and Border Protection are working with the USPTO to inform trademark owners of the Customs recordation process in order to prevent the import of fakes.

We are working with our colleagues at the Department of Justice and the Office of the Trade Representative to enhance the domestic and international IP environment for American businesses.

Mr. Chairman, you have been very clear about the unfortunate truth. Counterfeiting and piracy remain growth industries in some countries. But the thieves' days are being numbered. Combatting IP theft is a top priority for this Administration, and the Administration's focus has already resulted in unprecedented levels of interagency coordination. Commerce, working closely together with other Federal agencies through STOP! is making progress in attacking IP theft internationally and domestically.

Thank you very much for your time. I look forward to continued questions.

Senator VOINOVICH. Thank you, Mr. Dudas. Ms. Espinel.

TESTIMONY OF VICTORIA ESPINEL,[1] ACTING ASSISTANT U.S. TRADE REPRESENTATIVE FOR INTELLECTUAL PROPERTY

Ms. ESPINEL. Chairman Voinovich, Ranking Member Akaka, other Members of the Subcommittee, thank you for inviting me here today. I am pleased to have this opportunity to speak with you about the enforcement of intellectual property and the Administration's STOP! initiative.

The protection of IP is at the top of USTR's enforcement agenda. We have taken a comprehensive approach towards protecting IP by employing all the tools and resources at our disposal to improve intellectual property enforcement worldwide. For example, we have used our Special 301 Report to spotlight areas in need of reform abroad and we have used our FTAs to raise protection and enforcement of intellectual property with those specific countries or blocks of countries to a level comparable to our own. We will continue to

[1] The prepared statement of Ms. Espinel appears in the Appendix on page 65.

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use these tools in coordination with other agencies on behalf of our right holders.

Protecting IP is one of the most complex issues of our trade agenda. Since the advent of TRIPS nearly 10 years ago, globalization and new technologies have made it easier for thieves to steal, copy, and sell auto parts, medicines, and sports equipment to unsuspecting consumers. This illicit trade is growing. International criminal networks have found it more profitable and less risky to raise cash by entering into the trade of counterfeit and pirated goods. Unfortunately, existing international forums and agreements have proven insufficient to adequately address this new global challenge.

The international trade in fakes is hurting our companies and our citizens, as demonstrated clearly by the testimony of Mr. Evans today. U.S. businesses are having a difficult time tackling the problem, particularly small and medium-sized firms with limited staff, resources, and operations to protect themselves. Making matters worse, these firms are finding themselves having to address consumer complaints of inferior products passed on as their own.

More needs to be done. The STOP! initiative is an important start to addressing the challenges arising from the trade in fakes. Announced late last year, STOP! is designed to bring together all the major players, the Federal Government agencies that are charged to protect the intellectual property, the private sector, and our trading partners, to take action together in cracking down on piracy and counterfeiting.

Through STOP!, we are tackling theft of IP along with seven other participating agencies through a series of collaborative domestic and international initiatives that will make the trade environment friendlier for our consumers.

Domestically, as you will hear today, the agencies are working with the private sector and taking comprehensive actions to realizing our October goals, including through our law enforcement and home security actions, working with our businesses to help them secure and enforce their IP rights, and working to eradicate the domestic market by educating the public about the importance of intellectual property and the risk of counterfeiting.

Internationally, we began earlier this year reaching out to like-minded IP-friendly governments to build international support to attack the trade in fakes. It is critical that we have other governments working with us in order to address this global challenge.

We are proposing a series of initiatives intended to enhance border enforcement, law enforcement interactions, and the exchange of information to better use our resources and personnel to address this shared problem. These initiatives are drawn from actions we have been taking in the past year domestically to improve our own enforcement of intellectual property. At the same time, we are also learning from the practical solution and problems other countries are encountering in their efforts fighting IP theft to consider how we may further advance our cooperation and how we may be able to improve our own domestic programs.

Multilaterally, we have been advocating support for a series of initiatives in forums such as the G–8, APEC, and the OECD and other regional summits to further anti-piracy and counterfeiting.

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By working within these organizations, we hope, among others, to encourage countries that would otherwise not work directly with us to accept stronger IP enforcement measures that will protect our right holders.

Our efforts are yielding results. In assisting STOP! coordination pursuant to the Administration's overall policy, we facilitated outreach and significantly improved coordination. As a result of the STOP! team's collective efforts, APEC recently endorsed an initiative on anti-piracy and counterfeiting that we proposed in Japan and Korea, while the OECD has agreed to undertake a study that will aid governments in making the case for stronger action against IP theft.

Through our FTAs, we have substantially improved IP protection abroad. In close coordination with our industry, we have been working intensely with, for example, Australia and Singapore to ensure that the FTAs are fully implemented. We have also been working with our current trading partners to develop action plans to undertake similar efforts while we are engaged in the negotiations.

Through our annual Special 301 Report, we have also witnessed examples of how the report can affect change. For example, in Pakistan, Pakistan has long been turning out millions of pirated optical disks. It is a fact that we have highlighted to the government there regularly and noted in our Special 301 Report by elevating the country as a more egregious offender of intellectual property. We were pleased to see Pakistan shut down six of the plants cited in the report not long after the report's public release this year.

Mr. Chairman and Members of the Subcommittee, thank you for providing me with the opportunity to testify. I know I speak for my colleagues on the STOP! team when I say we appreciate your interest, guidance, and vigilance on the important issue of protecting intellectual property. We look forward to working with you to fine-tune our efforts with the goal of improving the situation for American rights holders worldwide. This task is a top priority for each of us. I look forward to your questions.

Senator VOINOVICH. Thank you. Mr. Baldwin.

TESTIMONY OF DANIEL BALDWIN,[1] ACTING ASSISTANT COMMISSIONER, OFFICE OF STRATEGIC TRADE, U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. BALDWIN. Good morning, Chairman Voinovich and Members of the Subcommittee. Thank you for this opportunity to testify and update you on the steps that the Department of Homeland Security is taking to improve the enforcement of intellectual property rights as part of the Administration's STOP! initiative.

Both U.S. Customs and Border Protection, CBP, and Immigration and Customs Enforcement, ICE, are full participants in the STOP! initiative. But my testimony this morning will focus on the contributions of CBP, the primary agency responsible for border enforcement in the STOP! initiative.

[1] The prepared statement of Mr. Baldwin appears in the Appendix on page 70.

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CBP, as the guardian of the Nation's borders, safeguards the homeland foremost by protecting the American public against terrorists and instruments of terror while at the same time enforcing the laws of the United States and fostering the Nation's economic growth through lawful trade and travel, including the laws and regulations related to the protection of IPR.

Between 2000 and 2004, the number of importations into the United States grew by approximately 20 percent and the value of those imports grew by 24 percent. Interestingly, during that same 5-year period, the number of Homeland Security seizures for counterfeit and pirated goods at our borders increased by 124 percent and the value of those goods increased by 306 percent. I identify these numbers to show you the magnitude and the scope that faces CBP at the border in enforcing these IP infringing goods.

Although China accounts for much of this increase, seizures of counterfeit and pirated goods from other countries have also increased. There have been estimates already cited this morning that 7 percent of all global trade involves counterfeit and pirated goods.

Although CBP's efforts to date have been successful, the flood of IPR-infringing imports requires us to explore new ideas for IPR enforcement. Today, I will discuss new approaches CBP is taking as part of STOP! to enhance and complement traditional methods of DHS's IPR enforcement.

With the STOP! initiative, CBP is diversifying its IPR enforcement portfolio in moving beyond our traditional methods. These approaches improve our ability to identify high-risk companies and shipments while maintaining the flow of legitimate trade.

In addition, our STOP! initiatives include greater cooperation with the business community and other government agencies to provide improved protection. Our initiatives include creating and testing an innovative statistical risk model for assessing IPR risks at the border; establishing a post-entry verification or IPR audits program designed to identify business practices that leave us vulnerable to IPR violations and determine the scope of a company's IPR violation. We are collaborating, as has been mentioned, with the Patent and Trademark Office to make it easier for businesses to obtain trademark protection through the recordation process. And finally, we have been engaged in issuing proposed regulations to enable CBP to better protect U.S. copyrights for sound recordings and motion pictures and some audio-visual works.

I would mention IPR risk modeling as a method to enhance our current efforts by applying a statistical model to our import data and to data provided by other government agencies and from the business community to identify that risky neighborhood or what we would call a model that identifies the characteristics of IPR infringement. We are then able to apply that model to both the transactions and to an account-based form, meaning we will better target for transactions coming across the border, but more importantly, be able to better target companies that participate in risky businesses for IPR infringement.

That IPR risk model leads us to the innovative program that we have established for creating IPR audits. For the first time, CBP is conducting approximately two dozen IPR audits for companies that exhibit strong characteristics for IPR infringement. We con-

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duct an audit to look at their internal control systems to evaluate whether they are sufficiently prepared to ensure that they are not importing IP infringing goods and work with those companies to ensure that they are able to maximize their internal control systems to guarantee against IP infringement.

We are also working, as I mentioned, with the PTO to streamline our recordation process. We have been working with PTO to develop a hyperlink system so that when a company is able to register their trademark with PTO, they will automatically be linked to Customs to record their mark to help us protect their mark, as well. What is key here is that this is our main initiative to help small businesses identify and help us protect their mark by simultaneously recording with Customs. We hope to have that system up and running later this summer.

With our STOP! initiatives, CBP has broken new ground in the fight against counterfeiting and piracy. We will continue to work with DHS headquarters, our colleagues at ICE, and other partner agencies as well as other industry, and continue to improve our targeting and enforcement efforts to deprive IPR violators of their illicit financial gains.

Thank you again, Chairman Voinovich, Members of the Subcommittee. Thank you for the opportunity to testify. I look forward to your questions.

Senator VOINOVICH. Thank you, Mr. Baldwin. Ms. Parsky.

TESTIMONY OF LAURA H. PARSKY,[1] DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. PARSKY. Chairman Voinovich, Members of the Subcommittee, intellectual property enforcement is an extremely important topic to the Department of Justice, and I commend you for holding this hearing to explore how the U.S. Government is responding to the growing threat of intellectual property theft. Today, I am pleased to share with you the Department of Justice's efforts to protect intellectual property rights through its enforcement efforts and participation in the STOP! Initiative.

Mr. Chairman, we are at a pivotal time in the history of intellectual property rights enforcement. A number of factors have converged to create unprecedented challenges to intellectual property rights holders and to law enforcement. The Internet and technology have made piracy and counterfeiting easier and less expensive than ever before. At the same time, the quality of the illicit goods is often near perfect. Detecting these illegal operations is more difficult than in the past and is compounded by sporadic and inconsistent enforcement throughout the world. Piracy and counterfeiting are low-risk, high-reward endeavors which are beginning, not surprisingly, to attract international organized crime syndicates.

The Department of Justice occupies a unique role in our government as the sole agency with criminal prosecutorial authority. One of the most important contributions the Department makes to the

[1] The prepared statement of Ms. Parsky with an attachment appears in the Appendix on page 76.

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protection of intellectual property rights, as well as to the STOP! Initiative, is the prosecution of organized criminal networks that steal the creative works of U.S. businesses, both large and small.

As my written testimony highlights, in the past few years, the Department has undertaken several of the most significant and successful multi-district and international law enforcement operations, dismantling some of the most prolific Internet piracy groups that steal digital copyrighted works, such as software, movies, games, and music, and distribute them worldwide on the Internet, often before they are released for commercial sale to the public. It is these digital copies that are so often used to create the counterfeit hard copies that are sold at international borders.

One example of this effort is Operation FastLink, in which the Department led the single largest international enforcement effort ever undertaken against online piracy. In one 24-hour period beginning on April 21, 2004, law enforcement executed over 120 searches in the United States and ten countries across multiple time zones. Through this unprecedented effort, we have identified over 100 individuals believed to have engaged in online piracy, many of whom are high-level members or leaders of online piracy release groups. Since last December, eight of these offenders have been convicted and many more individual prosecutions are ongoing.

Although these large-scale enforcement operations are resource- and time-intensive, they are an extremely effective way to enhance international intellectual property enforcement. By attacking the top level of the counterfeit distribution chain in this way, before the stolen works reach peer-to-peer and other distribution networks both online and off, the Department ensures the greatest protection for rights holders and consumers against the illegal reproduction and distribution of copyrighted and counterfeit materials.

In addition, through working on joint operations with our foreign counterparts, we are enhancing their understanding of and ability to pursue future intellectual property prosecutions.

Although investigation and prosecution is our primary focus, combatting intellectual property crime requires a multi-faceted approach, one that is global in scope and maximizes interagency coordination within the U.S. Government.

In this regard, the Department of Justice participates regularly in the interagency collaboration and international outreach that are fundamental to the STOP! initiative. Department officials have participated in the recent STOP! tours to Asia and Europe, and we are working with other agencies to increase public awareness of the harms of intellectual property theft. Through training and international outreach, we seek to help U.S. businesses work with foreign law enforcement to protect their intellectual property rights.

During these international trips, the Department has met directly with its foreign law enforcement counterparts, generating increased foreign interest in strong international enforcement of intellectual property rights. By developing this law enforcement network and points of contact through the STOP! international outreach, it will be easier and faster to enlist the cooperation of foreign law enforcement when future U.S. investigations identify foreign targets. It will also assist foreign investigations and prosecu-

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tions directly affecting American intellectual property business interests in foreign countries.

In addition to our prosecutorial and international efforts, the Department's principal contribution to STOP! has been the work of the Department of Justice's Intellectual Property Task Force, or "IP Task Force." Last fall, the IP Task Force completed a wide-ranging and exhausting—exhaustive review—it was also exhausting—of the Department's intellectual property enforcement efforts. Its collective recommendations were issued in a 70-page report last October. The Department is now engaged in the considerable and important work of implementing those recommendations.

For instance, in January of this year, the Department expanded its Computer Hacking and Intellectual Property (CHIP) program and the designation of CHIP coordinators in every U.S. Attorney's Office nationwide, bringing the total CHIP network to more than 200 prosecutors trained in prosecuting high-tech and intellectual property crimes.

Piracy is a global problem that requires a global response. Through its contributions to the STOP! initiative, the Department of Justice has made international prosecutions a priority within our overall intellectual property strategy. Our goal is to lead by example and to build international law enforcement relationships that allow us to work with our foreign counterparts in attacking this global problem.

While our primary focus and responsibility lies in the enforcement of this Nation's criminal intellectual property laws, we are committed to working effectively with other U.S. agencies to ensure that the overall intellectual property rights approach of the United States is second to none.

Thank you again for this opportunity to address the Department of Justice's efforts to protect intellectual property rights. I will be happy to answer any questions you may have.

Senator VOINOVICH. Thank you, Ms. Parsky. Dr. Yager.

TESTIMONY OF LOREN YAGER,[1] DIRECTOR, INTERNATIONAL AFFAIRS AND TRADE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. YAGER. Chairman Voinovich, good morning, other Members of the Subcommittee. Thank you for the opportunity to appear again before the Subcommittee, this time to discuss our work on U.S. efforts such as the STOP! initiative to protect U.S. intellectual property rights.

The statement is drawn from the report that we did on intellectual property protection last year, and we have held a number of interviews in recent weeks to update the material. I ask that my written statement be made part of the record.

Senator VOINOVICH. Without objection.

Mr. YAGER. Mr. Chairman, we know that the effects of IP theft on the U.S. economy are enormous, but the testimony of Mr. Evans of Will-Burt also shows the profound effect that these can have on individual businesses. From our trips to China, Brazil, the Ukraine, and Russia, we also assembled some illustrations of the

[1] The prepared statement of Mr. Yager appears in the Appendix on page 88.

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kinds of material that are easily available in those other locations and we have also shown some of the prices of the real versions as well as the copied versions so that people can get an understanding of just what is involved there. So we have a few items for display up on the table.

Senator VOINOVICH. Why don't you talk about those for just a minute.

Mr. YAGER. OK. One of the things that we can demonstrate, as some of the other witnesses also referred to, there is a wide range of quality when it comes to the types of goods that are available. In some cases, it is quite hard to determine whether it is legitimate or not. In other cases, it is very clearly a knock-off. But it is one of the reasons why the participation of the government agencies and the private sector is so important, because in many cases, only the private sector can determine whether the goods that is being sold is, in fact, a fake or a real item. So close cooperation between the agency officials and the private sector is obviously important.

For example, we were in Hong Kong looking at goods coming across the border from China and the Customs official had broken open a couple of boxes of apparel, could not tell whether these were legitimate or not, and made the interesting point that even the company representative in Hong Kong couldn't look at those to determine whether they were real or not. He had to consult his order book to see whether, in fact, that was a real product. So it shows just the kind of range of quality that you have. Some are very clearly knock-offs. Some are quite difficult to distinguish from the real thing.

So, Mr. Chairman, you heard from the Administration witnesses about the STOP! initiative. The purpose of my oral statement is to put STOP! in the context of the other coordination efforts that the U.S. Government has to enforce IP and to note some areas where U.S. efforts could be improved.

First, it is important to note that STOP! includes a range of agency activities that were already underway as well as some that have begun as part of the initiative. For example, the Justice Department Task Force on IP was already underway, but those efforts have now been rolled into STOP!. In addition, the OECD study that was mentioned earlier on the extent of IP piracy that has recently been agreed to has been under discussion for some time and STOP! may have provided additional momentum to get this study off the ground. The most visible new efforts undertaken as part of STOP! are the outreach efforts, the visits of the Administration to foreign countries, including a trip to Asia as well as a trip last week to Europe.

The second point I want to make is that STOP! is only one of a number of other IPR coordination mechanisms underway within the U.S. Government. I think it is useful to contrast the performance of three of these mechanisms, the Special 301 process, the NIPLECC, and the IPR Center.

Based on the evidence we collected in our visits to four countries and in our discussions with industry and agency officials, we found that the Special 301 process was having a positive effect on agency coordination and it also had some positive effects on legislation in certain countries. On the other hand, we found that the

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NIPLECC—that is the National Intellectual Property Law Enforcement Coordination Council—has had little effect on coordination, and the private sector has little confidence in that group. As you know, the NIPLECC was provided with $2 million during the most recent appropriations cycle but does not appear to have decided how to use that funding.

The third coordination mechanism, the IPR Center, is a joint effort between DHS and the FBI, but this group has lost a number of its on-board staff since we completed our work last year. At the current time, only about half of the positions in the center are filled and the lack of secure access to FBI computer systems at the center means that the slots are not always effectively utilized.

Based on these three examples, Mr. Chairman, there is a mixed picture when you look at the various coordination mechanisms within the government on this important matter. As a result, looking beyond the increase in attention that STOP! might provide in the short term, it is unclear whether there is a permanent mechanism that will enable U.S. agencies to successfully coordinate on the enforcement side issues.

Based on our prior work, we believe that there are specific steps that the agencies can take to improve the effectiveness of their efforts. One step is for DHS to complete the targeting effort that was described earlier as targeting is the only way to make the most of the scarce resources at the border for inspecting cargo.

A second step is for agencies to tighten some of the high-risk systems that still exist. We pointed out a number of weaknesses in the CBP inbound system that allows enormous volumes of cargo to be shipped throughout the United States with limited inspection and control.

Third, we think that the agencies can better communicate how small and medium-sized firms can utilize the law enforcement options of agencies such as CBP, and the agencies can also provide better information to firms regarding the prospects for protection of their intellectual property abroad.

Mr. Chairman, let me make one final observation. Despite the scale of the IP problems abroad and the extensive interagency efforts and Special 301, sanctions have been used only once, and that was against the Ukraine, and the last WTO case on IP protection was brought in the year 2000.

Mr. Chairman, this concludes my statement. I would be happy to answer any questions that you have.

Senator VOINOVICH. Thank you very much, Mr. Yager.

Customs and Border Patrol, you have talked about these audits, Mr. Baldwin.

Mr. BALDWIN. Yes.

Senator VOINOVICH. You have done the audits and the question is, once the audits are done, what do you do with them? For example, if you determine that a company, a trading company or whatever it is, doesn't have things in place in terms of checking to make sure that the stuff coming in here is not violating intellectual property rights, what do you do?

Mr. BALDWIN. Well, we have several steps and we are actually pursuing now what is the proper remedial or punitive action to be taken. First, I would like to highlight the fact that this is rather

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unique for how we would traditionally enforce IPR. I think we have a traditional approach that you would need to examine the goods at the border, open the container, find the infringing mark, and take action against the transaction and the transaction alone.

What this approach is really trying to do is hold the businesses accountable for their IP infringing goods. This is a unique approach.

So now to more directly answer your question, Mr. Chairman, what we would hope to do is evaluate their internal control system to identify the various weaknesses that they have if we find infringing goods, and we have in the warehouses. We have made seizures. We have made destructions. We have worked with the companies to try to improve their system and give them an idea of the best practices to ensure that this does not continue. But we also have the recourse of applying greater levels of examinations now that they have established a pattern——

Senator VOINOVICH. This is stuff that is coming to this country—you are examining it when it gets here, right?

Mr. BALDWIN. Yes.

Senator VOINOVICH. What if you find out you have a company that 90 percent of the stuff they are bringing in is counterfeit? Why don't you, when you find that 90 percent of a company's shipments are counterfeits, just say you can't ship to the United States any more. Goodbye, we are not going to allow you to import any more into the United States of America, period. Can you do that?

Mr. BALDWIN. I think we could certainly explore that option if we were to find 90 percent. Unfortunately, I don't think we ever find a margin of error that high. Even though we might make 7,000 seizures last year for IP-infringing goods, I would suggest that there wasn't any one company that dominated the vast majority of those seizures.

You will find consistently where we show two-thirds of the infringing goods are coming from China and we might find other countries that are sourcing those IP-infringing goods, but we are not finding a prevalent number of companies that account for those seizures or discrepancies on an annual basis.

However, what I think our program for IPR audits is trying to identify is that there are companies that are vulnerable for IPR infringement and we are trying to attack it in that fashion, as a complement to our traditional——

Senator VOINOVICH. Do you have the authority to do it? Right now, if two-thirds of the stuff coming in from a company is counterfeit, are you saying, look, you have demonstrated that you are a bad company, you are a counterfeiting operation. Can you stop them and say, we are not going to accept any more goods in the United States?

Mr. BALDWIN. I would be happy to get you a list, as a question for the record, as to what our remedial actions are under our current authority and how we could proceed if we found such an egregious violation.

Senator VOINOVICH. I would like to find out whether or not you need additional laws for you to make that happen.

We have the STOP! operation, OK. Mr. Evans patently has a situation where his trademark has been infringed upon. Why can't

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you determine that they have been infringed upon and basically say that if this company that has infringed on them is importing into the United States, that they can't bring their goods here? In other words, you give an order to say—my thought was that you have got a place where somebody can go and it is obvious based on everything that you can see, all the information that he brought, he has available, that there has been a knock-off. It is overwhelming. Why can't you then say to Customs, this product should not be brought into the United States?

Mr. DUDAS. You can say to Customs—there are certain products that can't be brought into the United States, there is this particular product that is being imported, and we think it is counterfeit. I don't mean to speak for Customs but I think Customs works very closely with the private sector on that topic and they can identify counterfeits.

One of the things that was just testified to earlier was that we are working with Customs, particularly with small businesses, in making sure that small businesses know very early on that when they get their trademark, they should record that with Customs immediately. In fact, we are putting that information on the notice of trademark registration so that the very first set of instructions they get with their trademarks include going to Customs.

Senator VOINOVICH. In terms of STOP!, and you said you got 400 calls, how many of the 400 people that have called have gotten any kind of remedy?

Mr. DUDAS. I would like to say that every single person who has called has gotten some form of remedy. The wide variety of calls we have gotten have included one woman calling who wanted to start a company called "Copycats" and sell counterfeit purses in the State of Washington. We convinced her why that was not a good idea through pangs of conscience.

We have had hundreds of calls from people calling to find out what they need to do to register for trademarks in the United States. You would think that this is something that might be problematic. It is not problematic in that it is the precursor for getting intellectual property anywhere else in the world if they are operating in the United States. In many cases, you need your IP in the United States before you will be able to get it, or at least to secure your rights.

We have had people calling in particularly with questions about what are the risks philosophically and specifically about whether or not to invest in China, whether or not to start a business in another country, or how might I get my trademark.

I think to a degree everyone has had the opportunity to discuss the issue. We have not been getting the kinds of calls where they are asking for an investigation to begun.

Senator VOINOVICH. Mr. Evans, he has got his property, these masts. If they are being brought in the country now, could you stop them from being brought in?

Mr. DUDAS. I think Mr. Evans could—if they were being imported into the United States. The first step would be that Mr. Evans would be able to enforce his rights. Our laws are very clear that you cannot import an infringing product into the United States.

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Senator VOINOVICH. What would Mr. Evans do?

Mr. DUDAS. If they are importing it from within China——

Senator VOINOVICH. If I know a company is shipping counterfeits into a U.S. port.

Mr. DUDAS. With that kind of information, I would defer to Customs about specifically where he would go. If he calls our line, we will make certain that we help as much as we can or get him to a person within Customs. Customs could also work on that. If you know there is certain manifest information and you know where it is coming in. Folks from the private sector do that all the time, and as you noted——

Senator VOINOVICH. OK, but the question is somebody has got to make up their mind that he has been infringed upon, somebody here says, you have been infringed on. And the question is, can somebody say he has been infringed on and then call Mr. Baldwin and say, Mr. Baldwin——

Mr. DUDAS. Actually, we can't make a determination about whether or not a product that we haven't seen is infringing. Certainly, any private business can say, "I know it is not my product coming in." That puts it under suspicion. Again, I think this is something more for Customs. Customs looks at that and then Customs has the ability to identify it as a counterfeit or not and seize it.

Senator VOINOVICH. Just one more minute. Go ahead, Mr. Baldwin.

Mr. BALDWIN. I was just going to add that, ironically enough, Mr. Evans and I were having this same discussion just before the hearing began where we were discussing that he was interested in recording his mark now with Customs in the event that there should be some imports of this product.

We have many avenues where, much like the STOP!——

Senator VOINOVICH. Could he do that now?

Mr. BALDWIN. He could do it now. If he has registered his trademark——

Senator VOINOVICH. And could you do anything about it?

Mr. BALDWIN. If there were imports of his product. He would notify us. We would record it, have it in our systems, and be prepared should imports that infringe on his mark occur.

We also have other avenues. I will discuss very quickly about——

Senator VOINOVICH. The question I have is—and I have gone on too long, but the question is, who determines that he has been infringed upon? What determination has been made that he has been infringed upon?

Mr. BALDWIN. Customs and Border Patrol does have the legal authority to make an infringement determination should an import of the infringing merchandise occur. So Customs can do that within our own authority. What we request ahead of time, though, is that Mr. Evans record his mark with Customs. That helps give us more information as to what his mark entails, what are the technical specifications, what would be required, and helps us help him protect his mark.

Senator VOINOVICH. OK. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

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Ms. Espinel, in February 2005, the International Anti-Counterfeiting Coalition submitted recommendations to the U.S. Trade Representative regarding countries that do not adequately protect and enforce intellectual property rights. The coalition reported that some IPR holders believe the Mexican enforcement environment is worse than China and the coalition recommended that Mexico be placed on the priority watch list. My question is, how is the USTR working with the Mexican Government on this issue?

Ms. ESPINEL. Let me mention a couple of things. One is Mexico does have a significant enforcement problem, and that is a concern to us not only because our rights holders are investing there, but because we share a border with them, and USTR has directly been raising those concerns with the Mexican Government and has made it clear to them that this is one of our top priorities for them that they have to address. So we have been using the Special 301 Report, but our ongoing bilateral discussions with Mexico to make quite clear that this is a serious concern for us.

I also want to note, though, that as has been mentioned here, we have been under the STOP! initiative reaching out to other trading partners to try to increase our coordination and cooperation with them, and although we have not yet, as has been mentioned, we have visited several countries in Asia. We have visited several countries in Europe. We are also planning to be talking to Canada and Mexico, key trading partners with whom we share a border, to try to increase our cooperation with them under the STOP! initiative.

If I could just make one other point, one of IACC's other concerns that they raise had to do with transshipment and the problem that we have of counterfeit and pirated goods going through Free Trade Zones. That is one of the things that we are trying to address under the STOP! initiative, and in our Special 301 Report this year, we included a new section highlighting the problem of transshipment through Free Trade Zones and our concern with them at the—in direct response to the concerns raised by IACC.

Senator AKAKA. Dr. Yager, in your testimony, you discuss the risks associated with the in-bond system run by the Department of Homeland Security.

Mr. YAGER. Right.

Senator AKAKA. This program allows cargo to be transported from one U.S. port to another U.S. port before it is formally entered into U.S. commerce or exported to a foreign country. In your written testimony, you stated that in-bond shipments are the least inspected and a fast-growing sector and are, therefore, considered high risk.

Can you discuss what specific recommendations GAO has made to DHS on the in-bond system, and can you elaborate on how this system can be exploited to allow pirated and counterfeited goods to enter the United States?

Mr. YAGER. Thank you, Senator Akaka. We actually did a report that looked in depth at the in-bond system that came out in January 2004, and we had a number of recommendations which I will go over. But for people that aren't familiar with the in-bond system, it is a situation where the goods physically enter the United States in a port like Los Angeles or Long Beach or New York; then

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they are shipped internally into another city in the United States. For example, if it is apparel, it might be going to Cleveland or Cincinnati, where many of the headquarters of certain firms are. And then it is brought into the commerce of the United States at that port, for example, in Cincinnati or another place.

Now, the problems that we found with this particular in-bond system was it had a number of internal control weaknesses which meant that many of the goods that were being brought into this country were then put in this in-bond system, and let me just say, this is not a small percentage of U.S. imports. Estimates are that as high as 50 percent of U.S. imports coming into the ports are shipped in-bond and then entered into the commerce in an interior city.

But between that time when it comes into the U.S. port and when it is actually entered into the commerce in that interior city, there is very weak internal control on that system. For example, there are long time periods to allow the trucks to get from the entry port to its port of entry into the United States. And then there are also situations where it is a very poorly automated system such that there is no specific control on how to close out shipments. So the shipments could be diverted into the commerce of the United States without actually having gone through the formal entry process.

So we had a whole range of recommendations on how to fix the in-bond system and we are working right now and we have been trying to get responses from DHS to determine how they have changed and what progress they are making in trying to fix the system. But we did find it to have serious weaknesses in terms of its controls over the merchandise, which means that some of that merchandise could get into the U.S. commerce without having been officially entered through a port of entry and going through DHS.

Senator AKAKA. Thank you. Ms. Parsky, as you know, one of the fastest-growing areas of IPR crime is pirated music and movies and illegal file sharing on the Internet. There will always be individuals who want something for nothing. Recently, however, industry and the government have worked together to educate consumers on how such actions impact our community.

Have there been any noticeable changes in public attitudes in the U.S. regarding the risk of illegal file sharing, for example, and what more can the Justice Department do regarding IPR crime prevention?

Ms. PARSKY. Senator, you raise a very important point, which is the public attitude within the United States about piracy, and particularly for children, and the widespread piracy of music and movies and video games, and this is something that the Justice Department is very aware of. We have, as part of the IP Task Force Report's recommendations, launched a public awareness campaign. Former Attorney General Ashcroft held the first session of a program called "Activate Your Mind, Protect Your Ideas" soon after the release of the IP Task Force's Report. This was a program for high school students where there were convicted perpetrators, IP thieves, who came and spoke to the students as well as those who create the products to give them a sense of what kind of damage is done by this type of piracy.

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On April 28 of this year, current Attorney General Alberto Gonzales was in Los Angeles for a second part to this program that was focused on the movie industry. He spoke to a number of high school students about what it really means to be stealing these things, and how even if it is over the Internet, it causes the same harm and is the same type of crime as if it were a physical CD.

This is something that is going to take a long-term effort, because I think that there is a problem in terms of youth not understanding the damage that is caused by IP theft. But it is something that we are committed to doing, and it is going to take reaching into high schools, but really into elementary schools where children are starting to develop their ideas of what is right and wrong and what is actually against the law, to educate them.

But I will tell you that this is a long-term effort because I think there is an attitude problem across the United States, and it is something on which we are trying to partner with private industry and with other government agencies. I know that PTO has also been engaged in a public education campaign. So we are trying to find ways that we can work together to get the message out, to educate the public, and then most importantly, through a lot of our criminal prosecutions, we are searching for those cases that will send out a very strong deterrent message and to publicize those, so people know that this is something that is illegal and that there are consequences for the behavior.

We have brought recently some cases involving the most recent developments, the most high-technology means of piracy, such as peer-to-peer networks using the BitTorrent technology, and so we have brought these cases to send a very clear message that no matter what type of technology you use, that it is illegal and that we will find a means to enforce the U.S. laws.

Senator AKAKA. Thank you very much for your responses. My time has expired, Mr. Chairman.

Senator VOINOVICH. Senator Carper.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman. To our panel, welcome. Thanks for joining us this morning and for your presentations.

A long time ago, I was a Naval flight officer. I served a fair amount of my time in my squadron in Southeast Asia and occasionally I would fly in and out of Taiwan. I recall our air crews buying books and reading them and they were just knock-offs of classics and other texts and so forth. We probably still have a few in our library at home. But at the time, Taiwan was regarded as a Nation that didn't pay a lot of heed to intellectual property rights. They had an opportunity to make a dollar, knock-off something of ours, they would just go ahead and do it.

Now, it looks like the nation, from your testimony, from what I have heard, the nation that is the greatest perpetrator of dealing in counterfeit goods is China, which sort of leads me to wonder, what has happened to other countries who sort of led the way in this effort, among them Taiwan? Do they continue to persist in counterfeiting goods as they once did? Have they changed their ways? Have they mended their ways? And are there any lessons that we might learn with respect to countries like Taiwan and their

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previous practices that might apply to courses we would take with China?

Mr. DUDAS. Yes, there are many lessons learned. In fact, what your experience was and what you are speaking about now, is something that goes back scores of years, if not hundreds of years. There is a question of development of countries and whether or not countries begin by copying to jump-start their economies and then eventually get their own products and have their own interests in turning out their own products and their own innovation. These statements have been made about a number of Asian nations. That has been said about the United States 100 years ago that the United States had a model along those lines.

I think there are places that disagree with that, but there are certainly signs that this may be the case here, as well. If you can jump-start an economy along those lines, it is our responsibility to make certain that China, the largest country in the world, realizes today, and all developing nations realize today that intellectual property enhances their development. It does not hurt their development.

By educating those countries, by working with them both through the carrot and the stick, we are letting them know that this is unacceptable from a trade perspective and to their trading partners. We spend a great deal of time working with those countries to develop their systems.

One piece of good news continuing along this path in China is they had more patents issued last year to Chinese nationals than they did to foreigners for the first time in their history. They have the largest trademark office in the world. They are learning more and more every day that they need to innovate if they are going to produce. It is our responsibility to make certain they understand that it is unacceptable to us and that they have to play within the rules.

Senator CARPER. Does anybody else want to add to that? Please, Dr. Yager.

Mr. YAGER. I would like to add just a couple points. One thing that you brought up here is China is a particularly important problem for two reasons. One, it is such a large internal market. Losing access to that market is quite a big problem in itself. But then, obviously, China is also a world-class exporter of these kinds of pirated goods.

We visited a number of countries in our work, but China was the one that had that particular combination of being both a large exporter as well as a large consumer of many of these goods. That is what makes it obviously so important.

But I think your point is one that, when the United States can ally itself with interest groups within those nations that have similar goals, the likelihood that they will be successful in getting laws changed and getting enforcement and protection of intellectual property goes way up. Some countries obviously don't have a lot of intellectual property to protect and, therefore, linking with interest groups inside those countries, frankly, is quite difficult, while others, there may be pockets of groups that do have interest in protecting their intellectual property. It behooves the United States to work closely with those groups because they can provide some of

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that domestic support for what is a fairly intensive and expensive effort to enforce these rules.

Senator CARPER. All right. Thank you.

Ms. ESPINEL. If I could just add to that, I think the USTR is generally better known for being the stick rather than the carrot and we have worked intensely with Taiwan. We have been very concerned about their intellectual property enforcement and we have made that a priority issue with Taiwan for a number of years. So I think one of the lessons learned, generally, is that we need to keep the pressure on with countries with whom we have concerns. Taiwan has started to respond to that. They have begun improving their enforcement. In recognition of that, USTR moved them down the 301 Watch List earlier this year.

But I think one thing that has changed, a relatively new development, are exports of counterfeit and pirated goods and the export market that is being created, and I think in order for us to be able to address that effectively, we really do need to cooperate with our trading partners. That is not something the United States can do alone, and that is one of the primary objectives, as you know, of the STOP! initiative, is to try to bring our trading partners together so that we can deal with this international trade and export of counterfeit and pirated goods in cooperation with them.

Senator CARPER. Let me ask a somewhat different question. There is a table up here, as we can see, and on the table are a variety of goods. I am not sure what all of them are. I recognize the sneakers. It looks like some of it might be toothpaste. I don't see any what looks like it might be prescription medicines, knock-offs on——

Mr. YAGER. There actually are some pharmaceuticals, I think just in front of the household goods. There are a couple of copies of prescription medicines.

Senator CARPER. One of the issues that has been kicking around here in the Senate for a while, and in the House, too, for a couple of years is the issue of reimportation of prescription medicines or pharmaceuticals, and I would ask you to—I don't care who takes this on, but for whoever feels comfortable, in talking with us about the counterfeiting of prescription medicines or pharmaceuticals and what we need to be mindful of. What do we face in terms of the flow of counterfeit drugs into this country? How are we trying to deal with that, and how should we be dealing with that threat?

Mr. DUDAS. Regarding counterfeits, I can tell you that the World Health Organization has done a study stating that 10 percent of the world's market in pharmaceuticals is counterfeit. It was a small study, but of those that they found, 67 percent didn't contain the right amount of the active ingredient or contained a different kind of active ingredient. As you can imagine, someone who bases their business on stealing doesn't have the greatest integrity in the quality of their product.

In the United States we don't have that problem because of how strong Customs is and because of what our rules and laws are. I can only speak from an IP perspective that we need to be incredibly careful, knowing what level of counterfeits there are out there in the world versus knowing that we have safe drugs in the United States.

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Mr. YAGER. I can add just a short matter——

Senator CARPER. Please.

Mr. YAGER. One of the things that is actually different about pharmaceuticals is, in many cases, they are actually imported by the end user. So it doesn't come in through the kinds of containers and shipments that we have mostly talked about here this morning, that many of the goods that are being imported are individuals who are using it through a website or they have other contacts outside of this country and it is being imported in very small quantities. And therefore, it is actually a very different kind of an inspection and targeting mechanism than what we have talked about today.

GAO did a report on that earlier this year, I believe, where we talked about the importation of pharmaceuticals, and it really just has to do with trying to look at the small package deliveries and get some sense of how many of those might be containing illegal goods, because obviously, there are some real dangers associated with the kinds of goods. When it becomes pharmaceuticals, there are some real dangers to the consumers, that they are importing something which is fake and doesn't have the active ingredient, or maybe worse, that it has some other ingredients that could be harmful.

Senator CARPER. All right. My time has expired, Mr. Chairman. Thank you.

Senator VOINOVICH. Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Mr. Chairman. Thank you for holding this hearing and thanks to the panel.

One of the biggest problems in counterfeiting is the problem which exists for automotive suppliers. The Federal Trade Commission estimates that the loss in sales to the automotive supplier industry is about $12 billion a year worldwide in counterfeit material. I want to ask you a number of questions about the automotive sector.

The theft of intellectual property now in China is so widespread and bold that an entire car is being knocked off. The Chevrolet Spark, which is copied, manufactured, and sold under the name of Cherry QQ by the Chinese Cherry Automotive Company, Limited. They even allegedly are going to try to export this knock-off to the United States. This vehicle is based on the Daewoo Matese, which is a mini-car originally developed and manufactured in Korea. GM Daewoo launched the Chevrolet Spark for the Chinese market, where it is assembled in a joint venture. And then all of a sudden GM noticed there appeared to be such a strong resemblance between the Chevrolet Spark and the Cherry QQ in April 2003.

I am wondering whether or not any of you are familiar with this issue, this counterfeit. Are you all familiar with it? OK. Are we going to allow the import of a car which violates the intellectual property rights of GM Daewoo?

Mr. DUDAS. If it violates the intellectual property rights that they have in the United States, it cannot be imported.

Senator LEVIN. Have you studied this knock-off?

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Mr. DUDAS. We have seen from GM Daewoo the pictures of the car and learned they actually interconnect almost perfectly. The only difference is the back handle of the car is nine millimeters back, or something along those lines.

Senator LEVIN. Have we talked to the Chinese about this?

Mr. DUDAS. We have talked to the Chinese.

Senator LEVIN. And what is their response?

Mr. DUDAS. We are continuing those dialogues and discussions along those lines of what has happened. There are questions that they have about what forms of intellectual property did Daewoo and GM engage in in China, and under what procedure they will follow. I believe GM and Daewoo are actually taking a case in China. We are attempting to work with them. I believe they are enforcing their rights in China through one legal theory. We are watching that case very closely.

Zippo lighters was a case where the Chinese Government declined to go forward and send for criminal investigation after a seizure and the U.S. Department of Commerce officials, USTR officials, and others pressed to say they are trying to enforce their rights in your country. They need to be allowed to enforce their rights. And now those have been referred as criminal cases in the Zippo case, I believe just this week.

Senator LEVIN. They have been referred by the Chinese?

Mr. DUDAS. I am sorry, I didn't hear your——

Senator LEVIN. Referred by who to whom?

Mr. DUDAS. They were administrative seizures in China. It is our opinion they needed to be referred to a criminal case in China. We told the Chinese Government that they have rejected sending those administrative cases as criminal cases we believe you need to do that, which they have agreed to do. They understand that. So when a company is——

Senator LEVIN. They have agreed to do that this week?

Mr. DUDAS. This week.

Senator LEVIN. And they are well known for agreeing to things and then not following through. So when did they say they would do this?

Mr. DUDAS. They said that this week.

Senator LEVIN. That they would do this immediately? That they would do it this decade? When?

Mr. DUDAS. It is very fresh news. In each of these cases, what I am trying to distinguish between are companies that are enforcing their intellectual property rights in China. That is an area where the U.S. Government can step in and say, you have laws in place, and you must enforce those laws and be fair with U.S. companies——

Senator LEVIN. If the Chinese Government is serious about intellectual property, and I don't believe for one minute that they are, by the way. I have seen so little evidence of enforcement of the trade agreements; I don't believe them, and I don't believe their commitments; I don't believe their promises. I will only believe it when their actions live up to what the law and requirements are. Until then, conversations are meaningless as far as I am concerned. Are you as frustrated as I am?

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Mr. DUDAS. Your point is exactly right. It is actions that speak louder than words. It is enforcement of laws, not laws, that is what is most important. We feel an amount of frustration when we hear statistics that show the amounts of illegal goods we are seizing in the United States.

We do see progress with the commitment level of working towards both passing laws and enforcing laws. You have made the exact point that the U.S. Government is making results that will make a difference.

Senator LEVIN. In the auto equipment area, virtually every automotive part has turned up in the counterfeit trade—windshield glass, brakes, safety lighting, headlights, tail lights, emissions components, structural parts, sheet metal parts, suspension parts, tires, belts, hoses, alternators, windshield wipers, and many other parts and components. We are going to need our government to take a lot stronger action with the Chinese on counterfeiting.

I mean, when I read what is going on and when the Chinese Government refers, for instance, automotive counterfeit issues to their courts instead of taking a position themselves, when they deal with the trade agreement as they have by not enforcing the policies which are in that agreement, it is infuriating. I will give you one quick example. I will just quote from the USTR 2004 Report to Congress on China's WTO compliance.

It says that since acceding to the WTO, "China has increasingly"—increasingly—"resorted to policies that limit market access by non-Chinese origin goods and that aim to extract technology and intellectual property from foreign rights holders. The objective of these policies seems to be to support the development of Chinese industries that are higher up the economic value chain than the industries that make up China's current labor-intense base or to protect less competitive industries." That is our report.

Since China's WTO accession, it says here, China has increasingly resorted to policies that limit market access. What are we doing with China besides just jawboning? That is my last question. What specific actions are we going to take to China saying, you enter into an agreement. You have got access now. You have acceded to the WTO. Our own report says your policies are getting worse in terms of limiting market access.

Ms. ESPINEL. Senator Levin, you probably know that USTR announced last year that we were conducting an extraordinary out-of-cycle review of China because of the very significant concerns I think we all share with respect to what is happening in China. We issued our report just a few weeks ago, on April 29, with the determinations of that out-of-cycle review, and in that report, we announced a few new actions that we would be taking with respect to China that go beyond mere discussions.

First, we elevated China to the Priority Watch List. As you probably know, China had not been on the watch list for a number of years, for almost a decade. So we have moved them up and onto as a Priority Watch List country to indicate the extreme level of concern that we have with how China is enforcing intellectual property.

We also announced in the Special 301 Report that we would be invoking the transparency procedures of the TRIPS agreement in

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order to require China to provide to us detailed information about their enforcement of intellectual property. As you probably know, one of the problems that we have and that our industry has is the lack of transparency inside China and its intellectual property enforcement. So we are going to use the TRIPS procedures in order to require them to give us more information.

We have also announced that we——

Senator LEVIN. When is that information due?

Ms. ESPINEL. We have not yet filed the request, although we are in the process of drafting it in consultation with our interagency colleagues and our industry and we plan to follow it very soon.

We also announced in the report that we have been working with our industry intensely on developing our WTO options, which would, of course, include litigation.

Senator LEVIN. I will tell you, we are "watching," we are "seeking information," and we are "coming up with options." Not one of those, to me, constitutes this is the action we are taking against you because you have violated your commitments, you have violated the WTO rules, and until we do that, as far as I am concerned, it is all hot air.

I am so frustrated. I am sure that frustration comes out. I am sure I am not alone in this. But we are basically watching China. It is one thing to have to deal with cheap labor and to have to compete with government owned enterprises, which we do instead of competing with private companies. It is something else when that government, and companies that it controls, ignores the rules, and that is what is happening. I think that frustration level is shared by a lot of folks here in Congress. So you can watch China, but we are watching what the Administration does and doesn't do and hopefully, this hearing will help. Again, I am very grateful to the Chairman for calling this hearing. It is all part of an effort to get China to deal honestly with the world.

Senator VOINOVICH. Senator, your brother and I were in China for a week and I share your same frustration. I will say this, that I think that we are cranking things up and I will be interested in our next two witnesses, who will comment on it from the point of view of the private sector in terms of whether or not we are getting the coordination, and whether or not we are getting the enforcement.

Senator LEVIN. Thank you, Mr. Chairman.

Senator VOINOVICH. I thank the witnesses for being here this morning. Again, there are many questions that I would like to ask. In deference to the next two witnesses, I think bring them on. Thank you very much for being here, and I will say this, that the best news I had is when I called the STOP! number and got the kind of action that I got, because the last time I called the number I was supposed to call, the person on the end of the line didn't know what I was talking about. So we are making progress. Thank you.

Our next two witnesses are Brad Huther, who is the Director of Counterfeiting and Piracy Initiative at the U.S. Chamber of Commerce, and Frank Vargo who is Vice President for International Economic Affairs at the National Association of Manufacturers

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(NAM). Mr. Vargo has testified before this Subcommittee before and I welcome him back.

I will tell you, Mr. Vargo, that I have been a little disappointed in the National Association of Manufacturers, particularly in your reluctance to put pressure on the Secretary of the U.S. Treasury in terms of China's fixing their currency. I thought for a while you were going to move forward and you backed off and I want to say I am very disappointed, because it is only going to be because of efforts from outfits like yours and the Chamber of Commerce and others that we are going to get this government to move forward.

Now, I think the Treasury Secretary has assured me that they are going to do something, but just as Senator Levin and I are frustrated with IPR problems—I am very frustrated in terms of the fact that we just keep allowing them to fix their currency and hurt our competitiveness. We have just got to get serious, and it won't happen without the support from people like the Manufacturers and the Chamber and the NFIB and a lot of other business groups. For some reason, it just seems that when we finally get to the edge, no one is willing to push.

I look forward to your testimony and we will start with Mr. Huther. Thank you, both of you, for being here.

Mr. VARGO. Senator, Mr. Chairman, if I could—I will respond to your statement in my remarks, but I just want to say that I am surprised at what you have to say because we have been pushing very hard and I would like to discuss that.

Senator VOINOVICH. OK. Well, that is what we want to hear today.

Mr. Huther.

TESTIMONY OF BRAD HUTHER,[1] DIRECTOR, COUNTERFEITING AND PIRACY INITIATIVE, U.S. CHAMBER OF COMMERCE

Mr. HUTHER. Thank you very much, Mr. Chairman and Members of the Subcommittee. I will be brief.

I have watched this issue for a long time. I have watched questions of interagency collaboration for a long time, and I just simply want to get to the bottom line, which is, I think, one of the best examples of interagency collaboration that I have seen. Although it has got a long way to go, I think it thus far has taken some very important steps, such as those you have heard today.

I don't think, however, the STOP! initiative by itself is the ultimate answer. It is the Administration's answer, but the business community has a very strong obligation to contribute to this. That is why the Chamber itself has developed a very aggressive action plan focusing on three main areas of trying to alert or educate, if you will, members of the public, Members of Congress, anybody who doesn't understand the scope of this problem, including small businesses who are not very well informed on the issue, I am sad to say.

Second, we want to offer whatever help we can to encourage stronger enforcement of their rights wherever those rights convey, such as those that you have adequately demonstrated here this morning with Mr. Evans' example.

[1] The prepared statement of Mr. Huther appears in the Appendix on page 109.

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And then finally, the Chamber will be targeting a number of countries, not only China, but Brazil, Korea, Russia, and the list will go on. We have people on the ground in those countries who are looking very hard at what is happening to enforce the intellectual property rights, or for that matter, just out and out thievery of American-owned manufactured goods or innovative technology.

So the Chamber pledges the fact that it is willing to do its part. It can't do it alone or together with the STOP! agencies and succeed either. That is why my colleague, Mr. Vargo, and I represent a coalition which now numbers 74 members, major national associations—you know all of them. Senator Levin just left, but the Motor Equipment Manufacturers Association and the Automobile Manufacturers Alliance are two members of that coalition who are hard at work in a number of the areas he cited.

We are taking a look at the issues, some of which have been raised today, including the Organization for Economic Cooperation and Development (OECD) study. We are supporting the OECD study in a number of respects to get rid of one fundamental problem that everyone hears everywhere you go, which is "show me the data." While the data that we have all been pointing out in our public documents—and by the way, I have with me a copy of a brochure which we think summarizes all the statistics, from the World Customs Organization to the U.S. Trade Representative to you name it. Whoever has quoted something about counterfeiting and piracy, we have attempted to record it in this document. I offer it to the Subcommittee to take a look at it to see if you think it is helpful, because we intend to take that kind of information to all of the three million members who comprise the Chamber of Commerce.

Senator VOINOVICH. With the permission of the Subcommittee, I will enter it in the record.

Mr. HUTHER. Thank you very much.[1]

But this coalition is not just one that sits around the table and talks. We have five task forces. They are working on things like the OECD study. They are working on things like drafting model text for future Free Trade Agreement negotiations. They are working on the No Trade in Fakes, or supply chain questions, that you have heard described today.

From an industry point of view, we think we can contribute to the best practices that are out there to protect America's supply chain. We hope those best practices could be useful to the Department of Homeland Security and the Department of Commerce in ways that develop guidelines for others to follow. And so the list goes on.

Finally, I will indicate, as you asked, what can the Congress do, and I think there are three very specific things that I would like to suggest. One is H.R. 32, which was passed by the House last month and is a very effective solution, in our opinion, to strengthen the protection of trademarked items, especially those things that deal with labels and the like which are attached to some of the illegally counterfeited and imported goods. So enactment of that stat-

[1] The pamphlet entitled "What are Counterfeiting and Piracy Costing the American Economy," submitted by Mr. Huther, appears in the Appendix on page 126.

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ute soon will strengthen America's ability to protect itself against counterfeiters, for sure.

Second, you mentioned earlier, Mr. Chairman, your views on Free Trade Agreements. I am a little reluctant to specify this one, but the Chamber does support ratification of the Dominican Republic-CAFTA Free Trade Agreement. Putting aside some of the political issues, there is a chapter in DR–CAFTA which is very strong on strengthening intellectual property rights protection in that very important region. If you want to worry about where goods are flowing illegally into the United States, that is one region, just like all the others that we have heard. So doing anything that we can do to provide stronger protection through Free Trade Agreement negotiations, we think is an important element of a comprehensive strategy.

And then finally, it is a little bureaucratic sounding, but there are two issues that haven't been addressed today. Who is going to coordinate all the work of the STOP! agencies? The Commerce-State-Justice appropriations bill last year indicated that there should be such a person appointed. We keep hearing very positive indications that the appointment of such an individual, as well as possibly some restructuring of NIPLECC, are in the works and we advocate that those decisions be taken soon because you do need a single focal point for this program, in my opinion, if it is going to have a greater chance of success than it has already demonstrated.

And then finally, the Congress can take a very active role through the use of the Government Performance and Results Act. It was passed 10 years ago to get agencies to get their act together, to develop strategic plans, to look at the global issues that are important to the American people. Certainly, we at the Chamber think that this is a national priority that has already arrived and we would advocate that if these STOP! agencies can develop an integrated action plan with a single point of contact to coordinate it at a very high level of government, and then can be tasked with providing reports to you, and frankly, the Chamber stands willing to provide reports to you, as well, on whether we are succeeding in achieving our performance metrics for the things that we are trying to contribute to this effort.

So the bottom line is I have listened to presentations by Jon Dudas. I have listened to other presentations by similar members of the agency panel that you have established this morning. I have listened to the comments of Secretary Gutierrez. I can tell you that we at the Chamber are quite impressed with what we hear. We are quite impressed with the level of detail and the care of planning. But we realize that if this is going to work well, all of us have to do our part to contribute to the ultimate solution.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you. Mr. Vargo.

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TESTIMONY OF FRANKLIN J. VARGO,[1] VICE PRESIDENT, INTERNATIONAL ECONOMIC AFFAIRS, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. VARGO. Thank you, Mr. Chairman. It is a great pleasure to testify before you again.

Clearly, I have been derelict in not visiting with you or your staff to discuss the NAM's actions on the Chinese currency issue because the NAM has been the leading advocate for pressing to get China's currency revalued. We started about 2 years ago. When we did, nobody had heard of the yuan. Nobody could spell renminbi. And we have elevated this up to where it has become one of the government's highest international economic priorities.

We, along the way, began developing a case under what is known as Section 301 of the Trade Act, and I think probably you are referring to the fact we did not want to file that. But the utility of a Section 301 case is if the government is going to accept it. The worst thing to do is have a case that you file and have the Administration reject it and have the Chinese see that there is discord. That is why we did not file, and we were very disappointed that a spin-off group of associations did that and it was rejected. So that was a negative thing.

We have worked with the Administration, with Secretary Snow very closely, and are at the point now where under the Trade Act of 1988, the Secretary of Treasury has stated that if the Chinese do not take a significant action before October, that they will almost certainly be cited under that Trade Act and a process begun. In my view, Mr. Chairman, there is no doubt that we would not be there had it not been for the continued and very determined efforts of the NAM, which I would be very pleased to document should you be interested. There is nothing of a higher priority for the NAM than getting that currency revalued. It is by far the biggest factor in our trade deficit with China. We will not get that deficit down until China's currency moves up, and also begins moving towards a market-determined currency.

But this hearing, Mr. Chairman, is on counterfeiting, so let me turn to that and the STOP! program.

The NAM has been a very strong supporter of the STOP! initiative. We had a lot of discussions with Administration officials before the program was put together. We are very pleased that many of the ideas that we had put forth are incorporated within the initiative. The initiative is 8 months old and we are quite satisfied with the way it has been evolving.

There are a couple of areas that need more work and we need to sit down and think through what we can do. The most important, I believe, is what to do with smaller companies and the problems that they are facing. You heard the testimony of the Will-Burt Company. This is not an unusual situation. Many small companies find they are being ripped off in China or they are having to face knock-offs around the world that are produced in China. It is a very expensive thing for them to do. Basically, they now are told they have to do the investigatory work, they have to bring about

[1] The prepared statement of Mr. Vargo appears in the Appendix on page 118.

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the legal action. It is a very expensive thing for them to do and there ought to be a better way to do it.

This is a crime. Governments ought to be doing more on their own to stop these crimes. If you have a case of murder, you don't ask the relatives of the victim to go out and begin doing their own investigation and bring a case. You have the prosecutorial authorities. You have the full force of the government behind you. And we need to look at what more we can do here.

This won't be an overnight process, but it is certainly something that we need to do in terms of there might be some possibilities for having a public defender. There might be some possibilities of having the U.S. Government pick up some more of the investigatory cost. There might be more we can do through diplomatic initiatives.

Frankly, I don't know. We don't have a program that we can lay out. But we want to sit down with the Administration, and they have indicated a willingness and interest in doing so, with your staff and with others, Mr. Chairman, because we need to push this through.

Mr. Huther mentioned H.R. 32, the bill that Mr. Knollenberg introduced in the House. It is not the jurisdiction of this Subcommittee or Committee but we hope you will take a very close look at it, become a strong advocate for getting that passed very quickly. It fills some rather major loopholes in U.S. law.

Finally, let me note that while our focus is on China—China is the epicenter of counterfeiting in the world—China is not the only problem. We have Russia going through the WTO accession process now. We want to ensure that we learn lessons from China's accession and we see that we are tighter in insisting that Russia has what we need before it comes into the WTO.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you. Again, thank you both for being here today.

One of the questions that I didn't get to ask, and we are going to send it off to them, but I think you made some reference to it, and that is the issue of coordination. Two issues that I am concerned about is who is the orchestra leader here? Second, are the folks going overseas?

I discussed this with USTR Representative Rob Portman. When he goes over there, when Mr. Gutierrez goes over there, when Mr. Snow goes over there, are they speaking with the same voice? So, do we have an orchestra leader there? In your opinion, who ought to be the orchestra leader?

Second of all, very concerned, is do they have the staffing, and maybe you were here for the call to STOP!. Well, the expert on China is in Detroit. Tell the folks what they should be doing and what are your observations in terms of the human capital that is needed over there to get the job done. Is it adequate or should we do more in that area?

Mr. HUTHER. I will try first, if I could, Mr. Chairman. There is, as I alluded to in my earlier remarks, no single designated spokesperson for the Administration as yet. We are not concerned that such an individual hasn't been appointed, but we will be if it takes too much longer for that decision to be made, because the longer

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it takes, the more likely it will be difficult to keep this interagency coordination effort that I have talked about in positive terms continuing.

Senator VOINOVICH. Who should be that person, in your opinion?

Mr. HUTHER. Well, we think the person should be someone who has cabinet-level rank, who can speak to these issues authoritatively, whether that be a member such as the Secretary of Commerce, whether that could be someone in the White House, in the National Economic Council, we are not necessarily here to say who the right person is or which of the organizations. What we do want is someone who can speak to the issues and who understands them horizontally, across the board, and who can represent the interests not only of the STOP! agencies in a fully authoritative way, but frankly, has sufficient interest in working with the business community, because I think without that, there is not much chance that they will be able to leverage the business community's resources.

We understand that the whole structure of NIPLECC is under review. We understand that there are a number of proposals that are being evaluated, and we have been told that the decision is imminent, and if that is so, then we are patient enough to wait.

So point one, we think the level of coordination for the time being is adequate. It would be enhanced if there were to be a single point of contact at a very high level to speak for the Administration and to represent the interest of the business community, small businesses especially, since they comprise the vast majority of the Chamber's members, if I could put in such a plug.

On the question of are there enough people on the ground? I think the PTO has a good example. The individual that they sent to China last year is doing effective work with the business community and with the Chinese Government. So positioning U.S. Government representatives who really know intellectual property issues or counterfeit or piracy subsidiary issues is a very significant thing to have.

We found that this is helpful to groups like the Am-Cham in Beijing. We found that, frankly, the more they can come here, as the Senator is addressing, to address the business community in the United States with firsthand knowledge of what is really going on in places like China—and I wish to reiterate, it is by no means only China. This problem is everywhere. The more people that are out there doing that, the better that we are going to feel.

Now, the agencies have not proposed resources at the full level. That is part of what this planning process is all about that is going on and that is why I suggest that if the Senate were to take an active role in looking at what these cross-cutting interagency plans are, including staffing level resources and performance metrics, what are we going to judge success by at the end of the day, then I think we, too——

Senator VOINOVICH. The question I have is are you familiar enough with these agencies to comment and tell me today whether you think that they are adequately staffed?

Mr. HUTHER. I am familiar enough with some of them. For example, in terms of the Patent and Trademark Office, I can tell you that they have a well-oiled capacity to hire high-tech people in

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great quantities and with high quality. They have been doing it for a couple of decades now. In fact, this year, they are targeting some 900 people alone to recruit from America's best engineering and scientific schools. Likewise, the International Trade Administration has a very strong record of being able to attract people to the Foreign Commercial Service with various backgrounds.

The question that is a longer-term one, I think, is not just recruiting them, but what does it take to provide continuity on the ground in remote locations where it is very difficult to find individuals of that orientation? But if they are creative with their family-friendly policies on how they structure the assignments and how they compensate the individuals, I don't think there is a problem in being able to recruit and retain whatever America can offer as its best and brightest.

Mr. VARGO. Mr. Chairman, if I could offer my view on that, the STOP! initiative, as I said, is about 8 months old and came together with some very good ideas from a variety of agencies who I think have worked together in an exemplary way.

Having spent many years in the government myself, though, I can tell you that the half-life of interagency cooperation is not that long. So it will need to grow into a coordinating mechanism pretty soon, not just to keep the existing program going, which is a good one, but to expand it into new areas. I believe that will require, in one way or another, coordination out of the White House, probably the National Economic Council.

The question on resources, the biggest lack I see right now is resources on the ground in China. The problem is larger than the solutions that we have put forward so far. I think another resource-short area is one that we need to have aimed at educating American companies as to what they need to do to be able to defend their rights. Unfortunately, it is not just a matter of having a website. It is not just a matter of sending out E-mails. We all get thousands of E-mails and unfortunately ignore all too many of them. There has to be a more personal outreach and that takes staff.

Senator VOINOVICH. You have got your Am-Cham groups. What is the Am-Cham group doing in Beijing, especially that one in Shanghai and a couple of other places? What are they doing in terms of putting pressure on the government to do some of the things that need to be done in IPR and others?

Mr. HUTHER. They are doing a fair amount of traditional kinds of things, collaborating within the business community and trying to keep communication lines open with the government. But more recently, as part of the Chamber's stepping up of its own responsibilities in this area, we have a number of initiatives that we have announced recently that we are going to be undertaking in China, building, for example, for lack of a better term, some of the leading IP violator indexes going on in China, not naming companies by name but rather aggregating the data to say to the Chinese, here is where it is today and we are going to start measuring whether the IP violations being reported by American companies are going up, down, or remaining the same, and we would use those data as part, then, of our active campaign.

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We also are looking into two provinces of China. China is a very big place. Trying to attack the whole thing is beyond the pale. But we have identified two of them, Guangdong Province being the most significant of the two. That is where most of the counterfeiting activity occurs in China.

But in these two provinces, what we are going to be doing is working with the local provincial officials, identifying: where are the problems? Where are these counterfeiters? What does it take to identify them, close them down, prosecute them, or in the absence of our ability to get that kind of provincial cooperation from the local government officials, to raise that to Beijing, to say, look, we can't get it done even in these two provinces for lack of cooperation, lack of resources, whatever the truth is.

But one thing you will hear over and over again from the Chinese is, well, show me the data; we are tired of listening to that. So any way that we know how to show the Chinese or the Brazilians or the Russians or the Koreans or anybody, we are going to gather the data as best we can. We are running economic studies in Brazil as part of the collaboration with Am-Cham.

Senator VOINOVICH. One of the problems that I think that you have is, and I want to talk with Premier Wen and I know I talked with Don Evans before I left, is they seem to be getting it up here, but it falls down out in the provinces. And part of the problem is that they have got to create another 250,000 jobs. They are very concerned about getting people working. And so that desire to create the jobs is inconsistent with enforcing intellectual property rights and so you get this clash going on.

My feeling is that unless we really get tough, it is not going to happen. One of my concerns is that, and I would be interested in your observations, is that we have our economic interest and then we have our foreign policy interest, and I have this sick feeling that part of the reason why we are not kicking as hard as we should be is because we need the Chinese to help us deal with the situation in North Korea. It seems to me that we have got to separate that.

I would like to know, what are the new provisions in CAFTA? Are these new provisions that have been added that are different than other trade agreements that we have signed that you believe are going to help the situation, Mr. Vargo?

Mr. VARGO. Certainly, one of the new provisions in CAFTA that we have not seen before is particularly important to us, and that is the ability for companies to be able to drop distributors and pick up new distributors, which in some of the Central American countries they have not been able to do. You have to go through a very lengthy process.

So with the emergence with provisions under CAFTA, if a company is not satisfied with its distributor, then it can go ahead and switch and that will make quite a bit of difference, too. So that is one of the improvements in CAFTA.

Mr. Chairman, I don't want to be a one-note samba here, but on China, what we have to do is press for the Chinese to treat counterfeiting as a criminal offense. I am not a lawyer and I don't know where the bounds are of what an individual has to do in order to make a case or present what evidence, but I think that the burden

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is right now too high, particularly on our smaller companies. And what we need to do, the U.S. Government needs to do, is to press China to set up its own investigatory force, its own resources to take reasonable claims of counterfeiting, to investigate them, and if they find that the Chinese producer does not have a license to the intellectual property, that they then prosecute and that they throw them in jail, that they publicize this. We can't wait for years to get our arms around the problem.

Senator VOINOVICH. They have increased their penalties, haven't they?

Mr. VARGO. They have increased their penalties. You mentioned a regional question. China is a very big country. Certainly, I think that people at the top increasingly get it. Certainly Vice Premier Madam Wu Yi does. But you have so many provinces, you have so many cities, it is very difficult to do, and the Chinese Government, I don't think, has put the priority on that which it needs. We met with a delegation of the Chinese Government IPR team just a couple of weeks ago at the NAM and it was clear they are doing more. It is clear that a lot more needs to be done. The WTO doesn't say, every year, you will get better and better. It says you will provide, "adequate and effective protection" for intellectual property, and we are running out of time for that.

We have suggested that a WTO case be prepared. We have found some resonance to that. But preparing a WTO case is not something one does overnight. We have to get our companies to step up to the plate and many of them right now are not prepared to do so. Some fear retribution of some form or another from China. Others don't like the idea of having to say, yes, my brand is being counterfeited out of fear that that may lead consumers to go to some other brand. So there is a number of reasons.

But we certainly need to begin looking at what it is we have to do to develop an effective WTO case to protect our rights or seek compensation here, Mr. Chairman.

Senator VOINOVICH. I would really appreciate both of your organizations to look at this STOP! procedure and talk about some other ways that possibly we could be of help. For example, giving some of these small businesses some kind of assistance, for they are just unable to do it. And, of course, within your respective organizations, you have got some problems. You have your large organizations that say, we are going to take care of this, and some of them, for instance, General Motors, when Cherry knocked them off, I mean, you would have thought it would have gone through the roof and they have kind of been handling it in a very calm way. Hopefully, they are going to get some kind of results.

But it just seems that we need to do our job here. In other words, we have to streamline this process. We need to provide more staffing. Would you agree to that, in terms of these agencies? I would be interested to look at that and your comments on it. Say, hey, look, we have looked at this and this is a great thing, but you don't have the bodies over there to get the job done.

And one of the things that came up at one of our last hearings was USTR, it is 200 people over there. They have had 200 for a long time. Do they need to improve their situation? Constantly, if they need experts, they have to reach into some of these other

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areas to get them, and I have talked to the new Trade Representative Rob Portman about it.

Have the two of you gotten together, or your organizations have sent any letters off to Mr. Portman and said, hey, look, you are the new guy on the block. Here are our observations. Here are things, Mr. Portman, that I think that you ought to be doing in order to shape up. Have you done that yet?

Mr. VARGO. We have begun working with USTR staff on exactly that. Ambassador Portman has stated he is going to do a top-to-bottom review, and he has started that on China. We would like to see a top-to-bottom review on enforcement, as well. Enforcement is a very important subject for us.

Senator VOINOVICH. Are you satisfied that we are speaking with one voice? The thing about it, when you are dealing with China, you have one voice. Mr. Portman will be going over there, Mr. Gutierrez will be going over there, John Snow will be going over there, and some other people. Are you satisfied that the message is coordinated enough so that the Chinese get how serious we are about this issue?

Mr. VARGO. We definitely are. We see a very high degree of coordination, most particularly between USTR and Commerce on China. Secretary Gutierrez, Ambassador Portman are saying exactly the same thing.

Senator VOINOVICH. I think Mr. Portman went along with them, when they went over on the last trip.

Mr. VARGO. Yes. And having been on the government staffs, they are very important. And Hank Levine, the Deputy Assistant Secretary for Asia at the Commerce Department, a posting I once had, and Charles Freeman, the Assistant USTR for China, are joined at the hip. We work very closely with them on a weekly basis. There is no question of the coordination.

What in our view we need to do, though, is to find a way to go further and get the Chinese really to take more initiative to take their new criminal statutes and apply them and do so in a way that does not put an unreasonable burden on innocent U.S. companies.

Senator VOINOVICH. I know, because my pitch to Premier Wen was that it is in his long-term best interest to enforce intellectual property rights. It is in his best interest, quite frankly, to float his currency, and many international organizations have suggested that they go forward with it. So it will be interesting to see just how well he understands what we are trying to communicate to him.

I have these little three companies and I have found the nature of them and I am going to—Mr. Evans is one of them—I am going to get an answer on it. I am going to get something done. And I think someone mentioned that you almost have to get at an individual company and you can get maybe some help. We will see.

But the big picture is some coordinated strategy, again, maybe with the government. Maybe you ought to sit down with Portman and others to talk about how we have a public-private partnership where we can really make this thing into a big deal, because the government can talk all they want to, but I believe that when they start hearing from companies that are doing business there, that

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that may have a much larger impact upon them than the government saying to them, you have got to do these things.

Mr. VARGO. Mr. Chairman, could I note that for that exact reason, the Chamber and the NAM and other associations have joined together to form a single voice for the private sector, that is, the Coalition Against Counterfeiting and Piracy, and that we have both trademark holders and copyright holders all working together. So we now have a really single mechanism to deal and interface with the U.S. Government and Mr. Huther is the Executive Director of that and very savvy, so we are looking forward——

Senator VOINOVICH. I am going to have my staff pay a lot of attention to it. If there is anything I can do—I noticed that H.R. 32 is, I guess it is over in Judiciary.

Mr. VARGO. Yes, sir.

Senator VOINOVICH. I understand that Senator Specter is looking at it, but we haven't got a sponsor yet and I told our people to let them know that I would be glad to be two or three. It is a Judiciary issue. Of course, Senator Specter has got a few things on his plate right now.

Mr. VARGO. Right. [Laughter.]

But we appreciate that, Mr. Chairman. It is very——

Senator VOINOVICH. You really have to just keep working on elevating this thing, and I think through your respective organizations and various States, I think that you ought to be encouraging them also to start to beat the drum on these issues so that the folks back home understand how significant it is and how important it is.

I have to tell you, I have got manufacturers coming in that actually have been in business for 75, 100 years. They actually cry in my office about the fact that they are just heartsick about what is happening to their businesses. We are seeing a little bit of an improvement today because of our currency, the value of the dollar is helping a little bit, but the same underlying problems still exist. We just really need to be as conscientious and hard-hitting as we possibly can to make this happen.

I am absolutely convinced that unless you get up early in the morning and go to bed late in the night and they know that it is a coordinated, strategic effort that everybody is involved in, we will not make the progress that we need to make. It is just not going to happen. I talked to Mr. Snow. He was in and he said they did their thing last year. You notice they are starting too—in terms of the currency situation. I think that by the end of this year, something is going to happen on currency. When they had that news conference last year, when they all got together and said there wasn't a problem. I couldn't believe it because everything I saw said that they are doing this thing.

I am hopeful that—well, I see good things happening and our job now is to make sure it does, and as I mentioned, you guys are partners. Let us keep it up, and thank you very much for coming here today. We are going to probably come back 6 months from now. I am going to stay on this thing until we get it done. Thanks.

[Whereupon, at 12:54 p.m., the Subcommittee was adjourned.]

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APPENDIX

Senator George V. Voinovich, Chairman
Subcommittee on Oversight of Government Management,
The Federal Workforce and The District of Columbia
Finding Fakes: Reviewing the Strategy Targeting Organized Piracy

Committee on Homeland Security and Government Affairs
442 Hart Senate Building, Washington, DC 20510

Testimony of The Will-Burt Company, Orrville, Ohio 44667
Jeffrey 0. Evans, CEO, Chairman and President
June 14, 2005

Greetings Senator Voinovich and Honorable Members of the Subcommittee: On behalf of the employees of the Will-Burt Company and in support of other companies like ours, I appreciate and am thankful for the opportunity to address you here today.

Background Will-Burt, 87 years old, is a 100% employee-owned company located in Orrville, Ohio, and employs approximately 270 people. In 2004 Will-Burt was selected Ohio's Exporter of the Year and approximately 25% of its sales come from abroad. Will-Burt manufactures a variety of mast products for military and commercial sales. In particular, Will-Burt has developed, manufactures and distributes a mast that sets atop police and rescue vehicles called a "**Night-Scan**." Will-Burt has secured both patent protection and trademark protection in China for its Night-Scan products.

Will-Burt had been successfully marketing its products in China for a number of years, but its approach was not focused. A Chinese company, Shenzhen Superway, approached Will-Burt promising larger sales volumes if Will-Burt granted an exclusive license agreement to this company to act as Will-Burt's sole distributor throughout China. Will-Burt agreed to this arrangement but only after securing a contract whereby Shenzhen Superway agreed not to steal Will-Burt's product or violate its other protected interests. At first, sales increased dramatically. However, it was not long until the distributor determined there was more money in the transaction by knocking off the product and by-passing Will-Burt entirely.

The Agreement reached with the Chinese company, which called for certain sales goals, contained language to protect the confidentiality of Will-Burt's product information and also contained a non-compete clause. Unfortunately, the Chinese company was aware of a fact unknown to Will-Burt. The Chinese company knew it could "steal" "appropriate" "knock-off" a US company's product and engineering and steal the intellectual property associated with that product with knowledge that such action could be done with virtual impunity. The Chinese company got what it wanted, the product, knowing that its promises would not be enforced.

- See attachment 1 for excerpts of the Agreement

Within a year, Will-Burt noticed the distributor was not meeting its sales goals. Will-Burt came to learn the sales were off because the product had been reverse-engineered and was being sold outside of the contractual arrangement. Will-Burt discovered this fact shortly after a visit to China to determine why sales were down. During this visit Will-Burt discovered its mast had been counterfeited and was being marketed in China under the same trade name, and then under a different name, by companies affiliated with its prior distributor.

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Once the Chinese company learned how to manufacture the product on its own, it entirely disregarded the contract and Will-Burt's patent and trade mark rights and proceeded to manufacture and sell the product as its own.

- See Attachment 2 for copies of pictures which clearly illustrate the knock-off as a copy of the Will-Burt product.
- See Attachment 3 for sample pages from the manual for the Chinese knock-off which remarkably contains pictures from Will-Burt's manual and Will-Burt's web address. Of particular interest might be the picture of the Ohio Highway Patrol vehicle.

The Painful Reality Like many U.S. companies, The Will-Burt Company had a business relationship with a Chinese entity that pirated Will-Burt's technology and confidential information. Will-Burt was victimized by a Chinese business climate and legal system that fosters and condones the illegal appropriation of another's product, but makes any attempt to remedy this wrong a practical impossibility. In fact, *Will-Burt's end customer, the Chinese Public Security Bureau (in effect, the national police department), is purchasing illegal counterfeit products from Chinese companies which directly violate several of the laws they are in existence to enforce.*

The Loss Prior to the pirating, Will-Burt sold about $1 million dollars of product through a Chinese distributor in China in 2001 and then saw a decline to a little over one-half million dollars in 2002 when the pirating was initiated. Sales declined further to approximately a quarter million dollars in 2003 and lower yet in 2004. We believe that the pirated product now has a market in excess of $2 million per year in China. There are now at least two more companies that are violating Will-Burt's rights in China with counterfeit products. Worse, these illegal Chinese products are now being marketed outside of China, threatening Will-Burt's markets worldwide, in countries such as Taiwan and Israel.

The Current Status After Will-Burt learned of the counterfeiting, Will-Burt, at considerable expense, employed a law firm in China to investigate and recommend a course of action, whether political or legal. The conclusion can be summarized quite simply: "Even though everything you say is true, there is no effective remedy."

Will-Burt has recently entered into another arrangement with a distributor in China in an effort to recapture the sales lost to the counterfeiting company; unfortunately, Will-Burt's product must now compete against itself. Will-Burt has undertaken great expense in its attempt to be competitive in the Chinese market. As an example, 10 Will-Burt employees have traveled to China over the past five years for a total of more than 35 trips, and at significant cost to the company.

The fight is not over. Will-Burt is currently deploying other tactics and strategies, focusing on regaining Chinese market share through its current distributor, while working to contain the problem within the borders of China. Given the nature of the legal and economic system in China, both tasks will be difficult. This is particularly true when the playing field is uneven and the political processes employed by our government have not been successful in addressing this injustice.

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ATTACHMENT 1.a

6.2 **Trademarks and Names**. SHENZHEN SUPER WAY is hereby granted permission to use during the term of this Agreement the trademarks and trade names used by WILL-BURT in connection with the WILL-BURT Products. Such permission is expressly limited to uses necessary to the sale of the WILL-BURT Products under this Agreement, and SHENZHEN SUPER WAY hereby admits and recognizes WILL-BURT's exclusive ownership of such marks and names and the renown of WILL-BURT's marks and names throughout the world and specifically in the PRC. SHENZHEN SUPER WAY agrees not to take any action inconsistent with WILL-BURT's exclusive ownership of such marks and names.

6.3 **Confidentiality**. As a result of the business relationship contemplated by this Agreement, SHENZHEN SUPER WAY and WILL-BURT will disclose to each other business and/or other information, which is confidential. Such disclosure may be oral, written or electronic. Confidential information includes, but is not limited to, all information of any nature whatsoever related to SHENZHEN SUPER WAY's marketing, distribution and sales of the WILL-BURT Products, know-how, procedures, business practices, specifications, data, design, documentation, protocols, processes, strategic plans, sales and marketing plans,, customer lists and information, financial information, and proposed business arrangement relating to the WILL-BURT Products ("Confidential Information").

Both SHENZHEN SUPER WAY and WILL-BURT shall use the highest care in its access to and use of the Confidential Information, and shall (a) use the Confidential Information only as allowed under this Agreement; (b) not disclose Confidential Information to third parties, or use Confidential Information for its, or a third party's benefit; (c) return all Confidential Information, including all copies, summaries and materials related thereto, to the other party upon request along with a signed statement certifying that all information and materials have been returned; (d) disclose Confidential Information only to its employees who have a need-to-know the Confidential Information to assist in the discussions with the other party; and (e) advise all authorized recipients of the Confidential Information as to the confidential nature of the Confidential Information.

Nothing in is this Agreement creates any representation or warranty related to the accuracy, completeness or reliability of the Confidential Information. Unless specifically provided in this Agreement, this Agreement does not transfer any rights, or grant any licenses, to SHENZHEN SUPER WAY or WILL-BURT in or to the Confidential Information. The confidentiality provisions of this Agreement survive termination of this Agreement or any business relationship between the parties, and shall continue for so long a period of time as the Confidential Information is maintained as confidential.

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ATTACHMENT 1.b

7. **Training, Marketing, Products Development.**

7.1 **Training.** WILL-BURT will provide initial training in the areas of Service and Repair, as well as on-going Sales/Marketing training.

7.2 **Marketing.** SHENZHEN SUPER WAY will quickly establish a showroom in both Shenzhen and Daway. These showrooms will have on display at least one each of a representation of WILL-BURT's Lighting Products.

7.3 **Products Development.** SHENZHEN SUPER WAY will provide information quickly to The WILL-BURT Company concerning the improvement and development of potential new Products for the Chinese market. The WILL-BURT Company will also provide information on any new Products to SHENZHEN SUPER WAY. WILL-BURT will be the sole owner of all Products development and designs.

8. **Non-compete.**

8.1 **Non-compete.** Except as specifically provided in this Agreement, Shenzhen Super Way or any of its affiliated companies shall not compete with The WILL-BURT Company in the sale, manufacture or marketing of WILL-BURT's Products. Included by way of example, but without limitation, SHENZHEN SUPER WAY shall not develop, manufacture, distribute, promote, market, advertise, or sell Products that are competitive with the WILL-BURT Products covered in this agreement or for a period of two (2) years after the termination of this agreement. Nor shall SHENZHEN SUPER WAY solicit Customers or otherwise interfere with WILL-BURT's business or goodwill, and shall not become involved in any entity which takes such actions.

9. **Terms and Conditions.**

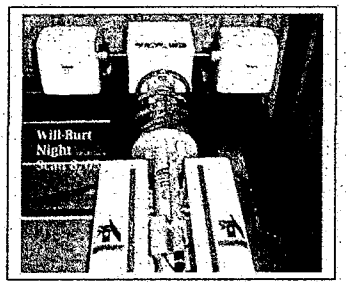
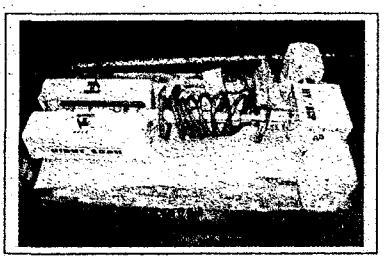
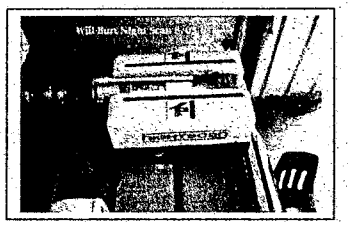
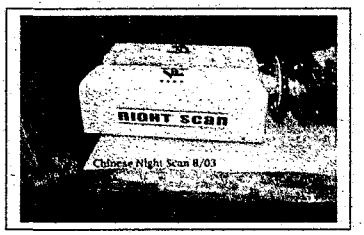
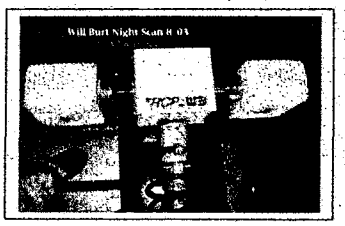
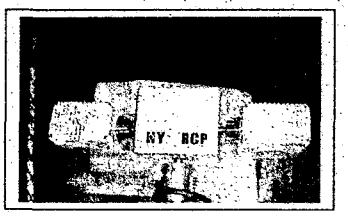
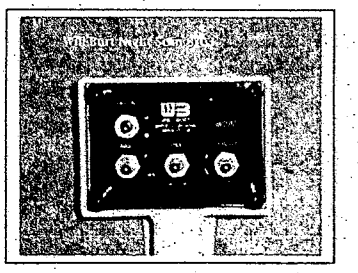
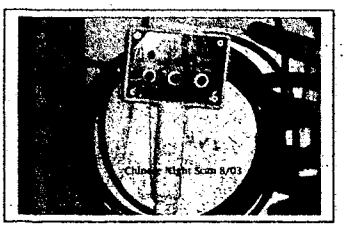
9.1 **Shipment.** Delivery will be Ex-Works (as per 1990 Incoterms), being the place of manufacture of the WILL-BURT Products. All shipments hereunder will be made in WILL-BURT's shipping packages, that conform to China and United States of America regulations. Title and risk of loss to the WILL-BURT Products purchased under this Agreement shall pass to SHENZHEN SUPER WAY upon delivery thereof to the carrier.

9.2 **Acceptance.** SHENZHEN SUPER WAY shall inspect all WILL-BURT Products promptly upon receipt in the territory and may make a claim under the contract if goods which fail in any significant respect to meet specifications due to manufacturing deficiencies. Such claims must be made by written notice to WILL-BURT within thirty (30) days of delivery to SHENZHEN SUPER WAY (including duty) or such right shall be deemed to have been waived. WILL-BURT shall, at its option and expense and in a timely manner, either repair or replace said goods provided that any such claim is honored and prior approval in writing is given.

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Attachment 2

Comparison Between Will-Burt and Chinese Counterfeiters

Will-Burt	Chinese Counterfeiters
	
	
	
	

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ATTACHMENT 3.a

EXCERPT FROM
COUNTERFEIT
MANUAL

NS2—140DC/12V 华鹰移动照明系统

用户指南

华鹰移动照明有限公司
地址：无锡市清扬新村南三路
邮编：214023
电话：(0510) 5760732、5765450
传真：(0510) 5785450
Email: willburt@elong.com

华鹰移动照明有限公司

Note: WILLBURT WEB SITE
www.willburt.com
E-mail: —— e willburt.com

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ATTACHMENT 3.b

EXCERPT FROM COUNTERFEIT MANUAL

英诚爬卅爬地用本公司的产品

为了您的成功

请仔细阅读本指南

PICTURE IN COUNTERFEIT MANUAL

NS2-140DC 应用写真

ORIGINAL WILL-BURT PICTURE. NOTE OHIO HIGHWAY PATROLMAN AND VEHICLE. NOTE ALSO THAT CHINESE MANUAL PRINTED THIS PICTURE IN REVERSE

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STATEMENT OF

THE HONORABLE JON W. DUDAS

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY
AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

before the

Committee on Homeland Security and Governmental Affairs

Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia

United States Senate

"Finding and Fighting Fakes: Reviewing the Strategy Targeting Organized Piracy"

JUNE 14, 2005

Introduction

Chairman Voinovich, Ranking Member Akaka, and Members of the Subcommittee:

Thank you for this opportunity to appear before you once again to discuss international intellectual property (IP) piracy and counterfeiting problems. In the year since I last testified before your Subcommittee, there have been several significant developments regarding the U.S. Department of Commerce's role in protecting IP both domestically and overseas. Secretary of Commerce Carlos Gutierrez is keenly aware of the increasing significance of IP protection for U.S. businesses and innovators and has made combating piracy and counterfeiting a top priority for the entire Department. I was pleased Secretary Gutierrez, who recently participated in his first trip to Russia and China as Secretary of Commerce, urged Russian leaders to strengthen protection of intellectual property rights (IPR). In addition, Secretary Gutierrez told Chinese business officials on the first day of his visit to China "Intellectual property rights violations are a crime and we don't believe we should be negotiating crimes with our trading partners."

As Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (USPTO), I am dedicated to marshalling U.S. government efforts to reduce the toll that IP theft takes on U.S. IP owners. I am very appreciative of the Subcommittee's interest in addressing additional ways to protect U.S. IP owners' assets, and I commend you for holding today's hearing on the U.S. government's efforts to combat international piracy and the STOP! (Strategy Targeting Organized Piracy) Initiative. STOP! is the most comprehensive U.S. government-wide initiative ever that offers a serious solution to combat the growing problem of global piracy and counterfeiting. The STOP! Initiative has brought together all the major players at the highest levels -- the Federal government, private sector and trade partners -- and is the culmination of a lengthy, multi-agency effort, in consultation with the private sector and Members

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of Congress. For the past four years, this Administration has vigorously worked to enforce IPR and clearly understands that IP is a vital component of our nation's economy. The STOP! Initiative allows us to leverage the Bush Administration's efforts and to provide new innovative solutions to better protect our nation's IPR. STOP! gives our nation's businesses concise steps to take to protect themselves from international pirates and counterfeiters who are robbing billions of dollars from the U.S. economy.

Scope of Global IP Piracy and Counterfeiting Problem

Increasingly, both the United States and our trading partners are relying on IP to drive economic growth. This is because competitive success in a market economy depends more and more on the IP assets held by an institution -- from the skills of its employees to the results of its latest research. IP-based businesses, such as the software and entertainment industries, now represent the largest single sector of the U.S. economy.

According to the International Intellectual Property Alliance, U.S. copyright industries continue to lead the U.S. economy in their contributions to job growth, gross domestic product (GDP), and foreign sales/exports. Between 1977 and 2001, the U.S. copyright industries' share of the GDP grew at an annual rate more than twice as fast as the rest of the U.S. economy. In 2002, the U.S. "core" copyright industries' activities accounted for approximately 6 percent of the U.S. GDP ($626.6 billion).[1] In 2002, the U.S. copyright industries achieved estimated foreign sales and exports of $89 billion, leading all major industry sectors, including motor vehicles (equipment and parts), aircraft and aircraft parts, and the agricultural sector.[2]

Unfortunately, the economic benefits of capitalizing on IPR have captured the attention of pirates and organized crime. The global criminal nature of IP piracy has effects in other areas as well. As former U.S. Attorney General John Ashcroft reported: "In addition to threatening our economic and personal well being, intellectual property crime is a lucrative venture for organized criminal enterprises. And as law enforcement has moved to cut off the traditional means of fund-raising by terrorists, the immense profit margins from intellectual property crimes risk becoming a potential source for terrorist financing." Senator Susan Collins, Chairwoman of this Committee, stated three weeks ago during her opening remarks of the "Counterfeit Goods: Easy Cash for Criminals and Terrorists" hearing that "The unclassified evidence linking terrorism and counterfeiting is compelling and spans several years and agencies."

USPTO and DOC Efforts to Combat IP Theft

Given these threats to U.S. economic interests and our national security, the USPTO and our colleagues in the Department of Commerce are working hard to curb IP crime and strengthen IP enforcement in every corner of the globe. Because American IP owners compete in a global marketplace, we must expand our efforts to promote IP protection internationally. We must make sure that American IP owners have sufficient knowledge and legal tools to fight piracy and counterfeiting. We also must provide foreign countries technical assistance on drafting and implementing effective IP laws and promoting the effective enforcement of IP rights.

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[1] "Copyright Industries in the U.S. Economy: The 2004 Report," Stephen E. Siwek, Economists Inc., prepared for the International Intellectual Property Alliance. "Core" industries include: newspapers, publishing, recording, music, motion pictures, radio, television broadcasting and computer software.
[2] "Id.

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The Role of the USPTO and IP Policy

The passage of the American Inventors Protection Act of 1999 (AIPA) (P.L. 106-113) set the stage for the USPTO to advise the President, through the Secretary of Commerce, and all Federal agencies, on national and international IP policy issues, including IP protection in other countries. USPTO is also authorized by the AIPA to provide guidance, conduct programs and studies, and otherwise interact with foreign IP offices and international intergovernmental organizations on matters involving the protection of intellectual property.

Our established Offices of International Relations and Enforcement carry out the functions authorized by the AIPA. These include (1) working with Congress to implement international IP treaties; (2) providing technical assistance to foreign governments that are looking to develop or improve their IP laws and systems; (3) training foreign IP officials on IP enforcement; (4) advising the Department of State and the Office of the U.S. Trade Representative (USTR) on drafting/reviewing of IP sections in bilateral investment treaties and trade agreements; (5) advising USTR on intellectual property issues in the World Trade Organization (WTO) and working closely with USTR in seeking assurances from our trading partners of higher levels of IP enforcement than those set forth in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs); and (6) working with USTR and industry on the annual review of IP protection and enforcement under the Special 301 provisions of the Trade Act of 1974. The USPTO also represents the United States in United Nation bodies, such as the World Intellectual Property Organization (WIPO), to help set the international standards for IP protection and enforcement.

The Strategy Targeting Organized Piracy (STOP!) Initiative

I am pleased to discuss with you the STOP! Initiative, the most comprehensive U.S. government-wide initiative ever advanced to demolish the criminal networks that traffic in fakes, stop trade in pirated and counterfeit goods at America's borders, block bogus goods around the world, and help small businesses secure and enforce their rights in overseas markets. What makes the STOP! Initiative so unprecedented is that for the first time, the issues surrounding IP enforcement have been raised to the highest levels in the Administration, and there is strong coordination by the NSC of the key agencies with a role to play in finding and fighting fakes. There are several important features of the STOP! Initiative, both international and domestic, that I would like to discuss.

International Efforts

Harmonizing the Trademark Application Process

The USPTO is seeking to simplify, streamline, and improve the cost efficiency of the trademark application process across borders in order to make it more efficient and less burdensome for right holders. The Trademark Law Treaty (1994) ("TLT"), administered by WIPO, harmonizes trademark application and renewal formalities among its members. It contains a maximum list of formalities that members can require during the trademark application and renewal process. From the intellectual property owner's perspective, the TLT saves time and money in trademark prosecution and maintenance. As part of the STOP! Initiative, the USPTO will seek to harmonize trademark formality standards with all WIPO members, especially EU countries, Japan and Korea, and will continue to actively work with like-minded countries to find a consensus on how best to

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revise the TLT so as to make the process of applying for and maintaining trademarks more streamlined, efficient, and cost effective for all trademark applicants.

Improving International IPR Regimes by Posting IP Attaché Abroad

The importance of intellectual property to the global economy cannot be overstated. With knowledge-intensive industries forming an ever-greater part of the world economy, intellectual property has become a key issue for both businesses and government policy makers all over the world. Fast moving developments in new technologies ranging from computer software to biotechnology, and the emergence of the Internet as a tool to move products across international borders pose new challenges for inventors and innovators, big and small companies, and creative artists, all of who must rely on intellectual property. It also poses challenges for government policy makers to find ways to effectively promote, protect, and enforce valuable economic and creative resources.

As the agency with the technical experts in intellectual property protection and enforcement, the USPTO is in a unique position to offer technical assistance, training, and capacity-building programs to other countries to address and strengthen intellectual property protection and enforcement worldwide. As part of these efforts, the USPTO currently deploys two intellectual property lawyers to work overseas on intellectual property rights issues; namely, at the U.S. Embassy in Beijing, China, and at the U.S. Trade Representative Mission to the World Trade Organization in Geneva, Switzerland. Placing our Attaché, who is fluent in Mandarin, for a three-year appointment in China highlights the seriousness of IP violations in China and has enhanced the USPTO's ability to work with Chinese government officials to improve IP laws and enforcement procedures in addition to assisting U.S. businesses to better understand the challenges of protecting and enforcing their IPR in China.

Building Coalitions

The ultimate success of the STOP! Initiative involves building coalitions with many of our like-minded trading partners, such as Japan, the United Kingdom, and France, who have all recently launched similar initiatives. Our goal is to fight against IPR thieves by seeking agreement with like-minded partners to block trade in pirated and counterfeit goods, conduct joint enforcement actions, and actively share information on the movement of suspected fake products. We are seeking to continue working with our partners in the G-8, Organization for Economic Cooperation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC) forum. Cooperation on new initiatives to improve the global intellectual property environment is essential to disrupting the operations of pirates and counterfeiters.

International Outreach

A delegation of U.S. officials from seven Federal agencies, including Deputy Under Secretary of Commerce for Intellectual Property Steve Pinkos, recently kicked off our international outreach effort to promote STOP! internationally. In April of this year, the STOP! Team began to open dialog with their counterparts in Hong Kong, Japan, Korea, and Singapore on how to stop the trade in fakes. On each leg of the trip, U.S. officials generated fruitful discussion and shared information on our efforts to combat the theft of inventions, brands, and ideas. This first leg abroad advanced our commitment by enlisting our trading partners in an aggressive, unified fight against intellectual

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property theft. Our outreach to Asia marked the beginning of a sustained global campaign to build international cooperation on the STOP! Initiative.

Last week, our USPTO representatives and officials from the STOP! agencies met with their counterparts and representatives from the private sector in five capitals throughout Europe. Our second global outreach tour was an important opportunity to continue developing enforcement mechanisms to raise the stakes for pirates and counterfeiters and share proposals on how to make it easier for businesses to protect their innovation at home and abroad.

We have tentatively planned that countries receptive to cooperation on STOP! will be invited to attend a meeting in Washington, D.C. (likely in the fall of 2005) designed to formalize their participation and finalize a work plan.

Domestic Efforts to Combat IP Theft

USPTO-Customs and Border Patrol (CBP) Initiative

The U.S. Customs and Border Protection (CBP) at the Department of Homeland Security provides the opportunity for trademark registrants to record their registration with them. This recordation provides the basis upon which the trademark registrant can stop the importation of infringing goods at the U.S. border. In addition to action by CBP on the basis of the information in the recordation form, a trademark registrant that has recorded the registration with CBP can also provide them with specific information about infringing shipments into the United States such that CBP can prevent importation of those shipments.

The USPTO believes that CBP border enforcement is not utilized by trademark owners to its fullest. To that end, USPTO is in the process of creating a notice that will be mailed to trademark registrants when they receive their Certificate of Registration that will direct them to the services that CBP offers. Furthermore, USPTO is in the process of putting a website link on our trademark homepage to the CBP IPR website which contains the form for recordation. Once the CBP electronic recordation system is online, USPTO's website will link directly to the CBP's recordation system.

USPTO believes that educating trademark registrants to the services offered by CBP will increase awareness of the importance for trademark owners to actively enforce their rights and address the issue of infringing importation directly. Such efforts will increase the value of the trademark goods for the trademark owner and will decrease the cases where consumers are confused and disappointed by infringing imported products that do not meet their quality expectations.

Hotline and Website

The USPTO manages a hotline, 1-866-999-HALT, established by the Department of Commerce to help businesses protect their IPR at home and overseas. The goal of the hotline is to empower U.S. businesses to secure and enforce their IPR by providing them the information they need to secure their patents, copyrights, and trademarks, and to enforce these rights in the United States and abroad. To date, the USPTO has received well over 400 STOP! hotline phone calls.

Callers receive information from IP attorneys at the USPTO with regional expertise on how to secure patents, trademarks, and copyrights, and on the enforcement of these rights. Businesses and

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innovators now have access to a place to learn more about the risks of global piracy and counterfeiting and how to protect their IP rights in both individual countries and in multiple countries through international treaties. In addition, we have established a link from our USPTO website to www.stopfakes.gov on the Department of Commerce's website, which provides in depth detail of the STOP! Initiative.

One key feature of the Internet website at www.stopfakes.gov is the country specific "Toolkits" that have been created by our embassies overseas to assist small and medium sized businesses with IPR issues in China, Korea, and Mexico. In the next few months, we expect additional Toolkits for more countries.

STOP! also seeks to increase global awareness of the risks and consequences of IP crimes through a section of its website, www.stopfakes.com/smallbusiness, that is specifically designed and operated by the USPTO to answer common questions of small businesses so they can better identify and address their IP protection needs. We're working with organizations like the U.S. Chamber of Commerce and the National Association of Manufacturers to help spread the word about the benefits of filing for IP protection, both domestically and abroad. We have also developed informational materials -- that can be downloaded off our website -- to help guide small businesses through the often-complicated world of intellectual property protection.

No Trade in Fakes Program

The Department of Commerce is in charge of another important component of the STOP! Initiative, the no-trade-in-fakes program that is being developed in cooperation with the private sector. This is a voluntary, industry-driven set of guidelines and a corporate compliance program that participating companies will use to ensure their supply chains and retail networks are free of counterfeit or pirated goods.

Small Business Concerns

While piracy, counterfeiting, and theft of intellectual property pose a serious threat to all American businesses, small and medium-sized businesses are particularly at risk in today's global marketplace because they often lack the knowledge and expertise to effectively combat it. Because small and medium-sized businesses typically do not have personnel or maintain large operations in other countries, American products and branding can be stolen without the rightful owner even being aware of it. Small businesses lack the knowledge, expertise, and resources to prevent the theft of their ideas, their products, and their good names and generally do not have the level of access to specialized legal counsel available to larger companies. In the fierce competition for the time of a typical small businessman or woman, things that go beyond the payroll, accounting and general operations -- including IP protection -- often get put on the back burner.

That is why the USPTO has launched an intensive communications program specifically designed to educate small businesses about protecting their intellectual property from pirates and counterfeiters -- both in the United States and abroad. The USPTO wants small businesses to consider IP protection at their inception -- to make it part of their business planning; to consider if they need to secure IP protection, what type of protection to apply for, when and where to apply, and how to go about it. We reviewed various market research studies earlier this year and found that only a small percentage of small businesses that do business overseas are aware that their IP protection in the United States does not travel -- that they have to gain protection in every country

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where they do business. Among small businesses that create and/or own intellectual property, research studies show a general lack of familiarity with when and how to protect their IP abroad.

Campaign on Protecting Intellectual Property Rights

For the reasons just noted, as part of our public affairs campaign, the USPTO is holding a series of seminars around the country to assist small and medium sized companies as to what IPR are, why they are important, and how to protect and enforce these rights domestically and internationally. The first of these workshops took place three weeks ago in Salt Lake City, Utah, and already, we have found an enormous amount of interest in USPTO's outreach program. While most attendees were from the State of Utah, others came from New York, Pennsylvania, California, Alaska, and Georgia. Aimed at small business owners and employees, the conference audience contained a cross section of IP awareness levels -- from the novice businessperson to the experienced IP attorney. I joined your colleague Congressman Chris Cannon, as well as nine USPTO staff attorneys, in providing information designed to raise awareness as to the importance of IP to businesses and to stress the importance of protecting IPR. During the two-day seminar, patent, trademark, and copyright experts, and lawyers from the USPTO provided attendees with specific details and useful tips about protecting and enforcing their intellectual property rights in the United States and around the world. We have reviewed the evaluation forms from our first event and it is my pleasure to report – and this is a compliment to our USPTO staff who participated – the feedback was overwhelmingly positive.[3]

We are replicating this program in other cities throughout several regions of the U.S. in the coming months. In each seminar lawyers and other professionals from the USPTO will provide attendees with specific details and useful tips about how to protect and enforce their IPR in the United States and around the world. Each program is tailored to the particular needs of the city host. Therefore, the topics of special interest to the city's business community will be addressed. These seminars will be useful to anyone with an already established business as well as entrepreneurs who are just starting up enterprises.

China Road Shows

The USPTO has a group of in house IP experts on China with extensive knowledge of IP legal regimes in China. USPTO's "China team" has been actively participating in DOC's "China road shows" to various cities in the United States, as part of an outreach effort to talk to small businesses about how to protect and enforce their IP in China. The STOP! Initiative is a large component of each of these seminars. So far, USPTO has visited several cities, including Fresno, CA; Kansas City, KS; Oakland, CA; Manchester, NH; Pittsburgh, PA, and plan for several more this year.

The USPTO has also developed its own China road show with another in a series to take place in Detroit, Michigan beginning this week. The seminar entitled "China's Impact on Intellectual Property: Understanding the New Realities within a Global Economy" will provide comprehensive information on protection and enforcement of intellectual property in China for companies ranging from small businesses contemplating entering the China market to large corporations with established presence in China. Topics include a review of recent laws and regulations promulgated by the Chinese government that may affect how you protect and enforce your intellectual property,

[3] The evaluations also had complimentary feedback such as "it was a great IP conference for small business." Again, I must brag about the efforts of my staff.

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what the U.S. government is doing to improve the intellectual property protection and enforcement environment in China, how best to protect your business assets to avoid intellectual property problems, how to recognize when your product has been infringed, and what to do if infringement occurs.

In addition, and closer to home, the USPTO's China team conducted two regional seminars earlier this year. During the February event in Washington, D.C., the China team discussed the Chinese criminal justice system for handling intellectual property rights infringement cases and the Chinese Supreme Court's recently issued Judicial Interpretations. In April, the USPTO sponsored a seminar on the general IP enforcement environment in China. Both of these seminars provided very useful information on protecting and enforcing IP rights in China.

This Week's Activities for Small Businesses

I am leaving today for a USPTO sponsored 2-day seminar in Detroit, Michigan on China's impact on IP – understanding the new realities within a global economy. Attendees will learn about Chinese IP laws and new developments, establishing and maintaining their IP portfolio in China, recognizing and responding to infringing activities, plus learn from private sector representatives of first-hand experiences related to IPR in China. In addition, I am pleased next month the USPTO, in recognition of the special threat posed to small businesses, will launch its "Small Business in a Big World" campaign as part of our efforts to educate small businesspersons about the importance of protecting their IP from piracy and counterfeiting.

Increasing and Communicating Enforcement

The USPTO's Office of Enforcement works to raise the level of and standards for intellectual property enforcement worldwide. The Office of Enforcement accomplishes this mission by, among other things: (1) training law enforcement personnel and other government officials throughout the world on best practices for, and the importance of, enforcing intellectual property rights; (2) drafting and negotiating strong, modern intellectual property enforcement provisions in free trade and other international agreements with U.S. trading partners; and (3) monitoring how intellectual property rights are enforced by other countries, and, where appropriate, engaging other governments on enforcement issues and demanding increased intellectual property protection.

Enforcement Training and Technical Assistance

The USPTO provides a variety of IP enforcement training and technical assistance activities. These programs are designed to foster respect for IP, encourage governmental and right holders' efforts to combat infringement, and promote best practices in the enforcement of IPR. Our technical assistance and capacity building initiatives grew out of U.S. trade obligations to promote IP protection and assist developing countries in meeting their obligations under the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement. In addition, we have responded to increasing requests by foreign governments for such training and technical assistance activities. Our efforts have had positive results in some countries, measured by decreasing levels of IP piracy and counterfeiting, and the implementation of stronger legal protections in many of the countries in which we have provided such training.

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Bilateral and Multilateral Negotiations

The USPTO advises many U.S. government agencies on issues involving IPR protection and enforcement involving countries, regions, and international organizations throughout the world. USPTO officials also support negotiations undertaken by the Department of Commerce, the USTR, and other officials on intellectual property matters in various countries. By working closely with the USTR, the U.S. Department of Justice, and the Department of Commerce's International Trade Administration, USPTO officials also work to provide for proportionate, deterrent penalties for commercial scale counterfeiting and piracy in East Asia, South Asia, and other regions.

Special 301

The USPTO advises the USTR in the administration of the Special 301 provisions in U.S. trade law, which requires the USTR to identify those countries that do not provide adequate and effective protection for IPR or lack of market access for products relying on intellectual property protection. The USPTO provides analyses of intellectual property laws of numerous countries, and participates in several bilateral consultations and negotiations conducted by the USTR under Special 301 and in the context of the U.S. trade agenda.

Conclusion

Mr. Chairman, the past year has presented great challenges and opportunities for all of the U.S. Government's agencies that have a role in fighting the theft of intellectual property. The Administration rose to these challenges in several ways, including the launching of the STOP! Initiative. The requirements on the Department of Commerce and USPTO's expertise in the international arena have grown dramatically in the last few years. These demands will continue to increase in the next few years, along with our obligations to meet our core patent examination and trademark registration functions.

However, while there are challenges both here and overseas, there is reason for optimism. I remain hopeful that with the continued support and partnership of Congress, we will be able to do even more to provide American businesses and entrepreneurs with the valuable IP information and protection they need. We will continue to work closely with the IP community, small businesses coast-to-coast, the STOP! team, and you Mr. Chairman to meet the huge challenge of combating piracy and counterfeiting. Clearly, in terms of the economy and national security, much is at stake. That is why our dedicated team of experts will continue to work tirelessly to protect American intellectual property all around the globe.

Thank you very much.

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TESTIMONY OF

VICTORIA ESPINEL

ASSISTANT U.S. TRADE REPRESENTATIVE (ACTING)

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

Finding and Fighting Fakes: Reviewing the Strategy Targeting Organized Piracy

June 14, 2005

Chairman Voinovich and members of the Committee, thank you for the opportunity to address your concerns over the protection of American intellectual property rights (IPR) under the Administration's Strategy Targeting Organized Piracy, or STOP! initiative.

As Ambassador Portman stated recently in reference to STOP!, "The protection of intellectual property is the cornerstone of an innovative and creative marketplace." Erosions to these protections cause American businesses, innovators and manufacturers to lose countless billions of dollars in lost revenue, investment, future sales and growth opportunities. Unfortunately, the global trade in fakes is growing. Interpol estimates that 7 percent of global trade in 2004 involved counterfeit goods, a figure equivalent to $512 billion that customs officials and industry experts anticipate will reach record levels at the end of this year.

We recognize that the trade in fakes is more than just a commercial problem. Consumer health and safety is threatened when cheap and unregulated goods are used, whether it is fake auto and airplane parts, household or other consumer products. A case in point, the World Health Organization estimates that up to 10 percent of medicines worldwide are counterfeit. In today's global production and distribution chain no country is immune. And, oftentimes consumers are paying top dollar for non-authentic products. It is in part for these reasons that Ambassador Portman has taken an active interest on IPR issues since being confirmed in April.

We are undertaking a comprehensive, multi-faceted approach to address the complexity of the global counterfeit and piracy problem. Aside from our participation in STOP!, we have been vigorously employing other tools in coordination with the interagency process to address global IPR theft. Noteworthy is our work with other agencies on the annual Special 301 Report, our Free Trade Agreements, usage of WTO mechanisms and various tariff preference programs such as the Generalized System of Preferences (GSP).

I am here today because Ambassador Portman and this Administration are committed to strengthening IPR protection and enforcement at home and abroad. We understand the growing frustration within the business community and Congress concerning the lack of enforcement of

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IPR by some of our trading partners. We are working diligently to address this situation. Through STOP!, Administration agencies are coming together with common purpose, focus and leadership to combat the trade in fakes as a complement to our existing efforts. We are excited about the prospects for STOP! and are enthusiastic participants on the team.

The STOP! Initiative

Announced in October of last year, the STOP! initiative is designed to bring together all the major players – the federal government, private sector and our trade partners – to take concerted action in cracking down on piracy and counterfeiting of tangible goods.

As a supplement to our existing IPR enforcement efforts, the Administration developed the STOP! initiative to combat the trade in fakes. STOP! has an international and a domestic focus. Eight federal agencies are actively engaged in STOP!, including USTR, the Departments of Commerce (along with the U.S. Patent and Trademark Office), Homeland Security (both Customs and Border Protection, and Immigration and Customs Enforcement), Justice, State, and the Food and Drug Administration.

Pursuant to the Administration's overall policy, USTR assists in the coordination of STOP! activities. We serve as a conduit for information sharing and promote collaboration on issues of relevance to STOP!. In this role we have facilitated outreach activities and sought to ensure that the STOP! team's core competencies were useful in wider IPR policy matters. On the international front, we and other STOP! agencies are encouraging other governments to coordinate their IPR efforts more effectively by designating a central focal point to cooperate with the U.S. agencies on STOP!. We and other STOP! agencies are working with these contacts to follow-up on items from bilateral meetings and have developed action plans with these countries to advance IPR enforcement and cooperation.

Since the announcement of STOP!, we have been coordinating with agencies on the STOP! team, working with the private sector, reaching out to stakeholders and taking comprehensive actions to realizing our October goals. Administration agencies have been hard at work. Building on domestic actions underway against IPR theft and enforcement and seizure problems prevalent in the global trade of infringing products, the STOP! team developed a strategy based upon its collective resources and a series of proposals to enhance international cooperation with other countries engaged in combating this growing global threat.

In early April, as members of the STOP! team, we began our international outreach efforts to explore how to increase cooperation, improve coordination, and open information exchange avenues. Key to these discussions has been the exchange of ideas. We have made clear to our counterparts that we are open to solutions. Our outreach has yielded results. We have gained insight into some of the key problems and host country solutions being pursued on a practical level to combat the trade in fakes. We anticipate that through greater dialogue, we will develop a common understanding with our trade partners of the problems requiring action. This understanding will in turn form the basis for further discussions on how to cement cooperation later this year.

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We have met with our counterparts in Singapore, Hong Kong, Japan, Korea, Germany, the European Commission, France and the United Kingdom, and representatives of the private sector in our initial outreach efforts. The reception has been positive and we believe there is potential for further cooperation. Among the 17 proposals we've shared, a number have generated interest and fruitful discussions. Some examples of the proposals discussed include:

- Networks that will enable police to better work with each other to investigate and arrest those who trade in fakes.
- Analytical supplements to border targeting and post-entry verification methods to identify businesses at high risk for IPR infringement.
- Best practices guidelines for government enforcement to stop the trade in fakes.
- Coordinating capacity building programs used to fight the trade in fakes so as to better utilize resources and deliver needs.
- Adoption of public awareness campaigns as a means to educate large audiences on the harmful effects of counterfeiting and piracy.
- Partnering with industry to develop a "No Trade in Fakes" program to keep the supply and distribution chain free of counterfeits.
- Improvements to the trademark application process by making it more common among participating countries.

In addition to our outreach efforts to Asia and Europe, we are in the process of exploring interest from Canada and Mexico. We hope to meet with our Canadian and Mexican counterparts in the near future. In the meantime, we will continue our close collaboration and further seek out other like-minded countries in the fight against the trade of pirated and counterfeit goods so as to determine their interest in cooperative activities.

We have tentatively planned that countries receptive to cooperation on STOP! will be invited to attend a meeting in Washington, DC (likely in the Fall of 2005) designed to formalize their participation and finalize a work plan for greater international cooperation.

Aside from our bilateral efforts on STOP!, the Administration is also coordinating our IPR efforts in support of the Administration's objectives in the G-8, the Asia-Pacific Economic Cooperation forum (APEC), the Organisation for Economic Co-operation and Development (OECD), various regional summits and in relevant daily activities we undertake on intellectual property matters. There are two recent examples of our success on this front:

- APEC – Less than two weeks ago, APEC trade ministers endorsed an anti-counterfeiting and piracy initiative jointly proposed by the United States, Japan, and Korea to strengthen intellectual property protection in the region.

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- OECD – Last month, OECD members agreed to the U.S. proposal for the OECD to update its 1998 study on the Economic Impacts of Counterfeiting and develop credible data to help governments make the case for strong action against IPR theft.

We've also witnessed successes stemming from our other activities, particularly actions associated with our Special 301 Report and the development of the FTAs.

Other Enforcement Efforts

Our FTAs reflect the level of protection and enforcement of IPRs in the United States. We recognize that in order for these relevant FTA provisions to be effective, provisions that provide for tighter border controls, and expeditious *ex parte* searches to gather evidence and higher damage awards (in particular statutory damages), to name a few, must be properly implemented and enforced. As a result, we ensure that the implementation process of our FTAs is a priority on par with their development and negotiation, and that adequate safeguards are provided for the enforcement of the agreement.

In the past year, we have worked closely with Australia and Singapore to ensure that their implementing legislation fully meets their FTA obligations to protect and enforce IPR. Currently, we are working very closely with Morocco to undertake similar efforts, and have added action plans for the implementation of FTAs in our current negotiations. We will continue to work closely with our trading partners and our industry on implementation of the FTAs.

Since the Bipartisan Trade Promotion Authority Act of 2002, we have completed and received Congressional approval of FTAs with Chile, Singapore, Australia and Morocco, have concluded negotiations with Bahrain and CAFTA-DR and have launched FTA negotiations with 13 more countries (Panama, Thailand, the Andeans, United Arab Emirates, Oman, and South African Customs Union countries). We will remain vigilant – with support and cooperation from our embassies and industry – to quickly respond to concerns over the possible lack of compliance or enforcement of FTA obligations that may arise in the future.

As we do in April of each year, USTR issued the Special 301 Report cataloging the IPR problems in dozens of countries worldwide. A country's ranking in the report sends a message to the world and potential investors about a country's commitment to IPR protection. The Special 301 has been a successful in encouraging countries to institute reforms or come forward with reform proposals to avoid elevation on the list. For example:

- Korea – After elevating Korea to PWL last year, Korea took significant steps earlier this year months to strengthen protection and enforcement of IPR such as, introducing legislation that will explicitly protect sound recordings transmitted over the Internet (using both peer-to-peer and web casting services); implementing regulations to address film piracy; and increasing enforcement activities against institutions using illegal software.

- Taiwan – In response to our out-of-cycle review last year, Taiwan's legislature approved a number of amendments to its copyright law that provide greater protection for

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copyrighted works and increase penalties for infringers. In addition, Taiwan authorities made permanent an IPR-specific task force that has increased the frequency and effectiveness of raids against manufacturers, distributors, and sellers of pirated products.

Mention in the Special 301 Report and the issues raised in it oftentimes remains unresolved for years, while other times a mention in the report compels authorities to take immediate enforcement action. Such cases are best exemplified by the longstanding and serious problems of optical media piracy in Pakistan, Malaysia and the Philippines, where both Malaysia and the Philippines have made measurable progress and Pakistan has undertaken recent IPR enforcement actions. The Philippines, for example, recently passed legislation on optical discs, and we are currently monitoring the enforcement of that law. Pakistan, one of the world's worst offenders, has shown movement through the closure of six well known plants that have been churning out millions of pirated optical disks for years.

Conclusion

We appreciate the Committee's interest in and will continue to work closely with Congress in the battle against the trade in fakes. Stopping this illicit trade requires a comprehensive, intensive and sustained effort. We recognize there are many challenges to overcome. We will press forward with the tools and resources provided us in addressing these concern with the goal of improving the situation for American owners of IPRs worldwide. We will continue to work with other federal agencies, coordinate with our stakeholders and reach out to our trade partners to develop mechanisms to comprehensively combat IPR theft through all means at our disposal. Stopping the trade in fakes and making the environment more welcoming to our right holders is a top priority.

Mr. Chairman and members of the Committee, thank you for providing me with the opportunity to testify. I appreciate the guidance you've provided and the vigilance this committee has shown toward tackling the important issue of IPR protection. I look forward to working with you and your staff to continue to devise solutions for dealing with problems of piracy and counterfeiting. I look forward to your questions.

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STATEMENT BY
DANIEL BALDWIN
ACTING ASSISTANT COMMISSIONER
U.S. CUSTOMS AND BORDER PROTECTION

HEARING ON "FINDING AND FIGHTING FAKES: REVIEWING THE STRATEGY TARGETING ORGANIZED PIRACY"

June 14, 2005

Good morning Chairman Voinovich, members of the Subcommittee. Thank you for this opportunity to testify, and update you on the steps that the Department of Homeland Security has taken to improve the enforcement of intellectual property rights as part of the Administration's Strategy Targeting Organized Piracy (STOP). Under Secretary Asa Hutchinson participated in the STOP! announcement with DHS's interagency partners. Both U.S. Customs and Border Protection (CBP) and U.S. Immigrations and Customs Enforcement (ICE) are full participants in the STOP! initiative.

My testimony focuses on the contributions that CBP, the primary agency responsible for border enforcement, has made to STOP.

CBP, as the guardian of the Nation's borders, safeguards the homeland -- foremost, by protecting the American public against terrorists and the instruments of terror, while at the same time enforcing the laws of the United States and fostering the Nation's economic growth through lawful travel and trade, including the laws and regulations related to the protection of IPR. Each year, the number of seizures of counterfeit and pirated merchandise made by the Department of Homeland Security rises dramatically. Since 2000, the number of seizures has more than doubled. Interpol estimates that 7% of global trade involves counterfeit and piratical goods. Although CBP's IPR enforcement efforts have been successful, the flood of infringing imports requires us to explore new ideas for IPR enforcement.

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Today, I will discuss new approaches CBP is taking as part of STOP to enhance and complement traditional methods of DHS's IPR enforcement. With its STOP initiatives, CBP is diversifying its IPR enforcement portfolio and moving beyond our traditional methods. These approaches improve our ability to identify high-risk companies and shipments while maintaining the flow of legitimate trade. In addition, our STOP initiatives include greater cooperation with the business community and other government agencies to provide improved IPR protection. CBP has

- Created and tested an innovative statistical model for assessing IPR risks at our borders
- Established a program of post-entry verifications, or "IPR audits", designed to identify business practices that leave us vulnerable to IPR violations, and to determine the scope of a company's IPR violations
- Collaborated with PTO to make it easier for businesses to enforce their trademark rights at the border
- Issued proposed regulations to enable CBP to better enforce U.S. copyright[s] protection for sound recordings and motion pictures, or similar audio-visual works.

Statistical Risk Modeling for IPR Enforcement

CBP's IPR risk model is designed to enhance current efforts by CBP officers to identify counterfeit and pirated goods at our borders. It builds on CBP's already strong border enforcement efforts by providing greater analytical targeting for IPR infringing shipments and importers.

The IPR risk model is a computer–based statistical model that diversifies CBP's approach to risk assessment and targeting; complements current enforcement efforts; and offers potential improvement in utilization of resources. CBP uses traditional

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targeting programs and reviews of transaction documentation to identify and target imports for examination for potential IPR violations. These two approaches depend upon the experience and knowledge of CBP officers, and require significant use of officer resources. Unlike our traditional approaches, the model applies statistical analysis techniques and external information to assess IPR risk. The risk model gives significant emphasis to CBP's IPR enforcement and import data while infusing other agency assessments on IPR risk, including information from the USTR's Special 301 Report on IPR threats throughout the world. CBP is also consulting with industry, including the National Association of Manufacturers and representatives of the pharmaceuticals industry, to identify and include risk indicators into the CBP IPR risk model where feasible.

The model consists of various statistical factors that form a "model" of the significant characteristics of IPR infringing imports. These factors are combined using a two-step statistical formula to calculate risk scores for individual imports. Scores for individual importations can be aggregated to provide an assessment of IPR risk for entities such as importers.

CBP has successfully completed first phases of testing the model and is working toward national validation of the model. The IPR risk model is being developed to identify both individual imports and companies found to be high risk for IPR violations. Individual imports are targeted for cargo examinations. Importers identified as being high-risk may be candidates for CBP's post-entry verification, another of CBP's STOP initiatives aimed at increasing the effectiveness of IPR enforcement efforts.

Detecting IPR Vulnerabilities through Post-entry Verifications

CBP is testing ways to expand IPR enforcement efforts that go beyond the traditional examination of containers at the border by bringing a new focus and new skills to IPR enforcement. Specifically, CBP is employing the skills of auditors and other

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resources to the evaluation of a business's systems to determine if there are weaknesses that lead to IPR violations.

Approximately two dozen companies will be subject to an IPR audit this year, based upon risks identified by the newly developed IPR risk model and/or as evidenced by past IPR violations.

Based on preliminary findings from ongoing audits, violations have been identified in several areas including importers of electronics, toys, textiles and recreational motorized cycles. Efforts are also underway to determine the appropriate remedial or punitive actions necessary.

CBP auditors review such documentation as purchase records, product specifications, general and subsidiary ledgers, and payment records. Financial records hold key information that allows auditors to identify potential IPR violations. Such information includes:

a) Purchase Orders provide details about the goods being purchased, including a description of the goods, price per unit, quantity, shipping instructions, delivery date, and payment terms. When counterfeit goods are seized, purchase orders can be instrumental in determining the quantity of infringing goods the manufacturer was contractually obligated to produce. In addition, purchase orders will often indicate the parties involved in the manufacture and/or trading of the illicit goods.

b) Product Specifications provide detailed technical specifications and requirements of products and are used by designers, engineers, and quality managers involved in the manufacturer of goods. Reviews of product specifications often indicate placement of trademarks or copyrights, or specify use of trademarked products (i.e. YKK zippers or Intel processors)

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c) General and Subsidiary Ledgers are where all accounting transactions are recorded for a company. When a company legitimately has rights to use a copyright or trademark, evidence can be found in the financial records of license agreements and royalties. Detailed transactions are typically recorded in subsidiary ledgers, such as accounts payable and inventory. These accounts can be instrumental in tracing the parties being paid for the illegal goods as well as the quantity of goods flowing through the inventory.

d) Payment Records provide details on remittances made for purchases. Companies conducting international business often make use of letters of credit or wire transfers to pay for products. Analysis of the remittances determines the parties involved in the counterfeiting scheme and the illicit financial gains.

Audits may also review for business records that are kept by small companies, such as:

a) Correspondence rather than formal purchasing contracts, purchase orders, or product specifications.

b) Financial records kept in an ad hoc form, rather than a formal system.

c) Payment records that could be made by alternate remittance systems, such as money orders, cashier checks, credit cards, traveler's checks, Western Union, or various other electronic payment methods.

Due to its initial success, additional companies will be selected for post-entry verifications and the audit findings will be incorporated into the IPR risk model.

Facilitation of Recordation of Trademarks

CBP and PTO are currently working to create a hyperlink from PTO's website to a CBP webpage explaining the recordation process and providing the recordation

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application. This link will help businesses, particularly small businesses lacking experience in working with CBP, to better enforce their trademarks rights.

In preparation for establishment of this link, CBP is currently in the final phases of developing a real-time, on-line recordation system through which recordants will be able to apply and pay for recordations at the CBP website. CBP expects that the new system will greatly reduce the length of time it takes to record intellectual property rights with CBP, and significantly reduce CBP's administrative burdens related to recording both trademarks and copyrights. We expect to roll out the on-line recordation system later this summer. When this is completed, we will be ready to establish a link at the PTO website.

Proposed Copyright Regulation

CBP issued proposed regulations to allow U.S. copyrights for sound recordings and motion pictures, or similar audio-visual works, to be recorded with CBP while copyright registration is pending at the Copyright Office. The early recording will provide CBP with the information it needs to prevent importation into the U.S. of pirated goods.

CBP has received and analyzed comments from the public on the proposed rulemaking and has drafted its final rule accordingly. At this time, CBP and DHS are currently reviewing the final rule through the normal approval process.

Conclusion

With our STOP initiatives, CBP has broken new ground in the fight against counterfeiting and piracy. We will continue to work with DHS Headquarters, our colleagues at ICE, and our other partner agencies, as well as industry, to continuously improve our targeting and enforcement efforts to deprive IPR violators of their illicit financial gains. Thank you again, Chairman Voinovich, and the members of the Subcommittee for this opportunity to testify. I would be happy to answer any questions you may have.

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Department of Justice

STATEMENT

OF

LAURA H. PARSKY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

CONCERNING

FINDING AND FIGHTING FAKES:
REVIEWING THE STRATEGY TARGETING ORGANIZED PIRACY

PRESENTED ON

JUNE 14, 2005

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Introduction:

Chairman Voinovich, Ranking Member Akaka, and Members of the Subcommittee, thank you for the opportunity to discuss the Department of Justice's efforts to protect intellectual property rights through criminal enforcement, as well as the Department's role in the Administration's Strategy Targeting Organized Piracy ("STOP!") Initiative.

One of the most important contributions the Department makes to the protection of intellectual property rights is the prosecution of organized criminal networks that steal the creative works of U.S. businesses, both large and small. This is also one of the Department's core missions in support of the STOP! Initiative. To fulfill this mission, the Department has developed an aggressive and creative prosecution strategy -- one that is grounded in lessons learned from actual investigations and prosecutions of intellectual property crimes, and one that we are constantly re-assessing and evaluating for opportunities for improvement and growth.

In addition to its prosecution mission, the Department's principal contribution to the STOP! Initiative is the work of the Department of Justice's Intellectual Property Task Force ("IP Task Force"). Last fall, the IP Task Force completed a wide-ranging and exhaustive review of the Department's intellectual property enforcement efforts. Its collective recommendations were issued in a 70-page report last October. The Department is now engaged in the considerable and important work of implementing those recommendations.

The Department also participates in the interagency collaboration and international outreach that is fundamental to the STOP! Initiative's mission. Department officials have participated in the recent STOP! tours to Asia and Europe, and we are working with other agencies to increase public awareness of the harms of intellectual property theft and to help U.S. businesses work with foreign law enforcement to protect intellectual property rights.

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My remarks today are intended to describe in more detail the Department's prosecution strategy and some of its recent successes, as well as to provide an overview of the Department's contributions to other aspects of the STOP! Initiative.

1. Prosecuting Organized Crime Groups Engaged in Intellectual Property Theft

a. Training and Retaining Expert Intellectual Property Prosecutors

No prosecution strategy can be effective if it lacks the skilled personnel to carry it out. The Department therefore has implemented a three-part approach to ensure that there is a sufficient number of trained and experienced prosecutors to effectively combat the ever-increasing number and complexity of intellectual property offenses.

First, within the Criminal Division, the Computer Crime and Intellectual Property Section ("CCIPS") devotes 11 of its 32 attorneys to intellectual property criminal enforcement issues, including prosecution, legislative reform, and international training and technical assistance. CCIPS' prosecution strategy stresses the development of undercover investigations that, in turn, lead to multi-district and international investigations and prosecutions of organized criminal groups. As the complexity and frequency of online intellectual property crimes have increased, demand for CCIPS attorneys has also increased: in the past three years, CCIPS has experienced a six-fold increase in its prosecution caseload. CCIPS also provides training and on-call, 24/7 legal guidance to agents and prosecutors in the field; provides technical assistance on relevant legislative issues; and assists in the development of Department and Administration policy on intellectual property issues.

The second component of the Department's approach is the designation of Computer Hacking and Intellectual Property ("CHIP") coordinators in every U.S. Attorney's Office in the country. As with all federal crime, primary responsibility for prosecution of federal intellectual property offenses falls to the 94 U.S. Attorneys' Offices across the United States and its territories. CHIP Coordinators are Assistant U.S. Attorneys who are given specialized training in intellectual property and certain types of computer crime, and who serve as subject-matter experts within their districts. Identifying a CHIP Coordinator in each District ensures that a prosecutor with training and experience in intellectual property crimes is available wherever and whenever an offense occurs. The position of CHIP Coordinator is often a highly-sought designation, and many of the current CHIP Coordinators have been part of the program since the creation of its predecessor program – the Computer and Telecommunications Coordinator (CTC) program -- in 1995.

The third component of the Department's approach is the creation of CHIP Units in certain districts where the incidence of intellectual property and hi-tech crimes is higher and is more likely to significantly impact the national economy. Former Attorney General Ashcroft

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created 13 CHIP Units across the United States, and this past January, in response to the recommendations of the IP Task Force, five additional CHIP Units were created. The new Units are located in Washington, DC; Nashville, Tennessee; Pittsburgh, Pennsylvania; and Orlando, Florida. CHIP Units consist of a concentrated number of trained prosecutors in the same U.S. Attorney's Office, and they have been successful in increasing the enforcement of criminal intellectual property laws. The most recent data shows an increase of 46% in the number of defendants charged in districts with CHIP Units as compared to the year before these Units were activated.

CCIPS provides regular training and support to this network of CHIP Units and Coordinators. Last October, CCIPS provided two full days of training to all CHIP Coordinators on various aspects of criminal intellectual property prosecutions, and it is organizing a 3-day course on intellectual property crime at the National Advocacy Center in Columbia, South Carolina in November 2005. In addition, CHIP Units have been providing regional training for federal agents. For example, on February 1, 2005, the CHIP Unit in Los Angeles provided a full-day course for the Federal Bureau of Investigation ("FBI"), U.S. Secret Service, U.S. Immigration and Customs Enforcement ("ICE"), Internal Revenue Service - Criminal Investigation Division, and other law enforcement agencies on intellectual property investigations.

Through implementation of this three-part approach, the Department has developed a highly-motivated and effective network of more than 200 skilled federal prosecutors who are capable of handling the complex intellectual property investigations and prosecutions that are central to the Department's overall prosecution strategy.

b. Prosecuting Organized Crime Networks

Both the STOP! Initiative and the Department's IP Task Force have given the highest priority to the prosecution and dismantling of multi-district and international criminal organizations that commit intellectual property crimes. The Department's increased focus on– and allocation of resources to—the prosecution of these organizations has paid dividends in the number and quality intellectual property cases prosecuted. The Department has given special priority to those online groups and networks that are the original source or supply for pirated and counterfeit goods, as well as to novel prosecutions that are likely to have the greatest deterrent impact on intellectual property criminals and the general public.

Online Copyright Piracy

The Department has developed a number of successful undercover investigations and prosecutions targeting the Internet piracy groups that steal digital works, strip away or circumvent embedded copyright protections, and distribute those works worldwide on the Internet — often before the movie, game, music CD, or software is released for commercial sale to the public.

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i. Operation D-Elite:

A recent example of the Department's success against Internet piracy is Operation D-Elite. On May 25, 2005, FBI and ICE agents executed search warrants at 10 locations across the United States as part of this ongoing investigation. Those targeted included the leading members of an international peer-to-peer ("P2P") network known as Elite Torrents. Elite Torrents used the new BitTorrent file sharing technology to allow its 133,794 members to distribute copyrighted software, movies, and music. As part of this comprehensive enforcement effort, federal agents also seized the Elite Torrents main computer server and replaced the publicly accessible web page with a strongly worded law enforcement message. A copy of that web page is attached as an exhibit to my written testimony. This ongoing investigation, being handled by the Computer Crime and Intellectual Property Section of the Criminal Division, is novel in that it is the first to target the misuse of BitTorrent P2P technology.

Although this investigation is still developing, Operation D-Elite has already had a significant deterrent impact as a result of the substitute web page. Any one of the approximately 133,000 members of the EliteTorrents network who attempted to log on to the main server on or after May 25th would have been greeted with the FBI / ICE announcement that the site was shut down. In the first week alone, the web page was viewed more than 500,000 times.

ii. Online Piracy and the Link to Hard Goods—Operation Fastlink:

Although many participate in underground Internet piracy networks to obtain copyrighted works for free, others seek financial gain by converting the digital copies of these works to optical disc form and selling them for profit. An example of this was uncovered after another highly significant online piracy takedown last April.

On April 21, 2004, the Department led the single largest international enforcement effort ever undertaken against online piracy - Operation FastLink. Operation FastLink resulted in 120 simultaneous searches worldwide (80 in the United States) by law enforcement entities from 10 foreign countries including Belgium, Denmark, France, Germany, Hungary, Israel, the Netherlands, Singapore, Sweden, and Great Britain and Northern Ireland. Law enforcement officials in Spain subsequently took action against related targets in that country.

In the months leading up to the enforcement action on April 21, 2004, CCIPS relied heavily on the network of CHIP Coordinators and CHIP Units to ensure that warrants were signed timely, and that simultaneous execution could proceed smoothly across the U.S. Additionally, in the months before takedown, CCIPS attorneys and FBI case agents traveled to Europe and met with each country involved to provide training on the operation of online piracy organizations and the law enforcement techniques used to identify, investigate, and prosecute them.

Operation FastLink has identified over 100 individuals believed to be engaged in online piracy, many of them high-level members or leaders of online piracy release groups (aka "warez" groups) that specialize in distributing high-quality pirated movies, music, games, and software over the Internet. Additionally, more than 200 computers have been seized worldwide,

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including over 30 computer servers that functioned as storage and distribution hubs for the online piracy groups targeted by this operation.

This is the largest global enforcement action ever undertaken against online piracy. To date, eight members of the organized piracy groups targeted by Operation FastLink have been convicted in the U.S., and many more prosecutions are ongoing.

Once one of these online piracy groups "cracks" a copyrighted work by disabling or removing the embedded copy protections, the transition of the "cracked" version from the online world to the profitable criminal enterprise of creating and selling pirated optical media is rapid. For instance, as a result of the searches they executed as part of Operation FastLink in Singapore, authorities arrested Ching Seen Ming in April 2004. Ching conspired with his brother to mass produce and sell optical discs containing the latest warez software, games, and movies throughout Asia and the Middle East. Ching obtained the "cracked" releases of various software, movies, and games by downloading them from a warez computer server managed by the warez group Fairlight. Ching would then pay members of Fairlight between $500 and $1,500 for the downloaded works, and would pay as much as $5,000 in order to obtain cracked versions of software, games, or movies that had yet to be released even to the warez underground. Ching was convicted in Singapore and sentenced to 15 months of imprisonment.

International Cooperation

i. Operation Buccaneer and Operation Spring

Operation FastLink shows that, in order to take effective action against organized criminal networks engaged in intellectual property theft, coordinated international enforcement is necessary. The Department's approach to international enforcement and cooperation cannot and does not end at the moment of arrest. We are committed to providing ongoing support to foreign prosecutions, thereby helping to ensure strong criminal intellectual property enforcement worldwide.

An example of this commitment is Operation Buccaneer. On March 6, 2005, the United Kingdom convicted two defendants of serious fraud charges after a four-month jury trial for which the Justice Department provided 8 witnesses and extensive prosecutorial assistance in the years of discovery and disclosure disputes leading up to the trial. These two defendants were part of Operation Buccaneer, a joint CCIPS / Customs (now ICE) undercover investigation targeting leading global Internet piracy organizations. The UK convictions brought the total number of Buccaneer convictions worldwide to 40 (30 in the U.S.). On May 6th of this year, the UK defendants were sentenced to terms of imprisonment of 2 and 2½ years, respectively, in what the Queens Counsel called "the first prosecution for software piracy on this scale conducted in this country." In public comments to both the court and the press, the Queens Counsel praised the "unprecedented" cooperation and assistance provided by the Department of Justice's Computer Crime and Intellectual Property Section throughout the investigation and prosecution.

Where foreign authorities are reluctant or unable to prosecute intellectual property criminals whom the Department considers a high priority, the Department is willing to seek the extradition of those offenders for prosecution in the U.S. In another case arising from the

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Buccaneer investigation, the Department is now seeking the extradition from Australia of a well-known international copyright pirate, Hew Griffiths. This is the first time the U.S. has ever sought the extradition of an individual based solely on online violations of U.S. copyright law. Over the past two years, Mr. Griffiths has fought extradition unsuccessfully in a succession of court cases in Australia. He now has appealed to the country's highest court. These efforts signal the United States' willingness to utilize all of the tools available to prosecute intellectual property criminals; geographic boundaries will no longer protect those who engage in these crimes.

Another recent example of international cooperation that produced a successful result is Operation Spring, in which U.S. law enforcement worked with their counterparts in China to thwart the international shipment and sale of illegally manufactured DVDs. In this cross-border effort, ICE worked with Chinese law enforcement officials to investigate an international piracy ring involved in the illegal sale of thousands of infringing movie DVDs via the Internet. As a result, in April 2004, four co-conspirators -- including two U.S. nationals and two Chinese nationals -- were convicted in China for selling more than 133,000 pirated DVDs to customers in more than 20 countries around the world. Defendant Randolph Hobson Guthrie III, the leader of the organization, was sentenced to 30 months in Chinese prison, a fine of approximately $60,000, and deportation after serving his term. This case represents a breakthrough in law enforcement cooperation on intellectual property crime between the U.S. and China, and we are seeking ways to identify additional opportunities for similar collaboration with the Chinese.

Protecting Business Trade Secrets

The Department's prosecution strategy also prioritizes cases involving trade secret theft made illegal by the Economic Espionage Act of 1996, particularly those cases where U.S. businesses are threatened by unscrupulous foreign competition.

One recent example involves the FBI's arrest of two former employees of Metaldyne Corporation of Plymouth, Michigan, on charges that they stole Metaldyne's trade secrets to enable a Chinese business to produce exact replicas of products at a reduced price. Chinese-based Chongqing Huafu Industry Co. is alleged to have obtained the Metaldyne trade secrets from the defendants in an effort to undercut the price that Metaldyne charged for a sophisticated metal rod used in truck engines. One defendant, Fuping Liu, worked at Metaldyne as an engineer until quitting in April 2004 to work for a competitor, while his co-defendant, Anne Lockwood, was a former vice president of sales at Metaldyne.

The FBI arrested Liu and Lockwood after investigation allegedly revealed a well-developed plan to produce Metaldyne's products in China, which included multiple trips to meet with potential Chinese business partners and the theft of numerous documents detailing Metaldyne's proprietary production methods. The bulk of the documents allegedly stolen originated with Metaldyne, but Liu is also accused of stealing confidential information from Metaldyne competitor GKN Sinter Metals of Auburn Hills, Michigan, and passing this information to Lockwood. The prosecution, which is being handled by a CHIP Coordinator in the U.S. Attorney's Office in Detroit, Michigan, is ongoing.

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Protecting Public Health and Safety

In addition to protecting businesses' trade secrets, the Department also is carefully monitoring the growing public health and safety threat posed by counterfeit products ranging from baby formula to batteries to pharmaceuticals. Counterfeit consumer products not only hurt the sales and reputation of trademark holders, but often pose serious risks to the health and safety of the general public.

One example of this occurred in April of last year when an Alabama man was sentenced to 41 months of imprisonment and ordered to pay $45,305 in restitution, after pleading guilty to twenty-eight counts of counterfeiting and pesticide misbranding charges. The defendant sold mislabeled and adulterated pesticides to municipalities and private businesses in a number of southern states. These pesticides were needed to control mosquitoes and the West Nile Virus.

2. The Department of Justice's Contributions to the STOP! Initiative

a. The Department of Justice's Task Force on Intellectual Property

In addition to the ongoing implementation of its overall prosecution strategy, a key component of the Department's other contributions to the STOP! Initiative has been the Department of Justice's Task Force on Intellectual Property and the implementation of the more than 25 separate recommendations in the IP Task Force's October 2004 report. Last year, the IP Task Force undertook an extensive, six-month review of the Department, examining all aspects of intellectual property protection including criminal, civil, and antitrust enforcement; legislation; international coordination; and prevention. After this comprehensive review of Department practice and policy, then-Attorney General Ashcroft released the IP Task Force's report analyzing the Department's efforts and recommending numerous measures to improve and enhance the Department's protection of the nation's creativity and innovation. On March 9, 2005, approximately four weeks after being sworn in as the 80th Attorney General, Attorney General Alberto Gonzales renewed the Department of Justice's commitment to the IP Task Force and to continuing the implementation of the recommendations contained in the IP Task Force's report.

Although the recommendations of the IP Task Force are numerous and wide-ranging, the Department has already implemented many of them. For instance, the report called for the expansion of the Department's CHIP Program and the designation of CHIP Coordinators in every U.S. Attorney's Office nationwide. In January 2005, the Department of Justice created five (5) new CHIP Units, bringing the total number of CHIP Units nationwide to eighteen (18). Each Unit received funding to hire two additional prosecutors to address intellectual property offenses in their respective districts. In addition, the Department designated a CHIP Coordinator in every U.S. Attorney's Office in the country, bringing the total CHIP network to a total of more than 200 trained prosecutors.

Further, the Department has enhanced and improved its delivery of intellectual property training programs for foreign prosecutors and investigators by developing key relationships with foreign officials directly responsible for IP enforcement. For example, the Department worked with Mexican government officials to provide a three-day seminar in December 2004 for

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intellectual property prosecutors and customs officials from Mexico. Department attorneys met with Mexican authorities in Washington, DC, and provided a detailed overview of criminal IP enforcement in the United States. Following the December meetings, the Department and the U.S. Embassy in Mexico City have worked with Mexican officials to provide training on trademark identification, and are planning an additional training program in Mexico City on counterfeiting investigations. Similar efforts are underway in Panama and are planned in several Eastern European and Southeast Asian countries known for producing pirated and counterfeit goods.

Many of the other comprehensive recommendations in the IP Task Force report are part of an ongoing process of implementation and will require the long-term efforts of various components within the Department. For instance, the report called for continued prosecution of national and international criminal organizations that commit intellectual property crimes. I have already provided examples of the Department's considerable success in this area during the past year alone. However, we will not rest on this record; we are committed to doing more.

Moreover, national and international takedowns such as those in Operations FastLink and D-Elite are not one-hit events. These takedowns create hundreds of new potential prosecutions, both national and international, all of which require the ongoing commitment of Department prosecutors. For instance, as a result of investigations like Operation Buccaneer and Operation FastLink, the Computer Crime and Intellectual Property Section has seen a 600% increase in its pending intellectual property criminal workload, from 27 to more than 170 cases over the last three (3) years alone. These cases must and will be prosecuted, but it will be a longer-term process.

b. The Department Is Committed to Interagency Coordination on Intellectual Property Protection

In addition to implementing the IP Task Force's recommendations, the Department has also worked closely with other STOP! agencies to ensure a unified, consistent approach to intellectual property protection from the Administration as a whole.

1. The Department is Engaged in Multi-Agency International Efforts to Protect Intellectual Property

One of the goals of STOP! has been the development of international interest in and commitment to the protection of intellectual property. The Department of Justice took part in both the Asia STOP! trip in April, which included meetings with officials in Singapore, Hong Kong, Japan and Korea, and the recently concluded European trip to the United Kingdom, France, Germany, and the headquarters of the European Union in Belgium.

During each trip, the Department met directly with law enforcement colleagues who share the Department's goal of increased international enforcement of intellectual property rights. A proposal developed by the Department to identify an intellectual property law enforcement point of contact in each country generated substantial interest from foreign counterparts, and the Department of Justice, through CCIPS, has established itself as the United States' international contact for criminal intellectual property matters. By developing this law

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enforcement network and points of contact through the STOP! international trips, the Department anticipates that it will be easier and faster to enlist the cooperation of foreign law enforcement when future U.S. investigations, similar to Operation FastLink, identify foreign targets. Through the international outreach driven by STOP!, the Department will develop information that can assist investigations and prosecutions directly affecting American intellectual property business interests in foreign countries.

The Department has also taken an active role in seeking greater criminal enforcement of intellectual property violations in China. U.S. and Chinese law enforcement officials had extensive discussions on criminal enforcement of intellectual property rights and areas for potential cooperation during the U.S.-China Joint Liaison Group meeting held in February 2005. The Joint Liaison Group has provided a productive forum for U.S.-China law enforcement cooperation in a number of areas of criminal enforcement, and we are hopeful that we will be able to make progress on intellectual property protection in China through this specialized law enforcement forum. In particular, we will seek opportunities for joint enforcement actions building on the success of Operation Spring. In addition, the Department has joined with many of the STOP! agencies to work with China through the IPR working group of the U.S.-China Joint Committee on Commerce and Trade.

The Department is also working closely with the Department of Commerce and the U.S. Embassy in Mexico City to encourage the intellectual property section of the Mexican Department of Justice to provide guidance for trademark and copyright holders in the best methods to seek criminal enforcement of intellectual property rights. By helping intellectual property rights holders understand the procedural and practical means to work with Mexican authorities, the U.S. Government will provide a real benefit to businesses seeking to market their intellectual property abroad. The Department hopes that this program will be a model that can be used in other countries to develop effective prosecutions and protect the intellectual property of U.S. companies doing business throughout the world.

2. The Department Cooperates with Other Agencies on Joint Projects to Increase Intellectual Property Protection and Enforcement

The STOP! Initiative also has had the beneficial effect of greatly enhancing the cooperation and coordination of all the U.S. Government agencies responsible for intellectual property protection at the leadership and staff levels. There is daily contact between these agencies, and the level of cooperation among agencies on intellectual property issues is at an all-time high.

In this environment, the Department of Justice has taken part in interagency projects and working groups focusing on intellectual property protection and employing strategies outside the scope of the Department's traditional focus on criminal prosecution. These areas include the development of public education programs and presentations on the importance of intellectual property – programs in which a multi-agency approach is particularly beneficial. The Department of Justice, along with the Department of Commerce and the Patent and Trademark Office, is working through STOP! to develop effective public outreach campaigns to educate

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Americans about the harm caused by intellectual property theft and the health and safety risks associated with counterfeit consumer goods.

In particular, soon after the IP Task Force report was released in October 2004, the Department of Justice hosted the first installment of a national education and prevention program known as "Activate Your Mind: Protect Your Ideas." In partnership with Court TV, the Department of Justice worked extensively with victim industry groups and educational organizations, StreetLaw Inc. and iSafe, Inc., to educate high school students on the importance of creativity, the impact of stealing creativity, and the consequences of violating the laws that protect creativity. More than 100 high school students participated in the day-long event at the Department of Justice where they listened to songwriters, victim representatives, the Attorney General, the Deputy Attorney General, and a convicted intellectual property offender about the harm caused by intellectual property piracy. The students then used their own creativity to develop anti-piracy slogans, songs, and public relations campaigns. The event was filmed by Court TV and produced into a 30-minute show that has aired on cable TV and been broadcast to thousands of high school students through Court TV's Courtroom in the Classroom program.

On April 28, 2005, Attorney General Gonzales traveled to Los Angeles, California to participate in the second presentation of the Activate Your Mind program at UCLA. This program focused on television and movie piracy and involved over 120 high school students who discussed intellectual property protection with the Attorney General and listened to presentations from actors, a stuntman, an FBI special agent, and a convicted intellectual property offender. The event, which was sponsored by the Motion Picture Association of America, received extensive coverage in the local media.

The Department of Justice is currently working with Court TV and other educational partners to continue the sustained prevention and educational efforts necessary to deter piracy among American students. In addition, the Department is working on developing regional public education programs for implementation by local CHIP Coordinators.

Conclusion:

In conclusion, I would just like to express the Department's appreciation and my personal gratitude to Chairman Voinovich and other Members of the Subcommittee for the opportunity to discuss the Department's efforts to aggressively fight intellectual property crime in the United States and abroad and its role in the Administration's STOP! Initiative. The Department of Justice is keenly aware of the grave harm to this nation inflicted by the theft of our creativity and innovation. We have a duty to protect not only the economic well being of our citizens but also their health and safety; therefore, the Department of Justice has made it a priority to do everything we can to strategically and effectively combat intellectual property crime.

At this time, I would be happy to answer any questions the Subcommittee may have.

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United States Government Accountability Office

GAO

Testimony

Before the Committee on Homeland Security and Government Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, United States Senate

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INTELLECTUAL PROPERTY

U.S. Efforts have Contributed to Strengthened Laws Overseas, but Significant Enforcement Challenges Remain

Statement of Loren Yager, Director
International Affairs and Trade



GAO-05-788T

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Highlights

Highlights of GAO-05-788T, testimony before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Government Affairs, United States Senate

Why GAO Did This Study

Although the U.S. government provides broad protection for intellectual property domestically, intellectual property protection in parts of the world is inadequate. As a result, U.S. goods are subject to piracy and counterfeiting in many countries. A number of U.S. agencies are engaged in efforts to improve protection of U.S. intellectual property abroad. This testimony, based on a prior GAO report as well as recent work, describes U.S. agencies' efforts, the mechanisms used to coordinate these efforts, and the impact of these efforts and the challenges they face.

What GAO Recommends

GAO is not recommending executive action.

www.gao.gov/cgi-bin/getrpt?GAO-05-788T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Loren Yager at (202) 512-4128 or yagerl@gao.gov.

June 14, 2005

INTELLECTUAL PROPERTY

U.S. Efforts Have Contributed to Strengthened Laws Overseas, but Significant Enforcement Challenges Remain

What GAO Found

U.S. agencies undertake policy initiatives, training and assistance activities, and law enforcement actions in an effort to improve protection of U.S. intellectual property abroad. Policy initiatives include identifying countries with the most significant problems—an annual interagency process known as the "Special 301" review. In addition, many agencies engage in assistance activities, such as providing training for foreign officials. Finally, a small number of agencies carry out law enforcement actions, such as criminal investigations and seizures of counterfeit merchandise.

Agencies use several mechanisms to coordinate their efforts, although the mechanisms' usefulness varies. The National Intellectual Property Law Enforcement Coordination Council, established in 1999 to coordinate domestic and international intellectual property law enforcement, has struggled to find a clear mission, has undertaken few activities, and is generally viewed as having little impact despite recent congressional action to strengthen the council. The Congress's action included establishing the role of Coordinator, but the position has not yet been filled (although the selection process is underway). The Administration's October 2004 Strategy Targeting Organized Piracy (STOP!) is intended to strengthen U.S. efforts to combat piracy and counterfeiting. Thus far, the initiative has resulted in some new actions and emphasized other ongoing efforts.

U.S. efforts have contributed to strengthened intellectual property legislation overseas, but enforcement in many countries remains weak, and further U.S. efforts face significant challenges. For example, competing U.S. policy objectives such as national security interests take precedence over protecting intellectual property in certain regions. Further, other countries' domestic policy objectives can affect their "political will" to address U.S. concerns. Finally, many economic factors, as well as the involvement of organized crime, hinder U.S. and foreign governments' efforts to protect U.S. intellectual property abroad.

Pirated DVDs from Brazil, China, and Ukraine



Source: GAO.

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Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to discuss our work on U.S. efforts to protect U.S. intellectual property rights (IPR) overseas. As you know, the United States dominates the creation and export of intellectual property—creations of the mind. The U.S. government provides broad protection for intellectual property through means such as copyrights, patents, and trademarks. However, protection of intellectual property in many parts of the world is inadequate. As a result, U.S. goods are subject to substantial counterfeiting and piracy in many countries.

The U.S. government, through numerous agencies, is seeking better intellectual property protection overseas. To understand more fully how U.S. agencies have performed in this regard, we have examined several issues. This testimony addresses (1) the specific efforts of U.S. agencies to improve intellectual property protection in other nations, (2) the means used to coordinate these efforts, and (3) challenges facing enforcement efforts abroad. In addition, this testimony, based on our September 2004 report addressing these topics,[1] provides an update on key IPR-related events since that time—an administration initiative referred to as the Strategy Targeting Organized Piracy, or STOP!; a report prepared by a Department of Justice intellectual property task force,[2] and congressional action concerning an interagency intellectual property law enforcement council.

To address these issues, we analyzed key U.S. government reports and documents from eight federal agencies and two offices. In addition to meeting with federal officials, we met with officials from key intellectual property industry groups and reviewed reports they had prepared. We also conducted field work in four countries where serious problems regarding the protection of intellectual property have been reported (Brazil, China, Russia, and Ukraine) and met with U.S. embassy and foreign government officials as well as representatives of U.S. companies and industry groups operating in those countries. We conducted this work from June 2003 through July 2004. We subsequently updated our work in May and June of 2005 by meeting with key government officials and industry groups

[1]GAO, *Intellectual Property: U.S. Efforts Have Contributed to Strengthened Laws Overseas, but Challenges Remain*, GAO-04-912 (Washington, D.C.: Sept. 8, 2004).

[2]*Report of the Department of Justice's Task Force on Intellectual Property*, Office of the Attorney General, U.S. Department of Justice, October 2004.

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involved in recent U.S. government efforts. All work was conducted in accordance with generally accepted government auditing standards.

Summary

U.S. agencies' efforts to improve protection of U.S. intellectual property in foreign nations fall into three categories—policy initiatives, training and assistance activities, and law enforcement actions. The Office of the U.S. Trade Representative (USTR) leads U.S. policy initiatives with an annual assessment known as the "Special 301" review, which results in an annual report detailing global intellectual property challenges and identifying countries with the most significant problems. This report involves input from many U.S. agencies and industry. In addition to conducting policy initiatives, most agencies involved in intellectual property issues overseas also engage in training and assistance activities. Further, although counterterrorism is the overriding U.S. law enforcement concern, U.S. agencies such as the Departments of Justice and Homeland Security conduct law enforcement activities regarding IPR. These activities have included Justice's creation of an intellectual property task force in March 2004, which in October 2004 published a report containing recommendations for, among other things, improving the department's criminal enforcement, fostering international cooperation, and preventing intellectual property crime.

Several mechanisms exist to coordinate U.S. agencies' efforts to protect U.S. intellectual property overseas, although the level of activity and usefulness of these mechanisms vary. First, the Special 301 process requires formal interagency meetings as part of the U.S. government's annual review to identify countries with inadequate IPR protection; government and industry sources view this effort as effective and thorough. Second, the National Intellectual Property Law Enforcement Coordination Council (NIPLECC)[3] was established in 1999 to coordinate domestic and international intellectual property law enforcement among U.S. federal and foreign entities. However, NIPLECC has struggled to find a clear mission, has undertaken few activities, and is perceived by officials from the private sector and some U.S. agencies as having little impact. In fiscal year 2005 appropriations legislation, Congress established a Coordinator for International Intellectual Property Enforcement to head NIPLECC, but the position remains unfilled (although a selection process

[3]NIPLECC was mandated under Section 653 of the Treasury and General Government Appropriations Act, 2000, Public Law 106-58 (15 U.S.C. 1128).

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is underway). Third, the most recent interagency coordination effort—the Strategy Targeting Organized Piracy, or STOP!, announced in October 2004—represents the administration's increased focus on IPR enforcement and is intended to strengthen U.S. government and industry efforts to combat piracy and counterfeiting. The initiative includes some new actions, such as the establishment of a hotline that businesses can use to report IPR problems to the U.S. government, and also emphasizes numerous preexisting efforts. U.S. government officials told us that the STOP! has strengthened interagency coordination in addressing IPR issues.

U.S. efforts have contributed to strengthened foreign IPR laws, but enforcement overseas remains weak and U.S. efforts face numerous challenges. Competing U.S. policy objectives may take priority over protecting intellectual property in certain countries. In addition, the impact of U.S. activities overseas is affected by countries' domestic policy objectives, which may complement or conflict with U.S. objectives. Further, economic factors, as well as the involvement of organized crime, pose additional challenges to U.S. and foreign governments' enforcement efforts, even in countries where the political will for protecting intellectual property exists. These economic factors include low barriers to producing counterfeit or pirated goods, potential high profits for producers of such goods, and large price differentials between legitimate and counterfeit products for consumers.

Background

Intellectual property is an important component of the U.S. economy, and the United States is an acknowledged global leader in the creation of intellectual property. However, industries estimate that annual losses stemming from violations of intellectual property rights overseas are substantial. Further, counterfeiting of products such as pharmaceuticals and food items fuels public health and safety concerns. USTR's Special 301 reports on the adequacy and effectiveness of intellectual property protection around the world demonstrate that, from a U.S. perspective, intellectual property protection is weak in developed as well as developing countries and that the willingness of countries to address intellectual property issues varies greatly.

Eight federal agencies, as well as the Federal Bureau of Investigation (FBI) and the U.S. Patent and Trademark Office (USPTO), undertake the primary U.S. government activities to protect and enforce U.S. intellectual property rights overseas. The agencies are the Departments of Commerce, State, Justice, and Homeland Security; USTR; the Copyright Office; the

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U.S. Agency for International Development (USAID); and the U.S. International Trade Commission.[4]

U.S. Agencies Undertake Three Types of IPR Efforts

The efforts of U.S. agencies to protect U.S. intellectual property overseas fall into three general categories—policy initiatives, training and technical assistance, and U.S. law enforcement actions.

Policy Initiatives

U.S. policy initiatives to increase intellectual property protection around the world are primarily led by USTR, in coordination with the Departments of State and Commerce, USPTO, and the Copyright Office, among other agencies. A centerpiece of policy activities is the annual Special 301 process.[5] "Special 301" refers to certain provisions of the Trade Act of 1974, as amended, that require USTR to annually identify foreign countries that deny adequate and effective protection of intellectual property rights or fair and equitable market access for U.S. persons who rely on intellectual property protection. USTR identifies these countries with substantial assistance from industry and U.S. agencies and publishes the results of its reviews in an annual report. Once a pool of such countries has been determined, the USTR, in coordination with other agencies, is required to decide which, if any, of these countries should be designated as a Priority Foreign Country (PFC).[6] If a trading partner is identified as a PFC, USTR must decide within 30 days whether to initiate an investigation of those acts, policies, and practices that were the basis for identifying the country as a PFC. Such an investigation can lead to actions such as negotiating separate intellectual property understandings or agreements between the United States and the PFC or implementing trade sanctions against the PFC if no satisfactory outcome is reached.

[4]Although the FBI is part of the Department of Justice and the USPTO is part of the Department of Commerce, their roles will be discussed separately because of their distinct responsibilities.

[5]Other policy actions include: use of trade preference programs for developing countries that require IPR protection, such as the Generalized System of Preferences; negotiation of agreements that address intellectual property; participation in international organizations that address IPR issues; and, diplomatic efforts with foreign governments.

[6]PFCs are those countries that (1) have the most onerous and egregious acts, policies, and practices with the greatest adverse impact (actual or potential) on the relevant U.S. products and (2) are not engaged in good-faith negotiations or making significant progress in negotiations to address these problems.

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Between 1994 and 2005, the U.S. government designated three countries as PFCs—China, Paraguay, and Ukraine—as a result of intellectual property reviews. The U.S. government negotiated separate bilateral intellectual property agreements with China and Paraguay to address IPR problems. These agreements are subject to annual monitoring, with progress cited in each year's Special 301 report. Ukraine, where optical media piracy was prevalent, was designated a PFC in 2001. The United States and Ukraine found no mutual solution to the IPR problems, and in January 2002, the U.S. government imposed trade sanctions in the form of prohibitive tariffs (100 percent) aimed at stopping $75 million worth of certain imports from Ukraine over time.

In conjunction with the release of its 2005 Special 301 report, USTR announced the results of a detailed review examining China's intellectual property regime. This review concluded that infringement levels remain unacceptably high throughout China, despite the country's efforts to reduce them. The U.S. government identified several actions it intends to take, including working with U.S. industry with an eye toward utilizing World Trade Organization (WTO) procedures to bring China into compliance with its WTO intellectual property obligations (particularly those relating to transparency and criminal enforcement) and securing new, specific commitments concerning actions China will take to improve IPR protection and enforcement.

By virtue of membership in the WTO, the United States and other countries commit themselves not to take WTO-inconsistent unilateral action against possible trade violations involving IPR protections covered by the WTO but to instead seek recourse under the WTO's dispute settlement system and its rules and procedures. This may impact any U.S. government decision regarding whether to retaliate against WTO members unilaterally with sanctions under the Special 301 process when those countries' IPR problems are viewed as serious. The United States has brought a total of 12 IPR cases to the WTO for resolution, but has not brought any since 2000 (although the United States initiated a WTO

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dispute panel for one of these cases in 2003).[7] A senior USTR official emphasized that this is due to the effectiveness of tools such as the Special 301 process in encouraging WTO members to bring their laws into compliance with WTO intellectual property rules.

Training and Technical Assistance

In addition, most of the agencies involved in efforts to promote or protect IPR overseas engage in some training or technical assistance activities. Key activities to develop and promote enhanced IPR protection in foreign countries are undertaken by the Departments of Commerce, Homeland Security, Justice, and State; the FBI; USPTO; the Copyright Office; and USAID. Training events sponsored by U.S. agencies to promote the enforcement of intellectual property rights have included enforcement programs for foreign police and customs officials, workshops on legal reform, and joint government-industry events. According to a State Department official, U.S. government agencies have conducted intellectual property training for a number of countries concerning bilateral and multilateral intellectual property commitments, including enforcement, during the past few years. For example, intellectual property training has been conducted by numerous agencies in Poland, China, Morocco, Italy, Jordan, Turkey, and Mexico.

U.S. Law Enforcement Efforts

A small number of agencies are involved in enforcing U.S. intellectual property laws, and the nature of these activities differs from other U.S. government actions related to intellectual property protection. Working in an environment where counterterrorism is the central priority, the FBI and the Departments of Justice and Homeland Security take a variety of actions that include engaging in multicountry investigations involving intellectual property violations and seizing goods that violate intellectual property rights at U.S. ports of entry.

[7]Of these 12 cases, 8 were fully resolved, and one was substantially resolved before going through the entire dispute settlement process by mutually agreed solutions between the parties—the preferred outcome, according to a USTR official. Another 3 cases resulted in the issuance of a final WTO decision, or panel report, and all of these cases concluded with favorable rulings for the United States, according to USTR. (One of these 3 cases–involving a dispute with the European Community regarding geographical indications–began with a request for consultations in 1999, for which a new expanded request was filed in 2003 and the case was brought before a WTO panel the same year.) In the substantially resolved dispute, involving Argentina, consultations continue with respect to certain issues.

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- The Department of Justice has an office that directly addresses international IPR problems.[8] Further, Justice has been involved with international investigation and prosecution efforts and, according to a Justice official, has become more aggressive in recent years. For instance, Justice and the FBI coordinated an undercover IPR investigation, with the involvement of several foreign law enforcement agencies. The investigation focused on individuals and organizations, known as "warez" release groups, which specialize in the Internet distribution of pirated materials. In April 2004, these investigations resulted in 120 simultaneous searches worldwide (80 in the United States) by law enforcement entities from 10 foreign countries[9] and the United States in an effort known as "Operation Fastlink."

- In addition, in March 2004, the Department of Justice created an intellectual property task force to examine all of Justice's intellectual property enforcement efforts and explore methods for the department to strengthen its protection of IPR. A report issued by the task force in October 2004 provided recommendations for improvements in criminal enforcement, international cooperation, civil and antitrust enforcement, legislation, and prevention of intellectual property crime. Some of these recommendations have been implemented, while others have not. For example, Justice has implemented a recommendation to create five additional Computer Hacking and Intellectual Property (CHIP) units to prosecute IPR crimes.[10] Additionally, Justice has designated a CHIP coordinator in every U.S. Attorney's office in the country, thereby implementing a report recommendation that such action be taken. However, an FBI official told us the FBI has not been able to implement recommendations such as posting additional personnel to the U.S. consulate in Hong Kong and the U.S. embassy in Budapest, Hungary for budgetary reasons; Justice has not yet implemented a similar recommendation to deploy federal prosecutors to these same regions and designate them as Intellectual Property Law Enforcement Coordinators.

[8]The Computer Crime and Intellectual Property Section (CCIPS) addresses intellectual property issues (copyright, trademark, and trade secrets) within the Department of Justice's Criminal Division. In April 2004, CCIPS appointed an International Coordinator for Intellectual Property.

[9]These foreign countries were Belgium, Denmark, France, Germany, Hungary, Israel, the Netherlands, Singapore, Sweden, and Great Britain and Northern Ireland. According to a Justice official, law enforcement officials in Spain subsequently took action against related targets in that country.

[10]These CHIP units have been added in the District of Columbia; Sacramento, CA; Pittsburgh, PA; Nashville, TN; and Orlando, FL.

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Fully implementing some of the report's recommendations will require a sustained, long-term effort by Justice. For example, to address a recommendation to develop a national education program to prevent intellectual property crime, Justice held two day-long events in Washington, D.C. and Los Angeles with high school students listening to creative artists, victim representatives, the Attorney General, and a convicted intellectual property offender, among others, about the harm caused by intellectual property piracy. The events were filmed by Court TV and produced into a 30 minute show aired on cable television. Further, to enhance intellectual property training programs for foreign prosecutors and law enforcement officials, as recommended in the report, Justice worked with the Mexican government to provide a three-day seminar for intellectual property prosecutors and customs officials in December 2004. Such actions are initial efforts to address recommendations that can be further implemented over time.

- The Department of Homeland Security (DHS) tracks seizures of goods that violate IPR and reports seizures that totaled almost $140 million resulting from over 7,200 seizures in fiscal year 2004. In fiscal year 2004, goods from China (including Hong Kong) accounted for almost 70 percent of the value of all IPR seizures, many of which were shipments of cigarettes and apparel.[11] Other seized goods were shipped from, among other places, Russia and South Africa.[12] A DHS official pointed out that providing protection against IPR-infringing imported goods for some U.S. companies—particularly entertainment companies—can be difficult, because companies often fail to record their trademarks and copyrights with DHS. DHS and Commerce officials told us that they believe this situation could be ameliorated if, contrary to current practice, companies could simultaneously have their trademarks and copyrights recorded with DHS when they are provided their intellectual property right by USPTO or the Copyright Office.

[11]For information on cigarette smuggling, see GAO, *Cigarette Smuggling: Federal Law Enforcement Efforts and Seizures Increasing*, GAO-04-641 (Washington, D.C.: May 28, 2004).

[12]One additional area of note regarding counterfeit seizures involves pharmaceutical products. DHS, in cooperation with the Department of Health and Human Services' Food and Drug Administration, conducts "blitz" exams in an effort to target, identify, and stop counterfeit and potentially unsafe prescription drugs from entering the United States from foreign countries via mail and common carriers. Such efforts have been undertaken in the past in locations such as Florida, New York, and California and have identified, in some instances, drugs that appeared to be counterfeit. For more information on federal efforts regarding prescription drugs imports, see GAO, *Prescription Drugs: Preliminary Observations on Efforts to Enforce the Prohibitions on Personal Importation*, GAO-04-839T (Washington, D.C.: July 22, 2004).

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- To identify shipments of IPR-infringing merchandise and prevent their entry into the United States, DHS is developing an IPR risk-assessment computer model. The model uses weighted criteria to assign risk scores to individual imports. The methodology is based on both historical risk-based trade data and qualitative rankings. The historical data are comprised of seizure information and cargo examination results, while qualitative rankings are based on information such as whether a shipment is arriving from a high-risk country identified by USTR's annual Special 301 report. According to DHS officials, the model has been piloted, and several issues have been identified which must be addressed before it is fully implemented.

- DHS officials also told us that problems in identifying and seizing IPR-infringing goods frequently arise where the department's in-bond system is involved. The in-bond system allows cargo to be transported from the original U.S. port of arrival (such as Los Angeles) to another U.S. port (such as Cleveland) for formal entry into U.S. commerce or for export to a foreign country. We previously reported that weak internal controls in this system enable cargo to be illegally diverted from the supposed destination.[12] The tracking of in-bond cargo is hindered by a lack of automation for tracking in-bond cargo, inconsistencies in targeting and examining cargo, in-bond practices that allow shipments' destinations to be changed without notifying DHS and extensive time intervals to reach their final destination, and inadequate verification of exports to Mexico. DHS inspectors we spoke with during the course of our previous work cited in-bond cargo as a high-risk category of shipment because it is the least inspected and in-bond shipments have been increasing. We made recommendations to DHS regarding ways to improve monitoring of in-bond cargo. USTR's 2005 Special 301 report identifies customs operations as a growing problem in combating IPR problems in foreign countries such as Ukraine, Canada, Belize, and Thailand.

Several Mechanisms Coordinate IPR Efforts, but Their Usefulness Varies

Several interagency mechanisms exist to coordinate overseas law enforcement efforts, intellectual property policy initiatives, and development and assistance activities, although these mechanisms' level of activity and usefulness vary.

[12] GAO, *International Trade: U.S. Customs and Border Protection Faces Challenges in Addressing Illegal Textile Transshipment*, GAO-04-345 (Washington, D.C.: Jan. 23, 2004).

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Formal Interagency Coordination on Trade Policy	According to government and industry officials, an interagency trade policy mechanism established by the Congress in 1962 to assist USTR has operated effectively in reviewing IPR issues. The mechanism, which consists of tiers of committees as well as numerous subcommittees, constitutes the principle means for developing and coordinating U.S. government positions on international trade, including IPR. A specialized subcommittee is central to conducting the Special 301 review and determining the results of the review. This interagency process is rigorous and effective, according to U.S. government and industry officials. A Commerce official told us that the Special 301 review is one of the best tools for interagency coordination in the government, while a Copyright Office official noted that coordination during the review is frequent and effective. A representative for copyright industries also told us that the process works well and is a solid interagency effort.
National Intellectual Property Law Enforcement Coordination Council (NIPLECC)	NIPLECC, created by the Congress in 1999 to coordinate domestic and international intellectual property law enforcement among U.S. federal and foreign entities, seems to have had little impact. NIPLECC consists of (1) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office; (2) the Assistant Attorney General, Criminal Division; (3) the Under Secretary of State for Economic and Agricultural Affairs; (4) the Deputy United States Trade Representative; (5) the Commissioner of Customs; and (6) the Under Secretary of Commerce for International Trade.[14] NIPLECC's authorizing legislation did not include the FBI as a member of NIPLECC, despite its pivotal role in law enforcement. However, according to representatives of the FBI, USPTO, and Justice, the FBI should be a member. USPTO and Justice cochair NIPLECC, which has no staff of its own. In the council's several years of existence, its primary output has been three annual reports to the Congress, which are required by statute. (NIPLECC's 2004 report has been drafted but is not yet available.) According to interviews with industry officials and officials from its member agencies, and as evidenced by its own reports, NIPLECC has struggled to define its purpose and has had little discernable impact.

[14]NIPLECC is also required to consult with the Register of Copyrights on law enforcement matters relating to copyright and related rights and matters.

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Indeed, officials from more than half of the member agencies offered criticisms of NIPLECC, remarking that it is unfocused, ineffective, and "unwieldy." In official comments to the council's 2003 annual report, major IPR industry associations expressed a sense that NIPLECC is not undertaking any independent activities or effecting any impact. One industry association representative stated that law enforcement needs to be made more central to U.S. IPR efforts and said that although he believes the council was created to deal with this issue, it has "totally failed." The lack of communication regarding enforcement results in part from complications such as concerns regarding the sharing of sensitive law enforcement information and from the different missions of the various agencies involved in intellectual property actions overseas. According to a USTR official, NIPLECC needs to define a clear role in coordinating government policy. A Justice official stressed that, when considering coordination, it is important to avoid creating an additional layer of bureaucracy that may detract from efforts devoted to each agency's primary mission.

According to an official from USPTO, NIPLECC has been hampered primarily by its lack of its own staff and funding. In our September 2004 report, we noted that "if the Congress wishes to maintain NIPLECC and take action to increase its effectiveness, the Congress may wish to consider reviewing the council's authority, operating structure, membership, and mission." In the Consolidated Appropriations Act, 2005, the Congress provided $2 million for NIPLECC expenses, to remain available through fiscal year 2006.[14] The act addressed international elements of the council and created the position of the Coordinator for International Intellectual Property Enforcement, appointed by the President, to head NIPLECC. This official may not serve in any other position in the federal government, and the NIPLECC co-chairs, representatives from USPTO and Justice, are to report to the Coordinator. The law also provides additional direction regarding NIPLECC's international mission, providing that NIPLECC shall (1) establish policies, objectives, and priorities concerning international intellectual property protection and intellectual property law enforcement; (2) promulgate a strategy for protecting American intellectual property overseas; and (3) coordinate and oversee implementation of items (1) and (2) by agencies with responsibilities for intellectual property protection and intellectual

[14]The Consolidated Appropriations Act, 2005, Public Law 108-447, Division B (118 Stat. 2809 at 2872-2873).

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property law enforcement. The Coordinator, with the advice of NIPLECC members, is to develop a budget proposal for each fiscal year to implement the strategy for protecting American intellectual property overseas and for NIPLECC operations and may select, appoint, employ, and fix compensation of such officers and employees as may be necessary to carry out NIPLECC functions. Personnel from other departments or agencies may be temporarily reassigned to work for NIPLECC. Agency officials told us that, as of June 2005, no Coordinator had been named (although a selection process was underway), the $2 million in NIPLECC funding has not been spent, and NIPLECC continued to accomplish little.

Strategy Targeting Organized Piracy (STOP!)

In October 2004, USTR and the Departments of Commerce, Justice, and Homeland Security announced STOP! to fight trade in pirated and counterfeit goods. Other STOP! participants are the Department of State and the Department of Health and Human Service's Food and Drug Administration. STOP!, which is targeted at cross-border trade in tangible goods and was initiated to strengthen U.S. government and industry enforcement actions. STOP! has five general objectives:

1. **Stop pirated and counterfeit goods at the U.S. border.** Such efforts are to be achieved through, for example, the implementation of the DHS IPR risk model, mentioned above, to better identify and seize infringing goods at U.S. borders.

2. **Dismantle criminal enterprises that steal intellectual property.** Justice and DHS are taking measures to maximize their ability to pursue perpetrators of intellectual property crimes through, for example, the addition of the 5 new Justice CHIP units mentioned above. Justice and DHS are also committed under STOP! to work with the Congress to update IPR legislation.

3. **Keep counterfeit and pirated goods out of global supply chains.** Commerce is working with industry to develop voluntary guidelines companies can use to ensure that supply and distribution chains are free of counterfeits.

4. **Empower U.S. businesses to secure and enforce their rights at home and abroad.** For example, Commerce is meeting with small and medium enterprises to inform companies on how to secure and protect their rights in the global marketplace.

5. **Reach out to U.S. trading partners to build an international coalition to block trade in pirated and counterfeit goods.** USTR

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and State are engaging in multilateral forums, such as the Organization for Economic Cooperation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC), through the introduction of new initiatives to improve the global intellectual property environment.

Agency officials told us that STOP! has both furthered ongoing agency activities and facilitated new initiatives. For example, Commerce officials told us that while they had been working on having the OECD conduct a study of the extent and impact of counterfeiting and piracy, STOP! provided additional momentum to succeed in their efforts. They said that the OECD has now agreed to conduct a comprehensive study on the extent and effect of international counterfeiting and piracy in tangible goods, with a study addressing the digital arena to follow. In addition, in March 2006, Justice announced the continuation of work by its intellectual property task force, which had been rolled into STOP!. Regarding new initiatives, USPTO has established a hotline[16] for companies to obtain information on intellectual property rights enforcement and report problems in other countries. According to USPTO, this hotline has received 387 calls since it was activated in October 2004. Commerce has also developed a website[17] to provide information and guidance to IPR holders for registering and protecting their intellectual property rights in other countries. The most visible new effort undertaken as a part of STOP! is a coordinated U.S. government outreach to foreign governments. In April 2005 officials from seven federal agencies traveled to Hong Kong, Japan, Korea, and Singapore and in June, they traveled to Belgium, France, Germany, and the United Kingdom. According to USTR officials, the goals of these trips are to describe U.S. initiatives related to IPR enforcement and to learn from the activities of "like-minded" trading partners with IPR concerns and enforcement capacities similar to the United States. DHS officials reported that their Asian counterparts were interested in the U.S. development of the IPR risk model to target high-risk imports for inspection, while a USTR official emphasized that U.S. participants were impressed by a public awareness campaign implemented in Hong Kong.

Officials involved in STOP! told us that one key goal of the initiative is to improve interagency coordination. Agency officials told us that to achieve

[16]1-866-999-HALT.

[17]www.stopfakes.gov. According to Commerce, between November 2004 and May 2005, there were almost 70,000 visits to this website.

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this goal, staff-level meetings have been held monthly and senior officials have met about every 6 weeks. Agency officials also told us that as an Administration initiative with high-level political support, STOP! has energized agencies' enforcement efforts and strengthened interagency efforts. A USPTO official explained that STOP! has laid the groundwork for future progress and continued interagency collaboration. Agency officials noted that STOP! goals and membership overlap with those of NIPLECC, and remarked that STOP! could possibly be integrated into NIPLECC at some future date. In May 2006, a NIPLECC meeting was held to address coordination between STOP! and NIPLECC. According to a Justice official, once an International Intellectual Property Enforcement Coordinator is appointed, there may be an opportunity to continue the momentum that STOP! has provided in the context of NIPLECC activities.

One private sector representative we met with said that although U.S. industry has worked closely with agencies to achieve the goals of STOP!, he is frustrated with the lack of clear progress in many areas. For instance, he said that the administration has neither supported any pending legislation to improve intellectual property rights protection, nor proposed such legislation. He added that agencies need to do more to integrate their systems, noting the situation where companies must currently receive a trademark or copyright from USPTO or the Copyright Office, and then separately record that right with DHS. Another industry representative noted that STOP! has been announced with great fanfare, but that progress has been sparse. However, he noted that industry supports this administration effort and is working collaboratively with the federal agencies to improve IPR protection. Another industry official cited issues of concern such as insufficient enforcement resources "on the ground" (particularly at DHS).

Other Coordination Mechanisms

Other coordination mechanisms include the National International Property Rights Coordination Center (IPR Center) and informal coordination.[14] The IPR Center in Washington, D.C., a joint effort between DHS and the FBI, began limited operations in 2000. According to a DHS official, the potential for coordination between DHS, the FBI, and industry and trade associations makes the IPR Center unique. The IPR Center is

[14]Another coordination mechanism is the IPR Training Coordination Group, led by the State Department. This voluntary, working-level group comprises representatives of U.S. agencies and industry associations involved in IPR programs and training and technical assistance efforts overseas or for foreign officials.

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intended to serve as a focal point for the collection of intelligence involving copyright and trademark infringement, signal theft, and theft of trade secrets. However, the center is not widely used by industry. For example, an FBI official told us that from January 2004 through May 2005, the FBI has received only 10 referrals to its field offices from the IPR Center. Further, the number of FBI and DHS staff on board at the center has decreased recently and currently stands at 10 employees (down from 20 in July 2004), with no FBI agents currently working there and fewer DHS agents than authorized. However, IPR Center officials emphasized one recent, important case that was initiated by the center. DHS, in conjunction with the Chinese government and with the assistance of the intellectual property industry, conducted the first ever joint U.S.-Chinese enforcement action on the Chinese mainland, disrupting a network that distributed counterfeit motion pictures worldwide. More than 210,000 counterfeit motion picture DVDs were seized, and in 2005, four individuals (two Chinese and two Americans) were convicted in China.

Policy agency officials noted the importance of informal but regular communication among staff at the various agencies involved in the promotion or protection of intellectual property overseas. Several officials at various policy-oriented agencies, such as USTR and the Department of Commerce, noted that the intellectual property community was small and that all involved were very familiar with the relevant policy officials at other agencies in Washington, D.C. Further, State Department officials at U.S. embassies regularly communicate with agencies in Washington, D.C., regarding IPR matters and U.S. government actions. Agency officials noted that this type of coordination is central to pursuing U.S. intellectual property goals overseas.

Although communication between policy and law enforcement agencies can occur through forums such as the NIPLECC, these agencies do not systematically share specific information about law enforcement activities. According to an FBI official, once a criminal investigation begins, case information stays within the law enforcement agencies and is not shared. [19] A Justice official emphasized that criminal law enforcement is fundamentally different from the activities of policy agencies and that

[19]Further, a DHS official noted that the Trade Secrets Act (18 USC 1905) precludes sharing information about specific imports, even where there is criminal activity. The Trade Secrets Act makes it a criminal offense for an employee of the United States, or one of its agencies, to disclose trade secrets and certain other forms of confidential commercial and financial information except where such disclosure is "authorized by law."

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restrictions exist on Justice's ability to share investigative information, even with other U.S. agencies.

Enforcement Overseas Remains Weak and Challenges Remain

U.S. efforts such as the annual Special 301 review have contributed to strengthened foreign IPR laws, but enforcement overseas remains weak. The impact of U.S. activities is challenged by numerous factors. Industry representatives report that the situation may be worsening overall for some intellectual property sectors.

Weak Enforcement Overseas

The efforts of U.S. agencies have contributed to the establishment of strengthened intellectual property legislation in many foreign countries, however, the enforcement of intellectual property rights remains weak in many countries, and U.S. government and industry sources note that improving enforcement overseas is now a key priority. A recent USTR Special 301 report states that "although several countries have taken positive steps to improve their IPR regimes, the lack of IPR protection and enforcement continues to be a global problem." For example, although the Chinese government has improved its statutory IPR regime, USTR remains concerned about enforcement in that country. According to USTR, counterfeiting and piracy remain rampant in China and increasing amounts of counterfeit and pirated products are being exported from China. In addition, although Ukraine has shut down offending domestic optical media production facilities, pirated products continue to pervade Ukraine, and, according to USTR's 2004 Special 301 Report, Ukraine is also a major trans-shipment point and storage location for illegal optical media produced in Russia and elsewhere as a result of weak border enforcement efforts.

Although U.S. law enforcement does undertake international cooperative activities to enforce intellectual property rights overseas, executing these efforts can prove difficult. For example, according to DHS and Justice officials, U.S. efforts to investigate IPR violations overseas are complicated by a lack of jurisdiction as well as by the fact that U.S. officials must convince foreign officials to take action. Further, a DHS official noted that in some cases, activities defined as criminal in the United States are not viewed as an infringement by other countries and that U.S. law enforcement agencies can therefore do nothing.

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Challenges to U.S. Efforts

In addition, U.S. efforts confront numerous challenges. Because intellectual property protection is one of many U.S. government objectives pursued overseas, it is viewed internally in the context of broader U.S. foreign policy objectives that may receive higher priority at certain times in certain countries. Industry officials with whom we met noted, for example, their belief that policy priorities related to national security were limiting the extent to which the United States undertook activities or applied diplomatic pressure related to IPR issues in some countries. Further, the impact of U.S. activities is affected by a country's own domestic policy objectives and economic interests, which may complement or conflict with U.S. objectives. U.S. efforts are more likely to be effective in encouraging government action or achieving impact in a foreign country where support for intellectual property protection exists. It is difficult for the U.S. government to achieve impact in locations where foreign governments lack the "political will" to enact IPR protections.

Many economic factors complicate and challenge U.S. and foreign governments' efforts, even in countries with the political will to protect intellectual property. These factors include low barriers to entering the counterfeiting and piracy business and potentially high profits for producers. In addition, the low prices of counterfeit products are attractive to consumers. The economic incentives can be especially acute in countries where people have limited income. Technological advances allowing for high-quality inexpensive and accessible reproduction and distribution in some industries have exacerbated the problem. Moreover, many government and industry officials believe that the chances of getting caught for counterfeiting and piracy, as well as the penalties when caught, are too low. The increasing involvement of organized crime in the production and distribution of pirated products further complicates enforcement efforts. Federal and foreign law enforcement officials have linked intellectual property crime to national and transnational organized criminal operations. Further, like other criminals, terrorists can trade any commodity in an illegal fashion, as evidenced by their reported involvement in trading a variety of counterfeit and other goods.[20]

Many of these challenges are evident in the optical media industry, which includes music, movies, software, and games. Even in countries where interests exist to protect domestic industries, such as the domestic music

[20]See GAO, *Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists' Use of Alternative Financing Mechanisms*, GAO-04-163 (Washington, D.C.: Nov. 14, 2003).

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industry in Brazil or the domestic movie industry in China, economic and law enforcement challenges can be difficult to overcome. For example, the cost of reproduction technology and copying digital media is low, making piracy an attractive employment opportunity, especially in a country where formal employment is hard to obtain. The huge price differentials between pirated CDs and legitimate copies also create incentives on the consumer side. For example, when we visited a market in Brazil, we observed that the price for a legitimate DVD was approximately ten times the price for a pirated DVD. Even if consumers are willing to pay extra to purchase the legitimate product, they may not do so if the price differences are too great for similar products. Further, the potentially high profit makes optical media piracy an attractive venture for organized criminal groups. Industry and government officials have noted criminal involvement in optical media piracy and the resulting law enforcement challenges. Recent technological advances have also exacerbated optical media piracy. The mobility of the equipment makes it easy to transport it to another location, further complicating enforcement efforts. Likewise, the Internet provides a means to transmit and sell illegal software or music on a global scale. According to an industry representative, the ability of Internet pirates to hide their identities or operate from remote jurisdictions often makes it difficult for IPR holders to find them and hold them accountable.

Industry Concerns

Despite improvements such as strengthened foreign IPR legislation, international IPR protection may be worsening overall for some intellectual property sectors. For example, according to copyright industry estimates, losses due to piracy grew markedly in recent years. The entertainment and business software sectors, for example, which are very supportive of USTR and other agencies, face an environment in which their optical media products are increasingly easy to reproduce, and digitized products can be distributed around the world quickly and easily via the Internet. According to an intellectual property association representative, counterfeiting trademarks has also become more pervasive in recent years. Counterfeiting affects more than just luxury goods; it also affects various industrial goods. An industry representative noted that U.S. manufacturers of all sizes are now being adversely affected by counterfeit imports.

An industry representative also added that there is a need for additional enforcement activity by the U.S. government at the border. However, he recognized that limited resources and other significant priorities for DHS

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heighten the need to use existing resources more effectively to interdict more counterfeit and pirated goods.

Conclusions

The U.S. government has demonstrated a commitment to addressing IPR issues in foreign countries using multiple agencies. However, law enforcement actions are more restricted than other U.S. activities, owing to factors such as a lack of jurisdiction overseas to enforce U.S. law. Several IPR coordination mechanisms exist, with the interagency coordination that occurs during the Special 301 process standing out as the most significant and active. Efforts under STOP! appear to have strengthened the U.S. government's focus on addressing IPR enforcement problems in a more coordinated manner. Conversely, NIPLECC, the mechanism for coordinating intellectual property law enforcement, has accomplished little that is concrete and its ineffectiveness continues despite recent congressional action to provide funding, staffing, and clearer guidance regarding its international objectives. In addition, NIPLECC does not include the FBI, a primary law enforcement agency. Members, including NIPLECC leadership, have repeatedly acknowledged that the group continues to struggle to find an appropriate mission.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you or other members of the subcommittee may have at this time.

Contacts and Acknowledgments

Should you have any questions about this testimony, please contact me by e-mail at yagerl@gao.gov. I can also be reached at (202) 512-4128. Other major contributors to this testimony were Emil Friberg, Leslie Holen, Jason Bair, Ming Chen, Sharla Draemel, and Reid Lowe.

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WRITTEN STATEMENT OF BRAD HUTHER,
DIRECTOR, COUNTERFEITING AND PIRACY INITIATIVE
U.S. CHAMBER OF COMMERCE

BEFORE THE
UNITED STATES SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA
HEARING ON
"FINDING AND FIGHTING FAKES: REVIEWING THE STRATEGY TARGETING ORGANIZED PIRACY"

JUNE 14, 2005

Good morning Chairman Voinovich and members of the subcommittee. My name is Brad Huther and I am the Director of the Anti-Counterfeiting and Piracy Initiative at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing more than 3 million businesses of every size and in every sector of the economy. Thank you Mr. Chairman, for holding this hearing.

We applaud the recent increased government-wide attention to the growing threat of counterfeiting and piracy. The business community also recognizes the need to organize itself and contribute to the government's efforts to protect intellectual property and our supply chains by leveraging the power of our collective resources. We will do our utmost to create a safer marketplace for consumers, protect the jobs of America's workers, and expand our competitiveness globally.

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Last year the Bush Administration's newly launched STOP! initiative promised "...to smash the criminal networks that traffic in fakes, stop trade in pirated and counterfeit goods at America's borders, block bogus goods around the world, and help small businesses secure and enforce their rights in overseas markets."[1] Fulfilling these promises will take considerable time, but the U.S. Chamber of Commerce believes the STOP! agencies are on the right track. Cabinet level officials, such as Secretary of Commerce Carlos Gutierrez, have dealt forcefully and candidly with China's highest-ranking policy officials about the need to protect and enforce intellectual property rights. Other officials have expressed their interagency commitments to STOP! prior to holding meetings with their counterparts in East Asia and Europe. The Chamber is impressed by the comprehensiveness of the United States Patent and Trademark Office's STOP! action plan after receiving a recent in-depth briefing by Jon Dudas, the Under Secretary for Intellectual Property and Director of USPTO. We are also pleased that the Department of Justice has recently recruited a highly competent point-person from its Los Angeles field office to implement its 23 point action plan to combat intellectual property crime. Finally, we were gratified that the Department of State has elevated the importance of its intellectual property activities by creating a new, higher-level organization structure several months ago.

[1] "STOP! Trade in Fakes" brochure, U.S. Department of Commerce, 2004.

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Similar leadership developments critical to the success of STOP! also have been achieved in the Department of Homeland Security and the Office of the United States Trade Representative.

The bottom-line is this: the Chamber is confident the Administration has, thus far, demonstrated its effectiveness in coordinating the federal government's efforts to combat intellectual property theft at home and abroad. If these policy officials and their technical experts are given adequate resources to carry out the STOP! initiative, the Chamber believes there exists a sound, aggressive and far-reaching interagency strategy to achieve many of the Administration's promises in the future.

We also recognize that the business community must contribute its expertise and resources to assist our government in the achievement of this newly-emerging national priority. In his testimony before the Senate Committee on the Judiciary in March 2004, Tom Donohue, our President and CEO, emphasized the disproportionate adverse effects of counterfeiting and piracy on small and emerging businesses. Small stores that unknowingly have fake products on their shelves or unknowingly distribute phony goods are at risk of losing consumer confidence. Small businesses can be financially devastated when their innovations are copied or reproduced illegally.

Accordingly, in our view the STOP! initiative provides important new measures to help small businesses protect their rights and interests. They range from providing an information hotline on ways to leverage the government's resources in the

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enforcement of their intellectual property rights, to developing in partnership with industry a "No Trade in Fakes" program to free supply chains from counterfeit or pirated goods, to educating small businesses and their workers on the risks of global piracy. The Chamber applauds these efforts and believes they are excellent components of the STOP! initiative.

The Chamber has developed a strategic action plan with tangible steps to stop counterfeiting and piracy. Our strategy has three major components:

- First, to educate lawmakers, the media, businesses, innovators and consumers about the health, safety and economic dangers that counterfeits and pirates are imposing on us;

  Second, to enforce the legitimate rights of small companies, manufacturers and retailers to protect the goodwill of their product line and to have safe, reliable distribution channels in the United States;
- Third, to engage on a global basis countries that are not honoring their international trade obligations, cracking down on counterfeiters and pirates of intellectual property, and strengthening their borders and shipping controls.

Our strategy will be implemented through more than fifty action items, phased in over the next two years. We intend to ensure that our work complements the STOP! initiative and we would be glad to inform the Subcommittee periodically on

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our progress. I am pleased to report today that the Chamber has already made significant progress on some of its objectives. We began our education strategy with surveys and focus group meetings with Congressional staff and small business owners to monitor the level of their understanding of intellectual property issues. Last month we released this informational booklet titled, "What are Counterfeiting and Piracy Costing the American Economy?" The booklet presents the facts behind the impact of counterfeiting and piracy in a way that is easy to read and understand. We have begun distributing it to businesses, government officials, the media and others throughout the country.

The Chamber has also been active on the international front against counterfeiting and piracy, as part of our global management strategy. For example, last month Tom Donohue led a delegation to China. He met with high ranking business leaders, and the protection of intellectual property rights was the top issue. The Chamber's delegation presented Chinese leaders with our action plan in the expectation that they will take concrete steps against counterfeiters and pirates, and they announced the creation of an index which will be continuously updated to measure the effectiveness of China's enforcement efforts. We have designed and are now implementing strategies to get other countries, such as Brazil, India, Russia and Korea, to strengthen their legal systems, prosecute counterfeiters and pirates, and to comply with their international treaty obligations.

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The Chamber and the National Association of Manufacturers have organized a coalition of more than 70 businesses and associations that is also committed to working with the Congress and the Administration. The Coalition Against Counterfeiting and Piracy (CACP) held its first meeting in November 2004 and has been collaborating ever since with STOP! agencies in the pursuit of our common objectives. For example, one of our five task forces has been working with the International Trade Administration and the Department of Homeland Security to create a set of business practices and guidelines to ensure that global supply chains are free of counterfeit or pirated goods. Another task force is developing a model framework on intellectual property rights for use by USTR in future negotiations of Free Trade Agreements. A number of key deliverables should be completed between September and the first quarter of calendar year 2006. Once again CACP would be glad to keep the Subcommittee informed of its progress in support of the STOP! initiative.

The 109th Congress provides a fourth opportunity to develop additional, long-term legislative solutions to combat counterfeiting and strengthen U.S. patent laws, and provide effective oversight of the Administration's long-term strategic plan for STOP! The Chamber recommends the following additional steps be taken:

1. The United States Senate should close existing loopholes in the criminal trademark law that allow counterfeiters to avoid prosecution, maintain control

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of assets for criminal enterprises, and unjustly profit from their illegal activities. In their October 2004 report titled, Report of the Department of Justice's Task Force on Intellectual Property, the Department of Justice stated that "in order to prevent the distribution of counterfeit products, the government should take reasonable steps to prevent their production. When law enforcement officials find materials and equipment that are used to create counterfeit products, the materials and equipment should be seized. Legal loopholes should not allow trafficking in counterfeit labels simply because they have not yet been attached to counterfeit goods." H.R. 32, the Stop Counterfeiting in Manufactured Goods Act, would close these existing loopholes.

Specifically, H.R. 32 would amend the U.S. Code, 18 U.S.C. 2320, by prohibiting the trafficking in counterfeit labels, patches, stickers, hangtags or medallions that are unattached to goods. In addition, the bill would make mandatory the seizure and destruction of counterfeit goods, as well as the forfeiture of illicit proceeds derived from counterfeiting. This legislation would grant trademark owners remedies similar to those already provided to copyright and trade secret owners.

On the International front, immediate passage of this legislation is necessary to more effectively combat counterfeiting abroad. With a number of free trade

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agreements currently being negotiated, it is imperative that the current deficiencies in domestic law are not codified in these international agreements. We should seize the opportunity represented by new trade agreements to obtain stronger enforcement obligations from our trading partners against counterfeiting. I would urge the United States Senate to quickly take up and pass these important legislative provisions.

2. Enact the U.S.-Dominican Republic-Central America Free Trade Agreement. DR-CAFTA would knock down trade barriers to American exports to the region. This FTA would be the largest trade agreement in a decade – two-way trade is currently $32 billion. The agreement includes member countries Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic and would eliminate 80% of their tariffs immediately, with the remaining tariffs phased out over 10 years. The Chamber strongly supports enactment of DR-CAFTA, major provisions of which would strengthen the protection of intellectual property rights and block the entry of counterfeit and pirate products from countries such as China and Russia, two of the worst violators.

3. Ensure that the provisions of the Governmental Performance and Results Act, especially those relating to establishing performance indicators and the means

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for validating actual versus planned achievement of them, are rigorously applied in the on-going implementation of an integrated, interagency STOP! strategic plan and provide regular oversight of the Administration's and business community's progress.

Thank you, Chairman Voinivich, for focusing on the economic and safety threats of counterfeiting and piracy. I appreciate the opportunity to provide testimony and will respond, to the best of my ability, to any questions you might have.

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Testimony of Franklin J. Vargo

Vice President for International Economic Affairs

National Association of Manufacturers

On Behalf of

The National Association of Manufacturers

Before the

Senate Committee on Homeland Security and Governmental Affairs

Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Hearing on

"Finding and Fighting Fakes: Reviewing the Strategy Targeting Organized Piracy"

Tuesday, June 14, 2005

Mr. Chairman, members of the subcommittee, I am pleased to appear before you this morning to participate in a review of the Strategy Targeting Organized Piracy (the STOP initiative). The National Association of Manufacturers (NAM) commends you, Mr. Chairman, for holding this hearing on the vitally important subject of product counterfeiting and what is being done to stop it.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states, as well as 350 vertical industry associations and state manufacturing organizations. Understandably, therefore, the NAM is very concerned about the growing worldwide scourge of counterfeiting and copyright piracy.

Counterfeit products account for a staggering 5 to 7 percent of world trade -- a volume of almost $500 billion annually. Counterfeiting not only violates the intellectual property rights of manufacturers, it also puts the safety of consumers at risk. Dangers range from ingestion of fake pharmaceuticals to accidents caused by substandard parts in rather important components such as replacement aircraft parts and automobile brake linings.

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China, in particular, engages in unfair trade practices, including wholesale counterfeiting of U.S. products. They have huge factories dedicated to making products that look exactly like U.S. brand name goods but don't meet the quality standards of the U.S. manufacturer. This is not cute. This is, as NAM President John Engler has said repeatedly, grand larceny on a massive scale. We are pleased that Secretary of Commerce Gutierrez stressed in his recent visit to Beijing that intellectual property abuse is a crime and needs to be treated as such. We applaud that he told the Chinese that, "Intellectual property rights are not up for negotiation. And frankly, the abuse of intellectual property rights is not acceptable."

The NAM met with a Chinese government intellectual property protection delegation earlier this month, when Vice Minister Ma visited Washington principally to discuss plans for the forthcoming meeting of the Joint Commission on Commerce and Trade (JCCT) – a bilateral commission I was privileged to staff for the U.S. side during part of my career at the U.S. Department of Commerce. In the NAM's meeting with the Chinese delegation, it was clear that while China is taking additional steps and is improving its laws, the effectiveness of enforcement in such a large country has a long way to go. While welcoming the steps the Chinese government is taking, the NAM made it plain that from our view, we are running out of time. We must see a sharp increase in enforcement, in criminal charges, and in convictions that put counterfeiters in jail.

Let me stress that counterfeiting is not just a serious problem for big companies. We hear from many of our small manufacturers that they are affected very strongly. Not only do they frequently find their market in China destroyed by Chinese-made fakes, but also their markets around the world can be ruined. The Subcommittee is hearing today from NAM member company Will-Burt on industrial and emergency lighting, and they are scarcely an isolated case. Tomorrow, the House Energy and Commerce Committee's Subcommittee on Commerce, Trade and Consumer Protection will hear from our member Uniweld, a Fort Lauderdale, Florida, manufacturer of manifolds that has found its markets as far away as in Saudi Arabia to be affected by Chinese-made counterfeit products.

The NAM's Role

The National Association of Manufacturers has worked to make this issue a top priority for lawmakers and the Bush Administration. In 2003, the NAM Board of Directors approved a resolution calling for greater industry vigilance against counterfeiting. Responding to increasing member-company complaints about counterfeiting, the NAM formed its Product Counterfeiting Working Group. The membership reads like a Who's Who of industry sectors – including automotive and aerospace; textiles, apparel, and footwear; widely used consumer goods including personal care and toiletries; chemicals and pharmaceuticals; electronics and imaging supplies; distilled spirits, cigarettes and groceries. Most major manufacturing industry segments have a serious global counterfeiting problem.

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The NAM has also helped launch the Coalition Against Counterfeiting and Piracy (CACP), a broad coalition focused on this issue. The NAM shares the leadership in close partnership with the U.S. Chamber of Commerce. We are delighted that such an experienced individual as the Chamber of Commerce's Brad Huther is the Executive Director for the coalition, and I am pleased to be on the same panel with him today. It is significant to note that this coalition represents the first time that the copyright side and the trademark side – that is, companies most hit by piracy and those most hit by counterfeiting – are working together formally.

The STOP Program

The NAM heartily supports the Bush Administration's interagency STOP initiative – the Strategy Targeting Organized Piracy. The NAM Anti-Counterfeiting Working Group I mentioned above met repeatedly with senior Administration officials to discuss counterfeiting, including several meetings with Deputy U. S. Trade Representative Josette Shiner to discuss how government and industry might work together more closely to combat counterfeiting and piracy. Many of these ideas are reflected in the STOP program.

All of industry has a vital interest in the ongoing success of the STOP initiative. Indeed, Governor Engler made his first public appearance on behalf of the NAM as the incoming president at the October 4 STOP press conference to underscore our support for the initiative. The NAM applauds the increased attention in the Administration to the problem of counterfeiting and piracy that is manifested in the STOP initiative. We appreciate the increased efforts that Commerce (PTO, ITA and others), USTR, State and Homeland Security/Customs and Border Protection have made in increasing cooperation and coordination among themselves and in focusing on what steps can be taken to reduce counterfeiting and piracy.

Let me turn to the components of the STOP initiative for some specific observations. But before doing so, I want to state that the NAM is pleased with the quick start on implementing STOP, and in some ways the U.S. government is out ahead of U.S. business. American business needs to put more time and effort into documenting intellectual property violations so that the U.S. government has the depth and breadth of evidence it needs to make a convincing case to foreign governments and law enforcement officials.

The STOP initiative contains five key elements aimed at addressing counterfeiting and piracy on a global scale. I am going to focus, however, on STOP's application to China because Chinese counterfeiting is the most serious challenge to U.S. manufacturers. The NAM views Chinese counterfeiting as having three major dimensions: 1) the internal problem of counterfeiting within China; 2) the export of counterfeit goods from China to third countries; and 3) the export of counterfeit goods from China to the United States. The STOP program deals principally with the latter two of these. I would like to discuss several aspects of the program.

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Stopping trade in fakes at America's borders -- This is a very important aspect of the initiative, one which the U.S. government has the most ability to control. The program has resulted in the use of new techniques and technologies to target shipments that are more likely to contain counterfeit goods, and also includes new efforts to reach out to intellectual property right holders to improve the communication and an ability to ascertain whether shipments are genuine.

In the view of the NAM, this effort has brought about an improvement in the rate of intercepting counterfeit goods, and also provides the opportunity to experiment with new ways of further improving the success rate. Limited customs resources and the need to keep trade flow limit the number of containers that are opened at our borders. Technology, however, can help us better target suspect shipments and track down those trading in counterfeit products.

The NAM would like to work for a central computerized registry that would enable customs officers to be able to ascertain automatically whether individual shipments are authorized. While this will take some time to achieve, we believe it is a goal worthy of seeking. The problems are likely to be more serious on the private sector side as we look for feasible methods that do not slow international trade or pose too large a cost burden.

The NAM, both directly, and with the CACP, has had initial explorations of some possibilities with Customs and Border Protection (CBP), and we welcome CBP's willingness to explore options. The NAM sees great promise in the application of anti-terrorist methods to profiling and catching counterfeit and pirate shipments, another element of the STOP initiative. We understand that CBP faces numerous challenges and needs some level of stability in their pilot project before being able to accept outside industry data, but we are very eager to get going. Essentially, we are seeking to discover what discrete data elements, in what format, companies can submit to CBP so as to increase their ability to profile suspicious shipments and shippers.

No Trade in Fakes Program -- This initiative, to encourage companies to take steps to ensure their supply chains are free of counterfeit or pirated goods, was a challenge to industry to examine present controls and procedures. The NAM recognized early on that industry was going to have to take more responsibility for detecting and removing fakes from the stream of commerce, not leaving the whole matter to law enforcement. In 2003, the NAM Board of Directors adopted a resolution calling on member companies to exercise greater vigilance in this regard.

The No Trade in Fakes Program is one that the CACP has taken on behalf of U.S. industry, and the NAM is supporting that initiative within the coalition. Brad Huther, the CACP's Executive Director, has elaborated on this aspect of the STOP initiative in his testimony before the subcommittee. We are encouraged by the leadership within the coalition shown by the grocery and retail industries. The Grocery Manufacturers of America, along with neighboring associations, will be working on new guidelines and best practices document this summer.

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For its part, the pharmaceutical industry has been working closely with the Food and Drug Administration, which is the first civilian agency to have adopted a policy calling for adoption of Radio Frequency Identification Devices (RFID) in its relevant industry sector. Their initial efforts should provide useful data and experience on how RFID can be applied more broadly by U.S. manufacturers to strengthen supply chain security. We have a considerable distance to travel, but, again, we appreciate the cooperation the U.S. government has extended thus far.

International Cooperation – The NAM views this aspect as especially important. The United States greatly needs more international cooperation in law enforcement and diplomacy, for two reasons that loom very large. The first is the sheer volume of counterfeit and pirate activity around the world. The second is the vast spread across so many countries, and the annual Special 301 report from USTR again confirms that 35-40 countries fail to afford adequate and effective protection to U.S. intellectual property rights.

Far too often, the United States has found itself in the lead in dealing with foreign countries containing large-scale piracy or counterfeiting, without commensurate interest on the part of other countries. Never has this need been so pressing when faced with the reality that a wide swath of the economy in China has not effective IPR enforcement, giving counterfeiters a free hand. If the United States stands alone in taking on this problem, which menaces not just Chinese consumers but consumers around the world, steals honest jobs, and besmirches good names, it cannot make enough progress.

There are several aspects to improving international cooperation. The first, of course, is to have others – particularly the European Union and Japan – raise their voices more loudly with respect to insisting that China increase enforcement of its intellectual property laws and reduce the incidence of counterfeiting and piracy. The NAM is pleased at recent statements and initiatives on the part of the European Union and Japan, but the visibility of their efforts still needs to be elevated so that China gets the message that its major trading partners want action. We still hear Chinese officials saying that the problem cannot be as serious as we make it out to be, for European and Japanese companies just don't see the problem in the same light.

The second is to increase third-country efforts to intercept shipments of counterfeit and pirated goods, both to prevent such goods from entering their own customs territories and to prevent their trans-shipment to the United States or other countries. U.S. Free Trade Agreements (FTA's) contain improved provisions and offer the opportunity of closer cooperation between U.S. and foreign enforcement authorities. I believe, however, that a couple of improvements are needed – improving U.S. law, as I will discuss later in my statement, and improving the attention to foreign trade zones. These zones are outside of the customs territories of countries, and are policed to a much less degree because of that. Such zones probably account for a disproportionate amount of trans-shipment of illegal goods, and we need to come up with better ways of dealing with that.

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The third is to elevate the priority of fighting intellectual property theft on the part of multilateral organizations. Here, the NAM is pleased that the Organization for Economic Cooperation and Development (OECD) has overcome internal problems and will be conducting its first extensive analysis of global counterfeiting. We are also delighted that the recent Asia-Pacific Economic Cooperation (APEC) meeting in Korea resulted in agreement that the nations bordering on the Pacific should increase their efforts to combat counterfeiting and piracy, including establishing guidelines for authorities to inspect, seize and destroy illegally-made goods and the equipment used to make them.

Need for Better U.S. Legislation

That point, Mr. Chairman, the destruction of the machinery used to make counterfeit goods, is an excellent transition to my point on the need for better U.S. legislation, for while existing laws permit the destruction of equipment used to manufacture pirated goods violating copyright laws, they do not permit the destruction of equipment used to manufacture counterfeit goods that violate trademarks. This must be fixed on an urgent basis.

Legislation that would fix this was just passed by the House, in the form of H.R. 32, the "Stop Counterfeiting in Manufactured Goods Act." Sponsored by Representative Joe Knollenberg of Michigan, the bill would strengthen U.S. law by allowing the seizure and destruction of machinery and equipment used by counterfeiters and traffickers in the United States.

Today, only the counterfeited inventory can be seized, and even that is discretionary; machinery used to make the fake goods cannot be seized at all. Additionally, the bill plugs the loophole through which unlabeled counterfeit goods may be brought into the country and the labels then applied later. Put these two weaknesses together, and you have a gaping import hole, under which shoddy no-name merchandise from China or anywhere else, for that matter, can be shipped into the United States, and Customs and Border Patrol has no grounds under IP laws to interfere with the entry.

What makes the weakness of the trademark counterfeiting remedies so odd is that the copyright piracy remedies are so much stronger. Seizure of inventory is mandatory, and seizure of equipment is provided for. We will not be able to make a convincing case to our trading partners that they should take tough action against counterfeiters, including the seizure of equipment used in this illegal practice, if U.S. legislation does not authorize our law enforcement officials and courts to take similar action.

We honestly see no rational reason not to move this legislation as fast as possible. Passing this legislation is a top priority for the NAM. While the Senate Judiciary Committee has jurisdiction over Senate consideration of the Knollenberg bill, the NAM hopes that you, Mr. Chairman, and all members of this subcommittee and the full committee will press for quick Senate adoption of the bill so that we can improve U.S. law and boost the ability to fight fakes. H.R. 32 by no means exhausts our legislative interests, but it will be hard for us to move on to anything else until we get this urgent business taken care of.

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More Must be Done for Small and Medium-Sized Firms

I have reserved my discussion of one of the most important aspects of the STOP program for last – because it is the area in which I believe we all need to accelerate our efforts. The STOP program established a "hotline" that for the first time provides a one-stop shop for smaller firms that generally lack the resources to understand their rights and seek redress when their rights are violated. This website is a good beginning, but we all need to work to make it better. Far too few small firms have registered their trademarks in China, for example. Without such registration, they have no rights.

Many of the major multinationals doing business in China, most of them NAM member companies, have banded together as the Quality Brands Protection Committee (QBPC), operating under the China Association of Enterprises with Foreign Investment. For several years, the QBPC has been encouraging prosecutors to bring the most far-reaching and visible cases against offenders and producing criminal convictions. This work is entirely necessary. At the same time, major multinationals have their own legal and enforcement staffs in China and also retain investigators so as to hand over enough evidence to local authorities to instigate seizures and arrests.

But where does this leave small manufacturers that have no personnel in China? All that they know is that fake products "Made in China" are for sale. Typically, even if the products are for sale in China and elsewhere around the world, the small U.S. manufacturer will discover the presence of counterfeits in the stream of commerce in the United States in one of several ways:

- Web site monitoring
- Trade show monitoring
- Customer service calls from those who have unknowingly bought fakes.

A small manufacturer, for example, a company of fewer than 500 employees, which typically has one or two lawyers to handle all legal matters has no way of knowing from where in China the fake products come.

The NAM and the other groups in the CACP will be developing specific ideas for how small companies might better be able to cope with the epidemic of counterfeiting. We believe it would be worthwhile to sit down with the subcommittee staff and with representatives of the Administration to explore some of these ideas. We would like to explore, for example, whether some form of "public defender" for small and mid-size firms might be feasible, or whether the U.S. government can play more of a role in third countries through diplomatic channels when it comes to stopping the sale of fakes. Additionally, there may be some way in which the resources of the government can be used to reduce some of the costs of investigating possible instances of counterfeiting, particularly in China.

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Finally, Mr. Chairman, the NAM has suggested to the Chinese government that it would be very useful were the Chinese embassy and Chinese consulates around the United States to provide a means for U.S. companies to better understand how to protect their intellectual property rights in China.

Before concluding my statement, Mr. Chairman, let me be clear that China is not the only problem. Counterfeiting and piracy are occurring in many other countries as well. In Russia, it is estimated that U.S. companies lost over $1.7 billion in sales to pirated optical discs and over $7 billion in the last 8 years. The focus in Russia is now on copyright piracy. But manufacturers are also concerned that weak IPR laws and poor enforcement in Russia will lead to rampant counterfeiting of trademarked products down the road, just as has occurred in China. We need to insist on effective IPR protection as a condition for WTO membership.

Thank you, Mr. Chairman.

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STATEMENT SUBMITTED FOR THE RECORD

Grocery Manufacturers Association

GMA is the world's largest association of food, beverage and consumer product companies. Led by a board of 42 Chief Executive Officers, GMA applies legal, scientific and political expertise from its more than 120 member companies to vital public policy issues affecting its membership. The association also leads efforts to increase productivity, efficiency and growth in the food, beverage and consumer products industry. With U.S. sales of more thar $500 billion, GMA members employ more than 2.5 million workers in all 50 states.

GMA has been fighting counterfeiting for a long time and is a member of the Coalition Against Counterfeiting and Piracy, an industry group created by a joint initiative between the U.S. Chamber of Commerce and the National Association of Manufacturers to act as the interface between business and the U.S. Government's Strategy Targeting Organized Piracy (STOP!) program.

The Scope of the Problem

Counterfeiting is not a victimless crime. On the contrary, it causes devastating financial and physical harm to United States companies, employees, investors, consumers, patients, and citizens. Many industries are affected, including consumer products, automotive, pharmaceutical, electronics, textiles and others.

When the average American thinks about counterfeit goods, he or she may think of phony Rolex watches, fake high-fashion handbags, or cheap knock-offs of designer T-shirts. The purchasers of these items usually know the products are not originals, so they may readily conclude that buying a fake is no big deal. However, counterfeiting is far more pervasive and dangerous than street vendors selling fake luxury items. In fact, only a minute portion of counterfeit goods are luxury items.

For example, in December, 2003, Australian customs officials stopped 52,000 container of counterfeit shampoo at port. Last week, officials in India seized a large quantity of bottled water with spurious marks as well as many counterfeit personal care consumer products. Canadian based Gieschen Consultancy, which tracks counterfeit product enforcement incidents. reports that in the first quarter of 2005, there were 279 incidents of intellectual property theft world wide, valued at a loss of $396 million dollars. Of particular interest to GMA member companies, this total included counterfeit milk drinks, wine, rum and soy sauce, as well as industrial goods and supplies such as insecticides and detergents and counterfeit perfumes and cosmetics.

Our member companies who make food, beverage and consumer products have rigorous quality controls to ensure their products are safe for proper human use and consumption. Counterfeit products are not subject to those same quality standards. As long as the packaging looks similar, it might enter the supply chain without any quality controls at all.

Domestic Efforts

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The first step in combating counterfeiting worldwide is to improve enforcement at home. We need to close some of the legal loopholes that allow counterfeiters to escape prosecution, and we need laws that give enforcement agencies better tools to fight counterfeiting.

GMA is pleased that the House has taken this first step by approving HR 32, the *Stop Counterfeiting in Manufactured Goods Act*, by Congressman Knollenberg. This bill will close a loophole in the federal criminal code that allows phony products to be shipped to the United States without brand markings, so they can pass through customs without any apparent violation. Counterfeit labels are then added and the products are sold through a variety of channels. HR 32 will allow authorities to prosecute the people who do the labeling and packaging here. It will also allow for the forfeiture and destruction of any confiscated counterfeit labels or products that would bear those labels.

In addition, the bill gives law enforcement officials the ability to seize and confiscate the equipment and assets – such as machine tools and computers – used to produce counterfeit products, labels, and packaging. Without this ability, law enforcement officers are forced to chase the same counterfeiters over and over again. The counterfeiters can simply continue to use their infrastructure to replace seized inventory and resume their trade. GMA strongly supported the passage of HR 32 in the House and we urge the Senate to pass the bill without delay.

GMA also supports the Administration's Strategy Targeting Organized Piracy (STOP!) initiative, which was launched in 2004 and brings together the U.S. Trade Representative, the Departments of Commerce, Justice, and Homeland Security to stop the distribution of counterfeit goods. The effort is broad in scope and brings a new approach, new tools and new pressure to bear through a coordinated effort from the federal government, the private sector and America's international trading partners.

A key element of the STOP! initiative is the development of purchasing guidelines for manufacturers and retailers to ensure that global supply chains are free of illicit goods. As a coordinator for the Coalition Against Counterfeit Products task force, GMA is working with other associations that represent food, beverage and consumer product manufacturers and retailers to accomplish this objective. The task force is developing voluntary guidelines to prevent illicit goods from entering the supply chain and prevent criminals from exploiting alternate sourcing strategies. The final document is expected to be completed by September, 2005. These guidelines will then be available for use by other industries.

Change Domestically Provides Leverage Globally

Passage of HR 32 is essential to our ability to improve anti-counterfeiting efforts abroad. The Office of the U.S. Trade Representative has made clear that it is not prepared to negotiate for mandatory confiscation and destruction abroad when U.S. law does not contain these provisions. Not surprisingly, our trade negotiators are loath to negotiate with other countries an agreement with which the United States could not comply under existing laws. We need to have domestic mandatory seizure and destruction so our trade negotiators have a foundation to press for this minimum necessary enforcement around the world.

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In 2004, the Office of the U.S. Trade Representative, in a "Special 301" annual review, reported that more than 66% of counterfeit goods seized by the U.S. Customs Service at ports of entry into this country were traced to China. In addition to combating counterfeiting within its borders, the Chinese government also must stop the export of counterfeit products. The United States should continue to work with the Chinese government to create an effective program to stop the trafficking of counterfeit goods at the point of export.

GMA is encouraged that the U.S. Government is taking the issue of intellectual property theft and counterfeit products seriously. In April 2005, as part of the Administration's Strategy Targeting Organized Piracy (STOP!), the United States traveled to Singapore, Hong Kong, Tokyo and Seoul to explore avenues for increased cooperation, improved coordination, and expanded information exchanges as an initial step in garnering international support to work together to stem the trade in fakes. A series of 17 U.S. proposals were shared with government officials from these countries generating fruitful discussions, interest and commitments to continue working together on this shared concern. And just last week, officials representing seven United States Government agencies traveled to Europe to meet with German, United Kingdom, French and European Commission officials to discuss cooperation to crack down on global piracy and counterfeiting.

In addition to having appropriate prosecutorial powers in the U.S. and other countries, it is important to understand the scope of product counterfeiting globally in terms of damage to rights holders and countries that harbor counterfeiting. GMA has long advocated engagement with the Organization for the Economic Cooperation (OECD) to address this issue. With the support of the U.S. government, the Organization for Economic Cooperation and Development announced in April 2005 that it will conduct a study to determine the scope of the problem and the damage product counterfeiting does on a global basis. The project will also analyze existing public and private anti-counterfeiting efforts to develop a set of best practices to guide future efforts in the fight against counterfeiting.

The project will include a three-phase study on the adverse impacts of counterfeiting and piracy; a series of four regional workshops, envisioned to take place in Russia, Brazil, India and China in 2006; and two Global Forums, focusing on various aspects of the problem, one planned for 2006 and the second in 2007.

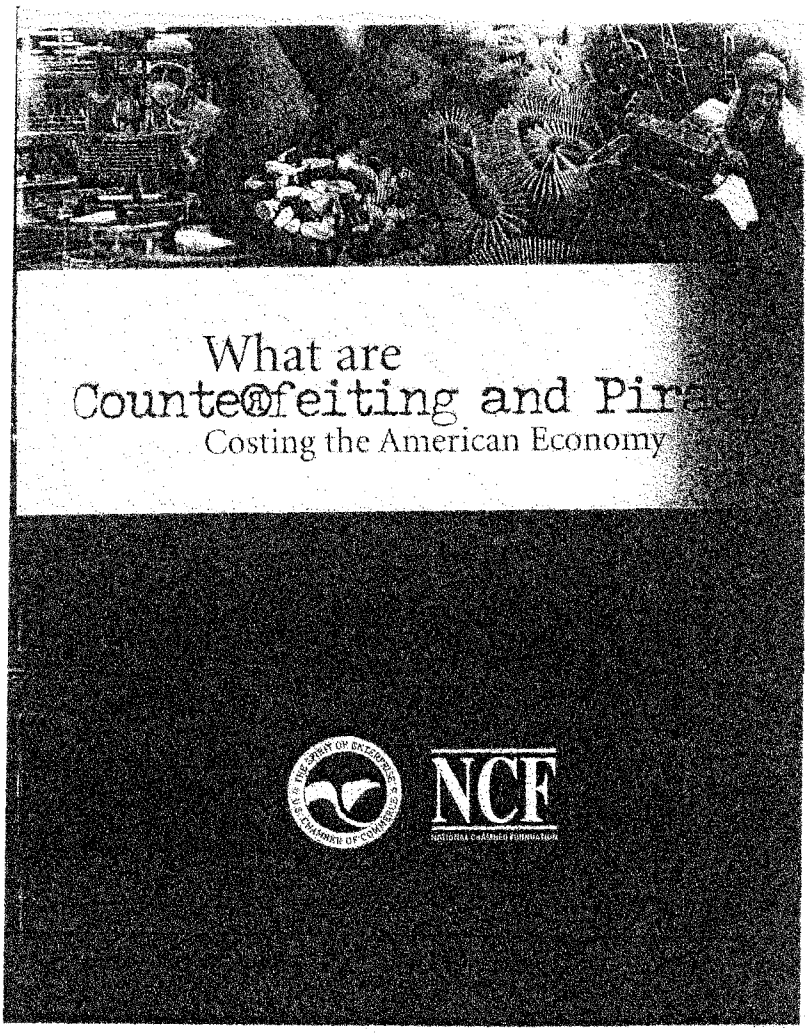
OECD is scheduled to co-host a two-day meeting with the World Intellectual Property Organization in October, 2005 in Geneva to develop metrics and examine statistical issues, and also plans to circulate an outline for the Phase one study to governments, asking them to circulate more widely for feedback. A final report is expected in May, 2006.

Now, around the globe, brand owners, industry coalitions, and governments are joining the fight against counterfeiting. This is not a problem we can solve overnight, and it is not a problem we can solve alone. We need global cooperation. To get it, however, we first need to close the loopholes in current federal criminal laws to criminalize trafficking in fake labels and packaging for all goods. We also need to provide our law enforcement agencies with authority to seize the machinery of counterfeiting. And we need to devote the resources to study this problem comprehensively, so that we can arm ourselves with more information about this problem in ways that will allow us more effectively to fight it.

GMA is encouraged by the efforts of the STOP! initiative and House passage of HR 32. Again, GMA urges the Senate to act quickly to pass this bill. But the U.S. government needs to continue its efforts to prevent the distribution of counterfeit products. This is a very important issue for the health and safety of consumers. GMA has and will continue to work with the U.S. government to stop the distribution of counterfeit products.

If you have any questions, please contact Steve Arthur at GMA at 202-337-9400.

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Breadth of the Problem

An Oceanside, California, 13-year-old sustained severe injuries from an explosion caused by his cell phone. The explosion happened with such force that fragments of the phone were lodged in his face and on the ceiling of his family's home.[1]

An unsuspecting woman noticed a strange taste to her cholesterol-lowering drug Lipitor. She phoned Pfizer's customer hot line, sparking an investigation resulting in the recall of more than 16.5 million pills nationwide.[2]

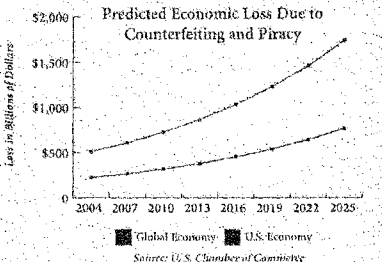
A small business owner in Indiana is losing an estimated $10 million a year in lost sales, not to a competitive product but to his own brand that has been expertly copied—down to the business cards of the sales representatives.[3]

These incidents have common threads—an often underestimated threat, counterfeiting and piracy.

In the Information Age, intellectual property (IP) is the "gold standard." It must be protected as it is the cornerstone for economic prosperity in this new era. The problem goes by many names—counterfeiting, piracy, or knockoffs. But the problem of IP theft is not going away.

In fact, it is getting worse. Experts say that it is growing exponentially and with sophistication and brazen boldness.

Increased access to technology and other resources has armed these criminals with the means to pirate the latest goods and stay one step ahead of the law. Stealing has become big business.



Source: U.S. Chamber of Commerce

Counterfeiting and piracy are costing the U.S. public billions of dollars every year. But the problem is more insidious than that. It damages investment and innovation; has potentially devastating economic consequences for small businesses; puts a severe strain on law enforcement agencies; nearly always escapes taxation; threatens public health and safety; diverts government resources from other priorities; and has links to terrorism and organized crime.

Counterfeiting and piracy, once viewed as "victimless" crimes mainly consisting of selling cheap knockoff sunglasses and watches, have mushroomed in recent years to endanger every product that is created. From dangerous substandard replacement parts for airplane engines to ineffective

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pharmaceuticals to illegally copied compact discs manufactured by the millions in clandestine factories around the world, sales of counterfeit and pirated goods are skyrocketing. Profits from these illicit sales are being funneled worldwide into the pockets of everyone, from groups associated with known terrorists to organized crime elements.

The problem of counterfeiting and piracy goes beyond the manufacture, distribution, and sale of cheap, unauthorized goods. It threatens our national security, lessens the value of legitimate brand names, and erodes the profits of nearly every business in America.

- Annually, approximately 5% to 7% of world trade is in counterfeit goods, according to the FBI, Interpol, and World Customs Organization estimates. That's the equivalent of as much as $512 billion in global lost sales. Of that amount, U.S. companies lose between $200 billion and $250 billion.[1]
- Counterfeit merchandise is responsible for the loss of more than 750,000 American jobs, according to the U.S. Customs and Border Protection.[2]
- The World Health Organization (WHO) has estimated that counterfeit drugs account for 10% of all pharmaceuticals. In some developing countries, WHO pegs that figure at 60%.[3]

For these reasons and more, it is time to act.

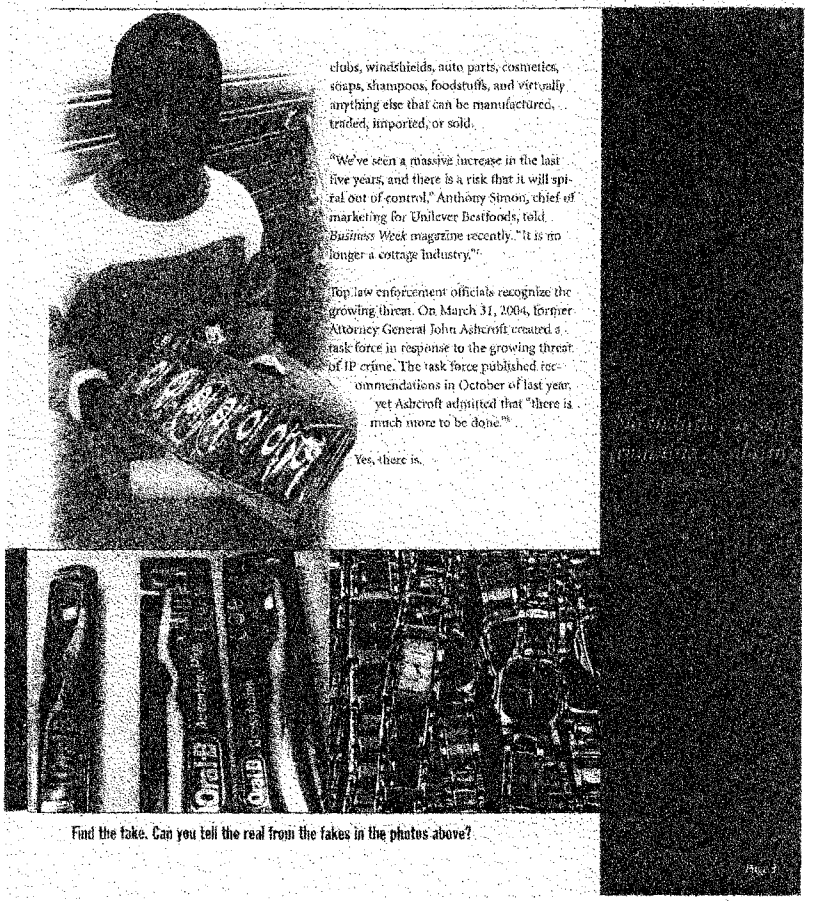
For every small seizure of counterfeit merchandise, top law enforcement officials say, several more container loads are entering this country. It is a flood of illegal, unlicensed, unregulated, and dangerous products that threaten to wash up on the shores of every legitimate business and industry in this country.

If your idea of fake goods is a pair of cheap bogus sunglasses, law enforcement officials say that your perception of the problem is perhaps a generation out of date. There are fake sunglasses and handbags and watches, to be sure. But the problem is far larger and more economically damaging. Today, counterfeiting and piracy run the gamut and include dangerous and unlicensed medicines, faulty computer chips and substandard batteries, compact discs and bogus recordings and movies, inkjet cartridges, golf



Former Attorney General John Ashcroft (far right) met with a small group of concerned business leaders to discuss ways to protect the nation's intellectual property—an increasingly important asset of the Information Age.

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clubs, windshields, auto parts, cosmetics, soaps, shampoos, foodstuffs, and virtually anything else that can be manufactured, traded, imported, or sold.

"We've seen a massive increase in the last five years, and there is a risk that it will spiral out of control," Anthony Simon, chief of marketing for Unilever Bestfoods, told *Business Week* magazine recently. "It is no longer a cottage industry."[7]

Top law enforcement officials recognize the growing threat. On March 31, 2004, former Attorney General John Ashcroft created a task force in response to the growing threat of IP crime. The task force published recommendations in October of last year, yet Ashcroft admitted that "there is much more to be done."[8]

Yes, there is.

Find the fake. Can you tell the real from the fakes in the photos above?

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Making a Difference

The world's largest business federation, the U.S. Chamber of Commerce, is taking action to thwart the growing global threat of counterfeiting and piracy.

"Counterfeiting and piracy deprive governments of tax dollars, undermine hard-earned brand reputations, finance organized criminal networks, put consumers' health at risk, and reduce corporate earnings," says Thomas J. Donohue, president and CEO of the U.S. Chamber. "The Chamber will continue to work to put these criminals out of business."



Chamber President and CEO Thomas J. Donohue is leading the business community's fight against counterfeiting and piracy.

And it's not just big business that is impacted. Even your local pharmacist is taking note. "I've been in this business for 40 years," said pharmacist Lowell Anderson of Bel-Aire Pharmacy in White Bear Lake, Minnesota. "I have less confidence in the integrity of the supply line today than ever before. It scares me."

To achieve its objective, the Chamber is committed to implementing an integrated three-part strategy.

Part one is education. The Chamber is working to educate businesses, the media, and lawmakers about the growing threat of this issue.

Part two is enforcement. The Chamber is committed to bringing these criminals to justice. It is working with manufacturers, retailers, and law enforcement to disrupt the ability of counterfeiting networks to use legitimate distribution channels.

Part three is country-specific initiatives in priority countries, beginning in China and Brazil and expanding to Korea, India, Russia, and to other countries where the problem is prevalent.

In addition, the Chamber is leading the Coalition Against Counterfeiting and Piracy (CACP) to coordinate the efforts of the business community to stop the problem of counterfeiting and piracy.

"The Chamber is working with every industry battling the growing threat of piracy and counterfeiting. We must approach it from a business-wide perspective and CACP helps us achieve this," says Chamber Senior Vice President David Hirschmann. CACP is committed to increasing the understanding of the negative impact of counterfeiting and piracy by working with Congress and the administration to drive greater governmentwide efforts to address this threat.

Beyond the Numbers

"The United States' society and economy are built on an assumption of fairness and equal opportunity. One person, one vote. A level playing field. Fair taxation. That's what makes this country great," says the Chamber's Tom Donohue.

Fairness and equal opportunity are tenets of American life balanced by the equal and vigorous enforcement of laws. Unfortunately, lax enforcement of sanctions against counterfeiters and pirates who are abusing copyright and intellectual property rights (IPR) laws is threatening to erode these basic principles of American business life. All

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U.S. businesses and entire industries are fighting for their economic lives in today's global marketplace.

"People who illegally download a movie online … are not 'pirates' or 'spies,'" former Attorney General Ashcroft said. "They are thieves, pure and simple. And these thieves are a threat to the economic strength and innovative spirit of our nation."

Piracy undermines the foundation of the American free enterprise system. A pirated compact disc means more than lost revenue for the movie or recording studio; it means no royalties for actors, singers, or songwriters. It means no tax revenue for schools, communities, and states. It means that your local music store might go out of business. It means lawlessness has taken over where once a fair system of economic rewards existed.

"You are creating a world where brands mean nothing. That's a threat to every business that is creating a brand," said Rick Lane, vice president of government affairs for News Corp., parent company of Fox Television and DirectTV, which loses millions each year because of pirated TV shows, CDs, DVDs, and other forms of piracy. Lane adds, "This is about more than getting a pair of $10 sunglasses. It's about what kind of future we want our kids to live in."

In the past, companies viewed competing with fakes as a cost of doing business. Now it has moved far beyond that to threaten the viability of not just businesses but of industries.

We must act now to fight the problem. In fact, we can't afford not to.

What Does Counterfeiting Cost?

That $40 fake designer handbag being sold on the street is no bargain. In fact, it is robbing America of jobs, tax revenue, and perhaps entire businesses. Even worse, the proceeds from the sale could be going to finance international terrorists.

The ramifications of piracy and counterfeiting are myriad. They affect the United States in major ways. The cost of IP crimes hurts this country in four broad categories: direct losses to the economy, financing terrorism through illegal profits, threats to consumer safety, and the loss of American jobs.



Economic Losses

Economic losses include direct and indirect costs to both businesses and government. As mentioned, the FBI estimates that U.S. companies lose between $200 billion and $250 billion a year in sales.

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It's not just lost sales. It's also lost tax revenues. New York City alone loses $1 billion annually in tax revenue, according to New York City Comptroller William C. Thompson Jr.[11] By comparison, losses from bank robberies for the entire nation amount to less than $50 million a year.[14]

"While [consumers] may pay a fraction of the cost of goods like a fake Coach bag that may look good, the people of New York City suffer," said Thompson. "There is a ripple effect. You can save in the short run, but in the long run there is a loss."[15]

Thompson is right. Although he's speaking only about New York City, the economic ripple continues through lost jobs and tax revenues across the country—and around the globe.

Annual global losses by specific industries are staggering. Here are some industry-specific economic losses, which are just part of the estimated $512 billion in global sales lost to counterfeit goods:

- Pharmaceutical fakes are estimated at $22 billion.[12]
- Software piracy is estimated at $12 billion.[13]
- Apparel and footwear losses are estimated at $12 billion.[11]
- Spare auto parts cost legitimate manufacturers $12 billion.[16]
- Artistic recordings cost $4.6 billion.[17]
- Motion picture losses are $3.5 billion.[18]

Financing Terrorism

Profits from counterfeiting and piracy are helping to fund terrorists, officials who track such financial dealings say. Recently seized Al-Qaeda training manuals recommend the sale of fake goods as a financing source for illegal activities, according to Interpol.[11]

Secretary General of Interpol Ronald K. Noble, in testimony to the U.S. House of Representatives Committee on International Relations, gave specific examples of links between IPR crimes and terrorist organizations. Included in the groups named were Al-Qaeda, Hezbollah, Chechen separatists, North African radical fundamentalists, and known terrorist groups in Kosovo and Northern Ireland.[11] The 1993

Did You Know?

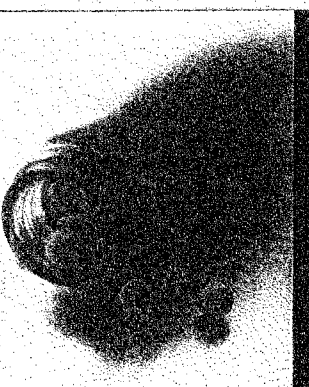
The 1993 World Trade Center bombing was partially financed through the sale of counterfeit goods, particularly fake Nike T-shirts sold from a store on Broadway.[19]

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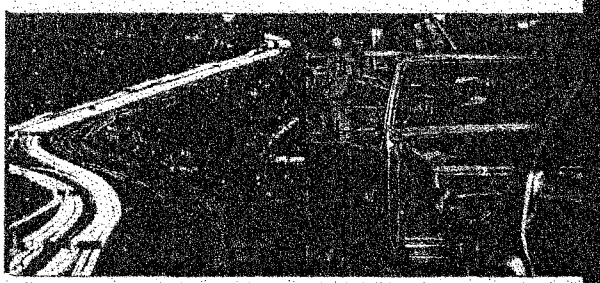
World Trade Center bombing was partially financed through the sale of counterfeit goods, particularly fake Nike T-shirts sold from a store on Broadway."

Consumer Safety

Simply put, consumers do not know what they are getting when they accidentally buy fake goods. There are no guarantees, no legal recourse, and little chance of recovery when accidents occur because of fakes. There are scores of news reports about exploding batteries, doctored pharmaceuticals and foods, and substandard auto and airplane components. There are reports of faulty medical devices, dangerous cosmetics and skin products, fake shampoos and soaps, doctored teas, dangerously defective and faulty batteries that have been linked to explosions in cell phones, and even fake and dangerous baby foods.

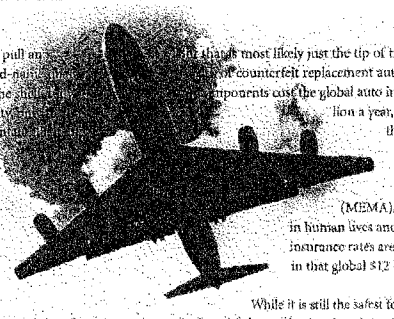


What makes this problem even more dangerous is that consumers simply don't know about it. It's one thing to knowingly spend $20 for a poorly produced fake Rolex watch when the name on the face says "Rolex." Most consumers know it's



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phony. It is quite another to pull an authentically packaged brand-name pharmaceutical or cosmetic off the shelf, expecting brand-name quality, and consume a product that may contain [illegible] often dangerous chemicals.



The Food and Drug Administration (FDA) in May 2003 recalled 16.5 million doses of fake Lipitor, a popular drug used by millions to control high cholesterol. But top FDA officials admit that what they catch is only a fraction of the total of counterfeit drugs.

John M. Taylor III, FDA associate administrator for regulatory affairs, told a Senate Commerce, Science, and Transportation Committee on November 20, 2003, that the Internet has made it virtually impossible to ensure the origin of any drug purchased on the Web.[4] In fact, the FDA says that counterfeit drugs account for 10% of all drugs sold in this country.[5]

The problem is not confined to fake pills. Anyone who drives a car, flies in an airplane, or uses a cell phone may be exposed to substandard, cheap, counterfeit parts that undermine safety and put all users at risk.

Investigators in New York City recently busted six auto parts dealers in Queens and Manhattan charged with selling potentially dangerous knockoffs as name brands such as Ford and Chrysler. The bogus parts from the Middle East and China included ignition coils, sway bars, and brake pads that can wear out faster than more expensive name-brand parts, investigators said. More than $700,000 of fake parts were seized.[6]

[illegible] is thought most likely just the tip of the iceberg. [illegible] counterfeit replacement auto parts and components cost the global auto industry $12 billion a year, according to the Motor & Equipment Manufacturers Association (MEMA).[7] And the toll in human lives and increased insurance rates are not included in that global $12 billion total.

While it is still the safest form of travel, a *Business Week* investigation found that bogus airplane parts played a role in at least 166 U.S.-based accidents or mishaps during a recent 20-year period.[8] And these are only the cases that could be attributed to fakes—the problem may be much worse.

Take the case of fake batteries. It's not just fraud. It's downright dangerous. The problem of exploding batteries is growing with the increased popularity of cell phones. Over the past two years, federal safety officials have received 83 reports of cell phones exploding or catching fire. These incidents usually are caused by incompatible or counterfeit batteries, officials say. Recently, Kyocera Wireless Corp. recalled 1 million batteries. Two other recalls were attributed to suppliers bringing counterfeits into the distribution chain.[9]

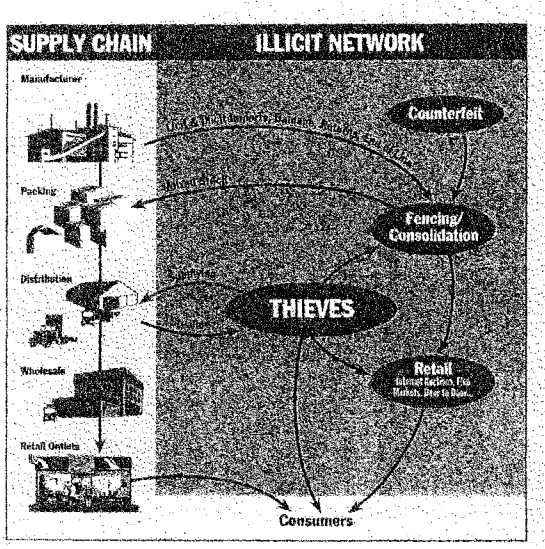
Again, that may be just the tip of the iceberg. During just one crackdown in one week in China, more than 1 million fake Duracell batteries were seized, according to the Gillette Co.[10]

It's not just batteries. It's faulty and dangerous knockoff children's toys, computer games, substandard sneakers, crayons, and children's jewelry, among other products. A recent *Consumer Reports* survey of products at more than a dozen stores in five states found

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that one out of every three toys purchased contained some violation of child safety standards."

The fakes are becoming tougher to spot. European and U.S. customs are increasingly seizing "disassembled" goods, or components of a product, such as labels, bottles, and corks. The counterfeiters ship the components into the importing country separately. Then they, or a third party, assemble the finished product for final distribution within the importing country."[4] This is a legal loophole that law enforcement is trying to close. But it's not easy. Tough enforcement also requires cooperation from the countries of origin. Such cooperation, law enforcement experts say, often requires delicate diplomacy between the United States and the countries that compete vigorously with us in the global marketplace.



Source: "The Illicit Market in Stolen Fast-Moving Consumer Goods: A Global Impact Study." Courtesy of the Gillette Co., 2004

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The Loss of Jobs

Good-paying jobs are the lifeblood of our nation's economy. Increasingly, counterfeiters and pirates are sapping that lifeblood through illegal products that are costing this country's workers their livelihood. One illegally downloaded version of a bootleg CD represents not just the loss of one $12.95 CD sale. It costs various musicians, songwriters, producers, stagehands, distribution and warehouse workers, transportation industry workers, sales personnel, and other people part of their support.

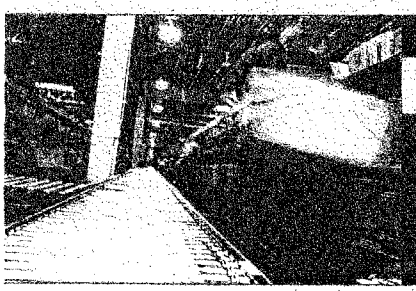
Industries as diverse as software designers to baby formula manufacturers estimate that they have lost more than 750,000 American jobs because of the cost of IP theft and other counterfeit goods and products.[v]

The Commerce Department says that the auto industry in this country could hire 200,000 additional workers if the sale of counterfeit auto parts were eliminated.[vi] But it's not confined to this industry. Counterfeiting and piracy cost jobs in heavy manufacturing industries such as farm and industrial equipment; consumer goods industries such as clothing and footwear; and medicines, even birth control pills.

Few industries have been hit harder by piracy than the software sector. Worldwide, 36% of the software installed on computers in 2003 was fake, according to a survey by the Business Software Alliance and the IDC research firm.

The Business Software Alliance says that a 10 percentage point reduction in worldwide computer piracy rates could add $400 billion to the legitimate global economy. That would generate 1.5 million jobs, as well as $64 billion in additional taxes.[vii]

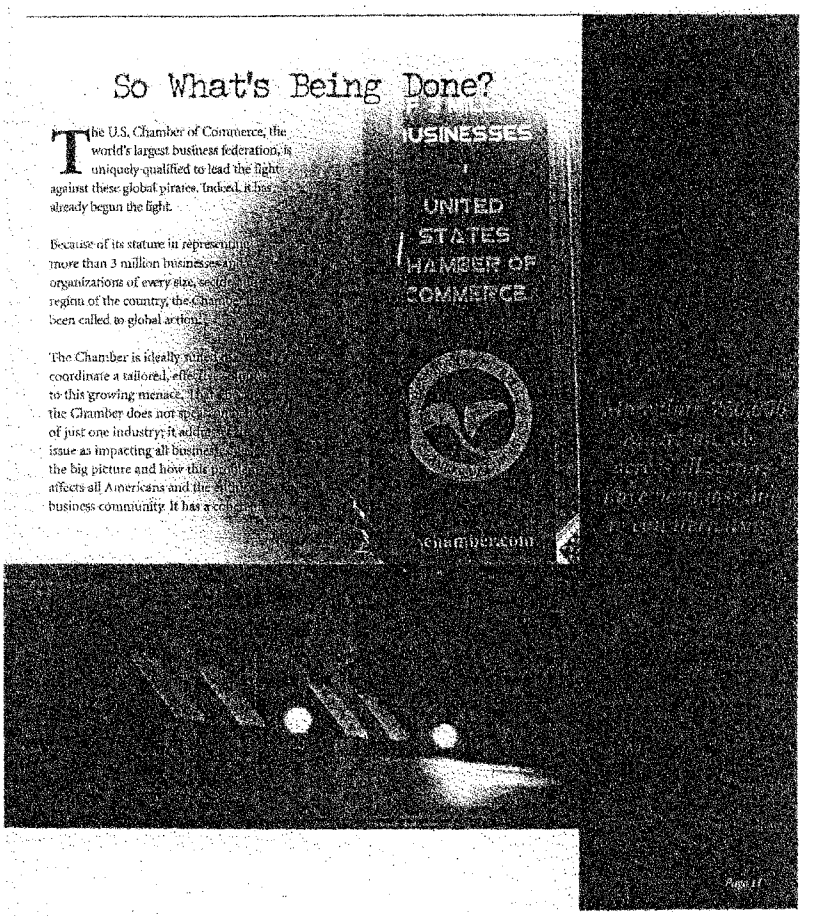
The United States and Canada actually have the lowest software piracy rate in the world, according to these groups. The North American computer piracy rate in software is 23%. That compares to 36% worldwide. The top two computer software piracy countries are China and Vietnam, each at 92%. Given the growth of the software business in those Far East countries' economies, one wonders how long North America can maintain its 23% rate.[viii]



Did You Know?

In 2003, more than 66% of goods seized by the U.S. Customs Service at ports of entry into this country were traced to China.[ix]

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strategy that cuts across all business lines and industries.

"The U.S. Chamber has developed an attainable, results-oriented action plan," says Brad Huther, director of the Chamber's Anti-Counterfeiting and Piracy Initiative. This action plan is producing tangible results. It is educating American businesses and consumers about the scope of the problem. It is raising the issue in corridors of power in Washington. It is tackling the issue head-on in a proactive manner with all the resources the Chamber can bring to the table.

A National Priority

In fact, the Chamber is helping to make counterfeiting and piracy a national priority.

In October 2004, the government announced the *Strategy Targeting Organized Piracy (STOP)*. According to a joint government press release, this cross-agency undertaking is "the most comprehensive initiative ever advanced to smash the criminal networks that traffic in fakes, stop trade in pirated and counterfeit goods at America's borders, block bogus goods around the world, and help small businesses secure and enforce their rights in overseas markets."*

What does STOP do? It is raising the stakes for international counterfeiters and pirates by casting a wider, tighter net for counterfeit goods entering this country. Disparate agencies are comparing notes and cracking down on these crooks.

And individual agencies are taking action. The Justice Department's Task Force on Intellectual Property provided recommendations to strengthen the protection of these valuable assets. Some have already been implemented.

For instance, Justice is adding new resources to its three-year-old Computer Hacking and Intellectual Property (CHIP) Units, resulting in an increased crackdown on such crimes. In 2003 (the first full year in which all CHIP Units were operational), charges increased by 46% over the average number in each of the four years prior to the formation of these units. More CHIP Units are on the way."

Success in Coordination

In addition to raising the profile on a national level, the Chamber is working to coordinate the business community's efforts. The Chamber-led CACP was formed to coordinate the business community's efforts and to leverage the use of collective knowledge rather than that of individual entities. CACP is committed to exposing the true cost of counterfeiting and piracy by working with Congress and the administration to drive greater governmentwide efforts to address this global threat.

CACP
Coalition Against Counterfeiting and Piracy

Beyond Our Borders

The roots of counterfeiting and piracy extend far beyond U.S. borders. And the U.S. Chamber similarly is taking an international approach to the problem.

The Chamber has selected five priority countries to target. The initiative began with China and Brazil and will extend to Russia, Korea, and India. These countries were chosen because of the scope of the problem and the ability to make a measurable difference. In fact, the Chamber already runs bilateral business councils in India, Korea, and Brazil.

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Case Study

Let's consider one example:

Pirating a copy of Microsoft Office 2000 may be more profitable than dealing cocaine.

Let's do the math:

A cocaine dealer pays about $47,000 for a kilo (2.2 pounds) of cocaine. He can sell it on the street for about $94,000—a 100% return on investment.

That same $47,000 expenditure can buy 1,500 pirated versions of Microsoft Office 2000. Those bootleg versions can fetch $423,000—or a 900% return on investment.

If you were a smart criminal—and that is not an oxymoron in these endeavors—where would you put your seed capital?

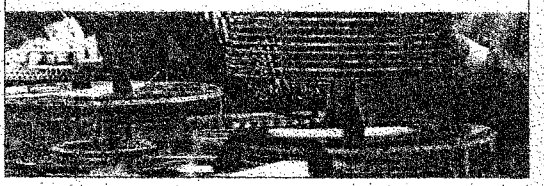
And it's happening every day somewhere in the world. In 2003, the world spent *more than $50 billion* (U.S. dollars) on commercially packaged software that runs on personal computers.

Yet software worth almost $80 billion was actually installed, according to the Business Software Alliance.[4]

This translates into an equation that makes dollars but no sense: for every two dollars' worth of software purchased legitimately, one dollar's worth was obtained illegally. That's a worldwide *piracy rate* of 36% in 2003.

The United States actually has one of the lowest software piracy rates—and even here it is 23%. But what business or industry can continue to prosper with a theft rate of nearly one of every four dollars?

Around the world the problem is more acute. In China and Vietnam, the software-piracy rate is 92% each. In Ukraine, it's 91%. Think about it: 9 of every 10 pieces of software sold in those countries is obtained *illegally*![5]



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China is Job One.

In 2003, more than 66% of goods seized by the U.S. Customs Service at ports of entry into this country were traced to China."

"China has failed to adequately enforce its own laws and regulations when it comes to piracy and counterfeiting violations," says Myron Brilliant, Chamber vice president for East Asia. "This is an endemic problem with immense consequences for the U.S. economy, our companies, particularly small and medium-size businesses, and public safety. We remain committed to constructive engagement with the Chinese government on this and other concerns," Brilliant continues. "But China must move beyond words to actions that crack down on IPR infringements in accordance with its WTO [World Trade Organization] commitments."

Accordingly, China is the Chamber's top priority in this initiative's international efforts. The objectives are to

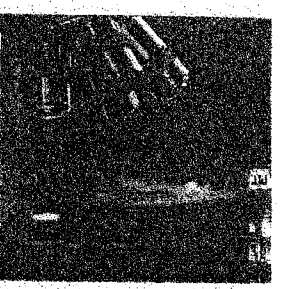
- ensure deterrent-level criminal and administrative penalties for IP violations,
- increase IP enforcement coordination at central and provincial areas,
- promote consumer awareness and curtail availability of pirated goods through border crackdowns,
- secure China's ratification of WIPO Internet treaties, and
- increase the market for legitimate goods.

In light of increasing international cooperation on IPR enforcement issues in China, the Chamber has organized an ad hoc coalition comprising key business organizations in the United States, Canada, China, Japan, and the European Union in an effort to fight against the existing high level of counterfeiting and piracy. Together, these organizations will present a united front in fighting the growing problem in China.

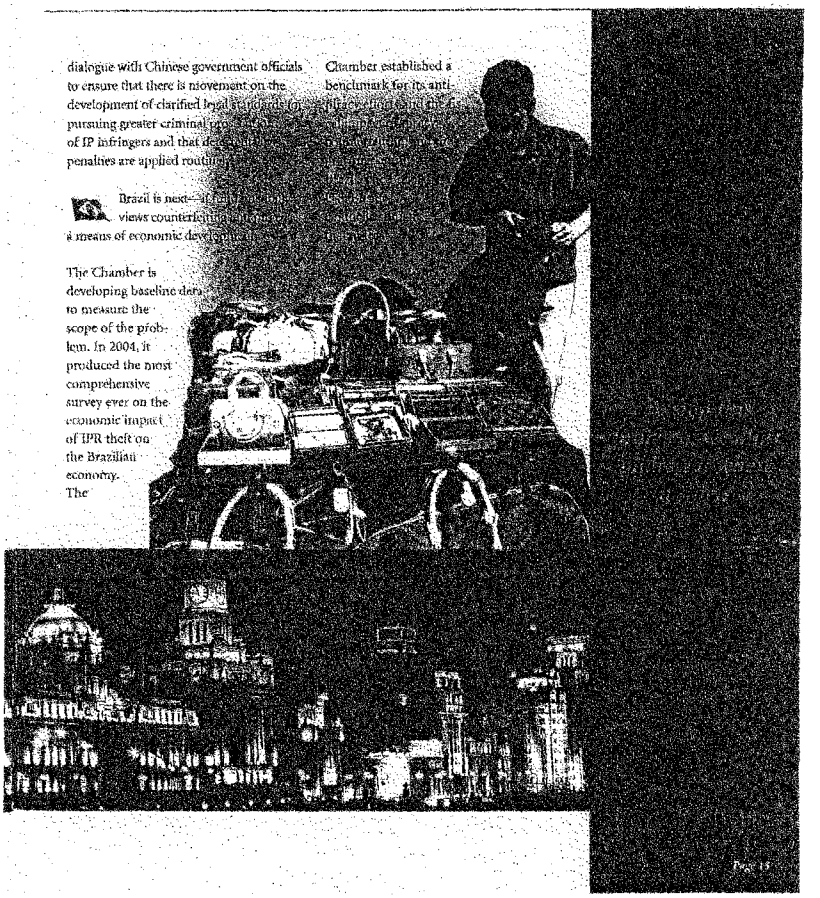
In addition, the Chamber has established a ground presence in China to support its anti-counterfeiting and piracy activities. In 2005, the Chamber is initiating best practices seminars with local enforcement agencies to foster educational efforts and to continue

Success Story

There is no question there have been successes. In April 2004, a Ukrainian man was charged with illegally distributing millions of dollars worth of unauthorized copies of software from Microsoft, Adobe, Autodesk, Borland, and Macromedia. In September 2004, more than $56 million in counterfeit Microsoft software was seized, and 11 people in California, Texas, and Washington state were charged with manufacturing counterfeit software and counterfeit packaging."



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dialogue with Chinese government officials to ensure that there is movement on the development of clarified legal standards for pursuing greater criminal [illegible] of IP infringers and that deterrent penalties are applied routinely.

Brazil is next—[illegible] views counterfeiting [illegible] a means of economic development.

The Chamber is developing baseline data to measure the scope of the problem. In 2004, it produced the most comprehensive survey ever on the economic impact of IPR theft on the Brazilian economy. The Chamber established a benchmark for its anti-[illegible]

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$1.6 billion in sales are lost annually to counterfeiting and piracy. The Chamber is conducting a similar study in 2005 to measure progress.

The Chamber is also making a difference in Brazil's government. It has hired on-the-ground resources to maintain constant focus on counterfeiting and piracy. It also increases the connection with the U.S. Congress by conducting missions to the country.

India, Korea, and Russia are next. The foundation has already been laid through executive missions, training programs, high-level government contact, and research. And the Chamber's initiative doesn't stop with these countries. It is committed to fighting counterfeiting and piracy wherever it starts.

The Role of Law Enforcement

In general, law enforcement does not treat IPR crimes as a high priority. In fact, law enforcement does not always investigate IPR cases. Even when investigations are begun, they tend to be "seizure-based" and do not extend to the onward flow of money.

The U.S. Chamber is working with the Department of Homeland Security's (DHS's) Immigration and Customs Enforcement and Customs and Border Protection units to increase awareness of this matter.

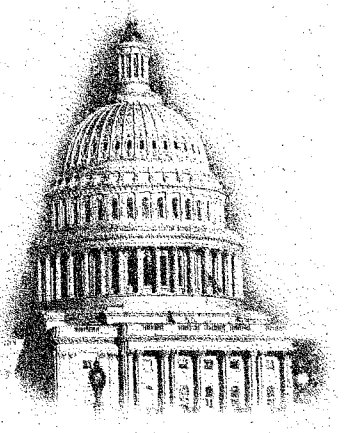
The Chamber plays a key role in helping DHS and other government agencies deliver their messages to the business community through its IP Roundtable Series, featuring senior officials. DHS continues to turn to the Chamber as a resource to create a dialogue between the public and private sectors."

Looking ahead in enforcement, the Chamber will play a coordinator role among various government agencies. It is also urging appointment of a White House-level IP "czar" to address the problem and will entreat Congress to pass comprehensive legislation to close existing loopholes.

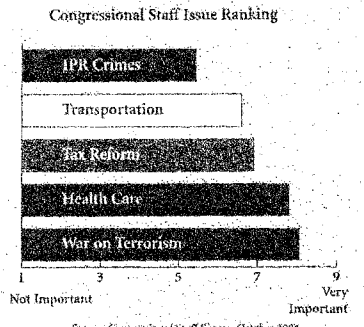
What Does Congress Think?

A recent survey conducted for the Chamber by The Winston Group confirmed that counterfeiting and piracy are not yet seriously on the radar of most members of Congress. The survey of more than 100 Capitol Hill staffers found that there is not a clear definition of IP crimes and counterfeiting among Hill staff. Moreover, the majority viewed IP crimes as a problem but not a priority for the country. Only 34% believed that penalties for IP crimes should always be enforced, while 64% believed that penalties should be enforced either in most cases or in the most severe cases.

Perhaps most telling, only 9% of Hill staffers considered themselves "very informed" on this issue. Some 6% reported that they felt "minimal action" was needed in



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Source: Congressional Staff Survey, October 2004

IP violations."[8] Indeed, in a world where daily headlines scream of terrorist threats and other stresses of modern-day life, IPR crimes do not rate highly on Capitol Hill, according to the Chamber survey.

Congressional staffers, when asked what issues Congress is considering in the upcoming legislative cycle, rated IPR crimes 5.44 on a scale of importance from 1 to 9 (1 being not important, 5 being neutral, and 9 being very important). That compared to 6.6 for transportation, 6.91 for tax reform, 7.8 for health care, and 8.06 for the war on terrorism."

What Is Being Done to Change Opinion?

The Chamber is committed to changing these opinions. It has begun a multi-channel education campaign to reach lawmakers, the media, and businesses. In addition to the formation of CACP, the Chamber continues to deliver its message at every opportunity to generate awareness of the initiative and to expand its reach by encouraging grassroots support and communication with its members on the scope and depth of the problem. Internationally, the Chamber is working with many organizations to curb counterfeiting and piracy. The Chamber's structure with its network of 99 AmChams in 86 countries worldwide makes it uniquely organized to manage and coordinate this effort.

Education is a key component of the Chamber's effort—and a major challenge. Chamber executives believe that increasing awareness is crucial because, unlike other criminal activity, the average consumer—and perhaps lawmaker—does not see counterfeiting as a threat to the economy, jobs, or public safety."

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In Closing

The problem of counterfeiting and piracy is more than just simple thievery, experts say. It involves much larger issues of fairness, competition, lost jobs and tax revenue, product safety, and the legitimacy of world brands. It also envelops a larger web that helps finance international terrorists as well as organized crime networks. Basic economics and today's modern technology would indicate that the problem of counterfeiting and piracy is not going away anytime soon.

In the past year, the Office of the U.S. Trade Representative and the U.S. Departments of State, Commerce, Justice, and Homeland Security's joint STOP initiative has begun looking at how to combat the trade of pirated and counterfeit goods at America's borders more effectively and to halt trade in bogus goods around the world. The government is working with the private sector to keep fakes out of global supply chains and to dismantle criminal enterprises that steal intellectual property. It is trying to tighten the global noose on IP thieves by seeking agreements with countries to block the trade in pirated and counterfeit goods.

While STOP is a good start, it's only a start. Clearly, much more needs to be done at all levels of business, government, and international treaties to halt this growing global menace.

The Bottom Line

It is no longer acceptable to consider the problem of counterfeiting and piracy as merely another cost of doing business. This is a modern-day scourge that is spiraling out of control. It has the potential to destroy industries and risks the economic underpinnings and future of all types of U.S. business.

The goal of the Chamber's initiative is simple—to make the world a miserable place for modern-day pirates and a safer place for consumers and businesses. Nothing short of that is acceptable.



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Endnotes

[1] Associated Press, November 24, 2004.

[2] "The Links Between Intellectual Property Crime and Terrorist Financing," testimony of Ronald K. Noble, Secretary General of Interpol, to House of Representatives Committee on International Relations, Washington, D.C., 108th Congress, July 16, 2003.

[3] "Stuck on You: A Tiny Glue Seller Claims Identity Theft," *The Wall Street Journal*, November 22, 2004.

[4] International Chamber of Commerce Commercial Crimes Services, *A Brief Overview of Counterfeiting*, July 2004.

[5] U.S. Customs and Border Protection, press release, May 29, 2002.

[6] "Fighting the Fakers," *The Engineer*, April 16, 2002; Philip Broussard, "Dangerous Fakes," *World Press Review*, January 1999.

[7] "Fakes!" *Business Week* cover story, February 7, 2005.

[8] Attorney General John Ashcroft, in prepared remarks to U.S. Chamber of Commerce, October 19, 2004.

[9] Reuters, July 1, 2004.

[10] Attorney General John Ashcroft in prepared remarks to the U.S. Chamber of Commerce, October 19, 2004.

[11] Interview, Rick Lane, vice president of government affairs for News Corp., parent company of Fox Television and DirecTV, October 2004.

[12] *Bootleg Billions: The Impact of the Counterfeit Goods Trade on New York City*, New York City Office of the Comptroller, November 22, 2004.

[13] George W. Abbott Jr. and Lee S. Sporn, *Trademark Counterfeiting*, 2001.

[14] "The Handbag: A Total Knockoff. The Cost to New York? All Too Real," *The New York Times*, November 23, 2004.

[15] *Pharmaceutical Technology Europe*, September 1, 2003.

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[16] "Facts on Fakes," International AntiCounterfeiting Coalition, www.iacc.org.

[17] *Business Journal of Portland*, April 12, 2003.

[18] *Detroit News*, October 2, 2003.

[19] "Issues," Recording Industry of America, August 8, 2004.

[20] Motion Picture Association of America, http://www.mpaa.org/anti-piracy, October 27, 2004.

[21] "The Links Between Intellectual Property Crime and Terrorist Financing," testimony of Ronald K. Noble, Secretary General of Interpol, to House of Representatives Committee on International Relations, Washington, D.C., 108th Congress, July 16, 2003.

[22] Ibid.

[23] Matthew Benjamin, "A World of Fakes," *U.S. News and World Report*, July 14, 2003.

[24] Testimony of John M. Taylor III, FDA associate commissioner for regulatory affairs, before a Senate Commerce, Science and Transportation Committee hearing on pharmaceuticals, November 20, 2003.

[25] Food and Drug Administration white paper on counterfeit drugs, 2003.

[26] Scott Shifrel, "Car dealers busted in scam," *New York Daily News*, December 1, 2004.

[27] Ed Garsten, "Fake Parts Hobble Car Industry," *Detroit News*, October 2, 2003.

[28] Willy Stern, *Business Week* cover story, June 10, 1996.

[29] "Cell Phone Batteries Explode, Causing Recalls," Associated Press, November 24, 2004.

[30] Testimony of Richard K. Willard, senior vice president and general counsel of Gillette Co., to the Senate Judiciary Committee, March 23, 2004.

[31] "Hazards in Aisle Five," *Consumer Reports*, November 2004.

[32] "Campaigning Against the Trade in Fakes," Anti-Counterfeiting Group fact sheet, 2004, info@a-cg.com.

[33] First Global Conference on Combating Counterfeiting, May 25-26, 2004, www.anti-counterfeitcongress.org.

[34] Tom Nash, "Counterfeit Parts: A Poor Fit for Your Shop," *Motor Magazine*, January 2004.

[35] First Annual Business Software Alliance and IDC Global Software Study, July 2004.

[36] Ibid.

[37] U.S. Trade Representative 2004 "Special 301" annual review, May 2004.

[38] Press release jointly issued by Departments of Justice, Commerce, Homeland Security, and State, October 2004.

[39] "Report of the Department of Justice's Task Force on Intellectual Property," U.S. Department of Justice, October 2004.

[40] First Annual Business Software Alliance and IDC Global Software Study, July 2004.

[41] Ibid.

[42] U.S. Trade Representative 2004 "Special 301" annual review, May 2004.

[43] First Annual Business Software Alliance and IDC Global Software Study, July 2004.

[44] U.S. Chamber of Commerce Global Anti-Counterfeiting Initiative, October 2004, www.uschamber.com.

[45] Intellectual Property Survey by the Winston Group, commissioned by U.S. Chamber of Commerce, preliminary findings, October 2004.

[46] Ibid.

[47] U.S. Chamber of Commerce Global Anti-Counterfeiting Initiative, www.uschamber.com.

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QUESTIONS FOR THE RECORD
FROM SENATOR GEORGE V. VOINOVICH

ON THE HEARING OF
"FINDING AND FIGHTING FAKES: REVIEWING THE
STRATEGY TARGETING ORGANIZED PIRACY"
TUESDAY, JUNE 14, 2005

Questions for Mr. Jon W. Dudas, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office:

1. Mr. Dudas, the Patent and Trademark Office manages the toll-free STOP! hotline. I am interested in the workload and workflow of the employees at the hotline. Specifically, how many employees manage the phone lines?

The STOP! hotline is staffed by 20 attorney-advisors in USPTO's Offices of International Relations and Enforcement. At least one attorney is available at any given time during normal working hours to answer calls. Calls are initially answered by non-attorney staff assistants who ascertain the nature of the call and direct it as appropriate to an available attorney.

How many incoming calls do they handle per week?

The hotline receives an average of 20 calls per week.

What type of training do they receive to manage these important calls?

The attorneys staffing the hotline are experienced professionals who have broad working knowledge in one or more areas of intellectual property law including domestic and international patent, trademark, copyright and/or trade secret matters. They do not receive any formal training beyond exchanging various best-practices procedures among themselves. We note that, even before STOP! was launched, one of the many long-standing functions of the attorneys now staffing the hotline has been to respond to phone calls and written inquiries from the general public about patent, trademark, and copyright matters. Therefore, USPTO attorneys handling hotline calls already have experience in fielding questions from concerned intellectual property applicants or owners.

Have you experienced a dramatic increase in the number of calls since the hotline was established?

While the number of calls has steadily increased since establishment of the hotline, we cannot describe that increase as dramatic.

What is the typical life cycle of a call? For instance, once a call comes in, what type of information do you collect and provide? After the call ends, what does PTO do with the information and does your agency follow-up with the caller?

Most calls involve a request for specific information or a discussion of a particular issue or problem and do not require a follow-up call. Follow-up calls by our attorneys are only made when warranted and only at the request of the caller. Our attorneys collect and record only summary information regarding the nature of the problem, the geographical origin of the call and the country where the problem occurred. They do not collect or record names, personal data or other identifying information.

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Also, has the hotline resulted in any enforcement actions being taken by DOJ or any other agency?

We are unaware of any specific enforcement action taken by a federal agency in response to a matter brought to our attention through the hotline.

2. Mr. Dudas, I understand that in order for a company's trademark, which is granted by PTO, to be protected by DHS from counterfeit imports, the company must file an additional form with DHS. GAO has indicated that DHS and PTO are aware of this issue, and the industry thinks this problem needs to be fixed, but it still exists. Is this correct?

Trademark owners may file a trademark recordation application with U.S. Customs and Border Protection (CBP) to provide information to CBP officers on their rights and to request official assistance in helping to prevent the importation of counterfeit merchandise. Although CBP may enforce trademark rights based on USPTO registration, recordation enables CBP to more effectively protect trademarks from counterfeit imports by making information on the recorded trademark available to CBP officers nation-wide, and by providing an avenue for trademark owners to share information on suspected counterfeit imports with CBP. Owning a federal trademark registration provides the trademark owner with the ability to file the U.S. registration with the CBP to prevent importation of infringing foreign goods.

To what extent do companies know they need to do this?

Companies are becoming more aware of this resource through the Administration's IP protection outreach efforts – most notably the STOP! initiative – and via information disseminated by the USPTO and various federal agencies and private sector trade associations. For example, the USPTO has established a prominent link on its website, "Register Trademarks with CBP Intellectual Property Rights border enforcement", to highlight this need. (See http://www.uspto.gov/main/trademarks.htm.)

Why hasn't this problem been solved?

Efforts are underway to automate CBP's trademark recordation process and otherwise make it more efficient, effective and user-friendly.

3. Mr. Dudas, does the USPTO provide any assistance to companies seeking to register patents and trademarks in other countries?

Yes. Information is provided regarding appropriate means of filing for and maintaining patent or trademark protection in foreign countries.

As part of Commerce's outreach to the business community under STOP, does Commerce stress the importance of registering in foreign countries?

Yes. As part of the Administration's outreach programs, members of the business community are advised that trademark and patent rights are territorial in nature and that in order to receive protection in a particular country, the patent or trademark owner must file for registration in that country. While copyright registration is not necessary under the Berne Convention, we advise right owners there may be advantages in obtaining foreign copyright registration for valuable works. Most countries offer

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protection to foreign works under certain conditions that have been greatly simplified by international copyright treaties and conventions.

4. Mr. Dudas, the Administration currently has two other programs to coordinate IPR enforcement: the National Intellectual Property Law Enforcement Coordination Council and the National Intellectual Property Rights Coordination Center. What is the relationship between STOP, the IPR Center, and NIPLECC?

STOP!, the IPR Center and NIPLECC are all Administration tools for combating piracy and counterfeiting. Federal agencies with responsibilities regarding intellectual property rights protection and enforcement are involved to varying extents with each of those programs.

STOP! is a White House led initiative that underscores the Administration's commitment to level the playing field for American businesses and workers. STOP! was announced in October 2004 by the Secretary of Commerce, together with the Office of the United States Trade Representative, the Department of Justice, and the Department of Homeland Security. This show of solidarity and cooperation by Cabinet-level officials sends a message to the world that the United States is serious about intellectual property - - and has the will to be effective. STOP! is the most comprehensive intergovernmental agency initiative ever advanced to smash the criminal networks that traffic in fakes, stop trade in pirated and counterfeit goods at America's borders, block bogus goods around the world, and help small businesses secure and enforce their rights in overseas markets. Under STOP!, the Department of Commerce created a single intellectual property rights (IPR) hotline staffed by USPTO attorneys -- 1-866-999-HALT -- that businesses can use to learn how to protect their IPR at home and overseas, or to file a complaint. The Department also launched a web site, www.StopFakes.gov, which provides information on IPR registration, border enforcement, criminal IPR enforcement, and protecting and enforcing IPR overseas.

The National Intellectual Property Rights Coordination Center (IPR Center), with core staffing from Immigration and Customs Enforcement (ICE) and the Federal Bureau of Investigation (FBI), is a multi-agency facility responsible for coordinating a unified U.S. Government response regarding IPR enforcement issues. The Center is staffed by agents with the authority to enforce federal IP statues and serves as a collection and dissemination point for intelligence provided by private industry for appropriate investigative and enforcement action. Partnerships with the varied IP industries are maintained through outreach programs directed at educating rights holders to better protect their intellectual property as well as providing access to the federal enforcement resources available to them. IP protection coupled with health and public safety from those violators using the Internet to facilitate IPR crime is a growing concern. Referrals to the Center are possible via Internet e-mail IPRCENTER@dhs.gov, hotline -- 866-IPR-2060 -- as well as an Internet web site available through www.ice.gov. Particular emphasis is given to investigating major criminal organizations engaged in Trans-national IP crime, halting the flow of counterfeit goods into U.S. commerce and pursuing the illegal proceeds derived from sales of counterfeit merchandise.

NIPLECC was launched in 1999 to ensure the effective and efficient enforcement of intellectual property rights in the United States and worldwide. The President recently appointed Mr. Chris Israel to head the international work of NIPLECC. NIPLECC's coordination activities help ensure that government enforcement efforts are consensus-based and non-duplicative. NIPLECC has developed a comprehensive database that includes all recent intellectual property law enforcement training provided by the U.S. Government and many associations to developing and least developed nations. NIPLECC agencies also develop legislative suggestions to improve domestic intellectual property laws related to enforcement.

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Do you believe that there is some overlap and duplication of responsibilities between these three initiatives?

While these initiatives share the common goal of fighting the piracy and counterfeiting of intellectual property, we are unaware of any significant overlap or duplication of responsibilities.

5. Mr. Dudas, GAO's written testimony provides a sharp critique of NIPLECC, an organization co-chaired by Justice and USPTO that seems to get lukewarm support at the most from its member agencies, despite recent congressional action in fiscal year 2005 appropriations law to (1) providing funding, (2) create a Coordinator for International Intellectual Property Enforcement, and (3) improve mission clarity. What plans exist to energize NIPLECC and make it a functioning, productive group?

After a careful and deliberative selection process, the President recently appointed Mr. Chris Israel to serve as the Coordinator for International Intellectual Property Enforcement. Upon the announcement, U.S. Commerce Secretary Carlos M. Gutierrez commented that "Intellectual property theft costs U.S. businesses billions of dollars and weakens our economy. American ingenuity and innovation are driving forces in our economy and we need to protect our ideas, both at home and abroad. This new position will help us to be more aggressive and also help us to better coordinate our fight against intellectual property pirates."

As the Coordinator for International Intellectual Property Enforcement, Mr. Israel will work with agencies across the Administration to coordinate development of policies to address international intellectual property violations and enforce intellectual property laws overseas. As mentioned previously, he will also head the international work of NIPLECC and coordinate international intellectual property protection plans among other agencies.

6. Mr. Dudas, implementing government-wide initiative requires rigorous coordination between the agencies involved. From your testimony, it is clear that each agency is responsible for portions of the STOP initiative. However, is there one agency specifically responsible for developing STOP's strategic plan, coordinating the initiative's activities, and ensuring that STOP is implemented efficiently and effectively? In other words, who is in charge of STOP?

STOP! is a White House led initiative with Cabinet level commitments and involvement. It is anticipated that the recently appointed Coordinator for International Intellectual Property Enforcement, Mr. Chris Israel, will play a significant role in the implementation of the STOP! initiative.

7. Mr. Dudas, STOP includes a toll free hotline providing information for businesses to protect their intellectual property at home and abroad, which is run by the Patent and Trademark Office. Also, the Department of Commerce has developed a number of resources for intellectual property rights, including a website called stopfakes.gov. What type of communication strategies are you implementing to ensure that individuals and business owners know about the resources available to them through STOP?

We have reached out to numerous trade associations, publications and other information outlets and urged them to take appropriate steps through their communications to make their members and readers aware of the resources available through STOP! For example, the USPTO is holding 2-day conferences to educate small businesses on how to protect and enforce their intellectual property rights

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domestically and abroad. Additionally, the USPTO is conducting seminars and conferences focusing exclusively on the challenges of protecting and enforcing intellectual property rights in China.

Does STOP have one centralized communication strategy or is each agency responsible for communicating their portion of STOP independently?

While every effort is made to maintain a centralized communication strategy, each department or agency involved with the STOP! initiative may choose to independently communicate the availability of a particular component or resource that is within its area of expertise. The stopfakes.gov website provides a centralized source of information to the public about the STOP! initiative.

8. Mr. Dudas, what steps are being taken to work with industry in order to increase your counterfeiting and piracy profiling capabilities?

The USPTO and other agencies involved in the STOP! initiative maintain ongoing contacts with representatives of industries that are victims of intellectual property theft and discussions with those representatives cover a wide range of enforcement-related issues.

9. Mr. Dudas, are there any restrictions on the federal government's purchase of fake products? How can we take action to make sure that our government is not contributing to the problem?

Yes. Procurement rules and procedures adopted by federal agencies are intended, in part, to prevent purchase of counterfeit or pirated products.

10. Mr. Dudas, if and when does the Administration plan to appoint an administrator for STOP? Will the administrator be someone with Cabinet-level rank?

I am unaware of any current plans by the Administration to appoint an administrator for STOP! As indicated above, it is anticipated that the recently appointed Coordinator for International Intellectual Property Enforcement, Mr. Chris Israel, will play a significant role in the implementation of the STOP! initiative.

11. Mr. Dudas, in Mr. Evans' testimony, he revealed that the Chinese Public Security Bureau is purchasing counterfeit versions of Will-Burt's products. Has the Administration taken any action to have the Chinese government halt these illegal purchases and have the Public Security Bureau purchase the authentic products from Will-Burt?

While it is my understanding that this matter has been brought to the attention of Chinese authorities, I am not aware of any specific resolution of this matter.

12. Mr. Dudas, how many employees does Commerce have dedicated to STOP?

While numerous professional and administrative personnel within the Department and the USPTO perform various functions to support the goals of STOP!, they have other concurrent responsibilities. It is my understanding that neither the Department of Commerce, nor the USPTO, has employees specifically dedicated only to STOP! initiative activities.

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What type of specialized training do they receive, if any, to enhance their effectiveness?

Personnel involved with STOP! have existing expertise that qualifies them for their particular duties and they enhance that expertise and effectiveness through ongoing contact and consultations with their colleagues within the USPTO and other government agencies.

Is there high turnover of the employees dedicated to STOP? If so, what is being done to reduce the turnover and how can Congress help reduce such turnover?

I am unaware of any such turnover in employees who perform functions in support of the STOP! initiative.

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QUESTIONS FOR THE RECORD
FROM SENATOR GEORGE V. VOINOVICH

ON THE HEARING OF
"FINDING AND FIGHTING FAKES: REVIEWING THE STRATEGY TARGETING ORGANIZAED PIRACY"
TUESDAY, JUNE 14, 2005

Questions for Ms. Victoria Espinel, Acting Assistant U.S. Trade Representative for Intellectual Property:

1. ***Ms. Espinel, in the USTR's 2005 "Special 301" report, you state that, "Global IPR theft and trade in fakes have grown to unprecedented levels, threatening innovative and creative economies around the world." Since most countries are now members of the WTO, and therefore bound to the TRIPS Agreement, the U.S. can file disputes against countries that do not effectively protect intellectual property rights. However, USTR has not filed any new IPR cases since 2000. If this is such a significant and growing problem, why hasn't USTR requested consultations with any countries in the past five years? Is the U.S. government currently considering taking action under the WTO? And if not, why? It is my understanding that USTR has been waiting until it got a good case to bring, but, given that no cases have been filed for five years, how much longer will we have to wait for the USTR to bring a case?***

   The TRIPS Agreement provides a good foundation for the rules to protect intellectual property rights (IPR). TRIPS also provides WTO Members a dispute settlement mechanism to address inadequate enforcement of the rules. We will not hesitate to use dispute settlement when it will be the most effective way to resolve a problem.

   The U.S. availed itself of the dispute settlement mechanism in 2003 when it filed a consultation request under the TRIPS Agreement against the European Communities challenging its discriminatory system for protecting geographical indications. The U.S. prevailed in that dispute, which is now in the implementation phase.

   USTR is currently working with industry and other stakeholders to improve protection of IPR in China and to develop our WTO options relating to China's compliance with its TRIPS obligations.

   However, enforcement is not solely about dispute settlement. It is only one tool in our arsenal we use to address the growing trade in counterfeit and pirated goods. USTR uses a variety of other tools to address our concerns and achieve results in the more than 150 countries with which we conduct trade. USTR raises our IPR concerns with our trading partners in a number of ways, including through bilateral discussions, our free trade agreement negotiations, the annual Special 301 Report, the STOP! initiative and TRIPS Council reviews to strengthen IPR protection for American businesses and workers in the global marketplace.

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Our efforts spotlighting reform have yielded results without having to resort to dispute settlement proceedings within the WTO. The following are examples of actions that have taken place this past year as a result of our efforts:

- Korea passed laws earlier this year protecting sound recordings, while also instituting regulations addressing film piracy and undertaking enforcement actions against those using illegal software.

- Taiwan has undertaken a number of actions to strengthen protection of IPR. It has implemented legal changes to its copyright law, plans to soon submit for legislative approval a data protection law, and has stepped up police actions against intellectual property theft. More recently, in September, a Taiwanese court also issued the first ever criminal conviction in the world to an internet peer-to-peer file-sharing service for copyright infringement.

- Pakistan stepped up enforcement against optical disc piracy in May through raids, seizure of counterfeit products and items used to make the infringing goods, and arrested IPR violators. More recently, in August, Pakistan also promulgated an ordinance for the establishment of Pakistan Intellectual Property Organization (PIPRO) which is designed to centralize the country's enforcement efforts.

- Ukraine passed optical disc legislation in July that will put into place changes to the criminal code to protect IPR, while also regulating the manufacturing exporting and importing of laser disc systems that has long been an issue in U.S.-Ukraine bilateral trade relations.

It is worth noting that invocation of TRIPS rules played an important part of the resolution of many of the above matters, even though ultimately we were able to achieve progress without bringing a formal dispute.

We recognize there is great concern in the Senate, as well as in the House, to address the important issue of IPR protection that affects so many of our companies and workers. *It is a concern we share, and one that we appreciate your Committee's* continued leadership and support in devising solutions toward addressing the problems of piracy and counterfeiting.

2. **Ms. Espinel, as I stated in my opening remarks, China has been the biggest culprit in failing to protect intellectual property rights. Given that widespread intellectual property theft in China, ultimately will hurt the Chinese economy, why do you think the Chinese government has been so reluctant to crack down on IP theft?**

Some ascribe this failure to the country's stage of development or cultural attitudes, and that the country's policy makers and its populace do not recognize the value of

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IPR. However, we believe broader issues are relevant in a country so large and dispersed.

For example, one issue is the dynamic that exists between the central and regional governments within China. While China's actions may be perceived as monolithic, actions by the central and regional governments are more often adversarial and driven by divergent interests. This difference makes coordination among enforcement personnel, government agencies tasked with IPR oversight, and civil, administrative and criminal remedy procedures largely unreliable.

The other issue has more to do with the relationship between the government and its economy. The government's ownership and control over the economy, which undermines private property rights --especially the intangible kind-- inherently provides a disincentive for innovation.

Lastly, there does need to be a greater recognition within China, both the policy makers and the general public, of the value of IPR. We are working to raise awareness of the benefits of strong IPR protection for China's consumers and China's economy.

3. **Ms. Espinel, last week you traveled to Europe to promote STOP. In fact, this was the Administration's second trip overseas designed to further the cooperative enforcement efforts of pirated and counterfeit goods. Could you please provide us with your assessment of these trips? In addition, do the European and Asian countries you visited have a functioning interagency coordination process that resembles STOP?**

Our initial outreach efforts to Asia and Europe were productive, generating much interest and fruitful discussions, as well as some early tangible results. On the bilateral front, we have increased cooperation in support of our border security, law enforcement and public awareness proposals.

We were also successful at gaining agreement from the countries we visited to better coordinate their IP efforts by designating a central point of contact to work with us on STOP!. Unfortunately, coordination within some of these countries is not yet as advanced as our own.

On the multilateral front, we've gained endorsement for many of the initiatives we pursued in the G-8, APEC and OECD.

4. **Ms. Espinel, USTR has chosen to impose trade sanctions under "Special 301" only once – against Ukraine. Why is Ukraine the only country to have been sanctioned (prohibitive tariffs of 100 percent on $75 million in Ukrainian imports to the United States) under 301? How effective have these sanctions been in encouraging change in Ukraine's protection of IPR? If these sanctions are proving useful, why don't we use this approach more frequently?**

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The "Special 301" provisions of the Trade Act of 1974 provides for the USTR to initiate Section 301 investigations of "priority foreign countries," which are those countries considered the most egregious in providing inadequate protection or enforcement for IPR, or market access for persons relying on IP protection. At the conclusion of the Section 301 investigation, the USTR is authorized to take appropriate and feasible action, including through the imposition of increased duties. Ukraine was designated a priority foreign country in March 2001, because at that time it was the largest producer and exporter of pirated optical media in Europe, and had failed to enter into good faith negotiations to address U.S. concerns through a bilateral arrangement.

In recent years, other countries designated as priority foreign countries have avoided sanctions by adequately addressing the IPR-protection problem prior to the conclusion of the Section 301 investigation.

The tariff sanctions against Ukraine likely contributed to the Ukraine's decision to reform its IPR laws. We also believe that other factors were important, such as extensive and ongoing discussions at technical and political levels, Ukraine's interest in bringing its laws up to international standards in order for it meet the requirements of WTO membership, and the USTR's decision to suspend Ukraine's GSP benefits.

The new IPR amendments passed by the Ukrainian parliament in July 2005 after several years of effort working with the U.S. Government and U.S. industry, address the primary concerns the U.S. had raised in the Special 301 Report. They amend the criminal code to protect certain IPR, while also regulating the manufacturing, exporting and importing of laser disc systems. As a result, on August 30, 2005, we lifted one level of sanctions that had been in place - the tariff sanctions. Meanwhile, we continue to work with the Ukraine regarding implementation and enforcement efforts and will assess this fall whether to restore Ukraine's GSP benefits.

Imposing sanctions is one option to press for stronger protection of IPR but it may not always be the most effective option. Our objective is to address problems and increase protection for IPR using the tools that will be most effective in a particular case, including bilateral discussions, free trade agreement negotiations and the annual Special 301 process.

5. **Ms. Espinel, I understand that USTR has taken the lead in organizing regular inter-agency meetings under STOP. Could you please explain the purpose of these meetings and who sets the agenda for the meetings? How have they improved coordination of enforcement efforts? Could you provide a summary of the topics discussed at those meetings?**

Pursuant to the Administration's overall policy, USTR has assisted in the coordination of STOP! activities. The primary purpose of these meetings has been to ensure that participating STOP! agencies, as well as the newly appointed 'Coordinator of

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International Intellectual Property Enforcement', are in constant communication with each other on an agreed approach toward resolving issues of relevant concern. Agendas for these meetings are developed collaboratively.

It is our assessment that the STOP! initiative has enhanced interagency coordination of enforcement efforts, most notably by enhancing accountability for agreed actions resulting from meeting deliberations. It is also helpful that STOP! provides all these participants with a clear and focused goal to channel collective resources.

Topics discussed at STOP! meetings vary according to the issues of the day. Most meetings are designed to generate a common understanding for a course of action to make progress on our IPR agenda. Discussion encompasses coordination on relevant IPR policy matters, developing plans to improve protection and enforcement of IPR, assessing progress of programs undertaken, agreeing to a division of labor, and managing outreach to the private sector and our stakeholders.

6. **Ms. Espinel, the Administration currently has two other programs to coordinate IPR enforcement: the National Intellectual Property Law Enforcement Coordination Council and the National Intellectual Property Rights Coordination Center. What is the relationship between STOP, the IPR Center, and NIPLECC? Do you believe that there is some overlap and duplication of responsibilities between these three initiatives?**

STOP!, the IPR Center and NIPLECC are all Administration tools for combating piracy and counterfeiting.

- **STOP!** – Designed to bring together all the major players – the federal government, private sector and our trade partners – to take concerted action in cracking down on piracy and counterfeiting of tangible goods, STOP! operates to address concerns of IP theft facing America's businesses and workers. Current program activities include strengthening domestic enforcement efforts, delivering assistance programs to small and medium size enterprises (SMEs) and building international cooperation to combat the manufacture and cross-border distribution of counterfeit goods.
- **IPR Center** – Responsible for coordinating a unified response regarding IPR enforcement issues between DHS and FBI law enforcement authorities, the IPR Center serves as a clearinghouse for information used by FBI and DHS field components targeting major criminal organizations and those using the Internet to commit IPR crime.
- **NIPLECC** – Designed to ensure the effective and efficient enforcement of IPR domestically and abroad, NIPLECC brings federal agencies charged with enforcement of IPR together so that U.S. government efforts are consensus-based and non-duplicative. Coordination through NIPLECC has led to the development of a central database capturing the IPR training activities participating NIPLECC agencies are conducting abroad.

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To date, we have not seen a duplication of efforts.

7. **Ms. Espinel, implementing government-wide initiatives requires rigorous coordination between the agencies involved. From your testimony, it is clear that each agency is responsible for portions of the STOP initiative. However, is there one agency specifically responsible for developing STOP's strategic plan, coordinating the initiative's activities, and ensuring that STOP is implemented efficiently and effectively? In other words, who is in charge of STOP?**

STOP! is a White House-led initiative with a clear and focused goal. This clear mandate facilitates interagency coordination in carrying out actions deliberated at STOP! meetings. Oversight of STOP! is conducted through the National Security Council that guides agency actions domestically and in international settings.

There is no one agency in charge of STOP! as it is a collective effort among the eight federal agencies participating in the initiative.

8. **Ms. Espinel, what steps are being taken to work with industry in order to increase your counterfeiting and piracy profiling capabilities?**

USTR works with industry through a wide variety of interactions, including development of the annual Special 301 Report, through cleared industry advisors as well as outside this advisory committee structure, the intellectual property chapters of our Free Trade Agreements and the "Best Practices for Enforcement Guidelines" under the STOP! initiative. In each case, interaction with industry has proven vital in providing a complete picture of the scope of infringement problems abroad. Oftentimes, this has included sharing information on industry efforts to enforce theirrights within specific countries and highlighting the obstacles they've encountered throughout the process.

Collectively, STOP! agencies are in frequent contact with both individual businesses and industry associations on a variety of matters to enhance public-private sector cooperation fighting counterfeiting and piracy. Currently three avenues exist which STOP! agencies use to work with industry and collect information.

- **STOP! portals to government assistance:** Contact with SMEs (victims of IP theft) often occurs via the STOP! hotline (1-866-999-HALT) or educational outreach/road shows conducted cross country, and follow-up to inquiries received through the www.StopFakes.gov website or cold calls by right holders seeking assistance to protect their rights.
- **Coalition Against Counterfeiting and Piracy (CACP)**: As the lead association whose members are developing the "No Trade in Fakes" program, voluntary guidelines that companies could use to ensure their supply and distribution chains are free of counterfeits, the Department of Commerce has served as an active partner in developing the guidelines.

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- **Customs and Border Protection IPR initiatives**: CBP is currently cooperating with a number of companies to validate its risk modeling initiative and further test its new post-entry verification audit techniques designed to improve detection and targeting of shipments containing infringing products.

In addition, participating STOP! agency representatives join monthly meetings held by the CACP to maintain awareness of the current issues plaguing industry in the area of IP protection and provide for regular contact with the business community. U.S. government participation has been welcomed and encouraged to promote greater public-private sector dialogue.

9. **Ms. Espinel, how many employees does the USTR have dedicated to STOP? What type of specialized training do they receive, if any, to enhance their effectiveness? Is there high turnover of the employees dedicated to STOP? If so, what is being done to reduce the turnover and how can Congress help reduce such turnover?**

Several USTR employees perform various functions to support the goals of STOP!. USTR was instrumental in formulating and pushing forward the STOP! initiative. USTR takes an active role in coordinating STOP! activities both at the working level and policy levels in cooperation with and leadership of the National Security Council. We serve as a conduit for information sharing on day-to-day relevant matters, and promote collaboration on IPR issues that bridge trade policy, our commercial interests and law enforcement efforts of relevance to STOP!. In this role we have facilitated outreach activities and sought to ensure the participation of all federal agencies that might assist in realizing STOP! goals, either by encouraging their participation in STOP! interagency meetings and/or working with them to determine if their operational activities could supplement STOP! programs and policy planning.

On the international front, we and other STOP! agencies have been encouraging other governments to coordinate their IPR efforts more effectively by designating a central focal point to cooperate with U.S. agencies on STOP!. Among those countries that have instituted such an approach, USTR has served as the U.S. centrally designated focal point for governments interested in working with us on STOP!.

Supporting staff members have existing expertise that qualifies them for their duties working on this initiative. All have been working on the STOP! initiative since or near the beginning of the rollout of the initiative.

10. **Ms. Espinel, USTR already has a very aggressive agenda for trade agreement negotiations and extensive enforcement responsibilities to fulfill with a relatively small workforce. Does USTR have sufficient personnel available to complete the tasks assigned to it through STOP?**

USTR currently has sufficient resources to support the STOP! initiative. As the STOP! initiative is a collaborative effort among eight federal agencies, time and resources are shared among the agencies as each contributes their own particular expertise toward achieving the goal at hand.

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QUESTIONS FOR THE RECORD
FROM SENATOR GEORGE V. VOINOVICH

ON THE HEARING OF
"FINDING AND FIGHTING FAKES: REVIEWING THE STRATEGY TARGETING ORGANIZED PIRACY"
TUESDAY, JUNE 14, 2005

Questions for Mr. Daniel Baldwin, Acting Assistant Commissioner of the Office of Strategic Trade (OST), U.S. Department of Homeland Security

1. **Mr. Baldwin, in order to catch counterfeit and pirated goods before entering the country, we must have stronger enforcement mechanisms in place at our nation's ports. Is Customs and Border Protection using the same employees to examine containers for intellectual property violations and weapons of mass destruction? If so, would it be more efficient to have specialized agents working on IP enforcement? Is this something the agency could do with existing resources, or do you need more employees?**

U.S. Customs and Border Protection Office of Strategic Trade Response :

U.S. Customs and Border Protection's priority mission is to secure the nation's borders from terrorist and terrorist weapons while facilitating the flow of legitimate trade and travel. The challenge for CBP is to protect and enforce Intellectual Property Rights (IPR) while performing this security role. CBP's approach to managing IPR risk follows that of the Department of Homeland Security "one face at the border" strategy. To address both the increased volume of trade and concurrent exponential growth in counterfeiting and piracy within the framework of its security mission, CBP has sought to optimize resources by assessing the greatest IPR risks given the volume of trade. CBP officers are not compartmentalized into specialties such as intellectual property or weapons of mass destruction. Rather, experience suggests that the most effective officers are those who are knowledgeable about a wide range of border security issues. Consequently, CBP's training program is diverse, enabling a unified presence at the border. Using this strategy, CBP has the flexibility to successfully respond to multiple security, narcotics and trade enforcement issues. Under the Strategy Targeting Organized Piracy (STOP!) initiatives, CBP has developed innovative risk modeling, company-focused post-entry verifications (IPR audits), and enhanced partnering with businesses to protect and enforce their trademarks.

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2. **Mr. Baldwin, DHS data shows that IPR-related seizures for fiscal year 2004 increased in value to almost $140 million, compared to about $95 million in fiscal year 2003. The number of seizures in 2004 also increased somewhat to 7,255 (compared to 6,500 in 2003). Please explain why the value of IPR-related seizures increased in 2004. Was it due to improved inspections or seizures of higher-value goods? How significant are these seizures relative to the scope of the problem? How many criminal prosecutions have resulted from these seizures? How many convictions?**

CBP Response (OST):

Global trade in fakes is a growing problem that STOP! is designed to combat. The increased value of IPR-related seizures in 2004 is a result of both a rise in the trade of fakes and improved targeting. During the last five years (fiscal years 2000 through 2004), DHS made more than 26,000 IPR seizures, valued at $434.5 million. The number of seizures of counterfeit and pirated products increased 124% to 7,255 seizures. The domestic value of seizures increased 206% to $138.8 million. It should be noted that while total seizure value may fluctuate as a result of variables such as the value and type of products seized or the size of shipments, the overall trend in seizures has consistently increased.

CBP's STOP! initiatives address IPR risk on multiple fronts. IPR seizures from China account for approximately two-thirds of the value of all IPR seizures by DHS. As the leading source country for counterfeit and pirated products, DHS devotes significant resources to the enforcement against fakes from China. Seizures from other countries have also risen significantly. Hong Kong, the United Arab Emirates, Pakistan and Russia followed China as the leading sources of counterfeit products seized by DHS at the mid-point in fiscal year 2005. Products from these sources included wearing apparel, toys, handbags, consumer electronics and cigarettes.

Furthermore, because seizures are but one measure of performance in stopping fakes at our borders, the effectiveness of CBP's layered approach to IPR enforcement under the STOP! initiative should be assessed by its effectiveness in assessing IPR risks both in stopping fakes at the border and in post-entry verification efforts.

U.S. Immigration and Customs Enforcement (ICE) Response (IPR Center):

ICE arrest, indictment and conviction statistics demonstrate significant successes in FY04. However, investigations of trans-national commercial smuggling are complex by nature and the full investigation process— where the violator is identified, an investigation is initiated, enforcement actions are completed, obtained are indicted, successfully prosecuted and results in a subsequent conviction – rarely occur within the same calendar or fiscal year. Moreover, the large investigations are increasingly requiring international cooperation that, while desirable, adds additional time to an investigation. ICE statistics demonstrate a similar increase in seizures, arrests, indictments and convictions.

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3. **Mr. Baldwin, I understand that DHS is developing an IPR risk and model to improve targeting for high-risk shipments that can be inspected for IPR infringements. The model has been pilot tested. Please explain how this model will work. What were the results of pilot testing the model? What benefits or problems did the model demonstrate? When will the model be fully implemented?**

CBP Response (OST):

CBP's IPR Risk Model will supplement current efforts by CBP officers to identify pirate and counterfeit goods at the border. By improving CBP's ability to identify and assess IPR risks through statistical analysis techniques, the new risk model builds on CBP's strong existing border enforcement efforts by including a new IPR risk assessment tool in its overarching risk analysis strategy. The IPR risk model will be implemented to identify both individual shipments and companies at high-risk for IPR violations. Individual shipments will be targeted for inspection by our officers at the border. Companies identified as being high-risk will be considered for CBP's post-entry verification program, another of CBP's STOP! initiatives that will increase the effectiveness of our IPR enforcement efforts.

CBP completed a 30-day limited test of the risk model in March 2005 and its performance has been evaluated. Lessons learned from the test are now being applied and the model is being refined with a goal of national validation later this year.

4. **Mr. Baldwin, the National IPR Coordination Center, a joint effort between DHS (ICE) and the FBI has experienced a decrease in staffing from 20 about a year ago to 10 staff today. Current staffing includes no FBI agents and fewer DHS agents authorized. GAO has reported that the Center has been underutilized. Why has staffing at the Center decreased? Beyond staffing, what types of solutions do you have to make the Center more effective?**

ICE Response (IPR Center) in three Parts: a, b, c

a. Why has the Center been underutilized?

Although the aforementioned GAO Report estimated that ten percent of all of the FBI industry referrals came through the Center, rather than directly from FBI field offices, the IPR Center has been an important and successful component in ICE efforts to combat counterfeiting. Notably, feedback on ICE outreach presentations from a variety of IPR manufacturing industries and other IPR recipients has been both positive and productive. There has also been a significant increase in requests for the IPR Center to provide additional outreach presentations. Additionally, in recent months, the number of U.S. Trademark and Copyright holders requesting meetings at the IPR Center to discuss referrals and to request support from ICE and the Center have also increased. Furthermore, case referrals, arrests, indictments and convictions have significantly increased or remained steady since the inception of the IPR Center.

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b. **Why has staffing at the IPR Center decreased?**

While staffing at the IPR Center has been reduced for several reasons, the principle factors for reduction in staff levels is the present funding limitations, coupled with normal attrition from retirement and reassignment of ICE Headquarters resources. Currently, ICE is operating at forty four percent of staffing requirements, with five Special Agents and two Intelligence Research Specialists assigned to the IPR Center. The FBI is operating at fifty seven percent of staffing requirements, with one Special Agent and three Intelligence Research Specialists assigned to the IPR Center. The CBP Program Manager assigned to the IPR Center is presently on temporary duty assignment within CBP Headquarters. Despite operating with a reduced staffing level, the IPR Center has remained highly effective in identifying IP violations and pursuing counterfeiting organizations. Additionally, ICE personnel assigned to the IPR Center have maintained a high level of professionalism and their commitment to the mission of the IPR Center and ICE remains strong.

c. **Beyond staffing, what types of solutions do you have to make the Center more effective?**

The IPR Center is continuing to increase its visibility and reputation as a major source of information and assistance to investigations and as a resource to field agents and the IP industry. The strength of the IPR Center lies in its ability to gather intelligence and expand its resource base within the IPR community. Accordingly, the IPR Center will continue to host joint training seminars on IP enforcement for both ICE and FBI agents, coupled with the outreach program to the IP industry. The IPR Center is currently meeting with the Small Business Administration and has recently initiated a pilot program to identify ways to better serve new and smaller trademark and copyright holders. Additionally, the IPR Center is continuing to increase its national visibility to IPR holders and strengthen its relationship and exchange of information with foreign law enforcement. For example, the IPR Center has recently had opportunities to meet with officials from the People's Republic of China (PRC) to discuss possible joint trans-national investigations between the PRC and U.S.

5. **Mr. Baldwin, the Administration currently has two other programs to coordinate IPR enforcement: the National Intellectual Property Law Enforcement Coordination Council and the National Intellectual Property Rights Coordination Center. What is the relationship between STOP, the IPR Center, and the NIPLECC? Do you believe that there is some overlap and duplication of responsibilities between these three initiatives?**

CBP & ICE Responses

The National Intellectual Property Law Enforcement Coordination Council (NIPLECC) facilitates keeping high level officials informed on a wide range of IPR issues and activities related to U.S. efforts to protect and enforce IPR. NIPLECC provides high-level coordination among top agency officials.

The National Intellectual Property Rights Coordination Center (IPR Center) coordinates operational and tactical activities related to the investigation of IPR crimes and is responsible for the effective enforcement of IPR laws. The IPR Center gathers IP information from a variety of sources, analyzes the information, and provides a coordinated flow of intelligence for use by FBI and ICE field components. It is also a clearinghouse for private sector referrals and complaints received via an IPR hotline used in concert with the web-based referral system. IPR Center personnel conduct outreach and training programs within the IP Industry and trade associations as well as working to identify and address growing IPR issues and criminal trends through outreach and training for foreign governments, federal, local and international law enforcement officials and prosecutors.

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The IPR Center is comprised of both of special agents and intelligence research specialists from ICE and the FBI, as well as representatives from CBP. As the lead investigative agency in the fight against both domestic and international IP crime, ICE is the principal agency responsible for IPR Center operations and coordinates both domestic investigations through the respective field offices as well as international investigations through the various ICE Attaché offices. IPR Center personnel participate in: IPR international working groups such as the Interpol Intellectual Property Crimes Action Group (IIPCAG) and the International Anti-Counterfeiting Coalition (IACC); national law enforcement agencies, international organizations; and industry associations whose mission is to coordinate and enhance IPR enforcement around the world.

STOP!, also a USG interagency effort , focuses on devising and implementing activities and programs to improve protection and enforcement of IPR, including our European trading partners with a focus on addressing piracy and counterfeiting in third countries.

6. **Mr. Baldwin, implementing government-wide initiatives requires rigorous coordination between the agencies involved. From your testimony, it is clear that each agency is responsible for portions of the STOP initiative. However, is there one agency specifically responsible for developing STOP's strategic plan, coordinating the initiative's activities, and ensuring that STOP is implemented efficiently and effectively? In other words, who is in charge of STOP?**

CBP Response (OST):

Each of the USG agencies involved in STOP! plays an important role in the protection of IPR at home and abroad. On July 22, Chris Israel was appointed to the newly created position of Coordinator of International Intellectual Property Enforcement. Mr. Israel will work with USG agencies to address counterfeiting and piracy, and will play a significant role in implementing STOP! While the National Security Council provides the overall leadership for STOP!, the program's benefits accrue only through a collaborative, interagency effort to combat counterfeiting and piracy. Consequently, the agencies involved meet regularly to develop plans, discuss progress and coordinate activities.

7. **Mr. Baldwin, what steps are being taken to work with industry in order to increase your counterfeiting and piracy profiling capabilities?**

CBP Response (OST):

Cooperative relationships with companies that own trademarks and copyrights are a key component of CBP's success in stopping counterfeit and pirated products at our borders. Educating businesses on how to partner with CBP and other agencies to protect their rights is one of STOP's goals. CBP and the United States Patent and Trademark Office (PTO) are working to establish a link between PTO's and CBP's websites that will help businesses, particularly smaller, less experienced companies, work with us to enforce their trademarks. Recordation is one avenue that businesses can use to provide information to CBP about counterfeiting of their trademarks. A link from PTO's website will go to a CBP webpage that will explain CBP's recordation process and will provide a link to the recordation application. CBP can then use this information in its efforts to target counterfeit goods. In conjunction with targeting of goods at the border and information in CBP's recordation system, training by industry also helps CBP officers recognize counterfeit and pirated goods, which are seized. CBP works with industry to provide training for our officers to help them enforce IPR.

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CBP has also met with industry to discuss how the business models of legitimate companies might be applied in CBP's IPR risk modeling initiative. The objective is to understand the business practices associated with genuine goods, and to apply that knowledge in assessing IPR risk. This will enable CBP to better focus its IPR enforcement resources where the risk of counterfeiting is the greatest. Post-entry verifications, another CBP initiative, may also contribute to future IPR seizures because audit findings will feedback into the risk model.

8. **Mr. Baldwin, how many employees does the Department of Homeland Security have dedicated to STOP? What type of specialized training do they receive, if any, to enhance the effectiveness? Is there high turnover of the employees dedicated to STOP? If so, what is being done to reduce the turnover and how can Congress help to reduce such turnover?**

CBP (OST) & ICE Response:

ICE does not have special agents specifically dedicated to the STOP! initiative. However, ICE continues to identify, target and combat IP violations that affect U.S. trademark and copyright holders as the lead U.S. agency in IPR enforcement. As legacy U.S. Customs agents, prior to the 9-11 tragedy, ICE aggressively pursued IP violations whenever and wherever they were discovered. Those efforts continue today as ICE special agents assigned to the Department of Homeland Security and are positively reflected in DHS seized counterfeit goods statistics and ICE IPR violation arrest, indictment and conviction statistics. Investigative case statistics, based on the review of case man hours expended on ICE IPR investigations reflect 131,098 man hours that would equate to seventy three agents engaged in IPR enforcement in FY04 and 92,000 man hours that would equate to fifty three agents engaged in IPR enforcement through mid-year FY05.

As with security, CBP similarly uses a layered approach to IPR enforcement. CBP presents one face at the border and provides diverse training for its officers to enable them to address multiple issues, including security, narcotics and trade enforcement. Protection of the trademarks and copyrights of U.S. businesses is a trade priority and CBP has integrated the STOP initiatives into existing programs and resources.

Through the use of post-entry verification ("IPR audits") as an IPR enforcement technique, CBP is going beyond traditional examination of containers at the border and integrating IPR enforcement into its audit program. CBP has added to the skills of its auditors by training them on the protection of trademarks and copyrights and ensuring application of these skills to enforce IPR. Through post-entry verifications, CBP has identified IPR violations among importers of consumer electronics, electrical appliances, motorized bikes, toys and apparel, and is in the process of taking remedial and punitive action.

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Response of
Laura H. Parsky
Deputy Assistant Attorney General
Criminal Division
Department of Justice

to
Questions for the Record

from the
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Committee on Homeland Security and Governmental Affairs
United States Senate

Concerning
Finding and Fighting Fakes: Reviewing the Strategy Targeting Organized Piracy

June 14, 2005

1. **Ms. Parsky, I commend the Department of Justice's efforts to increase enforcement of intellectual property laws. However, I noticed that most of the successful cases DOJ publicizes involve IT or computer related theft. Has the DOJ brought any cases involving IP theft related to manufacturing companies? Also, what is the total number of IP infringement cases that the Department of Justices has initiated during the past year? Past three years?**

   A: Although it is true that several of the well-publicized intellectual property rights cases prosecuted by the Department in recent years involved organized Internet piracy, the Department prosecutes nearly twice as many trademark cases involving counterfeit hard goods as it does cases involving online piracy and copyright infringement. Below are several examples of cases involving counterfeit merchandise:

   - Counterfeit Electrical Cords: In February 2005, in Houston, Texas, defendant Zheng Xiao Yi was sentenced to 63 months imprisonment after trial on six counts of trafficking in more than $300,000 in counterfeit merchandise imported from China. The counterfeit merchandise included batteries, electrical extension cords with counterfeit Underwriter's Laboratory ("UL") marks, Gillette products, Spiderman toys, and Nike sandals. The jury found that, by selling counterfeit UL extension cords, Zheng had consciously and recklessly ignored the risk of serious bodily injury to the public.

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- International Counterfeiting Operation Shut Down / $400 Million in Fake Goods: In July 2004, the U.S. Attorney's Office for the Southern District of New York announced that 17 defendants were charged as a result of an Immigration and Customs Enforcement undercover investigation that uncovered an international counterfeiting operation responsible for smuggling into the U.S. an estimated $400 million in fake goods. The smuggled goods included counterfeit handbags, wallets, sunglasses, purses, and clothing bearing false marks belonging to Louis Vuitton, Gucci, Christian Dior, and Cartier, among others. The counterfeit goods were destined for retail distribution in the New York metropolitan area through storefronts and street vendors. One defendant has pleaded guilty to conspiracy to traffic in counterfeit goods and trafficking in counterfeit goods; the remaining defendants are either fugitives or awaiting trial.

- Counterfeit Pesticides: In April 2004, William C. Murphy of Glencoe, Alabama, was sentenced to forty-one months in prison and three years supervised release, and was ordered to pay $45,305 in restitution following his conviction on Federal charges of selling counterfeit and misbranded pesticides to municipalities in Alabama and Georgia for use in mosquito and West Nile Virus control. Murphy sold imitations of brand-name pesticides which bore labels falsely identifying the brand name, manufacturer, or active ingredients to multiple municipalities across the southern United States.

  Murphy was prosecuted by the Department of Justice Environmental Crimes Section, with the assistance of Special Agents of the Criminal Investigative Division and Office of Inspector General of the U.S. Environmental Protection Agency, the Federal Bureau of Investigation ("FBI"), and the Alabama Department of Agriculture and Industry.

- $7 Million in Counterfeit Microsoft Software: In March 2004, defendant Ben Barbot was sentenced to 70 months imprisonment and ordered to pay $1.7 million in restitution for trafficking in counterfeit goods and copyright infringement. This was one of the longest sentences imposed for trafficking in counterfeit goods involving software. The defendant distributed well over $7 million worth of counterfeit Microsoft software products through multiple Internet-based stores he created. The products were extremely high-quality counterfeits that had been produced and imported from rogue production plants in Asia.

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- Counterfeit Computer Memory Modules: In October 2003, a Federal jury in Los Angeles, California, found Tony Minh Nguyen of Huntington Beach guilty of manufacturing and trafficking in counterfeit computer memory modules, in violation of Compaq's United States trademark registrations. Nguyen had illegally manufactured tens of thousands of counterfeit Compaq computer memory modules worth at least $5 million to $7 million. On May 24, 2004, Nguyen was sentenced to fifty-one months incarceration.

- 7-Year Prison Term for Counterfeit Clothing Trafficker: In May 2003, a Columbia, South Carolina, man was sentenced to seven years in prison and ordered to pay $3.5 million in restitution for trafficking in counterfeit clothing and other goods. The defendant, who was trafficking in counterfeit T-shirts and other products, as well as engaging in money laundering, will pay $3.4 million in restitution to Nike and $110,000 to Tommy Hilfiger as part of his sentence.

The number of Federal intellectual property prosecutions has grown substantially over the past three years. For example, the Department's Computer Crime and Intellectual Property Section ("CCIPS") has seen a 600% increase in its pending intellectual property crime caseload, from 27 to more than 170 pending cases in the last three years alone.

You specifically asked for the total number of intellectual property infringement cases that the Department initiated during the past year and during the past three years. According to reports compiled by the Executive Office of U.S. Attorneys ("EOUSA"), the Department filed intellectual property infringement and related charges against 141 defendants in FY 2004; 165 in FY 2003; 149 in FY 2002; and 121 in FY 2001. Statistics for FY 2005 are not yet available.

More generally, statistics compiled by EOUSA pertaining to intellectual property criminal cases are contained in the Attorney General's Annual Performance and Accountability Reports, which can be accessed at the following links:

AG Annual Reports: http://www.usdoj.gov/05publications/05_1.html.

FY 2004 Annual Performance and Accountability Report, Appendix C (Intellectual Property Report):
http://www.usdoj.gov/ag/annualreports/pr2004/Appd/A-c.pdf

FY 2003 Annual Performance and Accountability Report, Appendix C (Intellectual Property Report):
http://www.usdoj.gov/ag/annualreports/ar2003/appendices.htm#cc

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FY 2002 Performance and Accountability Report, Appendix C (Intellectual Property Report): http://www.usdoj.gov/ag/annualreports/pr2002/AppendixC.htm

The Department is aggressively working to increase the number and quality of intellectual property prosecutions across the board. However, it should be noted that currently the EOUSA statistics do not fully reflect the scope of intellectual property prosecutions across the country. For example, the EOUSA statistics for intellectual property prosecutions do not include intellectual property cases charged and reported solely as conspiracies (18 U.S.C. § 371) -- our charge of choice in cases involving organized groups and multi-jurisdictional criminal activity. For example, a large number of the more than 30 cases prosecuted in Operation Buccaneer, one of the Department's most significant intellectual property enforcement investigations, were not reflected in the EOUSA statistics for FYs 2002-2004.

Also, given that we have focused in recent years on prosecuting the highly structured criminal organizations that distribute massive amounts of pirated products throughout the world, the results of these investigations and prosecutions may take longer to realize, largely due to the fact that these complex cases are extremely time- and resource-intensive. Given the heightened interest in this area, we are working to improve our recordkeeping systems to ensure that the numbers fully account for all intellectual property prosecutions, regardless of how they are charged.

2. **Ms. Parsky, in March 2004, the Department of Justice created an intellectual property task force. The task force issued a report in October of that year listing numerous recommendations to improve intellectual property protection. Why was the task force created? How many of its recommendations have been implemented? What is the status of implementing the recommendations regarding stationing additional DOJ and FBI officials overseas? Since the FBI is a key law enforcement agency, are they included in the working groups for STOP? If not, should they be included?**

A: Intellectual property is a vital element of this nation's economy and a prime target for criminals seeking to profit by stealing the hard work of the American creative community. The Intellectual Property Task Force ("IP Task Force") was established in recognition of this serious criminal threat to our nation's economic infrastructure and in recognition of the Department's critical role in intellectual property rights enforcement. Shortly after his arrival at the Department, Attorney General Gonzales made combating intellectual property crime one of his top priorities and renewed the Department's commitment to the IP Task Force and to

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implementing the more than 20 separate recommendations contained in the IP Task Force Report issued last October.

Although the IP Task Force recommendations are numerous and wide-ranging, the Department has already implemented many of them and made substantial progress on others. I have attached to my written responses a document summarizing the Department's progress in implementing the IP Task Force Report's recommendations.

To highlight just of few of the Department's implementation efforts:

- The IP Task Force Report called for the expansion of the Department's Computer Hacking and Intellectual Property ("CHIP") Program and the designation of CHIP Coordinators in every U.S. Attorney's Office nationwide. In January 2005, the Department of Justice created five (5) new CHIP Units, bringing the total number of CHIP Units nationwide to eighteen (18). Each Unit received funding to hire two additional prosecutors to address intellectual property offenses in their respective districts. In addition, the Department has designated a CHIP Coordinator in every U.S. Attorney's Office in the country, bringing the CHIP network to a total of more than 200 trained prosecutors.

- The Department has enhanced and improved its delivery of intellectual property training programs for foreign prosecutors and investigators by developing key relationships with foreign officials directly responsible for intellectual property law enforcement. For example, the Department worked with Mexican government officials to provide a three-day seminar in December 2004 for intellectual property prosecutors and customs officials from Mexico. Department attorneys met with Mexican authorities in Washington, D.C., and provided a detailed overview of criminal intellectual property enforcement in the United States. Since the December meetings, the Department and the U.S. Embassy in Mexico City have worked with Mexican officials to provide training on trademark identification, and we are planning an additional training program in Mexico City on counterfeiting investigations. Similar efforts are underway in Panama and are planned in several Eastern European and Southeast Asian countries known for producing pirated and counterfeit goods.

- Many of the other comprehensive recommendations in the IP Task Force Report will require the long-term efforts of various components within the Department as well as some outside the Department. For instance, although the Department has not yet stationed intellectual property legal

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advisors overseas, we have begun negotiations with the State Department and are actively reviewing the details of such placements, making progress toward implementing this recommendation. Similarly, the IP Task Force Report recommended continued prosecution of national and international criminal organizations that commit intellectual property crimes – a long-term, ongoing effort. Enforcement actions such as Operation Site Down are an example of the Department's success in this area during the past year, but we will not rest on this record; we are committed to doing more.

As you have recognized, the FBI is a critical law enforcement agency in the Department's efforts to combat intellectual property crime. During STOP's recent outreach efforts to Asian and European countries, FBI representatives played an active role. Further, Department prosecutors work on a regular basis in close coordination with the FBI on intellectual property enforcement matters, and Department officials ensure that the FBI officials responsible for intellectual property enforcement are kept apprised of all Department initiatives.

3. **Ms. Parsky, the Department of Justice has signed several bilateral Mutual Legal Assistance Treaties and extradition treaties to recognize intellectual property crimes with Finland, Sweden, Belgium, Spain, and the United Kingdom. According to the USTR's website, you have several more agreements pending with Greece, Denmark, and Italy. First, what is the status of your agreements with Greece, Denmark, and Italy? Second, could you please explain the benefits of these treaties? Are you working on additional treaties with other countries? If so, which countries?**

A: The United States has pursued negotiations with the individual European Union ("EU") Member States to complete bilateral instruments that will serve as the legal basis for implementing obligations undertaken between the U.S. and the EU in June 2003. To date, the United States has completed negotiations with the 15 original Member States and several new Member States. Bilateral instruments have been signed with Austria, Belgium, Denmark, Finland, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. We expect to sign bilateral instruments with Germany, Greece, and Italy soon. Among the new EU Member States, instruments have been signed with Lithuania, and negotiations have been completed with Cyprus, Estonia, Hungary, Latvia, and Slovenia. Negotiations are nearing completion with Poland, while negotiations continue with Malta, Slovakia, and the Czech Republic.

These new bilateral agreements and the corresponding bilateral instruments are law enforcement agreements intended to expand and

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streamline cooperation in the areas of extradition and evidence exchange in criminal matters. Their use is limited to governmental entities with the authority to investigate and prosecute crime. These agreements modernize the extradition relationships of the United States with other countries, applying a dual criminality standard to define extraditable offenses, and expand the types of assistance available to investigate and prosecute criminal cases, including intellectual property offenses. Thus, these agreements will serve as modern law enforcement tools to address the criminal aspects of the infringement of intellectual property rights and will facilitate international cooperation in the criminal enforcement of intellectual property rights across international borders.

4. **Ms. Parsky, the Administration currently has two other programs to coordinate IPR enforcement: the National Intellectual Property Law Enforcement Coordination Council and the National Intellectual Property Rights Coordination Center. What is the relationship between STOP, the IPR Center, and NIPLECC? Do you believe there is some overlap and duplication of responsibilities between these three initiatives?**

A: NIPLECC and STOP share the general mission of coordinating U.S. Government efforts to combat intellectual property violations, but there are several differences in the focus and leadership of the two structures. NIPLECC is an interagency body co-chaired by the Department of Justice and the U.S. Patent and Trademark Office, which was instituted by Congress to ensure a high degree of interagency coordination on the entire spectrum of intellectual property enforcement issues. STOP is an Administration initiative led by the White House. While STOP includes the agencies that are members of NIPLECC, it also includes agencies, such as the Food and Drug Administration, that have not previously been part of the interagency intellectual property process. To date, STOP interagency activities have focused on building international cooperation and combating the manufacture and cross-border distribution of counterfeit goods.

The Department of Justice looks forward to working with Mr. Chris Israel, the recently named International Intellectual Property Coordinator, to ensure that NIPLECC and STOP provide meaningful coordination among the U.S. Government agencies responsible for the entire range of intellectual property enforcement, and that, rather than overlapping, the two groups continue to reinforce and build off of each other's work.

The IPR Center has traditionally been led by U.S. Immigration and Customs Enforcement (formerly U.S. Customs) with staff support by the

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FBI. Although the Department of Homeland Security ("DHS") may therefore be in a better position to describe the Center, I understand its functions to include intelligence gathering and dissemination; industry outreach; receipt of industry complaints/referrals and dissemination of leads to investigative field offices; and coordination of investigative activities on certain intellectual property cases. In my experience, the IPR Center has not functioned as an interagency coordinating body on intellectual property enforcement, and therefore its activities have not duplicated those of STOP or NIPLECC.

5. **Ms. Parsky, implementing government-wide initiatives requires rigorous coordination between the agencies involved. From your testimony, it is clear that each agency is responsible for portions of the STOP initiative. However, is one agency specifically responsible for developing STOP's strategic plan, coordinating the initiative's activities, and ensuring that STOP is implemented efficiently and effectively? In other words, who is in charge of STOP?**

A: The STOP initiative, like other Administration initiatives, is coordinated by the White House with full participation by each of the member agencies from the staff level to the Principal level.

6. **Ms. Parsky, what steps are being taken to work with industry in order to increase your counterfeiting and piracy profiling capabilities?**

A: The Department works very closely with industry in intellectual property enforcement matters in a variety of contexts. For example, industry often refers cases to the Department for prosecutorial consideration, and Department prosecutors are in almost daily contact with corporate anti-piracy officers and investigators for victim companies and their associations, such as the Business Software Alliance, the Motion Picture Association of America, the Recording Industry Association of America, and the Entertainment Software Association. While it would be inappropriate to include industry in the deliberative process for initiating investigations and prosecutions, the information contributed by corporate anti-piracy programs has been very useful in the Department's continued effort to address the most serious intellectual property violations.

The Department also periodically meets with industry representatives formally and informally to provide general and non-law enforcement sensitive updates on the Department's intellectual property enforcement efforts. At the same time, prosecutors receive updated information from industry on issues of concern to them involving intellectual property

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crime. For example, in the past year, CCIPS and DHS agents met with auto parts manufacturers to encourage them to report instances of counterfeiting that may be suitable for criminal investigation. Similarly, CCIPS attorneys participate in regular meetings hosted by the FBI's Intellectual Property Rights Unit with a variety of representatives from the copyright and trademark industry.

In addition, the Department participates in interagency governmental groups which interact with industry groups. For example, the Department participates in the State Department's Intellectual Property Training Coordination Group ("TCG"), which serves as a central point for the coordination of international intellectual property training. Industry representatives participate in the TCG to keep governmental officials informed of the problems and needs faced by industry due to piracy and counterfeiting overseas. The Department also participates in the annual Special 301 Process, conducted by the Office of the United States Trade Representative, in which Federal agencies review information provided by industry, United States embassies, United States trading partners, and the National Trade Estimates report to determine the adequacy and effectiveness of intellectual property protection in approximately 85 countries. Through its active participation in the deliberative meetings for the Special 301 Process, the Department has gained useful information about trends in global intellectual property theft.

7. **Ms. Parsky, have any IP cases been referred to the DOJ through STOP? Where does the Department receive most of its IP cases? Directly from victimized companies? Other agencies (which ones)?**

A: As is true with most criminal offenses, the Department of Justice receives the large majority of criminal intellectual property case referrals directly from victims and law enforcement agents at the time that a crime is detected. The Department has also run very successful undercover operations in which agents identify and actively pursue criminals who were not previously known. Although not generating a large part of the criminal intellectual property caseload, the Department does regularly handle case referrals from other STOP agencies, particularly when there are questions about whether infringing activities rise to the level of criminal conduct. In the past year, the Department has reviewed matters referred by the Department of Commerce (through the intellectual property rights call center and StopFakes.gov website), the U.S. Patent and Trademark Office, the Office of the U.S. Trade Representative, and the Food and Drug Administration.

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Although STOP itself does not generate cases, the Department expects that specific STOP activities will increase criminal referrals in the near future. For instance, in international criminal enforcement efforts, the Department has learned that the ability to quickly identify and contact foreign law enforcement authorities as foreign investigative targets develop is critical to successful investigations and prosecutions. Through the STOP Initiative, the Department is expanding its list of foreign prosecutors and investigators with intellectual property expertise and providing contact information for U.S. law enforcement experts to our international law enforcement counterparts. Although the intellectual property contact list is still developing, the Department expects that the number of case referrals from foreign law enforcement officials will increase substantially in the coming months due to this initiative.

In addition, within the borders of the United States, STOP activities have substantially increased public and industry awareness of Department components responsible for criminal intellectual property enforcement, such as CCIPS and the CHIP Units and Coordinators in U.S. Attorneys' Offices across the country. We expect that this increased awareness will also lead to more referrals in the near future.

8. **Ms. Parsky, how many employees does the Department of Justice have dedicated to STOP? What type of specialized training do they receive, if any, to enhance their effectiveness? Is there high turnover of the employees dedicated to STOP? If so, what is being done to reduce the turnover and how can Congress help reduce such turnover?**

A: The Department of Justice staffs the STOP Initiative primarily with prosecutors from CCIPS. These attorneys are specially trained in intellectual property crime and represent some of the Department's preeminent experts in the field. They are in constant contact with their counterparts in other STOP agencies and provide the expertise on criminal intellectual property enforcement necessary to STOP projects. In addition, the Department has drawn on intellectual property prosecutors in the field and FBI agents abroad to assist in STOP activities. For example, the Department has provided experienced Federal prosecutors from both U.S. Attorneys' Offices and Main Justice to take part in the U.S. Patent and Trademark Office's Conferences on Intellectual Property in the Global Marketplace to ensure that rights holders are aware of how criminal law protects their intellectual property.

CCIPS currently has twelve lawyers focusing solely on intellectual property matters. These attorneys specialize in prosecuting multi-district

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cases and cases with a substantial international component. CCIPS' attorneys also help formulate the Department's intellectual property enforcement strategy and policies and provide expertise on intellectual property legislation.

In addition to the CCIPS prosecutors in the Department's Criminal Division, there are also a total of eighteen CHIP Units and over 200 CHIP Coordinators in U.S. Attorneys' Offices across the country. CHIP Unit prosecutors and CHIP Coordinators receive special training in intellectual property offenses and work closely with law enforcement agents and the victims of intellectual property crimes to enforce the Federal criminal trademark, copyright, and trade secret laws. Although retention of CCIPS and CHIP attorneys has not been a problem, the success of the Department's intellectual property enforcement efforts is certainly dependent on having a sufficient number of both agents and prosecutors trained (and specifically assigned) to support intellectual property investigations and prosecutions.

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United States Department of Justice's Task Force on Intellectual Property

Accomplishments as of July 20, 2005

In March 2004, then-Attorney General John Ashcroft created the Department of Justice's Task Force on Intellectual Property to examine the Justice Department's efforts in addressing the rapidly increasing problem of intellectual property theft. The Task Force examined how the Department protects intellectual property through criminal, civil, and antitrust enforcement; legislation; international coordination; and prevention. In October 2004, the Task Force released its report recommending extensive improvements in the Department's efforts to protect the nation's intellectual resources. The following are some of the accomplishments achieved by the Department of Justice since the report was released.

Criminal Enforcement Accomplishments

- Created five new Computer Hacking and Intellectual Property ("CHIP") Units in the U.S. Attorney's Offices in Nashville, Orlando, Pittsburgh, Sacramento, and Washington D.C., bringing the total number of specialized prosecutorial units to 18.

- Expanded CHIP Units in San Jose and Los Angeles, two key regions where intellectual property protection is a critical component of the regional economy.

- Requested 11 positions, including 6 prosecutors, and $900,000 in President's FY 2006 Budget to expand the CHIP program.

- Continued to dismantle and prosecute multi-district and international criminal organizations that commit intellectual property crimes, including:

  leading the international takedown against members of over 22 major online software piracy groups in Operation Site Down in June 2005, involving 11 countries, the simultaneous execution of over 90 searches worldwide, and the eradication of at least eight major online distribution sites.

  shutting down a sophisticated international peer-to-peer network known as "Elite Torrents," used by 133,794 members, in the first-ever criminal action against a BitTorrent file-sharing network;

  obtaining felony conspiracy and copyright convictions against ten software, music, and movie pirates as part of the ongoing prosecutions in Operation FastLink, the largest law enforcement action ever taken against online intellectual property offenders; and

  obtaining convictions against two Los Angeles-area men for conspiracy and trafficking in over 700,000 counterfeit Viagra tablets manufactured in China and worth over $5.6 million.

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- Provided a comprehensive training program in New York City on various aspects of criminal intellectual property prosecution for all CHIP Coordinators and provided regional training and guidance to prosecutors and federal agents in Los Angeles.

- Distributed over 1,000 copies of the report of the Task Force on Intellectual Property, and electronically distributed thousands more, containing a checklist to help potential victims report intellectual property crime to law enforcement officials.

International Cooperation Accomplishments

- Participated in interagency trips to Asia and Europe through the Strategy Targeting Organized Piracy (STOP!) Initiative to encourage international partnerships to protect intellectual property rights and international cooperation in criminal enforcement.

- Engaged in law-enforcement-to-law-enforcement discussions with the Chinese government on criminal enforcement of intellectual property rights through the U.S.-China Joint Liaison Group.

- Provided foreign and state-side training programs on intellectual property enforcement for government officials from Brazil, Brunei, Cambodia, Chile, Colombia, Indonesia, Korea, Philippines, Malaysia, Mexico, Myanmar, Singapore, Thailand, and Vietnam.

- Executed agreements to implement obligations of US/EU Mutual Legal Assistance and Extradition Agreements that ensure cooperation regarding intellectual property crimes with Belgium, Finland, Spain, Sweden, the United Kingdom, France, the Netherlands, Luxembourg, Lithuania, Denmark, Ireland, Portugal, and Austria; and completed or nearly completed negotiations with Estonia, Germany, Greece, Hungary, Italy, Cyprus, and Slovenia.

Civil Enforcement Accomplishments

- Continued intervening in federal and state court actions to defend copyright owners' use of civil subpoenas to identify anonymous Internet users allegedly engaged in copyright infringement.

- Filed amicus curiae brief and participated in oral arguments before the Supreme Court in MGM v. Grokster arguing that court of appeals had adopted an unduly narrow view of the scope of secondary liability for copyright infringement.

Antitrust Accomplishments

- Presented over 15 public speeches by senior Department of Justice antitrust attorneys regarding international convergence, enforcement policies, and the Department's views on the right of intellectual property owners to decide independently whether to license.

- Participated in negotiations with the Fair Trade Commissions of Japan and Taiwan regarding appropriate intellectual property and antitrust laws.

Legislative Accomplishments

- Worked with Congress to achieve the following legislative accomplishments:

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legislation recognizing passive sharing of copyright works, as enacted in the Family Entertainment and Copyright Act, S. 167, on April 27, 2005;

legislation recognizing the premium value of copyrighted works before they are released to the public, as enacted in the Family Entertainment and Copyright Act, S. 167, on April 27, 2005; and

legislation allowing law enforcement officials to seize material and equipment used to make counterfeit products and labels, as enacted in the Anti-Counterfeiting Amendments of 2004, H.R. 3632, on December 23, 2005.

Prevention Accomplishments

- Attorney General John Ashcroft participated in a national education and prevention program at the Department of Justice entitled "Activate Your Mind: Protect Your Ideas," involving over 100 area high school students and presentations by songwriters, Department of Justice officials, victim representatives, and students regarding the impact of piracy. The event was filmed by Court TV and broadcast to thousands of high school students.

- Attorney General Alberto Gonzales participated in the second installment of Court TV's "Activate *Your Mind: Protect Your Ideas" program at UCLA with over 120 high school students to discuss* movie and television piracy and the importance of protecting creativity.

  Promoted anti-piracy educational campaign with numerous presentations by a convicted intellectual property offender who developed informational materials and an anti-piracy informational video.

As set forth above, the Department of Justice has implemented several important recommendations made by the Task Force and is currently in the process of implementing many more. Attorney General Gonzales announced the Department's renewed commitment to the Task Force in March 2005 and appointed his Deputy Chief of Staff, Kyle Sampson, as the new Chairman and federal prosecutor, Arif Alikhan, as the new Vice-Chairman and Executive Director, to oversee this long-term effort. The Department of Justice is fully committed to the implementation of the remainder of the Task Force's recommendations and will continue its efforts to protect the nation's creativity and innovation.

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QUESTIONS FOR THE RECORD
FROM SENATOR GEORGE V. VOINOVICH

ON THE HEARING OF
"FINDING AND FIGHTING FAKES: REVIEWING THE STRATEGY TARGETING ORGANIZED PIRACY"
TUESDAY, JUNE 14, 2005

Questions for Mr. Brad Huther, Director, Counterfeiting and Piracy Initiative, U.S. Chamber of Commerce:

1. Mr. Huther, I am very interested in your assessment of STOP. First, how would you evaluate the way the Administration is communicating this initiative to the business community? In other words, is the business community aware of STOP? If so, have businesses from your respective memberships utilized STOP? If so, how helpful has the process been?

   The Bush Administration has taken a number of important steps to communicate with businesses on its STOP! initiative. Some examples include: providing frequent briefings to the U.S. Chamber of Commerce-National Association of Manufacturers, Coalition Against Counterfeiting and Piracy (an 83 member group comprised of national trade associations, corporations and not-for-profit organizations); implementing a broad-based, integrated set of anti-counterfeiting brochures, web sites and training conferences for the business community (most of which are aimed at small businesses, which frequently do not understand the adverse effects of counterfeiting and piracy); and linking their efforts with those of foreign governments to ensure the global business community is consistently well-informed. In turn, the U.S. Chamber of Commerce has shared this information with its 3,000,000 member companies. Accordingly, I am confident that the overall awareness level regarding STOP! is increasing and that the business community has shown a keen interest in utilizing the benefits it offers, such as easy access to U.S. Patent and Trademark Office's (USPTO) hotline, Commerce's practical toolkits for protecting intellectual property in specific countries, and Homeland Security's investigations of counterfeiting/piracy complaints reported by businesses. Compared to the pre-STOP! era, the process is much improved and has been very helpful.

2. Mr. Huther, the Administration currently has two other programs to coordinate IPR enforcement, the National Intellectual Property Law Enforcement Coordination Council and the National Intellectual Property Rights Coordination Center. How do you view the relationship between STOP, the IPR Center, and NIPLECC? Do you believe there is some overlap and duplication of responsibilities between these three initiatives?

   Improving the relationship between STOP!, the IPR Center, and NIPLECC is vitally important. Even though NIPLECC has not been effective to date, standing alone, it

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has the potential to become a key contributor provided its work is fully integrated into the work plan of the other agencies. There has been considerable overlap or duplication of effort to date among the agencies cited, but that is also true of other agencies such as USPTO and the State Department (e.g. carrying out similar "studies," virtually identical training programs, etc.). The STOP! agencies have begun to coordinate and leverage their efforts better in 2005. Given the recent appointment by President Bush of the so-called "IP Czar", and Secretary Carlos Gutierrez' leadership of administration-wide IP initiatives, I am confident that the problems cited above will not be permitted to continue in the future.

3. Mr. Huther, I understand that Customs has worked with certain companies to successfully target the importation of certain fakes. I am interested in learning your thoughts on whether these micro-efforts could be expanded to involve more companies as part of a broader and more systematic program?

   The Customs program to target the importation f certain fakes can, and must, be expanded. That takes necessary resources: more staff to inspect shipping containers, implementation of very large databases for use by the business community and the STOP! agencies, identification of fake shipments before they arrive at ports of entry, etc. The business community also should be counted upon to contribute to this effort by documenting and disseminating widely best practices for protecting America's supply chain of goods, funding or supporting investigations and prosecutions of IP criminals, and sharing research experience on new and improved forms of detection technology, such as Radio Frequency Identifiers.

4. Mr. Huther, I commend your efforts as part of the Coalition Against Counterfeiting and Piracy to make sure that global supply chains are free of counterfeit and pirated goods. Can you discuss further some of the actions companies can take to make sure that they don't contribute to this problem by purchasing fakes?

   Most large companies take numerous steps to avoid purchasing fakes, but the reverse is true for small business owners who simply cannot afford the cost of such protective steps. Moreover, it is important to note that counterfeiters are becoming increasingly more sophisticated to the point that the manufacturer oftentimes cannot identify any difference between a fake and its own product. It is axiomatic, therefore, that a purchaser cannot avoid buying a counterfeit good. Among the most widely practiced measures to reduce the chance of fakes being purchased are: quality assurance inspections (examining for OEM-encoded holograms, watermarks or barcodes and rejecting shipments that do not "pass"); carrying out investigations at the source of expected counterfeiters; monitoring the overproduction of goods by foreign contractors; and filing complaints with police, customs or prosecution officials against the supplier of any identified fake product.

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5. Mr. Huther, I think today's hearing has shown that we need to develop better relations with the Chinese government with regards to IP enforcement. What type of relationship do your organizations have with the Chinese government? Do your organizations provide an informal avenue for companies to get the Chinese government to take action against IP thieves? If not, is this something worth exploring?

The Chamber is actively engaged in pressing the Chinese government at the central, provincial, and municipal levels to provide greater intellectual property (IP) protection and enforcement for U.S. companies. In its China IP Action Plan, the Chamber identifies four main practices to support the Chinese government in its efforts to extend greater protection to IPR. First, the Chamber initiates and participates in several high-level dialogues on the key IPR issues in the U.S. and China in order to promote strong ties with and greater coordination among IP stakeholders. To date, the Chamber has co-sponsored a Market Order Rectification Office roundtable, hosted a delegation of Chinese IP officials to visit the U.S., organized a high-level bilateral corporate dialogue in Beijing, and co-hosted the Vice Minister of Commerce of the People's Republic of China during the second meeting of the Joint Committee on Commerce and Trade (JCCT) IPR Working Group. These forums provide a platform for direct dialogue between Chamber members and PRC officials.

Secondly, the Chamber has initiated a program of targeted support at the provincial level, such as building relations with local officials, developing support with the local business community, running training or related educational programs, and engaging the local media. In July 2005, the Chamber launched its first in a series of provincial and municipal IP technical assistance programs in China in cooperation with Guangdong and Jiangsu Provinces. The programs targeted Chinese IP enforcement officials from the local administrative and criminal agencies where IP enforcement problems are perceived by Chamber members to be most severe. At the conclusion of the Jiangsu program, the Chamber and Intellectual Property Office of Jiangsu Province signed an MOU, which will provide more assistance to our members that have problems in the province. The Chamber will follow up these programs with additional capacity building efforts in targeted provinces and municipalities later this year and in 2006.

Third, the Chamber works closely with the U.S. and foreign governments, our corporate members, and counterpart associations, including with the AmCham network in China, to monitor China's progress in key areas of IPR enforcement. In May 2005, the U.S. Chamber and AmCham-China unveiled plans for an index which will measure the effectiveness of China's IPR enforcement measures. The results will be published periodically during the year. This index was designed by companies doing business in China and will be the first objective, independent gauge of what is really happening on the ground in China with respect to IPR.

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Finally, the Chamber plans to develop a media strategy to support the Chinese government's efforts to increase public awareness of the economic costs and public health and safety dangers associated with IP theft. This strategy will likely include a series of public service announcement and other targeted media events.

The Chamber's Strategic Action Plan also lists specific steps China should take to develop a more aggressive action plan to accelerate its IP enforcement and reform efforts. This call for action includes providing greater deterrence and transparency, curbing exports of fakes, improving market access, enacting new IP legislation, promoting public awareness, seeking input on draft regulations, and resolving high-profile cases such as the Pfizer patent case and the General Motors trade secrets case.

6. Mr. Huther, how many employees does Commerce have dedicated to STOP? What type of specialized training do they receive, if any, to enhance their effectiveness?

I do not know the answer. The recently appointed "IP Czar" (Chris Israel in the Office of the Secretary of Commerce) is the only Commerce official whom I know to be dedicated full-time to the STOP! program. Most Commerce employees spend a portion of their time on STOP! (principally in the Patent and Trademark Office and the International Trade Administration). Irrespective of the true number, I have no doubt that the current level of staffing is inadequate to meet the goals of STOP! and that the business community would rigorously support the re-allocation or appropriation of considerably more resources to stop the massive adverse effects of counterfeiting and piracy on the American economy and the growing threat to the safety of all Americans.

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RESPONSES FOR THE RECORD
FROM MR. FRANK VARGO, NATIONAL ASSOCIATION OF MANUFACTURERS
QUESTIONS FROM SENATOR GEORGE V. VOINOVICH
REGARDING
"FINDING AND FIGHTING FAKES: REVIEWING THE
STRATEGY TARGETING ORGANIZED PIRACY"
TUESDAY, JUNE 14, 2005

1. Mr. Vargo, I am very interested in your assessment of STOP. First, how would you evaluate the way the Administration is communicating this initiative to the business community? In other words, is the business community aware of STOP? If so, have businesses from your perspective memberships utilized STOP? If so, how helpful has the process been?

With respect to its Strategy Targeting Organized Piracy (STOP), the Administration appears to be making a good effort. The NAM does its part to publicize STOP on its Web site, and achieving even greater dissemination of the STOP program may depend more at this point on secondary private-sector efforts such as ours than on direct government channels. By now, the toll-free number has received more than 800 calls, probably the best indicator of awareness. At the same time, the NAM does not have a list of which of its member companies have called, nor do we know how satisfied they are with the response they are receiving. To judge customer service, it would be best for the PTO to hire an outside firm to conduct an independent third-party survey of customers. That said, we should keep in mind that the hotline effort is still very new, and it takes time to achieve results.

2. Mr. Vargo, the Administration currently has two other programs to coordinate IPR enforcement, the National Intellectual Property Law Enforcement Coordination Council and the National Intellectual Property Rights Coordination Center. How do you view the relationship between STOP, the IRP Center, and

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NIPLECC? DO you believe that there is some overlap and duplication of responsibilities between these three initiatives?

As to the relationships of STOP, the National Intellectual Property Law Enforcement Coordination Council (NIPLECC) and the National Intellectual Property Rights Coordination Center (IPR Center), the NAM perceives that these structures are evolving. Clearly, there is an attempt to do better. The Patent and Trademark Office hosted a major two-day workshop on Chinese counterfeiting on August 4-5, for all relevant agencies, in which the NAM participated. The NAM's larger concern would be how to ensure that smaller companies receive adequate attention. We understand that law enforcement agencies need to concentrate attention on high-loss or large-dollar cases. But the attendant downside of that rational emphasis apparently makes it hard for smaller companies whose relative losses are just as high as those of large companies – or even higher – to get attention. We appreciate your attention to the plight of small businesses suffering what are for them intolerable losses, Mr. Chairman, and we commend this matter to you for continuing oversight.

3. Mr. Vargo, I understand that Customs has worked with certain companies to successfully target the importation of certain fakes. I am interested in learning your thoughts on whether these micro-efforts could be expanded to involve more companies as part of a broader and more systematic program?

The NAM vigorously supports the element of the STOP initiative related to applying the statistical models developed by Customs and Border Protection (CBP) to piracy and counterfeiting. The NAM first approached CBP in this regard last November, to inquire how industry might supplement CBP data so as to improve their ability to detect and interdict contraband shipments and to identify bad actors. Since the formation of the Coalition Against Counterfeiting and Piracy (CACP), which the NAM co-chairs with the U.S. Chamber of Commerce, we have handed the leadership of this effort over to the Coalition's Detection and Enforcement Task Force. We continue to believe that industry

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can increase CBP's profiling capability by the judicious enrichment of its databases with product- and company-specific data. This entire CBP initiative remains in its earliest phase, with initial implementation underway only in selected ports. Understandably, CBP believes that it must achieve some success and confidence in this new application of its mathematical model before further extending and elaborating it. Industry is continuing to work with CBP to identify the precise content and format of data that will best fit with, and further empower, the CBP model.

4. Mr. Vargo, I commend your efforts as part of the Coalition Against Counterfeiting and Piracy to make sure that global supply chains are free of counterfeit and pirated goods. Can you discuss further some of the actions companies can take to make sure that they don't contribute to this problem by purchasing fakes?

Within the CACP, the lead responsibility for insuring that global supply chains remain free of fake merchandise rests with the Best Practices Task Force, being chaired by the Grocery Manufacturers Association (GMA). A model guidelines document is being reviewed by six related associations, including the GMA, right now, with adoption expected in September and implementation planned for early 2006. The release of the grocery industry document will serve as a basis for other industry segments to reassess their own practices. Overall, it may be fairly said that the continued public education on piracy and counterfeiting – of which your hearing, Mr. Chairman, was an integral part – is steadily chipping away at the remaining pieces of a seeming "It can't happen to me" mentality among some business executives who have not had any known experience with fakes and have tended to view the matter as rather irrelevant to them.

5. Mr. Vargo, I think today's hearing has shown that we need to develop better relations with the Chinese government with regards to IP enforcement. What type of relationship do your organizations have with the Chinese government? Do your

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organizations provide an informal avenue for companies to get the Chinese government to take action against IP thieves? If not, is this something worth exploring?

With respect to the relations with the Chinese Government, the NAM hosted the greater part of the Chinese intellectual property delegation that visited Washington during the week of May 23, with Madame Li from the Ministry of Foreign Trade and Economic Cooperation and Madame Xiang from the State Intellectual Property Office being the senior officials in attendance. The NAM reminded the delegation that bilateral IP relations between the two countries are now 13 years old, and that U.S. industry is losing patience. The NAM offered to maintain contact directly with the Chinese Government, but did not receive an enthusiastic response. We do, however, remain in close contact with the Quality Brands Protection Committee (QBPC), to which numerous NAM member companies also belong. The QBPC meets at least quarterly with the Market Order Rectification Committee, which reports to Vice Premier Wu Yi.

6. Mr. Vargo, how many employees does NAM have dedicated to STOP? What type of specialized training do they receive, if any, to enhance their effectiveness?

In addition to my own efforts, I have directed two of my staff to fight counterfeiting as well. Bill Primosch, Director, International Business Policy, chairs the CACP's International Task Force. Over the past two years, David Peyton, Director, Technology Policy, has put more time into fighting fakes than any other endeavor. He staffs the NAM's own Product Counterfeiting Task Force, serves as a member of Industry Trade Advisory Committee 15 on intellectual property rights, and maintains a highly useful part of the NAM Web site. While none of us has attended any special training sessions, allow me to observe that I served almost 30 years at the Commerce Department, almost entirely at the International Trade Administration, retiring as Deputy Assistant Secretary for Trade Compliance; that Mr. Primosch is a retired foreign service officer who has served in various foreign countries; and that Mr. Peyton's long experience in intellectual property dates back to his first professional position in 1976 at the Library of Congress.

Mr. Chairman, I again appreciate the opportunity to have testified before the Subcommittee and greatly appreciate the energy you bring to the effort to stem the global glut of pirate and counterfeit goods.

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