

STATEMENT OF
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BEFORE THE

Subcommittee on Government Management, Organization, and Procurement
Committee on Oversight and Government Reform
United States House of Representatives

**“Protecting Intellectual Property Rights in a Global Economy:
Current Trends and Future Challenges”**

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Our Shared Vision

Madame Chairwoman, Ranking Member Bilbray, and Members of the Subcommittee:

Thank you for this opportunity to discuss the role of the Department of Commerce (Commerce) in protecting U.S. intellectual property (IP) rights in a global economy. Protecting IP rights is one of Secretary Locke’s and the Department’s highest priorities, and for good reason.

Innovation and creativity are vital to this nation’s prosperity and job growth. Our inventors and artists need well-tailored, robust protection of their creations on a worldwide basis – not only so they can enjoy the fruits of their labors but, just as important, so their creations can fuel the enterprises that generate good-paying jobs and continue to enhance productivity. In the global economy, innovation and creativity are our clear competitive advantages. Across the U.S. Government, we must safeguard these national assets.

Of course, there is no more important time to focus on these issues. President Obama and Secretary Locke know there is no scenario for our economic recovery that is not driven by innovation and creativity. Looking out over the long term, our inventors need global protection for their creations if we are to address some of the grand challenges society faces. We have long known that research into and development of new medicines is a costly, high-risk undertaking. If we are to have any hope of providing ever-improving

levels of healthcare while containing costs, it will be with new innovations. Overcoming our energy and climate challenges will be impossible without widespread dissemination of new technology. And our workers of the future – our children and students – will have to be educated in the ways of innovation and creation if they and their children are to enjoy prosperity. Protecting present-day innovation and creation is essential to assuring our economic success in the global marketplace.

The U.S. Commerce Department is Proud to Play a Central Role in Protecting IP

Among the Nation's Founders' many enduring legacies is their respect for and values of intellectual property rights by providing for patents and copyrights in Article I, Section 8 of the Constitution -- "to promote the Progress of Science and useful Arts." Like other parts of the Constitution, the idea of promoting progress by rewarding the creation of intellectual property has become a nearly global aspiration. Over the decades, Congress, federal courts, and the Executive Branch have done a great deal to develop the Nation's intellectual property system, and in the process, we have established benchmarks for other nations seeking to emulate our success. Many of our national intellectual property rules are reflected in international treaties and agreements.

Today's world is infinitely more complex than 18th century society. Even where specific intellectual property rights are recognized, we face differing views on stakeholders' responsibilities in protecting and exercising these rights. The awareness of the importance of IP is not universal and in today's interconnected electronic age, preventing IP theft faces many challenges. Products can move across the globe at the speed of light and factories can be quickly adapted to replicate commercially successful goods.

Working with Congress, the courts and our sister agencies, the Commerce Department plays multiple roles in the national effort to address this complex set of issues. In broad strokes, we:

- Grant certain intellectual property rights on behalf of the U.S. Government;
- Provide Administration leadership in developing policy that supports statutory and case law;
- Advocate for the establishment of global intellectual property norms;
- Support national and international IP enforcement efforts, advocating protection for product or category-specific U.S. interests; and
- Work to build up capacity in other nations so that they can have more effective intellectual property regimes for their own benefit and the benefit of global commerce.

These activities are mutually reinforcing. Coordinating them across the U.S. Government and with our international partners can be a challenge, but Commerce is committed to working tirelessly on this effort.

Policy-Advice

The U.S. Patent and Trademark Office's (USPTO) role in establishing patents and trademark rights is fundamental to our intellectual property system. By law, the office is "responsible for the granting and issuing of patents and the registration of trademarks" (see 35 USC § 2(a)(1)). The role complements the Copyright Office's registration creative works, and the courts' protection of trade dress and trade secrets under the common law.

Giving life to this law – applying it in specific instances and evolving it to keep up with advances in technology – requires sound policy-making. Here, Congress has charged different parts of the Commerce Department with complementary missions:

- Congress has tasked the USPTO, through the Secretary of Commerce, with advising the President on intellectual property policy matters in the United States and internationally through the Office of the Under Secretary for Intellectual Property.
- Commerce provides policy guidance and advisory and technical assistance, consistent with Administration policies, on domestic IP issues to Members of Congress and staff, officials of government agencies and other IP stakeholders.
- And as the Internet has become a leading global platform for economic growth and social progress, the role of Commerce's National Telecommunications and Information Administration (NTIA) also comes into play. By statute, NTIA is the President's "principal adviser on telecommunications policies pertaining to the Nation's economic and technological advancement." Since the emergence of the Internet on the commercial scene, NTIA has played a leading role in shaping Internet policy in areas such as Internet domain names, technology innovation, privacy, and security. In these areas, NTIA and PTO have worked together to shape an intellectual property policy that balances strong intellectual property protection with flexibility to allow innovative new applications and services to flourish."

Of course, we perform these policy advice functions in collaboration with other U.S. government stakeholders. They include entities within the Executive Office of the President, including the Office of Science and Technology Policy, trade negotiators at USTR and others, as well as the Copyright Office, our diplomatic corps at the State Department, customs officials at the Department of Homeland Security (DHS), including law enforcement officers at U.S. Immigration and Customs (ICE)'s National Intellectual Property Rights Coordination Center (IPR Center), the Department of Justice and, increasingly, the Federal Communications Commission.

Establishing a Global, Balanced Rule-of-Law for Protecting Intellectual Property

Increasingly, our trading partners around the world also rely on innovative and creative works to drive economic growth. But respect for the intellectual property embedded in

such works is hardly uniform. With the increased significance of intellectual work-product worldwide, there is a parallel upsurge in unauthorized use of intellectual property, counterfeiting and piracy that actively undermines America's innovation-driven economy, the competitiveness of our companies, and the livelihoods of our workers. Counterfeiting and piracy are a threat to our health, safety and national security. Counterfeiting and piracy have annually cost us hundreds of thousands of jobs and billions of dollars. The U.S. Chamber of Commerce estimates that over 18 million American's are employed by IP intensive industries. According to a 2007 study, \$58 billion was lost to the U.S. economy in total output from piracy of motion pictures, music and sound recordings, and business and entertainment software (not even the entire copyright industry)¹. Small businesses are particularly at risk because they often lack the expertise to engage in self-help. Combating piracy and counterfeiting are therefore top priorities.

Here, an essential, foundational step is to promote worldwide adoption of reasonable legal norms concerning the recognition and protection of IP. In parallel, we continue to work with Congress and the courts to improve the state of U.S. law.

Right now, we are actively engaged with Congress to enact patent reform legislation that fairly balances the interest of innovators across all industries and technologies. We are seeking legislative changes that will simplify the patent process, reduce legal costs, improve fairness and make significant progress toward a more harmonized international patent system. As global trade continues to climb, greater harmonization of patent law will lead to greater efficiency, predictability, and reliability for U.S. innovators.

As the President's statutory adviser on intellectual property policy, Commerce and the USPTO have been actively involved in developing the U.S. government's legal position on important court cases. In *Bilski v. Kappos*, which was argued in the Supreme Court, in November of this year, the United States argued that the USPTO appropriately denied patent claims for a business method patent involving a method for hedging risk. In the Google Books matter, Commerce worked closely with the Department of Justice and other government agencies to craft a court filing explaining the many benefits of a settlement that would give consumers easy access to vast numbers of out-of-print works, while articulating a series of concerns about details of the proposed settlement. Likewise, Commerce has helped in developing U.S. litigation positions in other cases involving the USPTO's rulemaking authority, the appropriate standard for considering allegations of collusive conduct in the context of reverse payments from brand name manufacturers to prospective generic competitors in the Hatch-Waxman context, among other important intellectual property matters.

In the international realm, we work closely with the USTR and other agencies to establish, on a bilateral and multilateral basis, workable treaty commitments and trade agreements. For example, Commerce worked with the USTR on matters concerning the IP chapter for several free trade agreements (FTAs) during FY 2008, most notably

¹ Steven. E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, commissioned by the Institute for Policy Innovation.

negotiation of the IP chapter of the U.S.-Malaysia FTA, Costa Rica's implementation of the Dominican Republic-Central America-United States FTA, Peru's implementation of the U.S.- Peru Trade Promotion Agreement, as well as implementation of the U.S.-Chile FTA. Commerce also contributed to the development of the United States' World Trade Organization dispute settlement case against China relating to deficiencies in its IPR enforcement regime. USPTO co-chairs the IPR Working Group in the U.S.-China Joint Commission on Commerce and Trade (JCCT), our ongoing trade dialogue with China.

Commerce also works with the Department of Justice to develop proportionate, deterrent penalties for commercial scale counterfeiting and piracy in regions around the world. In addition, the USPTO maintains an active leadership role in the area of patent harmonization and continues to advocate for harmonization in the so-called Group B+ process, which includes Japan, Canada, Australia, and countries from Europe. Harmonization of administrative procedures is also an important goal of the USPTO in its Trilateral Offices consultations with the European Patent Office and the Japan Patent Office. The Group was convened in an attempt to accelerate progress on substantive patent law harmonization talks that were not moving in the World Intellectual Property Organization.

Protection Abroad

The Department helps provide American intellectual property owners with knowledge and legal tools to fight piracy and counterfeiting both at home and abroad, and assist them in their enforcement efforts overseas. We provide foreign countries with technical assistance on effective enforcement of intellectual property rights.

Within Commerce's International Trade Administration (ITA), we run the Market Access and Compliance (MAC) program. MAC's mission is to develop strategies to overcome market access obstacles faced by U.S. businesses. MAC monitors foreign country implementation of multilateral and bilateral trade-related agreements, and identifies various market access and other issues, including ones related to intellectual property rights. Upon identification of an IPR-related trade issue, a team of experts comprised of country, industry, and issue experts is assembled to coordinate ITA's efforts to successfully resolve the issue. This work is then closely coordinated with the USTR and the Department of State as well as other relevant agencies such as USPTO, the Copyright Office, the Department of Justice, and the Department of Homeland Security.

The USPTO's Attaché Program was formally instituted in 2006 for the benefit of U.S. economic and political interests abroad to promote the value and importance of strong intellectual property protection and enforcement in selected, high-profile countries where U.S. IP challenges are greatest. In partnership with Commerce's more broadly scoped Foreign Commercial Service (FCS) and the Department of State, the intellectual property Attachés are sent out to strengthen global intellectual property protection and enforcement overseas. The IPR experts support U.S. embassies and consulates on IPR issues, including devising strategies to stop counterfeiting and piracy, and supporting

U.S. Government efforts to improve the protection and enforcement of IPR. The Attachés also advocate U.S. intellectual property policies, coordinate training on IPR matters, and assist U.S. businesses that rely on IPR protection abroad. These Attachés serve at posts in Brazil, Russia, India, China, Thailand, and the U.S. Missions in Geneva.

FCS officers working worldwide advocate for the interests of U.S. companies on IPR issues to appropriate foreign government officials in coordination with their Commerce counterparts and State Department colleagues. FCS officers worked closely with ITA's Office of Intellectual Property Rights (OIPR), State, and USTR during the drafting of the Special 301 Report on IP rights protection. FCS officers also deliver demarches, arrange for U.S. Ambassadors to visit Ministries, and work with embassy officials to promote IPR protection. FCS officers and International Trade Specialists at U.S. Export Assistance Centers across the United States also assist U.S. companies to develop IPR protection strategies.

Commerce has put special emphasis on assisting small and medium sized enterprises (SMEs) in protecting their intellectual property both in the United States and abroad. ITA and USPTO, working in conjunction with other agencies, have undertaken numerous activities to assist SMEs. The focal point of much of this effort has been the StopFakes.gov website managed by ITA. The site allows businesses to file complaints about IPR-related trade problems, which are answered within 10 days by a trade specialist from OIPR. On the website, SMEs can find country toolkits that contain detailed information on protecting IPR in key markets around the world including Brazil, Brunei, China, Egypt, European Union, India, Malaysia, Mexico, Paraguay, Peru, Russia, Taiwan, Thailand, and Vietnam. The USPTO and ITA are currently working to expand the program to include toolkits for other trading partners. ITA, USPTO, and the Small Business Administration also worked together to develop an online training program for SMEs to learn how to evaluate, protect, and enforce their IPR. Commerce has established the 1-866-999-HALT hotline answered by USPTO IPR experts to help businesses secure and enforce their IPR worldwide. This has been followed-up with the recent posting of a USPTO attorney to the IPR Center to assist with the coordination of domestic and international investigative training and enforcement capacity building efforts.

To strengthen coordination and strategic planning against counterfeiting and infringement, the Prioritizing Resources and Organization for Intellectual Property Act of 2008, established the position of Intellectual Property Enforcement Coordinator. By statute the Intellectual Property Enforcement Coordinator (which sits in the Office of Management and Budget) will coordinate and assist in the development and implementation of the Joint Strategic Plan against counterfeiting and infringement, facilitate the issuance of policy guidance to assure coordination of intellectual property enforcement policy, and chair an interagency intellectual property enforcement advisory committee. Commerce looks forward to working closely with the Intellectual Property Enforcement Coordinator to improve the efficiency and effectiveness of the Federal Government's enforcement efforts against counterfeiting and infringement.

Training and Capacity Building

Since 2005, the USPTO Global Intellectual Property Academy (GIPA) has provided high-level intellectual property rights training, capacity building programs and technical assistance training to foreign judges, prosecutors, customs officials, IP enforcement personnel, as well as officials from copyright, trademark and patent offices from around the world. Those individuals come to the United States to learn, discuss and strategize about global IPR protection and enforcement. The program's goals include fostering a better understanding of international intellectual property obligations and norms, exposing participants to the U.S. model of protecting and enforcing intellectual property rights, and promoting discussion of intellectual property issues in a friendly and supportive environment. The Academy provides both multilateral programs and country-specific programs as needed. USPTO further envisions programs dedicated to specific legal issues or technologies as the Academy continues to develop. GIPA also delivers training to other stakeholders, including small business owners, U.S. Government officials, and the general public.

With the establishment of GIPA, the USPTO also implemented the International Examiners-in-Residence (IEIR) program for patent examiners from foreign countries. The first one lasted eight months and ended in January 2008. It included examiners from China, India, Egypt, Brazil, Philippines, and Mexico. In the current program, there are eight examiners here from South Korea, China, Saudi Arabia, and Germany for a six-month program finishing the end of December, 2009. The group of five Korean examiners will stay with USPTO up to May 2010 to work on additional projects. These programs are provided free of charge and permit patent examiners from foreign countries to sit in lectures side-by-side with newly hired United States' examiners to learn examination practice and procedure. The current program is aimed at increased understanding of U.S. practice in order to facilitate work sharing efforts with other countries.

In addition, for several years now the USPTO has held enforcement workshops in coordination with, for example, the World Intellectual Property Organization, the Department of Justice, the IPR Center, U.S. Immigrations and Customs Enforcement, and U.S. Customs and Border Protection, providing training for foreign enforcement and intellectual property officials from developing countries on implementation of the TRIPS Agreement (WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights) enforcement provisions, problem-solving exercises involving civil, criminal and border issues, and discussions with rights holders on challenges in obtaining effective enforcement.

Furthermore, the USPTO has a group of in-house experts on China with extensive knowledge of IP legal regimes in China. The USPTO's China Team has actively participated since 2005 in China Road Shows to various cities in the United States as part of an outreach effort to talk to small- and medium-sized businesses about how to protect and enforce their IP in China. Often, these small- and medium-sized businesses lack the

resources and expertise available to larger corporations. These events are open to any business, including those that already are doing business in or with China and those that currently have no business with China but may not understand the risk to their intellectual property from IP theft from China. The China events have, in the past, been conducted in several cities around the country including, for example, Fresno, Oakland, Chicago, Baltimore, Detroit, Atlanta, Kansas City, Manchester, and Pittsburgh, each tailored to the particular needs of the host city's business community. The USPTO has reached out to both government and non-government stakeholders to help publicize the conferences and campaign. Some of the organizations that we have worked with to promote awareness of the conferences and of the issue of IP theft are: The IPR Center, Small Business Administration, Minority Business Development Centers, U.S. Export Assistance Centers, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, American Intellectual Property Law Association, Intellectual Property Owners Association, U.S. Chamber of Commerce, National Association of Manufacturers, Service Core of Retired Executives, National Federation of Independent Business, United Inventors Association, North Carolina Secretary of State's office, federal, state, and local law enforcement officials.

In 2009, USPTO decided to expand the China Road Shows to include issues related to India. In 2010, USPTO will host a China-India Road Show at the USPTO headquarters in Alexandria, Virginia.

The General Counsel's Office in Commerce also supports efforts to improve IP protection -- and rule-of-law more generally -- via the Commercial Law Development Program (CLDP). As part of its capacity building, CLDP assists developing countries with the reform of their IP law, to improve the efficiency and transparency of their IP administration, to increase the strength of local IP enforcement, and to expand public awareness. From Ukraine to South Africa and Pakistan to the Philippines, CLDP has provided a wealth of technical assistance for the training and coordination of judges, IP officials, customs officials, food and drug officials and standards officials, whose knowledge and capacity are key to the improved protection of IP in those countries and regions. This fall, Commerce hosted the 13th U.S.-China Legal Exchange. USPTO officials were joined by a Chinese delegation in Los Angeles, Chicago, and New York to discuss China's new patent law. The discussions highlighted the improvements, as well as the shortcomings, of China's efforts in these areas and provided U.S. businesses, practitioners, and academics an opportunity to give input to Chinese officials.

Finally, through various international frameworks, the USPTO strongly advocates cooperation and collaboration with intellectual property offices as a means of addressing global workload and patent application examination backlog issues, reducing the duplication of work among intellectual property offices, and improving the quality of patent examination. Since 1983, the Trilateral Offices-- the USPTO, the European Patent Office, and the Japan Patent Office-- have been meeting to discuss cooperation in the areas of automation and sharing of patent-related information. Most recently, the Trilateral Offices have focused on creating new efficiencies in the global patent system. As a result, work-sharing arrangements have been introduced and implemented that allow

for accelerated and improved processing of a patent application once an initial office makes a determination of patentable subject matter. To address these issues on a larger scale, the five largest patent offices - the USPTO, the European Patent Office, the Japan Patent Office, the Korean Intellectual Property Office, and the State Intellectual Property Office of China - have been meeting since 2007 to develop a strategy for increasing patent quality and maximizing efficiencies. Known as the IP5, this group recognizes that maximizing work-sharing is critical to sustaining the global patent system and is working on technical projects to support and maximize work-sharing.

Closing Thoughts

Madame Chair, the Department of Commerce and all within the Obama Administration recognize the importance of intellectual property protection both domestically and globally. As you can see, we are deploying our resources with a multi-prong, holistic strategy. We do so because, clearly, much is at stake. We look forward to working with the new office of Intellectual Property Enforcement Coordinator and with other agencies, and we will continue to work tirelessly, with all stakeholders, to combat piracy and counterfeiting around the globe in order to protect American innovation, creativity and jobs.

Thank you for this opportunity. This concludes my statement. I would be happy to answer any questions you may have.