

Testimony of

The Honorable Jon Dudas

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STATEMENT OF
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AND
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BEFORE THE
COMMITTEE ON JUDICIARY
UNITED STATES SENATE
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Introduction

Chairman Hatch, Ranking Member Leahy, and Members of the Committee:

Thank you for this opportunity to appear before you to discuss the problem of counterfeiting and intellectual property theft and the Department of Commerce's role in protecting intellectual property abroad. Secretary Evans is keenly aware of the increasing significance of intellectual property protection for American businesses and innovators and has made combating counterfeiting and piracy a top priority for the entire Department. In addition, as Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office's (USPTO), I am dedicated to marshalling U.S. government efforts to reduce the toll that IP theft takes on American IP owners. To that end, I commend you for holding today's hearing and am very appreciative of the Committee's interest in finding additional ways to protect U.S. intellectual property owners' assets overseas. Your long-standing commitment to these issues, as well as your consistent support of the work of the USPTO, is of tremendous value.

International IP Enforcement Overview

Increasingly, both the United States and our trading partners are relying on intellectual property (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 results of the latest research to the brand recognition of a company's trademark. For example, with one of the largest trademark licensing programs in the world, Coca-Cola's brand value exceeded \$70 billion in 2003.¹

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 1977-2001, the U.S. copyright industries' share of the GDP grew more than twice as fast as the rest of the U.S. economy. In 2001, 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 These same companies depend upon their brands or trademarks to compete effectively in the marketplace, distinguishing one's products from others used in commerce, and promoting consumer confidence and brand loyalty.

Unfortunately, the economic benefits of capitalizing on intellectual property rights have captured the attention of pirates, organized crime, and -- in some limited but increasing instances -- terrorists. Today, the illegal

¹ "The Global Brand Scorecard 2003," BusinessWeek, August 4, 2003. ² "Copyright Industries in the U.S. Economy: The 2002 Report," International Intellectual Property Alliance, April 2002.

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duplication of software, music, DVDs, and other digitized information and the trafficking in counterfeit products, from which no industry and no country is exempt, are all too common.

Optical disk piracy in the form of music, business software, videogames, and published materials is a chief concern. In China, U.S. industry estimates that 90 percent of business software, valued at \$1.5 billion, is pirated.³ Worldwide, industry estimates that approximately 40 percent of software programs are pirated. In 2002, Pravda reported that the bulk of video and audiotapes produced in Russia were counterfeit. With advances in digital technology, piracy in optical media is increasingly high quality, high volume, and low cost. The problem is compounded by the growth of the Internet and the increase in bandwidth, which makes some of this piracy less dependent on tangible optical media, while at the same time enhancing the impression that piracy is victimless or free.

According to 2001 and 2002 U.S. Customs statistics on seizures based on copyright piracy and trademark counterfeiting, the value of goods seized due to trademark counterfeiting was greater than for copyright piracy. In fact, global trademark counterfeiting totals about \$500 billion a year, of which pirated automobile parts account for about \$12 billion.⁴ Indeed, the U.S. Trade Representative's 2003 Special 301 Report concluded that counterfeiting has become "a massive, sophisticated global business involving the manufacturing and sale of counterfeit versions of everything from soaps, shampoos, razors and batteries to cigarettes, alcoholic beverages and automobile parts, as well as medicines and health care products." The World Health Organization estimates that counterfeit drugs account for ten percent of all pharmaceuticals, and in developing countries the percentage can be as high as 60 percent.⁵ Piracy and counterfeiting come with a high price. For example, according to the Business Software Alliance, in the United States the U.S. software industry lost nearly \$2 billion in 2002.⁶ The cost of counterfeit and pirated products is not limited to lost revenue and jobs. Consumer health and safety is at stake, too. U.S. Food and Drug Administration counterfeiting investigations have jumped from about five a year in the late 1990s to 22 in 2002.⁷ Viagra is known to be a frequent target of counterfeiters, but other commonly prescribed drugs such as Lipitor and Procrit are being targeted as well. Counterfeit drugs may contain too much, too little, or none of a drug's active ingredient. Common everyday household products also are at risk. In December 2003, the Department of Homeland Security's Bureau of Immigration and Customs Enforcement announced seizures of electrical goods and batteries valued at approximately \$8 million. Counterfeit batteries can explode in electronic equipment or children's toys. Even product approval marks certifying a product's safety are being counterfeited.

To make matters worse, the global criminal nature of IP piracy is all too real. During a House International Relations Committee hearing last summer, the Secretary General of Interpol noted what we believe is a potential, though yet not significantly realized trend, when he testified that IP crime "is becoming the preferred method of funding for a number of terrorist groups." A customs expert with the European Commission recently stated that al-Qaeda and Hezbollah are among organizations believed to be using counterfeit goods to launder money and fund their activities. Mr. James Moody, former chief of the Federal Bureau of Investigation's Organized Crime/Drug Operations Division, has stated that counterfeiting is likely to become "the crime of the 21st Century."⁸

Given these threats to U.S. economic interests and our national security, the USPTO and our colleagues in the Department of Commerce, particularly the International Trade Administration and the Office of General Counsel, are working hard to curb IP crime and strengthen IP enforcement in every corner of the globe. Indeed, Secretary Evans has been a champion on this issue and has made it a top priority for the entire Department.

Because American IP owners compete in a global marketplace, we need to expand our efforts to promote IP protection internationally. We need to make sure that American IP owners have sufficient legal tools to fight

³ <http://www.bsa.org/usa/press/newsreleases/New-Economic-Impact-Study-Details-Benefits-of-Strong-Copyright-Protection.cfm>

⁴ "Chinese Counterfeiters Turn Out Fake Car Parts", Wall Street Journal, March 3, 2004 at p. A.14.

⁵ <http://www.iacc.org/teampublish/uploads/factsupdated.pdf>

⁶ <http://www.bsa.org/resources/loader.cfm?url=/commonspot/security/getfile.cfm&pageid=1292&hitboxdone=yes>

⁷ "More Fake Lipitor Prompts Lawsuit from Distributor", Wall Street Journal, Oct. 5, 2003, p. C.9.

⁸ <http://www.iacc.org/teampublish/uploads/factsupdated.pdf>

piracy. We also need to provide technical assistance to foreign entities on drafting and implementing effective IP laws and training on enforcement of IP rights.

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

Through our Offices of International Relations and Enforcement, the USPTO: (1) helps negotiate and works with Congress to implement international IP treaties; (2) provides technical assistance to foreign governments that are looking to develop or improve their IP laws and systems; (3) trains foreign IP officials on IP enforcement; (4) assists in the drafting and revision of IP sections in bilateral investment treaties and trade agreements; (5) advises the Office of the U.S. Trade Representative (USTR) on intellectual property issues in the World Trade Organization; (6) works with USTR and industry on the annual review of IP protection and enforcement under the Special 301 provisions of the Trade Act of 1974; and (7) consults with the Department of Justice and other federal law enforcement entities who are responsible for criminal IP enforcement.

The USPTO also serves as the co-chair of the National Intellectual Property Law Enforcement Coordination Council (NIPLECC), which is tasked with coordinating domestic and international intellectual property law enforcement.

NIPLECC was launched in 1999 to ensure the effective and efficient enforcement of intellectual property in the U.S. and worldwide. While NIPLECC's coordination activities may not have a direct impact on corporate stewardship, they ensure that government enforcement efforts are consensus-based and non-duplicative, and therefore are vital to an

ensuring fairness and honesty in the use and development of intellectual property.

NIPLECC has developed a comprehensive data base that includes all recent intellectual property law enforcement training provided by the US government and many associations to developing and least developed nations. It is also developing legislative suggestions to improve domestic intellectual property laws related to enforcement. NIPLECC currently operates on whatever funding and resources are provided by individual member agencies. One of the most important NIPLECC initiatives, which is pending due to funding issues, is a public awareness campaign on IP piracy and counterfeiting.

Enforcement Training and Technical Assistance

The USPTO provides intellectual property enforcement training and technical assistance on a truly global basis. These training and assistance programs foster respect for IP, encourage governmental and corporate efforts to combat and deter infringement, and promote honest business practices in the use and development of intellectual property. Our technical assistance and training initiatives were launched to address U.S. statutory and trade obligations to promote IP protection, and to meet increasing numbers of requests for assistance by foreign governments throughout the world. Our efforts have yielded positive results, measured by decreasing levels of intellectual property piracy and stronger legal protections for intellectual property in many countries where we provided training and technical assistance. Still, much work remains.

Today, the focus of our efforts is: (1) addressing the difficulties governments in developing and least developed countries face in meeting international obligations; and (2) bringing together local authorities to address their own enforcement issues.

At the conclusion of the Uruguay Round in 1994, the resulting World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs) presented WTO members with new obligations and challenges. The TRIPs Agreement sets minimum standards of protection for the various forms of intellectual property and requires WTO members to provide for "effective enforcement" of intellectual property rights. TRIPs also includes detailed provisions on civil, criminal and border enforcement measures designed to protect the owners of intellectual property rights. Today, developing countries obligations' under

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TRIPs have entered into force. Least developed countries have until 2006 to comply with the bulk of the provisions, including the enforcement obligations. As a WTO agreement, TRIPs obligations are subject to the dispute settlement procedures of the WTO.

Over the last several years, the USPTO has assisted countries around the world in establishing adequate enforcement mechanisms to meet their obligations under TRIPs. In bilateral negotiations, we work closely with USTR to obtain more detailed commitments on enforcement and means to deal with infringement using new technology. We provide technical advice through the annual Special 301 process, the GSP review, TRIPs Council review of implementing enforcement legislation, and in the negotiation of free trade agreements (FTAs).

Our approach to the on-going FTA negotiations has been to build upon the TRIPs agreement. In other words, our negotiating position is that these trade agreements should follow a "TRIPs Plus" format by expanding the minimum standards set out in TRIPs. One way of achieving the "TRIPs Plus" goal is by enhancing the enforcement provisions contained in TRIPs and combining them with the enforcement provisions contained in the WIPO "Internet" Treaties - the WPPT and WCT. The 1996 WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT) bring copyright law in line with the digital age. The WCT and the WPPT establish important new international norms related to the right to make a work available to the public through interactive media. They also provide for the protection of copyright management information and technological measures used to protect copyrighted works. The FTAs also incorporate provisions from our own Digital Millennium Copyright Act. These include Internet Service Provider (ISP) liability, protection against anti-circumvention devices, and satellite signals.

Regional Concerns

As I am sure the Committee is well aware, one of the areas of greatest concern with respect to IP counterfeiting and piracy is Asia, particularly China. Despite China's membership in the World Trade Organization (WTO) and its requirement to comply with the TRIPs Agreement, inadequate IP enforcement in China is a major problem for U.S. business interests, costing billions of dollars in lost revenue and tens of thousands of U.S. jobs. For example, according to the Business Software Alliance, China accounts for 44 percent of the piracy-related dollar losses to BSA member companies in the Asia/Pacific region.⁹ IP enforcement problems are pervasive with piracy and counterfeiting being the most serious and widespread. These problems run the gamut from rampant piracy of movies and business software to counterfeiting of consumer goods, electrical equipment, automotive parts and pharmaceuticals.

China is a leading source of counterfeit automotive parts production, which costs the auto industry \$12 billion a year. Most counterfeiting involves parts that need to be replaced frequently, such as oil filters, headlamps, batteries, brake pads, fan belts, windshields and spark plugs. For example, DaimlerChrysler, BMW, Audi, Volvo, Mitsubishi and Toyota report that even though a factory in Guangdong Province has been raided three times in a two and a half year

period, it has been allowed to continue making windshields stamped with their brand names for sale in the world market. It is estimated that automotive companies could hire 210,000 more employees if the counterfeit auto parts trade is eradicated.¹⁰ According to the World Health Organization, China also is a major source of counterfeit and substandard medicines.

Last fall, Secretary Evans led a mission to China and highlighted China's lack of IPR enforcement. The Secretary met with high-ranking Chinese officials and reiterated a continuing concern: that effective IPR protection requires that criminal penalties and fines for intellectual property infringement be large enough to be a deterrent rather than a business expense. Secretary Evans believes in the strong enforcement of our trade laws and is taking new and proactive measures to strengthen the enforcement and compliance of our trade agreements. He has tasked Commerce agencies, such as USPTO and the new Office of Investigations and Compliance under Commerce's International Trade Administration, to coordinate their efforts to vigorously pursue allegations of IPR violations wherever they occur, especially in China.

⁹ Eighth Annual BSA Global Software Study, June 2003. 4

¹⁰ Motor and Equipment Manufacturers Association, September 2003.

⁵ Under the direction of Secretary Evans, the USPTO has been working extensively to reduce piracy and counterfeit activity in China. As a follow up to the Secretary's October 2003 trip, I recently led a delegation to China for consultations with senior officials at China's patent and trademark and other intellectual property agencies. Our delegation also met with U.S. companies facing intellectual property issues in China. A primary focus of this trip was to further the Administration's goals of improving the intellectual property environment for U.S. companies doing business in China and, specifically, of addressing widespread counterfeiting and piracy. Many industries have noted that the Chinese government, by restricting market access for certain products, is providing free reign for counterfeiters, pirates and criminals to exploit the void created by the lack of legitimate products. Given these trends, we will continue to press hard for enhanced steps by the Chinese Government to significantly reduce the extent of IP violations.

Trademark counterfeiting and copyright piracy in Russia is a major problem as well. The International Intellectual Property Alliance estimates that 75 percent of the products seized in raids go back into the marketplace to be sold in Russia or abroad.

Organized crime involvement in Russia is such a threat that companies are concerned about the danger in protecting their intellectual property rights. By some accounts, organized crime groups control the duplication and initial distribution of the majority of pirated videos and DVDs. In the 2003 Special 301 Report, the U.S. Government urged Russia to combat organized crime involvement through specialized enforcement units and the enactment of tough criminal penalties. We continue to urge: (1) the closure of plants producing illegal optical discs; (2) increased raids and prosecution of optical disc piracy; and (3) the adoption of an optical media enforcement regime.

The USPTO has been extensively involved to improve the enforcement, especially criminal enforcement, of copyright and other IP rights in Russia. For example, in November 2002, the USPTO cosponsored and participated in a United Nations Economic Commission for Europe (UNECE) seminar in Moscow on intellectual property enforcement in Russia. The seminar was attended by Russian government officials representing the State Duma and the Ministries of Defense, Culture, Education and Science. The USPTO has several proposals pending for technical assistance in Russia in FY 2004, which would build upon these and other programs we have conducted in Russia.

Conclusion

Mr. Chairman, the demands on the Department of Commerce's and USPTO's expertise in the international arena have grown dramatically in the last few years. These demands most assuredly will increase in the next few years, alongside our obligations to meeting our core patent and trademark examination functions.

As we look to the future, however, let me conclude on a positive note. Although by all accounts counterfeiting and piracy appear to be growth industries, there have been some recent successes in attacking the problem. Between 2001 and 2002, according to industry estimates, software piracy in Indonesia decreased from 89 percent to 68 percent. In South Africa, it fell from 63 percent to 36 percent. The Motion Picture Industry has reported a decrease in piracy levels in Qatar from 30 percent in 2001 to 15 percent in 2002. In Bahrain there have been dramatic and systemic improvements in IP protection and enforcement over the past few years. These include the signing of numerous international IP conventions and the virtual elimination of copyright piracy and counterfeiting in retail establishments.

So, there is reason for optimism. I am hopeful that with the continued support and partnership of this Committee, we will be able to do even more to provide American businesses and entrepreneurs with the IP protection they need.

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 products in every corner of the globe.

Thank you very much.

