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PIRATES OF THE 21ST CENTURY: THE CURSE OF THE BLACK MARKET

HEARING

BEFORE THE

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

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

APRIL 20, 2004

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PIRATES OF THE 21ST CENTURY: THE CURSE OF THE BLACK MARKET

TUESDAY, APRIL 20, 2004

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

The Subcommittee met, pursuant to notice, at 9:33 a.m., in room SD–342, Dirksen Senate Office Building, Hon. George Voinovich, Chairman of the Subcommittee, presiding.

Present: Senator Voinovich.

Staff Present: Amanda Nichols, Counsel; Andrew Richardson, Staff Director; Kevin Doran, Chief Clerk; Marianne Upton, Minority Staff Director, and Deborah Parkinson, Minority Staff Assistant.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. The meeting will come to order. Good morning, and thanks very much for being here today.

The title of this hearing this morning is, "Pirates of the 21st Century: The Curse of the Black Market." It's a pretty serious title. It could be a movie title, and if somebody would make a movie about it, I think the American public might be so engaged that we would really start getting something done about the problem that we have.

We're going to focus on the effectiveness of the Federal Government's efforts to enforce intellectual property rights. Specifically, this hearing is going to examine the activities of the Department of Commerce, the Office of the U.S. Trade Representative (USTR), and the Department of Homeland Security, to protect U.S. intellectual property interests both at home and abroad.

I want to begin by noting that the Office of the United States Trade Representative was unable to send a witness. This is very distressing to me, as the USTR plays a prominent role in intellectual property issues, and I believe their testimony is crucial to uncovering why it seems that we are not getting the job done in enforcing our intellectual property rights. I also find it ironic that they did not have anyone to send.

One topic I wanted to cover with them today is their lack of resources, particularly their staffing levels. This is an office of 225 people, with a budget of roughly $40 million. In my December hearing, where I focused on the human capital challenges at USTR and Commerce, I was shocked to learn that an office as small as USTR

had so many responsibilities. I was also shocked to hear that USTR testified that it relied heavily on personnel from other agencies to perform their functions.

If USTR were present today, I would again ask questions concerning their small staffing and funding levels and whether they have the right number of people, with the right amount of resources, to protect U.S. intellectual property rights and subsequently U.S. manufacturing jobs.

This is a very important issue. This agency needs to be examined to determine if it has the resources to successfully carry out its mission. I intend to ask the General Accounting Office to look into the issue and report back to me what they find. I would also like to add that although USTR is not here, they have agreed to answer questions from Subcommittee Members after the hearing in writing, and I certainly have some questions for them.

The importance of our hearing today is underscored by the fact that the United States has lost over 2.7 million manufacturing jobs since July 2000. In July 2000, there were more than one million manufacturing jobs in the State of Ohio. Yet, by October 2003, this had fallen to 840,000. This is a loss of 17.6 percent of the State's manufacturing employment, a loss of more than one out of every six Ohio factory jobs.

These numbers represent a crisis for Ohio's economy, especially since the manufacturing sector in Ohio accounts for the second highest weekly earnings of any economic sector and supports local communities and schools with more than $1 billion in corporate franchise and personal property taxes.

Ohio's manufacturing companies are distressed by our current trade priorities, especially with regards to China. I have heard it over and over and over again. As I meet with business leaders throughout the State, one of their top concerns is their inability to compete on a level playing field with their Chinese competitors. Many of them are for free trade, but they really don't believe that we have fair trade, as they feel that our government's policies with respect to intellectual property rights are not helping to level the playing field and affecting their bottom line.

This is not surprising, however, when you look at the statistics on the subject. The International Chamber of Commerce estimates that counterfeiting drains between $300–$350 billion annually from the world's economy. This is roughly 5 to 7 percent of total world trade, and each dollar lost to American citizens and companies ends up lining the pockets of people I refer to as criminals. They are criminals. Actually, they are stealing ideas from other people and selling them on the marketplace. That's theft.

For U.S. manufacturers, protection of intellectual property is not an abstract concept. America's competitive edge is derived from innovation and rising productivity, and the protection of intellectual property remains one of the best means for ensuring that American manufacturers enjoy the benefits of their investments.

The very foundation of our economy is the American entrepreneur, but who will want to continue on this path if your work product can be stolen out from under your nose at every turn? In fact, the International Anti-Counterfeiting Coalition puts revenue

loss—this is a stunning number—to U.S. trademark holders at $200 billion a year.

While USTR's Special 301 report contains a lengthy list of countries with deficient intellectual property protection, this hearing will place a specific emphasis on counterfeit goods from China, which remains the leader in counterfeit goods production for the majority of U.S. companies. It is estimated that 15 to 20 percent of all products made in China are counterfeit, and this accounts for roughly 8 percent of the Chinese gross domestic product. In fact, the Bureau of U.S. Customs and Border Protection seizure statistics show that about one-half of all intellectual property related seizures for anywhere in the world involving goods entering a U.S. port are from China.

I am not surprised by these numbers. This has been an ongoing problem with China for some time now. USTR cited China's failure to provide adequate protection of patents, copyrights and trademarks back in 1991, when it threatened to impose a billion-and-a-half dollars in trade sanctions.

When I was in China on a trade mission as governor of the State of Ohio in 1995, this was an issue that I talked about constantly with Chinese Government officials.

At that time, the International Intellectual Property Alliance, an association of major U.S. copyright-based industries, had estimated that intellectual property rights piracy by Chinese firms cost U.S. firms $2.3 billion in lost trade. The terms of China's WTO accession required that China immediately bring its intellectual property laws into compliance with the WTO agreement on Trade Related Aspects of Intellectual Property Rights. But I haven't seen any evidence that China's behavior has changed a bit since then. We need to stop standing by and watching as, year after year, China continues to counterfeit U.S. products, costing many Americans their jobs.

While a wide variety of manufacturing industries have experienced job losses related to intellectual property rights, I would like to focus specifically on one industry which has a large presence in my State: The automobile industry. According to a 2003 report from the U.S. Federal Trade Commission, the counterfeit auto parts industry accounts for $3 billion in business to the United States alone, and $12 billion per year globally. The Commission has also estimated a related loss of about 250,000 domestic jobs in the auto industry as a result. Automotive suppliers across the country have identified this rising illegal practice as a risk to their global sales and operations. Many U.S. automobile parts manufacturers have sustained damage to their international branding and reputations as a result of active efforts to copy their packaging and trademark protected materials. Senator Levin and I are co-chairs of the Senate Auto Caucus and we are very concerned about this issue.

The purpose of this hearing is to learn what the Executive Branch is doing about this and whether their efforts are succeeding. I was encouraged to see some progress on the issue in the January 2004 Commerce Department manufacturing report, which stated that: "to the extent that U.S. investment in research and development provides a competitive edge in the marketplace, the pro-

tection of the intellectual property developed by U.S. manufacturers which embodies the product of that research becomes critical to the future of the manufacturing sector." I just wonder, though, how many other Commerce Departments have said this over the years. I will be interested to hear how the Commerce Department today plans to follow through on that statement.

I was also encouraged to read in the same report that Commerce will be reinforcing the efforts of the National Intellectual Property Law Enforcement Coordination Council, which has been around since 1999, whose mission is "to coordinate domestic and international intellectual property law enforcement among Federal and foreign entities." With so many agencies, namely Commerce, Homeland Security, USTR, Justice and the FBI all involved in efforts to fight counterfeiting, I believe this Council will be crucial to maximizing the government's effectiveness in this area. I am interested to learn everyone's opinion on how successful this Council has been and the prospects for its future success.

I am looking forward to hearing the testimony of all of our witnesses today and learning what more we can do to find solutions to this challenge. American manufacturers, including those in Ohio, have run out of patience as they see jobs lost to intellectual property piracy and the flourishing black market of the 21st Century.

We have a nice line up of witnesses today. On our first panel we have two witnesses representing the Bush Administration. First is John Dudas, Acting Under Secretary for Intellectual Property within the Department of Commerce, and Director of the U.S. Patent and Trademark Office. We also have Francis Gary White, Unit Chief of Commercial Fraud, Immigration and Customs Enforcement, U.S. Department of Homeland Security.

I am really glad to have both of you here. Mr. White, I am also very happy that you're here because you are actually "hands on" in terms of the operation. So often we get people that are higher up and when you start asking questions about what happens, they really don't know because they have so many other responsibilities on their plate.

James Mendenhall, the Assistant U.S. Trade Representative for Intellectual Property, was scheduled to testify but cancelled at the last minute. As I said, I am very disappointed that the USTR isn't here today because they are very much a part of this whole issue.

Our second panel consists of three Ohio witnesses. First we're going to hear from Professor Daniel C.K. Chow of the Michael E. Moritz College of Law at Ohio State University, my alma mater. Michael Moritz, who the college was recently named after, was one of my classmates, in my graduating class. In fact, it's interesting, that we both ran for president of the law school Young Republican Club. I won and he lost. We had a class reunion 2 years ago here in Washington. They said, well, Moritz might be the Senator and Voinovich might be in Moritz' position. I said there is no way in the world that if I was a practicing lawyer I would have been able to contribute $30 million into the Ohio State University College of Law.

Joining Professor Chow is Phillip A. Rotman II, Assistant Patent and Trademark Counsel for Dana Corporation. Dana is based in Toledo and is celebrating its 100th anniversary this year. Finally,

we're going to hear from Jeff Gorman, President and CEO of the Gorman-Rupp Company, headquartered in Mansfield, OH.

I want to thank all of you for making the trip to Washington today. Again, thank you for coming.

If all the witnesses would please stand, I will administer the oath. Our testimony is sworn to before this Subcommittee. So if you would stand and raise your right hand.

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

[Affirmative responses.]

Let the record show that the witnesses have answered in the affirmative.

Mr. Dudas, will you begin, please.

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

Mr. DUDAS. Thank you, Mr. Chairman. Thank you for the opportunity to appear before you and discuss the problem of counterfeiting and intellectual property theft and piracy and the Department of Commerce's role in protecting intellectual property abroad.

Secretary of Commerce Don 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.

As you know, intellectual property is a net export of the United States and is responsible for creating and sustaining tens of millions of jobs in the United States. As Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the Patent and Trademark Office, I am dedicated to coordinating U.S. Government efforts to reduce the toll that IP theft takes on American IP owners and users. I commend you for holding today's hearing and am grateful to the Subcommittee for its interest in finding additional ways to protect U.S. intellectual property owners' assets overseas and, as you mentioned, informing people of the importance of this issue and these problems that we face.

Increasingly, both the United States and our trading partners are relying on intellectual property to drive economic growth. This is because competitive success in a market economy depends heavily on intellectual property assets held by an institution.

Piracy and counterfeiting threaten to undermine some of the strongest areas of growth in 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, and foreign sales/exports. Between 1977 and 2001, the U.S. copyright industries' share of the GDP grew more than twice as fast as the rest of the U.S. economy.

The costs of counterfeiting and piracy are not merely economic. Consumer health and safety is at stake as well. U.S. Food and Drug Administration counterfeiting investigations have jumped

[1] The prepared statement of Mr. Dudas appears in the Appendix on page 43.

from about 5 in the late 1990's to 22 in 2002. Counterfeit drugs very often contain no active ingredient, or a mixture of improper active ingredients. Counterfeit batteries can explode in electronic equipment or children's toys. Even product approval marks certifying a product's safety are now being counterfeited widely.

To make matters worse, the global criminal nature of IP piracy is all too real. During a House International Relations Committee hearing in 2003, the Secretary General of Interpol identified a disturbing potential trend when he testified that IP crime is becoming the preferred method for funding 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.

The USPTO is directed by statute to advise the President, through the Secretary of Commerce, and advise all Federal agencies on national and international intellectual property policy issues, including intellectual property protection in other countries. The USPTO also serves as the co-chair, as you mentioned, with the Criminal Division of the Department of Justice of the National Intellectual Property Law Enforcement Coordination Council, or NIPLECC, which is tasked with coordinating domestic and international intellectual property law enforcement.

The USPTO provides intellectual property enforcement training and technical assistance on a truly global basis. Over the last several years, the USPTO has assisted countries around the world in establishing adequate enforcement mechanisms to meet their obligations under TRIPs. We provide technical and legal advice to the USTR through the annual Special 301 process, the TRIPs council review of implementing enforcement legislation, and in the negotiation of free trade agreements.

Our approach to the ongoing FTA negotiations has been to follow a TRIPs-plus format by expanding the minimum standards set out in TRIPs. One way of achieving the TRIPs-plus goal is be enhancing the enforcement provisions contained in the TRIPs agreement and combining them with the enforcement provisions contained in the World Intellectual Property Organization Internet treaties.

As I am sure the Subcommittee is aware, and as you noted, one of the areas of greatest concern with respect to intellectual property piracy is Asia, and particularly mainland China. Despite China's membership in the WTO, and its requirement to comply with the TRIPs agreement, the lack of effective IP enforcement in China is a major problem for U.S. business interests, costing potentially billions and billions of dollars in lost revenue.

Last fall, Secretary Evans led a mission to China and highlighted China's lack of intellectual property rights enforcement. The Secretary met with high-ranking Chinese officials and reiterated a continuing concern, that effective IPR protection requires that criminal penalties for stolen intellectual property theft and fines are large enough to be a deterrent rather than a mere business expense. Secretary Evans has carried a strong message of the need for results, results that can be measured so that progress can be identified. That is perhaps the most important issue in China, to see a trend where results are identified and we can see progress.

As a follow up to the Secretary's October 2003 trip, I recently led a delegation to China with other members of the USPTO China team for consultations with senior officials at China's patent and trademark office and other intellectual property agencies, as well as customs and enforcement. While our visits were well-received and we were pleased to note a continuing and increasing awareness among Chinese officials of the importance of IP protection and enforcement, we have not yet seen significant progress on most of the key issues we have been urging China to act on for some time. These issues include enhanced criminal enforcement, protecting copyrights over the Internet, and stopping the export of counterfeited goods.

Mr. Chairman, the demands on Commerce and USPTO's expertise in the international arena have grown dramatically in the last few years. These demands will certainly increase in the next few years, as well as our obligations to meeting our core missions.

I am hopeful that with the continued support and partnership of this Subcommittee, we will be able to provide American intellectual property owners with the protection they deserve and need.

In terms of the economy and national security, much is at stake. That is why our experts will continue to work tirelessly to protect American products in every corner of the globe.

Thank you very much for this opportunity to answer your questions.

Senator VOINOVICH. Thank you very much. When was it that you visited China?

Mr. DUDAS. The first week of March.

Senator VOINOVICH. Mr. White.

TESTIMONY OF FRANCIS GARY WHITE,[1] UNIT CHIEF, COMMERCIAL FRAUD DIVISION, IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY

Mr. WHITE. Good morning, Mr. Chairman, and thank you for the opportunity to testify about the Department and ICE's, the Immigration and Customs Enforcement's efforts undertaken to investigate intellectual property right violations. I would also like to note the strong interest of the Department's leadership in this area and the support they have provided ICE as we move forward in our mission to detect IP violations.

With the creation of the Department of Homeland Security in 2003, the investigative and intelligence functions of the former U.S. Customs Service and the Immigration and Naturalization Service were merged into ICE, now the second largest Federal law enforcement agency. ICE's mission is to protect the United States and its citizens by detecting, interdicting and investigating threats arising from the movement of people and goods into and out of the country, and to detect and shut down vulnerabilities in our Nation's border, aviation system, and economic systems.

Today's increasing demand for products protected by intellectual property rights has escalated. The losses to the U.S. economy in revenue and jobs due to IPR violations are staggering. In 1982, the International Trade Commission estimated the loss in counter-

[1] The prepared statement of Mr. White appears in the Appendix on page 54.

feiting and piracy at $5 billion. By 1998, the International Chamber of Commerce estimated that 5 to 7 percent of the world trade was comprised of counterfeit goods, a market worth $350 billion.

In many cases, the profit of counterfeit merchandise is used to fuel additional criminal activities. Some of these profits are laundered and invested in legitimate business enterprises. Both ICE and the Customs and Border Protection (CBP), have modified enforcement strategies that were originally aimed at simply seizing counterfeit goods before they entered the U.S. market. Now ICE coordinates targeted seizures with follow-up criminal investigations and forfeiture of assets. Our ultimate goal is to dismantle the smuggling organizations and to halt the flow of counterfeit merchandise into the commerce of the United States.

To help us with this mission, in July 2003, ICE created the financial investigative initiative identified as Operation Cornerstone. This program is dedicated to the U.S. economic security and highlights the DHS mission to protect the United States by securing its borders, transportation sector, ports, and critical infrastructure.

Cornerstone protects the integrity and security of the U.S. economy by identifying, targeting and eliminating systematic vulnerabilities in the financial, commercial, trade, manufacturing, and transportation sectors that could be exploited by criminal or terrorist organizations.

To attack the counterfeiting problem, a multi-agency, the National Intellectual Property Rights Coordination Center, was developed in 2000, comprised of both investigative and intelligence research personnel from ICE, CBP, and the FBI.

The IPR Center works with copyright owners and trade associations on an ongoing basis, and has conducted outreach presentations to both trade associations and foreign governments. This year, in April 2004—April 28 to be exact—the IPR Center will host its inaugural industry anti-counterfeiting coalition working group in conjunction with IACC. They will meet with trade associations and business to better identify and address the growing IP issues and to identify criminal trends. In addition, the IPR Center personnel have provided training in IP enforcement, as well as legal requirements necessary to successfully prosecute IPR violations.

The IPR Center also plays a key role in international IPR enforcement by participating in worldwide IPR working groups and committees. Since the majority of counterfeit goods are produced in foreign countries, ICE attache offices around the world work closely with their host country law enforcement counterparts. Their efforts in developing information regarding the manufacture and shipment of counterfeit goods have resulted in numerous seizures of containers of these illegal goods in the United States. Computer parts, toys, video games, wearing apparel, and watches are a few examples of counterfeit merchandise routinely seized by ICE and CBP.

But IPR violations can take many forms and may also involve health and safety concerns. Counterfeit pharmaceuticals, tools, electrical cords, as well as aircraft and automobile parts, all have a significant impact on the public safety. For example, laboratory testing of imported counterfeit batteries have revealed inferior manufacturing practices that create improper ventilation, causing increased risk of explosions.

In conclusion, as much as we have done to protect intellectual property rights, we must do more in staying ahead of the perpetrators. Greater interaction among ICE, industry, intellectual property right owners, and the public, as well as domestic and international law enforcement organizations, is critical to our effort in combating the increasing threat posed by IPR violations.

I would like to thank you, Mr. Chairman, and the distinguished Members of the Subcommittee, for their support and the opportunity to testify before you today.

I request my full written statement be included in the record, and will be glad to address any questions you might have.

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

It's interesting to me that both of you have mentioned organizations, terrorist organizations that are taking advantage of this to generate money for their organizations. That's an aspect of this that I was unaware of.

Is that pretty rampant? I mean, ordinarily we just think of a country doing a lax job of enforcing their trademark, to kind of wink and pay lip service to doing something about it, and people continue to do it. They know they're doing it, but they are benefiting from it because of the money they're generating.

But you're saying we have organizations that are actually in various countries that are counterfeiting goods and then selling them on the open market, generating the cash, and then using it to fund their illegal activity?

Mr. DUDAS. There certainly are links that have been identified outside the USPTO with law enforcement nationally and internationally with ties to organized crime, primarily, from what I understand, because it is more profitable than even selling drugs in many ways, which is another way of funding organized crime.

Also the criminal thresholds are much lower in many nations and the enforcement is less enthusiastic in many nations. Some have testified, including Interpol, that they believe that some of the terrorist organizations are also finding this to be a preferred method for funding because of how attractive it is, with the lower cost of prosecution and higher profitability.

Mr. WHITE. We, at ICE, are aware of the allegations of potential terrorist funding. We have no sustainable evidence to link IPR violations to terrorist activity and terrorist funding. However, because of the allegations that are being provided to us, we take this issue very seriously. We constantly are looking at this as a possibility. This is part of our investigative process and it is a concern to ICE as well as to the Department. It is not one we're taking very lightly.

We are very aggressively trying—as we receive allegations now of IP violations, we look at the bigger picture. We look at the people. We look at the goods. We look at the funding, trying to again focus on the economic security.

Senator VOINOVICH. It's interesting, because I had a hearing last year in my capacity on the Foreign Relations Committee, a hearing on corruption and organized crime in the southeastern Europe area. In fact, my feeling is that that's even a greater threat over there with corruption and organized crime than terrorism.

It was interesting that during the testimony it never came up that counterfeiting was a way they are operating to raise money. They talked about drugs, they talked about arms, they talked about prostitution rings and so forth, but never got into the issue of counterfeiting.

With regard to the National Intellectual Property Law Enforcement Coordination Council, which has been around since 1999, do you feel that this Coordination Council is achieving its mission of coordinating domestic and international intellectual property law enforcement among Federal and foreign entities?

Mr. DUDAS. That's a very good question. I think the answer depends on what is expected from NIPLECC. NIPLECC arose out of an expectation that there is a need for more coordination among government agencies, certainly within the United States, what agencies are doing, how effective are they.

NIPLECC has been extremely effective in terms of becoming a reporting mechanism from agency to agency, so that agencies know what other agencies are doing. It has not been something that has—it has no staff of its own, no dedicated staff, nor particular resources. It has not, in and of itself, become a leading force in intellectual property enforcement, in my opinion, nor has it become something that has been the primary coordination throughout the U.S. Government.

What it does right now, it's primarily again agencies coming together, reporting what they're doing, coordinating activities, understanding where resources are being spent to make sure it's not duplicative nor redundant, to make sure that we understand the full force of what the U.S. Government is doing.

It has increased in importance. There has been an agreement among agencies to come together to talk about public awareness campaigns within the United States and internationally. But I believe to take the next step, to make it an even more effective coordination council, it may require looking at funding from within, and certainly that's one of the responsibilities PTO has, as well as the co-chair of the council.

Senator VOINOVICH. Mr. White.

Mr. WHITE. I believe, as an organization and a coordination council, it is effective, but is it as effective as it could be? I think there is room for improvement.

We participate. It's meetings are scheduled. It's an excellent coordination tool, but I believe that it can improve.

Senator VOINOVICH. What's troubling is that the charter says its mission is to coordinate domestic, international, and intellectual property law enforcement among Federal and foreign entities. Obviously, this responsibility is split up with Commerce, Customs, USTR, the FBI, and so forth.

It seems to me that if this problem is as significant as it is, as you have now added a new dimension of terrorism, that one person/agency should be in charge of knowing what's going on in all the agencies in order to better coordinate the government's efforts. This is necessary because from what I'm hearing today, each agency comes and listens to what the other is doing, so they're aware of what they're doing, but there is nobody looking at the big picture, to coordinate everyone's efforts.

When I was governor, I had coordinators of a cabinet council comprised of four or five departments. Because these departments had some synergism going on, they, in effect, had a symbiotic relationship. They tried to make sure they knew what was going on, to direct things, and keep everyone working together as a team.

It is just reminiscent of the 9/11 hearings, that the left hand didn't know what the right hand was doing, there wasn't coordination. There wasn't the sharing of information—somebody was not paying attention to the big picture.

Would you agree that we ought to perhaps look at staffing NIPLECC and having somebody there that is looking at the big picture to assess what everybody is doing?

Mr. DUDAS. I think that any time you would have dedicated staffing or resources that would help coordinate that better, that is something that should be considered. It is something that, as Acting Under Secretary, I have been out speaking to folks. The co-chair is also the Department of Justice and we have begun discussions about how we would go about doing that, either from within our agencies or how we may want to go about doing that.

So I would agree that dedicated staff and dedicated resources to NIPLECC is something that would make it more effective.

Senator VOINOVICH. If you were sitting down and designing an organizational structure from scratch, and looked at the respective responsibilities of the various agencies involved, do you feel that we are organized in the best way that we can be organized?

In other words, what happens in organizations is that things change sometimes and you're a lot busier, and then less busy, and you try to organize things to deal with the problem. But as the problem moves and changes, ordinarily what you do is you look at your structure to see whether or not it is responding to the challenge that's there, and also the issue of shaping your workforce to make sure you've got the right people with the right skills and knowledge at the right place in time.

At this stage of the game, with your plate seeming to be growing with items, if you were to look at this today and step back for a moment, is it organized the way it ought to be organized? Or do you think it should be looked at differently?

Mr. DUDAS. I can say that, from a philosophical perspective, the idea that you have different organizations with a particular expertise coming together and providing that expertise to each other, and maintaining separate entities, I think probably is the right approach.

Do I think it's perfect, or do I think it can't be improved in individual areas? I absolutely think it can, and I can identify areas at USPTO where it can be improved from a resource perspective, etc.

But I think one of the issues that comes up in intellectual property rights enforcement is there are so many different agencies that are involved, and is that the right way to do it, or should it be one central agency that deals completely with intellectual property rights? To some degree, that is the USTPO, but certainly we are not an enforcement agency of the likes of the Department of Justice or Customs or anything along those lines.

I can share with you just an experience from the USPTO why I think being able to tap into the expertise of the USPTO without

having separate expertise—and I certainly think this probably plays out in other areas, like the Department of Justice and Customs. Much of what we do at the PTO is try to lead by example in the United States. Our office continues to be the envy of the world as far as how to set up an intellectual property system in an office. So much of what we do is work with other nations to develop their intellectual property offices. That's literally hundreds of people within our office.

What we do in treaty negotiations, what we do in terms of working with other offices to help them set up a patent system, really plays a significant role even in what we do for FTA agreements and what we do elsewhere. I would say there's room for improvement, but the idea of having an area that has enforcement and an area that offers technical expertise, being able to tap into other areas of the government, is probably the most efficient way to do it, in my opinion.

Senator VOINOVICH. Mr. White.

Mr. WHITE. I believe our organizational structure right now for the enforcement of IP violations is effective and well organized. With the creation of the Department of Homeland Security and the Immigration and Customs Enforcement as an investigative tool within the Department, by providing the expertise that has been brought together by legacy Customs and legacy Immigration agents, I have personally seen a change in the dynamics, the quality of the work, and the quality of the investigations. I am pleased and very comfortable in the direction we're moving down the road.

Also, from an enforcement perspective, we have looked very seriously at intellectual property rights for some time. With the creation of the Intellectual Property Rights Center, it was our intention of bringing together our separate functions, even within the legacy customs role. I believe that organization, although I can see an expanding role for it, right now is effective and can continue to be effective. My concern is the public perception of the role, the public knowledge of the IPR Center.

We, in the law enforcement community, are familiar with it, but do we need to do something more to bring it to the public's attention?

Senator VOINOVICH. What do you mean by that?

Mr. WHITE. Well, recently I began to research with our Office of Public Affairs the possibility of public service announcements that would be geared to communities. I have heard that there is a concern that outside of the law enforcement community, the public, and the trade, is not aware of the IPR Center. So we are looking at what can we do to publicly advertise ourselves, to make ourselves known.

That is one of the reasons why our April 28 conference, partnershipping with the international anti-counterfeiting coalition, is going to Atlanta. That maybe is what we need to do: Move ourselves, and rather than hosting all our meetings in Washington, go where the industries are, making it more convenient for them to participate.

These are just some of the thoughts. Organizationally, I think we're organized correctly. But I also think that there is more we

can do to take the message out, that maybe we have not done as well as I would like us to have done.

Senator VOINOVICH. One of the questions I was going to ask is nobody seems to know what you're doing. You have the Small Business Administration and other Federal agencies that have outreach organizations that are helping inform people about what's going on.

I will never forget when I was governor, I was concerned that not enough of our businesses were involved in international trade. With regard to the Export-Import Bank, I found out that we were at the bottom of the list in taking advantage of Export-Import funds. I looked into it and found out the reason why is because nobody was really paying attention to it.

Now, I would have thought maybe the Export-Import Bank might have been hustling and making their services available. I, subsequently, hired two people in my administration to advertise the availability of funds and process applications. We went from being at the bottom to the top because there was an aggressive effort to go out and market it.

If you did that, do we have the people in place that could respond to these complaints that are coming in?

For example, I read an article in the *Cleveland Plain Dealer* this Sunday about an Oregon business where somebody is absolutely copying their product and so forth. It's Videx, Inc. The Chinese changed the name to Vdiar. Instead of dealing with this thing as an individual company, they basically said to them we can't deal with you individually but we can deal with the whole industry. You know, we don't have the staff to just deal with your particular problem.

If you go out and do what you're saying, do you have the people available to follow through?

Mr. WHITE. From an investigative perspective, I do believe we do. Obviously, we would look to prioritize our investigations, and we would assess the actual complaint allegation. But I believe, yes, we do.

In our partnership with other law enforcement agencies, with the criminal statutes that are provided within the State law enforcement, is where I think we can improve on. I'm working towards that, because that is a concern of mine.

I think what we have done is a very good job of developing our international work relationships. I think we've done a very good job here, with the trade associations, but not necessarily have we hit the State and local law enforcement officers that I would like to go to. That is a partnership that I think we need to really work on and hopefully we can do in the near future.

Senator VOINOVICH. This stuff over here that you brought with you, what is that? It looks like the Dollar Store. [Laughter.]

Mr. WHITE. It's counterfeit merchandise, merchandise seized by ICE agents and CBP inspectors, just as examples of some of the material that we have been able to seize over the last year.

Senator VOINOVICH. That tennis shoe is supposed to be what?

Mr. WHITE. It should be Nikes, but they're not.

Senator VOINOVICH. Then I see a little bottle. Is that some kind of medicine that is counterfeited?

Mr. WHITE. Yes, Chairman. It is counterfeit Viagra.

Senator VOINOVICH. They'll find out quickly whether it works or not. [Laughter.]

Mr. WHITE. Yes, Chairman.

Senator VOINOVICH. And then it looks like there's some cigarettes, also counterfeited cigarettes?

Mr. WHITE. Yes, sir. These are the concerns of ours on public health and safety. Even the Oakleys, the counterfeits, do not provide eye protection. There are so many issues that come forward. These are not just simple t-shirt counterfeits. They are public health and safety concerns. When you begin to look at the aircraft industry, the auto parts industry, these are extremely sensitive to us.

Senator VOINOVICH. With our terrorism responsibilities as they are—I talked to a former head of Customs, a good friend of mine, Frank Keating, former governor of Oklahoma who now heads up a large group here in Washington. He said that when they were Customs, they really did the job of stopping this stuff at the border.

With the new responsibilities that Customs has under the reorganization, how many additional people do you have in your agency to get the job done? Have you increased the number of people that are involved?

Mr. WHITE. Yes, sir, although I don't have the exact statistics with me. In previous allocations we were able to bring additional agents on board to do the work of intellectual property rights, and I believe that number showed an increase last year and the year before. They are focused on intellectual property rights.

We have seen an enforcement area of intellectual property rights alone. In preparation, I was looking at our statistics, and just on the criminal enforcement perspective in 2003, as I recall, we had 132 arrests on intellectual property rights violations. In year-to-date, by mid-year of 2004, we had 125. So I believe we've got a focused effort on criminal enforcement, and by that criminal enforcement and the results, it helps us develop trends in the import process that allows us to have a better focused enforcement at the border for seizures, by understanding when we get into the actual analysis of the case, how they found the system to be vulnerable. We share that with CBP.

Senator VOINOVICH. What I would like you to do, is to give me a written breakdown of the agents assigned to intellectual property issues within Customs, both before and after the reorganization. I would also like to see a breakdown of the budget.

Mr. WHITE. Yes, sir.

Senator VOINOVICH. This is maybe a little bit redundant, but if I was a small- to medium-sized manufacturer of widgets, and I just found out that a Chinese company was stealing my widget design and shipping it to the United States, with the exact same packaging as my widgets, what would be my recourse today?

Mr. WHITE. I would always encourage someone who finds their process, their identity, has been counterfeited, that they notify the local law enforcement for immediate attention. Because again, States do have appropriate criminal statutes, as well as we and ICE have 25 SAC offices, and 171 resident agent offices. As I recall, there are three in the Ohio area—Cleveland, Columbus and Cincinnati——

Senator VOINOVICH. Wait a second. You're talking about contacting your officers in Customs, not some other law enforcement agency?

Mr. WHITE. Correct. So that we could begin to immediately analyze the allegation.

The local offices know to contact us in the IPR Center, the Commercial Fraud and Investigations Unit. Our role is to help coordinate their national and international, to help facilitate their investigative case at the lowest level, at the ground level, at the actual site of the allegation. That would be one way that I would recommend it.

The other way I would recommend for some of the smaller and mid-sized businesses are the trade associations. I suspect most who have IP issues are members of trade associations, to help them facilitate and getting the information to us. Those would just be a couple of recommendations that I might make.

Senator VOINOVICH. Isn't the latter you just mentioned kind of going around the barn? Let's say I have a friend of mine that makes the best mixer in the world. This is an actual case. And several years ago, a company in China copied this. Moving on that was like going through the Maginot Line to get anything done about it.

It would seem to me that there should be some mechanism that, if I can demonstrate that somebody has actually done what you have here, that you ought to be able to stop that from coming into the country. The issue is how soon after this has been found to be true—I mean, how long does it take for somebody to say yes, you're right, they did counterfeit your patent, they are manufacturing your product. How much time does it take for something like that to stop?

Mr. WHITE. I would hope it would be quickly, but I cannot guarantee it. I don't know—in actuality, I have never looked at the date and time period. I have to apologize.

Senator VOINOVICH. I would like to find out. That's really what this is about. These are little guys, a lot of them. They haven't got a lot of wherewithal. They don't have a big corporate staff of individuals that can go ahead and do this. They feel like they're all by themselves and lonely. They're the people who need to be able to turn to the government and say, I need your help.

To say go see a trade organization or something like that, I don't think that's a very good answer for them, Mr. White.

Mr. WHITE. I would not want them to see the trade organization for a resolution; only for possibly assistance to get their allegation—some of the smaller companies do not know, as you say, and the organization might be able to give them information about how to get a hold of us. It was only a possible recommended solution about how to get their complaint to us, not how to fix their problem.

Please, if I left it like I was suggesting that would be a fix to their problem, I apologize. It was only——

Senator VOINOVICH. So the first thing is go and see the local person, if I'm in Cleveland, Ohio—I think we have Customs people there. I go to see them, talk to them about it, and say this is what's

happening. You think they would be able to help them move along with the process?

Mr. WHITE. I do, yes, sir.

Senator VOINOVICH. OK. What I would like to do is get some statistics on the last couple of years of cases that have individually come in and how long has it taken for something to happen in terms of dealing with that situation.

What Keating told me is that if somebody brought that to his attention, they could move on it very quickly, and when it came into the country, they were able to stop it right there. I think if somebody knew that it could happen that quickly, they might be reluctant to go ahead and steal somebody's product, because they figure why steal it, because if you get it back to the United States, they're not going to——

I talked to another friend of mine who's an investor in a golf club. They manufacture golf clubs. He said that within 2 or 3 days after they put a new golf club on the market, it's being duplicated and manufactured in China and sent back to the United States. It seems to me that if they have that information and it's verifiable, the government ought to be able to step in immediately and stop that from coming into the United States.

Then the next issue is following through, taking the action, legal, criminal, or otherwise, in the particular country where they're operating. But if it takes forever and a day—you were talking in your testimony about the fact that these fines and criminal penalties have got to be significant, and the fines have to be made very high, because if you get fined $60,000 and you make $6 million, you'll do it every time.

That's what I'm getting at, that there doesn't seem to be enough of this dotting the I's and crossing the T's and really letting people know that we're serious about this.

I know in the Department of Commerce I talked to Don Evans about this. He said, yes, we're really serious about it, but it seems to me that at this stage of the game we should be aggressively going out and trying to let people know that we're there and how can we help you.

Mr. DUDAS. Mr. Chairman, if I might just add, one of the points you made at the very beginning was having people aware. You talked about the title and having people aware of what's going on.

One of the things we're trying to do at the Patent and Trademark Office, and we need to do more of, is informing small and medium enterprises about what kind of environment they are operating in if they operate in China.

It has come as some surprise to some of us, that both small and medium enterprises, and in some cases multinational companies, have not availed themselves of the intellectual property rights that may be available in China or are unaware of this. I think they believe the trade relationship is such that you just go from the Untied States to China and don't recognize the risks. So that's another area where we have had discussions, we've had seminars, etc., with small and medium enterprises.

Again, I think that's where one of the areas I have seen more in the last year, areas like the U.S. Chamber of Commerce, certainly the International Anticounterfeiting Coalition and ITA, the Inter-

national Trademark Association who are doing more and has done a great deal in the past to inform their businesses and their member companies of what they need to do, both in terms of operating in China or operating in the United States, and the problems they face. And some of it is a public-private partnership on that level as well.

Senator VOINOVICH. It seems to me that there ought to be—well, first of all, in the United States, when something like that happens, to be able to move on it quickly. But also, Mr. Dudas, following up on your suggestion, I know when I visited foreign countries, we sat down with the folks from the AmCham, their business. I sit down with them and confidentially tell them what the scoop is.

I know in one case—and I won't mention the country—that the courts are corrupt, forget them. I'll never forget it, because the newspaper people were in the meeting at that time and they were going to report it. I said please don't do that. Then we went to the embassy and they did it again, and the newspaper people said they would report it. I thought we were going to have an international incident. But they were pretty blunt about the country and their court system and so forth.

But I think this is some stuff that you really need to get out to people before they venture over there. As I say, some of them are smaller. We're encouraging them to get involved in exports, but we need to make sure that they know what they're doing when they get involved.

Personnel again. I hate to do this to USTR, but they're not here to defend themselves and that's their fault. I don't know whether you'll be candid with me or not. But when we had the hearing on the capacity of the Department of Commerce and the USTR, in terms of enforcing our trade laws, I was told by USTR that they've got about the same number of people they've had forever.

From your experience with USTR, do you feel they need some more people over there to get the job done? Mr. Dudas, I think you mentioned that when they're negotiating their trade agreements, they call upon your folks to help them with getting the right language to protect intellectual property rights and copyright trademarks.

At this stage of the game, having the same number of people they've had forever, what's your reaction?

Mr. DUDAS. I certainly don't feel qualified to speak to their budget and resources as an expert, but I can say that, as an agency that's working on intellectual property rights, we have seen an increase in activity certainly with just free trade agreements with the Special 301 process, etc. I'm guessing that USTR could use additional resources. I'm certain they would know what to do with those resources.

Again, I think the model that we have is one that I believe works, because it's an opportunity for the USTR, at least with our agency, to work with us to get the technical and legal expertise that is necessary. We can provide more people when necessary, and I know we certainly are taxed but are able to provide what we need to provide now.

Senator VOINOVICH. Well, let's start off with your own agency. USTR goes to you folks for advice, right?

Mr. DUDAS. Yes.

Senator VOINOVICH. Would you say that within the last year that the requests for your help have increased measurably?

Mr. DUDAS. Yes.

Senator VOINOVICH. How about your department? Are you able to handle those increased requests coming in?

Mr. DUDAS. We are able to handle them, but it is certainly taxing on our agency as well. The free trade agreements in particular, we have structured in a way that we are prioritizing, quite honestly, to make certain that the free trade agreements and the Special 301 process are important.

I think there has been more activity of late, in the last few years, because of the free trade agreements, and because of nations throughout the world having to come to terms with their WTO obligations and TRIPs obligations.

But I can certainly speak with some expertise, that in our own office we are continuing to staff slightly more. I think we will add maybe 2 percent more—I'm sorry, about 10 percent more—to our area, to make certain we're giving the appropriate support.

Senator VOINOVICH. Do you think they might be better off having one or two people stationed full time at USTR, so that they wouldn't have to constantly keep coming back to you?

Mr. DUDAS. I actually think the model works better to have them come to our office, because of the expertise that is there for each of the areas. I mean, when it comes to free trade agreements or a Special 301 process, sometimes we are asked to help negotiate and participate.

I think, from the USTR perspective, there are so many issues on which they have to work, my belief is that at least in the IPR perspective it would be redundant to have USTR staff up at that level if they did it throughout. I believe that so long as the model works and we're being efficient in how we employ it—and I think to a large degree that has occurred—it is the right model.

We sometimes will draw from areas of people that were examiners in the Japanese Patent Office, if we're dealing with the Japanese office. There is certainly a great amount of experience to draw from. We have relationships upon which we can leverage.

For instance, in China, we are able to go to China with a good degree of "carrots" as well. They are the fastest growing patent office and the largest trademark office in the world.

Senator VOINOVICH. What is the office?

Mr. DUDAS. Their trademark office is the largest trademark office in the world. Their patent office is the fastest growing patent office in the world. I believe it's the fourth or fifth largest. And they're growing at an incredible rate.

I think they need the expertise that the U.S. Patent and Trademark Office can offer, to talk about the type of growth we've had, and also talk about the appropriate ways to deal with biotechnology issues or to deal with other patent issues. Those are relationships that we can leverage again.

We also find that these are agencies within any government, and China in particular, that are pro-intellectual property rights, that

understand it. Again, these are the benefits, I think, of going to areas of expertise.

Senator VOINOVICH. Well, if I'm prioritizing in an agency, it means that some of the things that some people were doing are not being done, and the issue is what are the things they were doing that have fallen down to a lower priority and where does that stack up. I'm really interested in the capacity that you have to respond to the challenges that you have, just as I am in the case of Mr. White. How many people do you have, and how many did you have before, and what's the new responsibility and demands that are being made. You have to have the people to get the job done.

I think one thing is that, on this side of the aisle, we don't pay enough attention to that. My problem is I'm an old mayor and governor, and administrator. I know that agencies, in order to get the job done, if you give them a lot more work to do and you don't give them the budget, the people, or the resources to get the job done, it doesn't get done. That's really the real issue here today. This subject is very serious to our economy.

Mr. Dudas, you said that in the Department of Commerce manufacturing report it stated that Commerce would like to reinforce the efforts of the National Intellectual Property Law Enforcement Coordination Council. We just talked about that. They would like to reinforce the efforts.

Does that mean getting some staff people over there?

Mr. DUDAS. It certainly means we're considering how we can move beyond being more than just a reporting mechanism, what does it take, in particular, what proposals do we want to have in order to consider, from a staffing perspective or a resource perspective, what would make NIPLECC a more effective coordinating agency.

It also means really redoubling our efforts, particularly with the Department of Justice, the Criminal Division, who was co-chair, to determine what areas do we really need to focus on in particular and how do we make certain that we have the level of involvement that we want to get from each of the agencies that's involved.

I really think it's a matter of taking a look at what NIPLECC is doing, saying yes, we've been successful for what's been expected of NIPLECC, but it's an ideal arena in which to take it to a much higher level, to make it more of, I think, the kind of coordination that you're talking about, the kind of coordination that we think we could see, to use it to develop particular projects that will be beneficial to intellectual property owners. It involves all of that, and discussions have begun with the Department of Justice. Certainly the co-chairs have to be on board to consider taking it to a higher level, and to some degree, we'll either need additional resources, but we'll need commitment from each and every agency within NIPLECC on a particular project or on a mission of the Council.

Senator VOINOVICH. Don Evans, the Secretary of Commerce, was in Beijing on October 28, 2003. He stated that the U.S. patience on China's WTO compliance was "wearing thin" and warned of growing protectionist sentiments in the United States against China.

I have to say to you, as a Member of the U.S. Senate, that my patience has worn thin. I have no more patience. All I have heard is talk, talk, talk, talk, and I haven't seen action. It seems that we go over there and we talk to these folks, and they don't seem to get it.

I'll never forget, when I was in South Korea in 1997, and I was there with a group of business people to promote joint ventures, as well as to convince the South Korean Government that they should allow in non-South Korean made vehicles, I spent 3 days with government officials. I can't remember the exact statistics, but you'll understand. I said you've got to do better at allowing in more non-South Korean vehicles. And they said we're doing better—they had increased it 100 percent from one-tenth of one percent to two-tenths of one percent.

Today we import more vehicles from South Korea into the United States than all of the non-South Korean vehicles that go into South Korea in a year. Think about that. If you buy a non-South Korean vehicle, you can pretty well be assured, if you're a South Korean, that you're going to have your tax return audited, and you may get a few more parking tickets or traffic tickets.

The point I'm making is that it doesn't seem they get it. You just said you came back from China in March and you were over there again, but it's still not happening. What does it take for us to get the Chinese to understand that they've got to do something about this problem?

Mr. DUDAS. I understand completely your concern, and I can tell you Secretary Evans is tremendously results-oriented. This week the Joint Commission on Commerce and Trade meets. I think what is important that the Chinese understand—the Chinese Government believes they have done a great deal, and they can show quantitative enforcement and they can show certainly millions of CD's or other products that have been destroyed.

But we have our own measures in the United States, and we've seen the seizures of counterfeit goods that we seize at our borders grow from 16 percent to 66 percent from mainland China over the last 5 years. So in an area like that, where things are clearly getting worse from our own measures, what we need to see is progress. In China, we're not seeing progress. What we're seeing is the opposite.

I think what we have always pushed for in the U.S. Patent and Trademark Office is we need to see how you will measure results. That's what we're trying to do in the JCCT, is to make certain the Chinese Government understands how important this situation is, how dire it truly is.

Senator VOINOVICH. But it's not in your power to do anything about enforcement. You can talk to them about the situation and point it out to them——

Mr. DUDAS. That's correct.

Senator VOINOVICH. But the enforcement of it has to come from them, or when they try to bring the goods into the United States, it has to come from the Department of Commerce——

Mr. DUDAS. Ultimately, there are trade sanctions that can be placed. Right now I think the Chinese Government understands—I certainly believe they understand the message from Secretary

Evans, that they need to show concrete results. We need to see progress. Right now we're not seeing progress.

I think, beyond that, if progress isn't shown, then the United States considers all of the options it has on——

Senator VOINOVICH. I just want to say this to you.

I have been asking now for about a year for a Special 301 investigation into the fact that the Chinese, in my opinion, are pegging their currency to the U.S. dollar. It's having an enormous impact on the competitiveness of their products.

I feel the information is solid as a rock; I understand the National Association of Manufacturers considers it solid as a rock; that the AFL–CIO considers it solid as a rock. And yet, our government has done nothing about going forward with a Special 301 investigation.

A lot of these things that need to be done are very expensive for businesses to try and do it on their own. Even trade organizations. If I'm sitting back and I'm the Chinese, and I know that the facts are there and nobody seems to be doing anything about it, I'm just going to keep doing what I've been doing, because I'm going to think that these people aren't serious.

When are we going to do a Special 301 investigation?

Mr. DUDAS. I'm sorry, I can't answer that question on that area. It's outside my area of expertise. It is an incredibly important issue—and it's important to manufacturers and you have been involved in that.

I can carry the message back of your concern that's been reiterated, and I do understand that area of concern. It's outside my area of expertise, but I understand what your point is and I can certainly relay it.

Senator VOINOVICH. Well, I have a lot more questions here for you, and I could keep you here for another hour-and-a-half, but it wouldn't be fair to the other witnesses that we have and the clock is running.

I want to thank you very much for you both being here today. I consider what you're doing to be very serious, and there will be some other questions that I will be submitting to you for the record.

As a Member of this Subcommittee, I am genuinely interested in a candid response to these questions. If you need more help from this side, if it's an issue of more money, of staffing, flexibility or whatever the case may be, let me know. I don't know if you're familiar with this or not, but I'm very much involved with the whole area of human capital, trying to give you guys the flexibility so you can keep the folks you have and pay them the bonuses when they're supposed to get them, to allow you to go out and get the best and brightest people to come work for you in your respective agencies.

But I would like to do more to help you get the job done. If you need more money or more staff, I want to know that. Somebody has got to be candid with us about it. I know sometimes you go to OMB and they say, well, your budget has got to be here and there. But we spent a lot of money on a lot of things, and one thing I think we're not spending enough money on is people. We want the best

and brightest people in government today. So I would really appreciate your candid response to these questions.

Thanks very much.

Mr. DUDAS. Thank you.

Senator VOINOVICH. We are now going to proceed to the second panel. We would like Professor Chow to begin the testimony, if you will. And if you could, please try to limit your presentation to around 5 minutes. If you go over a little bit, that's OK, too. Then we can open it up for questions.

I am glad that all three of you have had a chance to hear the testimony of the people from the U.S. Patent Office and also from Customs, and would welcome, in the question and answer period, your observations and comments about some of the answers to the questions that I raised with them, and your opinion about some of the things they talked about.

Professor Chow.

TESTIMONY OF DANIEL C.K. CHOW,[1] THE OHIO STATE UNIVERSITY COLLEGE OF LAW

Mr. CHOW. Thank you, Mr. Chairman.

I'm going to talk about counterfeiting in China, which has come up several times already. Counterfeiting in China is the most serious counterfeiting problem in world history. The government estimates in China put counterfeiting at $19–$20 billion per year, and about 8 percent of its gross national product. U.S. industry estimates that they lose billions to tens of billions of dollars per year.

Now, no problem like this could exist without the direct or indirect involvement of the State. In fact, I will discuss the involvement of government in this problem.

Exports from China make this into a global problem. I want to flag this point because, Mr. Chairman, we're about to see a significant increase in exports of counterfeit goods from China beginning in the year 2004, and I'll explain why.

The reason for this problem—how did this problem come about—first it's the growth of China's economy, which is the most spectacular growth of an economy of this size in history. But it is also the role of foreign direct investment and technology transfer. China now is the world's largest recipient of foreign direct investment.

Foreign direct investment is also the best way to get technology transfer. Thus, China now gets unprecedented access to patents, trademarks and copyrights. In fact, in many cases today, the intellectual property component is the most important part of the foreign direct investment. Proctor & Gamble, where I used to work, their trademarks in China are worth many more times than their capital investment in all of their joint ventures in wholly owned enterprises. In fact, the value of their trademarks is worth 10 times the value of their capital, 100 times, maybe 1,000 times—and maybe you can't even count it.

So thus, what really has caused this problem is two things: It is this increase in foreign direct investment—China now is the world's largest recipient—and the unprecedented access to advance

[1] The prepared statement of Mr. Chow with an attachment appears in the Appendix on page 65.

technology. You combine that with a weak legal system and now you've got the world's most serious commercial piracy problem.

It is no accident, it is no coincidence, that China is the world's largest recipient of foreign direct investment, and it also has the world's most serious commercial piracy problem.

Now, I'm going to focus on just what I think is the most crucial aspect of the problem, because I know my time is limited, and I want to talk a little bit in this chart about the trade in counterfeit goods. The chart itself really divides the trade into two aspects. One is the manufacture, and then the second is the distribution.[1]

The manufacture that you see here on the chart is in the shaded areas. These are in Guangdong Province and Fujian Province, which these are the first areas that were open to foreign direct investment in China, and this is where the counterfeiting problem started. A lot of this activity is financed by criminal organizations from Hong Kong and Taiwan. Guangdong Province is the ancestral home of many people in Hong Kong. Fujian Province is the ancestral home of many of the people in Taiwan.

Now, the chart also points out—and I want to focus in on this issue—in addition to manufacture, there is also distribution. You see the chart points to five major wholesale markets which distribute goods all over China.

I want to make this point, that these wholesale markets are set up by the Administration of Industry and Commerce, which is the government entity, the local government entity which is in charge of developing trade and commerce. So the government actually invests in the markets which sell these counterfeit goods.

Also, the Administration of Industry and Commerce is also charged with enforcement against counterfeiting, so you can see the direct conflict of interest in that the government is supposed to suppress an activity in which it has a direct financial interest.

Let me just talk a little bit about a town here called Yiwu, which you see on the chart. It is well known as the counterfeit capital of China.

Senator VOINOVICH. Where is that on the chart?

Mr. CHOW. It's this town right here [indicating].

Senator VOINOVICH. OK. I have a copy of this in front of me here, too. Go ahead.

Mr. CHOW. I want to focus in on this just to really point out what the problem is.

In this town, the entire economy is built on the trade in counterfeit goods. This used to be a small farming community in the middle of nowhere, and now it's got a bustling business center, it's got a four-star hotel, and it really depends entirely on the trade in counterfeit goods for its economic development.

Every day, 200,000 customers from all over China visit Yiwu, and they visit the 33,000 wholesale stores and outlets which sell 100,000 varieties of products. Ninety percent of them are counterfeit and infringing. I know that because when I worked in China I spent many weeks in Yiwu investigating this and compiled these facts. Two-thousand tons of products are ordered, and the roads are congested day and night as the traffic goes in and out.

[1] The chart referred to appears in the Appendix on page 70.

Now, the entire economy of this town is based on counterfeit product, the trade in counterfeit goods, and it's been integrated into the legitimate economy of this town. So not only do you have this trade, but you have restaurants, you have hotels, you have night clubs, you have warehouses. All of this is supported by the trade in counterfeit goods.

Now, what would happen if there was a serious crackdown on the trade in counterfeit goods in this town? It would shut down the local economy. It would cause the dislocation through the loss of jobs, the closing down of business. Indeed, it may result in social turmoil and chaos, which is something that the Chinese Government really fears. So, for that reason, because the town itself has a financial interest in this trade, counterfeiting is heavily defended at local levels.

This is really where the problem is. The problem is one of local protectionism because the government has a direct stake, the local governments have a direct stake in this illegal trade. And it is very difficult, it has become very difficult for the national government—and I believe the national government is sincere, that the authorities in Beijing are sincere. But it is very difficult for them to control what goes on at the local level, because the people in Beijing are policymakers, they're lawmakers. But enforcement occurs on the ground, at the local level. This is where I think the crux of the problem is.

I'm going to skip some of this because I know my time is limited. I want to focus on the export issue because I mentioned this earlier. I want to make sure that enough attention is paid to this.

Counterfeits from China probably account for about 80 percent of all exports to the United States. I know that the Customs statistics talk about 66 percent, but a lot of goods are transshipped——

Senator VOINOVICH. Wait. You're saying counterfeits from China may account for 80 percent——

Mr. CHOW. Of all the counterfeit exports to the United States.

Senator VOINOVICH [continuing]. Of all the counterfeits in the world?

Mr. CHOW. Well, I'm talking specifically about exports now, Mr. Chairman. U.S. Customs seized, in the year 2003, counterfeit product from China consisting of 66 percent of the total of the counterfeit product that was seized. We believe that the actual total is probably higher, and that is because many of these goods are transshipped through other countries, such as countries in South America, through Canada, that come into the United States. So we believe that probably a more realistic figure is about 80 percent.

The value of the counterfeits seized by U.S. Customs in 2003 was valued at $62.4 million. Of course, what is seized can only represent a tiny percentage of what actually gets into the market. If it is 1 percent of what actually gets into the market, then the value of the counterfeit product from China is between $6–$8 billion.

I believe we're going to see a significant increase in the export of counterfeits from China starting in 2004. And why is that? Well, it's ironic, but as part of China's WTO obligations, China in December 2003 had to eliminate the state monopoly on export privileges in accordance with its WTO obligations.

Now, under prior law, only certain state trading companies could export because only they had the state license to export product. So if you were a counterfeiter, you had to find a compliant state trading company to work with you. Of course, to be honest, there was no lack of state trading companies willing to work with the counterfeiters, but still there was an added expense and added obstacle.

But in 2004, because of the elimination of this requirement, it means that anybody can export, and I believe what we're going to see is we're going to see many counterfeiters now turn to export as an opportunity to increase their profits.

There are no criminal laws against export of counterfeit products in China. There are criminal laws against counterfeiting within the country, but none for exports. So if you're a counterfeiter and you're faced with the possibility of civil and criminal penalties for counterfeiting within China, and you're faced with no civil or criminal penalties for export, I think the choice is pretty obvious of where they're going to increasingly turn for their profits.

I just want to make two points now with respect to the future. I believe the real issue here, as I hope I've pointed out, is an issue of political will. The issue is really the will of the national government to deal with the problem of protection at local levels. I believe the national government is sincere, but it is a very difficult problem to force these local governments to crack down on counterfeiting because the social costs of cracking down are very serious. The national government fully understands that, and I believe they don't want to incur those costs until they absolutely have to.

Finally, with respect to the WTO and TRIPs—and I guess you'll have other folks speaking about this—I think that most people, including myself, believe that China really is in substantial compliance—excuse me, that it's laws are in substantial compliance with TRIPs. It's really the enforcement of those laws which I think falls short, and that is something I think we have to take a very close look at.

Thank you, Mr. Chairman.

Senator VOINOVICH. Thank you very much.

Mr. Gorman, thank you for coming this morning. I have to say, I'm impressed with these witnesses from Ohio.

TESTIMONY OF JEFF GORMAN,[1] PRESIDENT AND CEO, THE GORMAN-RUPP COMPANY, MANSFIELD, OHIO

Mr. GORMAN. Thank you, Chairman Voinovich. I appreciate the opportunity to testify and leave you with an important message regarding the issues facing many American manufacturers.

Senator VOINOVICH. Mr. Gorman, would you tell us where your company is located?

Mr. GORMAN. Mansfield, Ohio.

When you hear of pirated and knock-off products, you may think initially of computer software, movies, music and CDs. I'll assure you the problems go much deeper than that and are affecting job retention and growth at the core of American manufacturing.

[1] The prepared statement of Mr. Gorman appears in the Appendix on page 85.

Our company has steadily seen a growth of pirated items produced in foreign countries aimed directly at stealing our products, our after-market parts, and frankly, our identity in the marketplace.

A real quick overview of our company. Gorman-Rupp is a Mansfield, Ohio based manufacturer of pumps and pumping systems for applications including water, wastewater, petroleum, government, agricultural, and many other markets. The company was founded in Mansfield in 1933 by two gentlemen, one of whom was my grandfather, who during the Great Depression had some new ideas about how to design, manufacture and sell pumps. They borrowed $1,500 and started the company. Today we have about 1,000 employees and sell on a global basis.

Competition has always been keen in the pump industry. Until recently, most competition from pump manufacturers came from those manufacturers vying for their own market share with their own ideas, designs, engineering, and manufacturing.

Today, some foreign pump manufacturers have taken a less ethical approach. Call it copying, counterfeiting, reverse engineering, knocking off, pirating or whatever, it basically comes down to stealing your identity, your engineering, for monetary gain in pump and after-market parts sales.

Pumps may not be a great item of beauty to some, but they are essential to everyone's everyday lives. Shown on the screen is one of our main product lines, a 4-inch pump, primarily used by municipalities for sewage handling.[1] Shown on this screen is a knock-off version of the same pump. This pump is manufactured in Brazil and is not only nearly identical in looks, but functionally interchangeable in dimension.

Closer examination of the knock-off pump shows not only the pirate's imitation of the Gorman-Rupp design, but notice the name and logo. I submit that it was neither a mistake nor a mere coincidence.

Technology has simplified the reverse engineering of products. It has become much easier to copy or steal the engineering and trade dress of a product than in the past. All that is really needed is to have one of the original products and the proper measuring equipment, and you can be in business without the need for expensive research and development. Add to this inexpensive labor, much lower overhead than many U.S. manufacturers face, such as health care, litigation costs, excess litigation and regulations, etc., and it's quite easy for the pirate companies to sell pumps and parts at a considerably lower price, all at the expense of the original American manufacturer and developer.

Pirates many times use the sales tactic that it's just the same as the original product or part, and in some cases, outright confuse the customer that it is the original OEM product or part. Pirates have deceived Gorman-Rupp's U.S. customers who learned to their expensive dismay, after purchasing the pirated parts, that they were not interchangeable in quality or performance.

Patents are helpful, but they do not eliminate pirating. In some cases, they even explain information and technology and trade se-

[1] The charts referred to appear in the appendix on page 86 and 87.

crets to the pirating company. It is also very prohibitive to patent your product in every country around the world.

Pirating does not just stop with the physical products, either. We recently learned of a Chinese company that not only copied the looks, design and manufacture of our pumps, they even stole our advertising literature. How do we know? The Gorman-Rupp logo is still displayed on the products in their literature. The next step is that these Chinese knock-off pumps will probably find their way to the American market if we do not have some legislation to protect our engineering investment and identity. The Brazilian pirates have also copied and exploited Gorman-Rupp product manuals and product performance specifications.

Legal recourse against knock-off products in foreign courts is very time consuming, very expensive, and in some cases, almost impossible. We find little or no help from the government in dealing with these issues.

I would ask for the following to be considered: A single point of contact within the Department of Commerce that is specifically directed and funded to assist U.S. manufacturers that have had their products reverse engineered. Second, the responsibility and authority of the Commerce Department to instruct the Customs agencies to levy stiff fines or duties on proven importers of pirated parts.

Gorman-Rupp does not want to stand in the way of honest competition. In fact, we welcome it. But we need a level playing field against pirating of our own products and our identity.

Mr. Chairman, we have a common goal: That is, retention and creation of jobs. With legislation and procedures that will seriously impede the importation of these pirated products and parts, we will and we can expand in the USA.

Thank you.

Senator VOINOVICH. Thank you very much, Mr. Gorman. Mr. Rotman.

TESTIMONY OF PHILLIP A. ROTMAN, II,[1] ASSISTANT PATENT AND TRADEMARK COUNSEL, DANA CORPORATION

Mr. ROTMAN. Good morning, Mr. Chairman. My name is Phillip Rotman, and I am the Assistant Patent and Trademark Counsel at Dana Corporation. One of my job responsibilities is to enforce our intellectual property rights around the world.

I am here today to testify on behalf of the company, and will be sharing some of our views and experiences with dealing with counterfeit products around the world. In some of my written submissions, I not only focus on China, but also focus on our experiences in other parts of the world, including the United States.

Dana Corporation is a global leader in the design, development, and engineering of products and systems for the automotive, commercial and off-highway vehicle. As you noted, we are 100 years old this month. Counterfeiting of automotive products appears to be on the rise for us. In fact, in the last 5 years, we have noticed a steady increase.

[1] The prepared statement of Mr. Rotman with attachments appears in the Appendix on page 91.

Since 2000, we have instituted over 40 actions around the world, including China, Taiwan, the United States, and other countries in Africa. We also have currently a number of ongoing investigations. It is hard to quantify this problem because we only know what we know. But during this time, we seized about a quarter-of-a-million sets of parts—and our parts tend to be packaged as a kit. We value that the parts that we have prevented from coming into commerce is about $5 million. Unfortunately, fines have been rather minimal. They have totaled about $25,000, and our civil recoveries against the counterfeiters have only totaled around $200,000. We spend significant resources to fight this issue. It's hard to quantify management time and resources, but one way we can quantify it is what do we pay outside counsel and it averages about a quarter of a million dollars a year just on counterfeiting. This doesn't include other forms of intellectual property disputes.

About two-thirds of our anticounterfeiting activities have been in China. We have been successful in China in fighting the problem. We are well organized in China. We have trusted people working for us, and we do find that we have good relations with some of the government agencies we work with, partly because we are back before them time and time again in various locations seeking to enforce our rights.

Unfortunately, however, most of our actions have been against small shops. As Professor Chow noted in his written materials, he describes the way in which parts are distributed in China and it's very different than anything I have ever encountered in the United States. To visit a marketplace like this is truly unbelievable. But we have not been successful at finding factories which are the source.

Part of that problem is the counterfeiters are smart. They know that if they create the product at one place, and they create the packaging at another place, and then they bring the two components together typically at the shop itself, they can avoid detection and liability.

Our concern in China has not been with the government's unwillingness to act. They do take prompt action. In fact, when we bring a matter to the Chinese Government's attention and we can prove our case, we generally get results the same day. They will go seize the product that very day, which I suspect is a surprise to a lot of people.

Once the product seized has been confirmed as counterfeit, the product is destroyed. In fact, I was in China last month dealing with a number of these issues and attended a destruction ceremony. They are publicized by the local government on occasions.

But as everyone else has noted, the fines are low. I think as you noted, Mr. Chairman, when the fine is just the cost of doing business versus a deterrent, it's a cost of doing business and it's something they will continue to do.

Another concern in China is the ability to obtain information. Because it is a state run society, we don't get access to a lot of the books and records when we conduct a raid. We are interested in the source of the counterfeit product and its distribution channel. We want to follow the product. A lot of times it's very difficult to

get access to that information. We can act on it if we have the information.

I also want to turn our attention to the United States. We have had some experiences in the United States. As I mentioned in my written material, we identified counterfeit product in this country last year. We took it upon ourselves to do something about it. Interestingly enough, when we filed our law suit, the first question from the court was, have you given the other side notice, which we thought was a peculiar question, given that the reason we moved ex parte for the seizure order is we were concerned that the products and records would be destroyed once they learned of the law suit. It turned out that that didn't occur, that the individual in this country had been misled as well and was terribly cooperative. However, it could have been a lot worse.

Unfortunately, we don't see that the criminal laws are being enforced by the U.S. Government. They are on the books in Title 18, but if these government agencies have done things, it's not being well publicized. We view ourselves a leader in this industry and, frankly, we were surprised to learn of some of the activities in the last month when we were requested to come testify. We suspect that outreach is an area that the government could do a better job on promoting its services, especially to small companies. We suspect that many companies and attorneys, frankly, just wouldn't know who to call if they had a problem.

Also, U.S. law could be improved. As you may be aware, there is a U.S. Court of Appeals circuit case that overturned the conviction of a man who was shipping counterfeit fake labels for designer purses, but because the labels weren't on or in connection with the goods, his conviction was overturned. While part of the criminal statute deals with the trafficking of counterfeit labels and packaging, it's limited to albums, computer programs, motion pictures, and other audio-visual works. It frankly doesn't help the manufacturing community to protect its parts. This deficiency could be addressed by Congress in revising several sections of Title 18.

Finally, we believe that counterfeit crimes need to be brought to the same level as drugs and other high-profile crimes. Governments need the right to seize the assets used in counterfeiting, such as equipment, tooling, and computers. Furthermore, it would be beneficial and a deterrent to the counterfeiters if their assets could be forfeited such as houses, cars, boats, jewelry, and cash.

In summary, while the United States has good laws on its books, it needs to become a leader in this area, frankly, before it can ask other countries to enforce the IP laws on their books.

Dana would like to thank the Subcommittee for the invitation to testify. Your support and attention to this matter strengthens our resolve to fight, and we would be willing to answer any questions you have. Thank you.

Senator VOINOVICH. Thanks very much.

Mr. Rotman, you fundamentally are saying that your company is large enough that you are handling this problem overseas and here in the United States. A quarter of a million dollars for outside counsel is a bit of money. Professor Chow, that's more work for your graduates at Ohio State University.

The fact is, how many employees does Dana have? Just so we get a sense of this, how large is it?

Mr. ROTMAN. Sure. Dana has——

Senator VOINOVICH. Let's say your sales.

Mr. ROTMAN. About $10 billion a year.

Senator VOINOVICH. OK. Ten billion dollars is a big company.

Mr. ROTMAN. Yes. We have about 60,000 employees worldwide.

Senator VOINOVICH. Sixty thousand employees. So you're large.

Mr. ROTMAN. Yes.

Senator VOINOVICH. How long have you been in China?

Mr. ROTMAN. Dana has had a presence in China since the early 1990's.

Senator VOINOVICH. Your feeling is that you're handling the problem in China because you've got the connections and you can get action pretty rapidly?

Mr. ROTMAN. There are several reasons we believe we're successful in China. We think we've found good people to work for us in China, people we trust. We also have employees in China who can help us, who are on the lookout for counterfeit products.

They are incentivized, frankly, to help because if a counterfeit product is sold, we don't sell a genuine product. So they are there on the ground and they are in touch with distributors and retailers who will pass information on to us.

Senator VOINOVICH. So the bottom line is they have an incentive to work with you because the counterfeiting is hurting their distributors for you and that's hurting their business, so they want to work with you to make sure you do something about counterfeiting.

Mr. ROTMAN. That's correct.

Senator VOINOVICH. And they have the connections with the government to get the job done?

Mr. ROTMAN. I wouldn't say we have connections, but——

Senator VOINOVICH. Well, they have and you have.

Mr. ROTMAN. I think we've had enough experience that, when it's time—when we do our homework and we have done our own internal investigation, and we have determined it is a counterfeit product or packaging, we believe, we use local lawyers. We know what government agency to go to.

China has a number of state agencies that have overlapping responsibilities, and I've heard in the industry of our counterparts going to the wrong government agency and not getting results and being frustrated.

Senator VOINOVICH. So if you were really going to get the job done in China, would you try to replicate what Dana has done in China? In other words, we've got a lot of people in this country that are very small individuals, that have problems with counterfeiting. They don't have the legal folks to help them and the connections and so forth.

But if you could take a company like Dana or some other company of the United States doing fairly well over there, in terms of dealing with this problem, and tried to replicate that for the small people, do you think we might make more progress? I mean, we heard Mr. Dudas basically say he's been over there, they've been talking to these folks, and nothing is happening.

Mr. ROTMAN. It's hard to say whether our model would work. Our model is, I think, unique to us because we do have employees in China helping us. They are Dana employees. They're looking out for Dana.

I guess the other issue is that Dana laid the groundwork many years ago to protect IPR in China by registering IPR in China, so we have the rights in China to go out and enforce it.

I do think it is possible for a small company to be successful in China, possibly with some assistance, with us sharing some information with them about, frankly, how we investigate and who we work with.

Senator VOINOVICH. Well, it seems to me it might be very smart for the Federal Government to look at it, how you're organized over there and how you get the job done, and maybe look at some other businesses to institutionalize this so they can do some work on behalf of companies like Mr. Gorman's, who don't have the resources and the connections and the rest of it to get the job done for them.

Mr. ROTMAN. One thing, Mr. Chairman, if I might add, we have, I think, as an industry, what the automotive industry has attempted to do perhaps in the last year or so, is look out for one another. While a lot of us are competitors, we are legitimate competitors, but we do believe that counterfeiters hurt us all. So what we have instructed our people to do is that, if they find products that they believe to be counterfeit of another company, they should pass the information back to us so that we can share that information with others.

We suspect that the counterfeiters are much better organized than we are, and we're trying as an industry to be more organized and to share information amongst ourselves to help each other out.

Senator VOINOVICH. So the fact of the matter is that you're recognizing that you have to work more together to get the job done. In my opening statement I talked about the fact that we've got $3 billion of auto parts that are coming into the United States, which we estimate is costing us about 250,000 jobs. So what you're saying is that companies like yours would be interested in those parts coming in and try to help those folks?

Mr. ROTMAN. You mean help others in our industry police for counterfeiters?

Senator VOINOVICH. Yes.

Mr. ROTMAN. Yes. We believe that the counterfeit products coming in, even from a competitor, hurt us all.

Senator VOINOVICH. What kind of help do you get at all from our government?

Mr. ROTMAN. Not much. We tend to go it alone. In the past, we've had experience where we were contacted by the government when they suspected some product was being imported, but the communication was sporadic, and trying to, frankly, get some information in order to assess the situation and provide feedback was difficult.

Senator VOINOVICH. So, in effect, you took your destiny in your own hands and said we'll take care of it?

Mr. ROTMAN. Yes.

Senator VOINOVICH. Professor Chow, before agreeing to testify before this Subcommittee, had you heard of the National Intellec-

tual Property Law Enforcement Coordination Council? If so, what had you heard about it, and if you knew about it, have you seen any changes since the inception of the Council in 1998?

Mr. CHOW. Well, to be quite honest, I really didn't know very much about it. I have actually done work for private clients as well, and we really didn't find that to be a very helpful resource.

Senator VOINOVICH. You heard the testimony from the other witnesses and the questions I asked about their coordinating their activities. There seems to be several agencies that are involved.

Do you think it would be valuable if that agency were provided the staff and the resources to do a better job of coordinating?

Mr. CHOW. It seems to me, based upon my own experience working in the field here in the United States, that there really is a lack of coordination and that would be helpful.

Senator VOINOVICH. So it's your opinion that, from your observation, these various agencies, in spite of the fact it was said today they are coordinating and working together, your impression is that, in fact, there is not very good coordination and cooperation?

Mr. CHOW. Not in particular cases, based on my own experience. I have worked on several cases in which we found very little cooperation from some of these agencies, such as the FBI and Customs, for example, in a couple of cases.

Senator VOINOVICH. If you were in my shoes and the Members of this Subcommittee, what would you be doing in order to handle this?

One of the things you mentioned in your testimony was the fact that you've got a whole province, Yiwu, that the whole deal is based on counterfeiting. They've got a problem there with that community because, if they start doing things, they're going to have civil unrest and so on and so forth. They're reluctant to do that because of a lot of people being unhappy.

Mr. CHOW. Yes. Well, I think it's really an issue of priority for the Chinese Government. Currently, as far as I can see, the Chinese Government does not have the political will to force the local jurisdictions, such as Yiwu, to crack down. It doesn't have the political will because I don't believe the Chinese Government really feels enough pressure, especially from brand owners in China, to take that kind of step. It's a very drastic step to impose a crack down against the will of a local town or jurisdiction. The national government can do it, if it wishes to do so, but to do that, it has to expend a lot of political capital and it has to absorb some very serious costs.

Now, the government is not going to do that unless it feels it absolutely has to. I don't believe, currently, that the government in China is feeling enough pressure or is getting enough heat from brand owners, or the U.S. Government, to make it take that drastic step.

Senator VOINOVICH. One of the other issues we've got in this country is some of our businesses now are being told that, in order to stay in business, they have to meet the global market price. This is very difficult for a U.S. company to do because the global market price includes Chinese manufacturers, who don't have to worry about excessive regulations or health care costs.

The question I've got is, how do we get the Chinese attention that this is a serious problem and we want something done about it? What would really be a way of bringing it right to their attention so that they snap back and say, these folks are serious about this issue.

For example, one of the things I would like to see happen is a Special 301 investigation. That takes a long time. But it just seems that all we do is talk, talk, talk, talk. And my little bit of relationship with the people over there is that doesn't get it done. They need to see something more than that.

What is that something more that we need to do to get them to understand that we're serious about this problem?

Mr. CHOW. Mr. Chairman, to be honest, I think there is some conflict and ambiguity within the industry itself. I think that the brand owners in China do not want to offend the Chinese Government. This is one of the things that you see very clearly, that they are tiptoeing around this issue. They don't want to do anything to offend the Chinese Government, so they form an industry group called the Quality Brands Protection Committee, to work cooperatively with the Chinese Government. They don't want to do anything confrontational.

Senator VOINOVICH. Who are they?

Mr. CHOW. It's call the Quality Brands Protection Committee, the QBPC for short. It consists of about 80 multi-national companies. Their stance—and I was involved in this when I was working in China—their stance is to work cooperatively with the Chinese Government. They don't want to offend the Chinese Government.

The Chinese Government, of course, is very smart and they can see that they don't want to do anything to the industries in China, they don't want to take drastic steps. So, thus, I really think that the industry itself has to determine how far they're willing to go.

You mentioned a Special 301 action against China. That would get China's attention. That would bring it right to the top of its agenda.

Another thing that would bring it right to the top of the agenda is a WTO dispute resolution petition, challenging China's compliance with TRIPs. That would bring it immediately to the top of China's agenda. But that can't occur, Mr. Chairman, unless industry fully supports it.

Senator VOINOVICH. What's the latter thing you said, the WTO——

Mr. CHOW. It's a WTO dispute settlement petition, whereby a complaining country can challenge China's compliance with the WTO, and TRIPs specifically, that counterfeiting exports from China of counterfeit products violate China's obligations under the WTO. That type of petition, brought by the United States, with the WTO, would put this right at the top of the Chinese agenda. It will draw their attention, as would a Special 301 action.

Senator VOINOVICH. I want to go back, because I'm thinking about the figure you gave us was what? You think it's 66 percent of the counterfeit goods that come into the United States are from China, is that right?

Mr. CHOW. The U.S. Customs, by their own statistics, seized in 2003, counterfeit product from China worth $62.4 million. That

consisted of 66 percent of the total of the counterfeit product that was seized from all countries around the world.

I believe that figure is probably a little bit higher because a lot of the counterfeit product from China is transshipped through South America and other countries and comes into the United States. It's probably about 80 percent of the product that enters into the United States, the counterfeit product that enters into the United States is from China.

Senator VOINOVICH. In other words, you believe that there is enough information available today that a dispute settlement petition, complaining that they aren't complying with the intellectual property parts of WTO, would be well taken?

Mr. CHOW. Well, it's a process where we have to do information gathering, but I think it's a viable—and others may disagree—but I think it's a viable claim. I don't think it would be easy to prove. There are many issues with that, but that is a strategy that the United States can take.

If you want to draw this to their attention, I assure you this will draw this to their attention, as would a Special 301 action brought against China for the failure to protect U.S. intellectual property rights.

But I believe there is no industry support for either one of those two actions, at least as far as I can see, and I believe that the U.S. Government is not about to go and do that without full industry support. And there is no industry support, I believe, because most industries do not want to offend the Chinese Government. So we're in a position where I think the industry has to, really for themselves, clarify exactly how far they're willing to go.

Senator VOINOVICH. Based on your reading and study, do you feel there is a basis for us to file a Special 301 action?

Mr. CHOW. Well, this is also a complicated issue, but although China is a member of the WTO, it also has other intellectual property obligations that it entered into under bilateral agreements with the United States, specifically in 1995 and previously. So on the basis of separate agreements in which China made separate obligations, specifically with respect to export in these agreements, which are outside the WTO, I believe there may be a basis for a Special 301 action.

I mean, just to clarify, the WTO, once you're a member of the WTO, like the Untied States and China, the WTO framework prohibits its members from taking unilateral action, such as a Special 301 action. But because the United States and China have agreements outside the framework of the WTO, which predates the WTO, that may provide a basis for the United States to bring a Special 301 action. But that's a very drastic step, Mr. Chairman, and it would severely elevate the seriousness and tension of this problem, and as I mentioned, I don't believe there is industry support for that.

Senator VOINOVICH. Well, there is support for it in the Congress and we're going to have to really get on that. I have introduced legislation, and it's been introduced in the House and it's just kind of laying there, but we're going to have to bring this up and move maybe in our direction if the government is not willing to go forward with it. Although I understand the AFL–CIO and the Na-

tional Association of Manufacturers is thinking about filing a Special 301 action. That would deal with one of the problems, and that is the industry, at least with regard to that issue, understands how serious it is to manufacturing in this country.

Mr. CHOW. But I believe those petitions would not be based upon—I'm not sure, but from what you're telling me, I don't think those petitions are based upon the counterfeiting problem, right?

Senator VOINOVICH. No, they're based on currency, not counterfeiting.

Mr. CHOW. Right. So that's, I think—just specifically on intellectual property, bringing a Special 301 action, I don't think there's any industry support for that.

Senator VOINOVICH. But you think there's adequate support for the Special 301 investigation in terms of currency fixing?

Mr. CHOW. I think there's a legal—I guess I don't feel I'm in position to really comment on that, but it appears from what you say, yes.

Senator VOINOVICH. Mr. Gorman, prior to your agreeing to testify, had you heard of the National Intellectual Property Law Enforcement Coordination Council?

Mr. GORMAN. No, sir.

Senator VOINOVICH. Mr. Gorman, tell me about how much help you have gotten from your government in terms of the problems you've been confronted with over the last number of years and how much has this cost your business, roughly, and how many jobs do you think we've lost as a result of the fact that we haven't taken action?

Mr. GORMAN. Regarding the government question, I have to say that I probably haven't pursued it at all. In going to trade organizations and asking them, are you familiar with anything that we can do or contact within the government to address these issues, mostly the answers that come back are "good luck, you're on your own." That's pretty much the unilateral response that you get from the manufacturing organizations. So I have to say, in all honesty, no, I have not really addressed any direct involvement from the government. We have taken it on by ourselves.

Senator VOINOVICH. Have you ever asked any government agency, have you asked the Department of Commerce or the U.S. Trade Representative, or have you asked the Patent Office, for any help?

Mr. GORMAN. Only indirectly through manufacturing organizations, who really couldn't come up with any agency that really addressed the situation of the problems that we were having.

Senator VOINOVICH. Do you think there's a lot of other people in this country that are in the same boat as you are?

Mr. GORMAN. I would.

Senator VOINOVICH. So from your perspective—we had two people testify, and you heard them testify, that in terms of what they were testifying to, you didn't relate to what they were talking about here today?

Mr. GORMAN. Well, I have not had any personal experience with it, but we're going to try it and see what happens.

Senator VOINOVICH. Do you believe that we need to get more aggressive in this area, to make information available to people like you about what help is available to you from the government?

Mr. GORMAN. It would certainly be an advantage. If the trade organizations aren't familiar with the help that the government can give, then I don't see how you can expect especially smaller manufacturers to be aware, either.

Senator VOINOVICH. It seems to me you've had a problem with pumps from Brazil for how long?

Mr. GORMAN. It's been going on now from 3 to 5 years.

Senator VOINOVICH. Based on what I saw here today, there ought to be somebody that could look at that information and say these people are copying your pump and we are not going to allow those pumps into the United States.

Mr. GORMAN. That would be our suggestion. Give us somebody that we can go to that has the authority to level out the playing field. If you can stop it, fine.

Senator VOINOVICH. And then after a determination has been made, then whoever in the government is responsible ought to be able to go after the people in Brazil and the people in China in terms of their violating their commitments in terms of intellectual property.

Mr. GORMAN. Whether the answer is—we're trying to go after the company in Brazil now. I'll tell you, it's a very uphill battle. Months and months of work and expense even to get the paper——

Senator VOINOVICH. Are those pumps still coming into the United States?

Mr. GORMAN. Oh, absolutely.

Senator VOINOVICH. They're still coming in here?

Mr. GORMAN. Oh, yes, daily. But trying to stop it on our own accord, I'll tell you, it's no small task to try and bring an IP case against a company in Brazil. It's very expensive, very time-consuming, and we'll see what happens.

Senator VOINOVICH. Let's start off with the big picture. Have you calculated what counterfeiting has meant to your business in terms of lost income?

Mr. GORMAN. It's difficult to put a specific number on it because you're dealing with small companies that don't have that specific information available, but it's clearly in the millions of dollars of imported product, and especially the after-market parts.

Senator VOINOVICH. So we're just talking about the pump you showed me here?

Mr. GORMAN. Right.

Senator VOINOVICH. So with the pump, you would say it's costing you $3–$4 million?

Mr. GORMAN. I would say in that area.

Senator VOINOVICH. In lost sales?

Mr. GORMAN. Clearly, yes, probably much more than that over the last 3 to 5 years.

Senator VOINOVICH. Could you calculate the impact that it has on your employment?

Mr. GORMAN. I wish I could. We're the type of company that takes a lot of pride in not laying people off, even in tough times. We have not hired as many people as we could have if we wouldn't have been faced with these situations. But I'm sure it's 20 to 25 people for our small company, just directly related to the importation of product. This is not just one company in Brazil. We have

a couple in Brazil that are doing it. So it's very difficult to put a specific number on it, to say we have lost "x" jobs because of it. But clearly, we have not been able to grow. It's been a situation of not letting us grow as much as we could have, or hire new people to replace those people that have retired.

Senator VOINOVICH. In your association with other manufacturers, do you come in contact with other people that are experiencing the same kind of problem that you have experienced?

Mr. GORMAN. I know it's pretty rampant in the pump industry itself. You hear other examples pretty much daily in trade journals and whatever, that it's a very pronounced problem.

But I go back to my suggestion. I think we've got to take the results into our own hands and stop them from coming into the country. We can work with the Governments of China or Brazil and hopefully make some headway there, but I think, until we have some legislation and some means that clearly stops it, or at least levels out the playing field, with increased stiff tariffs at the border, that's going to be the most immediate thing that you can do.

Senator VOINOVICH. The best thing would be to just stop the products from coming in, period. That would be the simplest thing.

Professor Chow, again, how do you rate the U.S. Government and all the agencies involved in this whole issue of intellectual property rights on a scale of 1 to 10, in terms of what they're doing?

Mr. CHOW. Well, I mean——

Senator VOINOVICH. With No. 1 being the worst and No. 10 being the best.

Mr. CHOW. Well, I don't want to seem unfair to them because I have worked with the U.S. Government and specifically I have worked with the U.S. Government agencies in attempting to exclude product from coming to the United States. But quite honestly, Mr. Chairman, it is very difficult to attempt to exclude the entry of counterfeit product because a lot of it comes in under false documentation. The container says it's full of plastic toys and it's full of counterfeit cigarettes. It's placing, I think, frankly, an unreasonable burden on the part of the U.S. Customs Service to expect them to be able to catch and seize all of the illegal containers at the border.

There are really two choke points. One choke point is to prevent it from being exported from China or any other country, and the second choke point is to prevent it from being imported. You have got to do both of those. You can't place the entire burden on the U.S. Customs Service because they really don't have the resources to go and U.S. Customs would grind to a halt if they had to go and inspect the number of containers they would have to in order to make a real dent in this problem.

The other issue, frankly, is that when I met with U.S. Customs about a year ago, they made it very clear that this was not their priority, that seizing infringing product at the border was not their priority. Their priority was terrorism. So it was clear that, as we were there, brand owners—and I was representing a brand owner—it was clear, and Customs made it very clear, that this was not a top priority for them and they would give it whatever priority they felt it deserved.

Senator VOINOVICH. The things I want to find out—as I said, I talked with a former Customs official, who said they were doing a very good job, and this is why I'm interested in knowing how many people they have, what are their priorities, and what's their budget? I am also concerned that in the process of dealing with the issue of terrorism, that we may be neglecting dealing with this counterfeit product challenge.

The fact of the matter is that if what both those other witnesses talked about, in terms of terrorist organizations using counterfeiting to help pay for their terrorism activities, it seems to me that gives it even more of a heightened interest on their part to stop the counterfeiting that is going on.

Mr. CHOW. Well, just to make a comment on that, it was clear to us, when we met with Customs—and I was representing a brand owner at that point—it was clear that we were not going to be their top priority, and we were going to be maybe their second, third or fourth priority. They said we're very sorry. And that was clear. They also made it clear that their top priority was terrorism.

Now, with respect to terrorism, I just want to make a comment, that at least with respect to China, just to be clear on this issue, we have seen no evidence that links counterfeiting from China to terrorism.

Senator VOINOVICH. Right.

Mr. CHOW. OK. I just want to make that clear, that we don't make that connection. It may be there, but we have not seen any evidence of it.

Senator VOINOVICH. From what they said, that counterfeiting is a way for some of these terrorist groups to fund their respective organizations. It seems to me, if you're talking about containers, and you're saying you don't know what's in them—that's something we have been talking about for quite some time around here, that we don't know what's coming in in these containers. If we can get counterfeit goods through Customs and into the hands of people who will distribute them in the United States, who says that we can't bring in all kinds of devices and get them in the hands of terrorists in this country. That's a question that a lot of us are asking.

It seems to me you've got a "two-fer" here. If you increase the number of people in Customs, you would enhance your ability to preclude things that could get in the hands of terrorists while also dealing with the counterfeiting problem that is impacting negatively on the economy of our country.

We've got two problems right now. We have the problem of terrorism and we've got the problem of an economy, that if we're not careful, we may lose.

Mr. CHOW. Mr. Chairman, I just want to make a comment on that. I think it's a natural inclination to link, if you can, terrorism to counterfeiting. But I do believe that more work needs to be done there before we can say that connection has been established. I understand that some groups of brand owners are trying to make that connection, and that connection may be there. But I don't think enough work has been done to show that it's a real established connection.

Senator VOINOVICH. You said that the choke point is at Customs and also in the countries where these goods are coming in. Would

you like to repeat what you think—I'm interested in hearing from you, Mr. Rotman. You're doing all of this on your own.

Mr. ROTMAN. Yes.

Senator VOINOVICH. And you are not getting a lot of help from Uncle Sam, even though we're apparently spending a lot of money dealing with the problem.

What would you do if you were running the government in terms of dealing with this problem?

Mr. ROTMAN. I do agree with the Professor, that expecting Customs to look at the product, compare original to counterfeit and make a determination is asking a lot of somebody. As was detailed in some of our written material—there was a side-by-side picture of an engine bearing. We ourselves had trouble telling the difference between a counterfeit product and an original. In fact, in some instances, we have to do metallurgical studies on the product to tell because the counterfeit is so good. So asking a government agency to do something that, while we can do it, it takes time, effort, and a lot of just knowing your product, as almost knowing your child. That's a lot to ask of a government agency.

I do think that their heart's in the right place, but their resources just aren't there. As the Professor indicated, in our experience their priorities are elsewhere.

Senator VOINOVICH. What was the industry group you were talking about, Professor?

Mr. CHOW. It's the Quality Brands Protection Committee, the QBPC.

Senator VOINOVICH. Are you familiar with that?

Mr. ROTMAN. I am familiar, but we are not a member.

Senator VOINOVICH. Why not?

Mr. ROTMAN. Cost. It's expensive to belong.

Senator VOINOVICH. And the alleged purpose of that is what? Is it to try and work something out with the government in a diplomatic fashion so that something will get done?

Mr. CHOW. Well, the QBPC is working with the government specifically on legal reform. In other words, to revise or amend some of China's laws to give them more bite, because that's the real issue. The issue of deterrence. So the QBPC is making that one of its major objectives. They have a number of other objectives as well, including increasing training for the local officials and education for the consumer.

Senator VOINOVICH. OK. So what you're saying is that they are conscientiously trying to build the infrastructure for intellectual property rights, the respect for intellectual property rights, the body of law, the enforcement and so on.

Mr. CHOW. Well, the impetus for the QBPC—and I was actually working in China when it was formed with a group of companies, and Proctor & Gamble took the lead in forming this—the idea was that individual companies felt that they were completely helpless in attempting to resolve this problem. So by forming an industry group and getting everyone together, you have now 80 of the most powerful multinational companies, the biggest names, in China now that belong to the QBPC. To have that type of presence, to raise the level of—to raise attention to this problem, that was the idea, and then to work for long-term reform, to over a longer period

of time to improve the environment for the enforcement of intellectual property rights in China, that was the basic idea.

Senator VOINOVICH. How about influencing our government to take action?

Mr. CHOW. Well, the QBPC is basically a China group, and it's not—frankly speaking, I think some of these companies have conflicts between their China management on the ground in China and their U.S. management. The China management is always taking the position that we can't do anything to offend the Chinese Government. The U.S. management says but you're losing all this money over there, why don't we go do something and go to the U.S. Government? So there's actually some conflict there, I think.

Senator VOINOVICH. I think there is obviously some conflict. The fact is that our government should be doing a whole lot more than what they're doing. They seem to be reluctant to take the action that should be taken. Can you explain that?

Mr. CHOW. I honestly believe that, at least with respect to China, that the U.S. Government will take its direction from industry. I think that if industry wants drastic action, and it made it clear to the U.S. Government, that would occur.

I think U.S. industry is giving some conflicting signals, quite honestly, and the government isn't quite sure what to do.

Senator VOINOVICH. Well, we do have laws on the books, and they shouldn't have to take their cues from industry groups to do what the law requires them to do.

Mr. CHOW. Well, if we're talking about specific enforcement of U.S. laws, for example, I think more can be done there. But if we're talking about a broader diplomatic, political, international strategic move, that's where I think the U.S. Government needs clear direction from industry.

If we're talking about specific border enforcement of Customs regulations, or if we're talking about enforcement of the Trademark Counterfeiting Act of 1984, for example—and there are some real issues with the interpretation of that, which Mr. Rotman talked about, and there were some other issues with that—I think those are specific legal issues for which the U.S. Government could be doing more.

Senator VOINOVICH. So to put it in a nutshell, one of the biggest companies in this country, the Dana Corporation, 100 years today, is it?

Mr. ROTMAN. April 1st.

Senator VOINOVICH. Of what they're getting in terms of their Federal Government and the departments that are dealing with this whole issue of intellectual property rights is very little.

Mr. ROTMAN. That would be correct.

Senator VOINOVICH. And we have Mr. Gorman, who represents a smaller company, that's been around since 1933, a family business, very competitive, and the answer to the question about how much help you're getting is zippo?

Mr. GORMAN. Correct.

Senator VOINOVICH. There seems to be a big conflict between what these two gentlemen who first testified had to say about what they were doing and what the perception is of the people who are supposed to be their customers. It might be good if they went out

and spent some time with their customers, to find out how they feel about things, and maybe they could do a better job of servicing those customers.

I am very disappointed, because I believe in quality management. Quality means that you go out and you talk to your customers and you find out what they think, and you try to take care of them. Then you also try and take care of your internal customers and make sure the people that you have are ready and able to get the job done.

Apparently we have a failure in both areas. They're not talking to their customers, and it appears they don't have the people inside to get the job done that they're supposed to be doing. So we have a real genuine problem on our hands here, and unless we get on it, we're going to continue to see the loss of jobs and a negative impact on the economy of the United States.

That's just one of the things. I am very interested in manufacturing, because Ohio is a manufacturing State. But if we don't deal with this and we don't deal with the issue of currency, if we don't deal with the other problems—Mr. Gorman and I have talked about health care and energy costs and so on—we're in for some rough times here in our country, particularly in economies like Ohio and other manufacturing States.

I want to thank you very much for coming today. It has been very enlightening for me. I'm going to do what I can to convey this to my colleagues and see if there isn't something that we can do to get going.

I once talked to a very important person in this country, who is a big man, and said that unless we do something about the Chinese problem, it's going to be an issue in this presidential campaign. If something doesn't happen fast, it will become a major issue, one that all of us should be concerned about. Because if we don't do enough about enforcing our trade laws, then we don't have fair trade. If we don't have fair trade, the protectionism in this country is going to grow and grow and grow—and international trade is very important to the economy of the United States. So it's in the best interest of all of us that we enforce the trade laws. I hope that somebody can get the message, because I doubt any new trade agreements are going to get through the U.S. Congress this year, and maybe next year, unless the American people and their representatives see that there is something happening and that the response to what's being done by our agencies to deal with international property rights isn't that, in terms of the customers, doing zippo, nothing.

Thank you very much for being here.

Mr. CHOW. Thank you.

Mr. GORMAN. Thank you.

[Whereupon, at 12 Noon, the Subcommittee adjourned.]

APPENDIX

STATEMENT OF

JON W. DUDAS

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

before the

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

Committee on Governmental Affairs

UNITED STATES SENATE

"Pirates of the 21st Century: The Curse of the Black Market."

APRIL 20, 2004

Introduction

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

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 of Commerce Don 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. The Department fully appreciates the crucial role of intellectual property development to the economic competitiveness of the United States. As you know, intellectual property is a net export of the United States and is responsible for creating and sustaining tens of millions of U.S. jobs. As the Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office (USPTO), I am dedicated to coordinating U.S. Government efforts to reduce the toll that IP theft takes on American IP owners and users. As we hear regularly from the IP community about the huge challenge of combating piracy and counterfeiting, I commend you for holding today's hearing and am grateful to the Subcommittee for its interest in finding additional ways to protect U.S. intellectual property owners' assets overseas.

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 heavily on the IP

assets held by an institution -- from the results of the latest research to the brand recognition of a company's "crown jewel" trademarks.

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. In the twenty-four year period between 1977 and 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 other words, the U.S. copyright industry collectively contributed to sustained increases in economic growth through all types of economic conditions. 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.[1] 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 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, video games, 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.[2] 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. Indeed, the United States 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

[1] "Copyright Industries in the U.S. Economy: The 2002 Report," International Intellectual Property Alliance, April 2002.

[2] http://www.bsa.org/usa/press/newsreleases/New-Economic-Impact-Study-Details-Benefits-of-Strong-Copyright-Protection.cfm

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.[3]

Many consumers -- and even some governments -- believe that pirated and counterfeit goods are a great deal, offering almost the real thing at a huge discount. They could not be more wrong. In fact, purchasers of pirated and counterfeit goods pay a terrible price - - and they pass the price of their mistake to innocent people, in a variety of insidious forms. For example, according to the Business Software Alliance, in the United States the U.S. software industry lost billions in 2002. [4] Thus, purchase of pirated CDs may cost someone's neighbor his or her livelihood. And 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.[5] 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. 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 in 2003, the Secretary General of Interpol identified a disturbing potential 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." [6]

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 is a true 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

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[3] http://www.iacc.org/teampublish/uploads/factsupdated.pdf

[4] http://www.bsa.org/resources/loader.cfm?url=/commonspot/security/getfile.cfm&pageid=1292&hitboxdone=yes

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

[6] 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 (AIPA) (P.L. 106-113), the USPTO is directed to advise the President, through the Secretary of Commerce, and advise 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, with the Criminal Division of the Department of Justice, 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 United States and worldwide. NIPLECC's coordination activities help ensure that government enforcement efforts are consensus-based and non-duplicative, and therefore are vital to 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 U.S. 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. TRIPs 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 intellectual property rights. Today, developing countries obligations under 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 Generalized System of Preferences (GSP) review, TRIPs Council review of implementing enforcement legislation, and in the negotiation of free trade agreements (FTAs).

Our approach to the ongoing FTA negotiations has been to build upon TRIPs. 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 and protection against anti-circumvention devices and satellite signal theft.

China

As I am sure the Committee is well aware, one of the areas of greatest concern with respect to IP piracy is Asia, particularly mainland China. Despite China's membership in the WTO and its requirement to comply with the TRIPs agreement, the lack of effective 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, China accounts for 44 percent of the dollar loss due to piracy in the Asia/Pacific region. 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.

Under the direction of Secretary Evans, the USPTO has been working extensively to reduce piracy and counterfeit activity in China. First, we provide technical support to all agencies of the U.S. Government that are addressing these issues, including USTR, the Department of Commerce/International Trade Administration, U.S. Department of Justice, Department of Homeland Security, and the State Department. We have also consulted with state authorities involved in IPR enforcement, and are seeking ways to improve our cooperation with them. Our cooperation on these efforts is through our own team of experts on Chinese intellectual property matters, which includes individuals with knowledge and background on patents, trademarks, copyrights, enforcement issues, and WTO/WIPO issues. Our cooperation with these agencies also extends beyond the trade agenda, to providing technical support on strategies to address transnational crime and transnational trade in counterfeit goods as well as other issues.

For the past two summers, with the active support of U.S. Ambassador Randt, we have stationed an IP enforcement attorney – who is fluent in Mandarin -- in our embassy in Beijing to help with IP enforcement issues in the region. Working with industry groups such as the Business Software Alliance, International Federation of Phonographic Industries, Motion Picture Association, and anti-counterfeiting associations, we have held enforcement conferences in such major cities as Beijing, Shanghai, Guangzhou, Wuhan, Nanjing, and Chengdu, that addressed piracy and counterfeiting issues. Working with the Department of Commerce's Technology Administration and the International Intellectual Property Institute, we have provided technical assistance on copyright protection in Dalian and Shenzhen. Our rights holders have welcomed this approach. In fact, USPTO intends to detail an IP enforcement attorney to China soon for an extended period to provide further expert support for our Government's efforts to combat piracy and counterfeiting.

One of the greatest challenges in China is ensuring that localities fully enforce national laws. To that end, we have held meetings with numerous local copyright, trademark, judicial, police, and prosecutorial enforcement officials throughout China to insure that local officials fully understand their international obligations. We have also hosted numerous such delegations at the USPTO, with the objective of addressing this challenge. We have worked with China's Supreme People's Court to encourage greater transparency in its regulation-like "judicial interpretations." We have also worked with U.S. non-governmental organizations in support of rule of law efforts and training programs, including a Temple University program.

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 for stolen intellectual property theft and fines are 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 Investigations and Compliance Unit within the International Trade Administration's Market Access and Compliance Group, to coordinate their efforts to vigorously pursue allegations of IPR violations wherever they occur, especially in China.

The Chinese IPR enforcement and protection environment today is complicated by a variety of different Chinese and foreign interests, including Chinese industrial policies, trade policies, the interests of foreign investors, and the interests of Chinese domestic enterprises. In this environment, our rights holders increasingly look to adequate enforcement of criminal IPR laws in implementation of China's WTO commitments, as a key to reducing counterfeiting and piracy rates in China. China, it should be noted, does not lack for quantitative enforcement. Each year thousands of enforcement actions are undertaken. However, these actions are typically pursued by administrative agencies which impose non-deterrent penalties. For this reason, we have undertaken numerous joint training programs and discussions with U.S. Department of Justice, U.S. Immigration and Customs Enforcement and other agencies on the criminalization of IPR violations, and we are actively talking with other countries about cooperating on joint efforts in training the Chinese on criminal enforcement in particular.

Many of the challenges that China encounters are at least partially due to deficiencies in its own system, including extensive corruption, lack of interagency coordination, and lack of adequate legal understanding. Some of the issues we have raised with Chinese colleagues include: the use of mandatory sentencing guidelines for IPR crimes; support for specialized IPR courts which have greater independence from local financing and control; establishing appropriate procedures for investigation, prosecution and conviction of IPR criminals; and how to effectively address trans-border IPR crime, as well IP crime committed over the Internet.

As a follow-up to the Secretary's October 2003 trip, I recently led a delegation to China with other members of the USPTO China team 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. This trip also was intended to pave the way for this month's meeting of the Joint Commission on Commerce and Trade (JCCT) on trade issues with China, as well as other Department of Commerce IPR initiatives in China.

While our visits were well received and we were pleased to note a continuing and increasing awareness among Chinese officials of the importance of IP protection and enforcement, we have not yet seen significant progress on most of the key issues we have been urging China to act on for some time. These issues include enhanced criminal enforcement, protecting copyrights over the Internet, and stopping the export of counterfeit goods. For example, we have yet to see a plan for China's IPR "task force", notwithstanding a stated commitment to solving intellectual property rights problems "step-by-step" at a U.S. Embassy "roundtable" in November 2004. We also share concerns of many other agencies and private organizations that such task forces may be short-lived or fail to address long-term systemic problems in China's IPR enforcement system.

We have also participated in training programs for our business people in the United States, to better enable them to forcefully address the IPR challenges they experience in China and, when necessary, bring well-founded complaints to our attention. Typically in conjunction with the Department of Commerce, we have held programs in such cities as: Cincinnati, Ohio; Grand Rapids and Pontiac, Michigan; Wichita, Kansas; St. Louis, Missouri; New York City; Long Island; Waterbury, Connecticut; Boston, Massachusetts; Providence, Rhode Island; Portsmouth, New Hampshire; Fresno, San Jose and San Francisco, California; Salt Lake City, Utah; and Washington, D.C. A major focus of these efforts has been to address problems of small and medium enterprises, although larger enterprises have also participated in many of these programs and have benefited from them.

While we fully recognize that China needs to make significant, drastic improvements in its IPR system in order to ensure that our rights holders are fairly protected, we should not under estimate the steps that our businesses and government can undertake to reduce the risks of piracy and counterfeiting. Many small and medium-sized companies still fail to register their Chinese language trademarks, and fall victim to counterfeiting of these marks in a timely manner. Given the fast pace of China's economic development and the huge volume of trademark applications in China, companies should file for their marks early in their marketing cycle. Globalization has meant that competitors can retrieve information about products not yet introduced in their country from a U.S. company's web site. Much counterfeiting and piracy originates from employees, agents, or distributors who have taken confidential information to engage in a competing operation. Many companies have declined to prosecute invention or design patents in China, when

prudence might dictate otherwise. Sometimes the problems are at least partially attributable to lack of cultural or linguistic familiarity. Chinese police and enforcement officials are much more comfortable enforcing trademarks in their own native language rather than in English or other foreign languages. Just recently, one U.S. company reportedly lost a copyright case in China involving the artistic calligraphy it uses for its Chinese trademark, an art form that is very difficult for most Americans to evaluate.[7] Furthermore, in China's increasingly complicated environment, many of the rights and obligations that we have requested of China to be used in our interests can equally be used against us, including requests for deterrent damages, preliminary injunctions, ex parte relief or border measures on imports or exports. It is therefore especially important that our industries: urge the fair and transparent implementation of China's IPR system; fully exploit this system; provide us with detailed information on its deficiencies in order to reduce future risks of such activities; and support our bilateral and multilateral efforts to reduce the impact of these problems.

At the same time, we must seek on an interagency basis to use the available government tools at our disposal to address these issues. The USPTO, through its roles as the agency in charge of domestic patent and trademark filings, as an expert consultant to other agencies on trade-related intellectual property issues, as well as co-chair of the National Intellectual Property Law Enforcement Coordination Council with U.S. Department of Justice, has a unique role to play in these areas. In addition to trade remedies which are within the jurisdiction of USTR, we believe that cooperation on trans-border IPR crimes between U.S. Department of Justice and China's Ministry of Justice can also help to improve the overall enforcement environment for U.S. rights holders, particularly in copyright and Customs crimes. We may consider specific strategies to address trends in imports or exports. U.S. Customs and Border Protection may also wish to develop unique profiling systems to track goods that originate from known counterfeiting "hot spots". State government authorities also undertake a large amount of U.S. IPR enforcement, which might be more deeply involved in enforcement and training efforts. A recent raid in New York State, for example, involved cooperation with the U.S. Department of Labor.[8] We may also wish to see how we can better cooperate with administrative agencies in China that conduct much of the enforcement activities, such as China's State Food and Drug Administration, which pursues counterfeit drug products, China's State Tobacco Monopoly Administration, which pursues counterfeit cigarettes, and Chinese Customs, which imposes border measures on infringing exports.

It is important to recognize that there is a Chinese domestic constituency seeking enhanced IPR enforcement, and that pirates and counterfeiters do not necessarily discriminate against Americans or just against Americans lacking political influence. Among the famous incidents, the daughter of China's former leader, Deng Xiaoping, had her biography of her father pirated. In another incident, one of China's preeminent scholars on intellectual property law who is also considered a "state treasure" on these matters, Prof. Zheng Chengsi, had his textbooks compiled into a pirated version. What was worse, the publisher was

[7] "Dow Jones Loses Copyright Suit in China." http://quickstart.clari.net/qs_se/webnews/wed/bb/Qchina-media-copyright.RZR4_DSN.html

the Chinese prosecutor's publishing house. Recently, press reports indicated that a private publishing house also pirated a Communist Party handbook. Chinese software engineers, inventors and movie producers have to struggle with a severely deficient domestic market as their principal source of income.

Additionally, in a recent study commissioned by the State Council Development Research Center, the Chinese Government acknowledged the increasing role of organized crime in counterfeiting activities, and the need for international cooperation and enhanced, deterrent penalties. The Vice Premier's Market Order Rectification Office intends to address some of these issues. Among the indicia that IPR is obtaining increased domestic importance, the Chinese Trademark Office received more trademark applications than any country in the world for the past two years. The Chinese Patent Office is one of the most rapidly growing patent offices in the world. The USPTO, for its part, has tried to play a constructive role in our recent meetings with these agencies to help them improve the quality and efficiency of their decision making, which has a direct impact on product piracy and counterfeiting. As the economy grows domestic interest in intellectual property, particularly in the more developed cities on China's seaboard, is increasing dramatically. China received more foreign direct investment (FDI) than any country in the world for the past two years. This FDI is also having an impact on the domestic call for increased IP protection.

All of these developments may be of small comfort to industry when reports tell of some cases where piracy and counterfeiting matters have gotten worse. U.S. Government statistics show a worsening situation as well. For example, U.S. Customs and Border Protection reported that year-end-2003 China accounted for 66 percent of the domestic value for all seizures of infringing goods; this is a steady increase from 16 percent in 1999.[9] Many industries also increasingly suspect that the Chinese Government, by restricting market access, is providing free reign for counterfeiters, pirates and criminals to exploit the void created by the lack of legitimate products. Many U.S. companies also complain of industrial policies that help create conditions for production of infringing products. Counterfeit Viagra, for example, dominates the Chinese market, while the legitimate product is hampered by market access restrictions. Pirated movies appear in the Chinese market long before censors have approved the legitimate product. Other high tech companies complain of standards setting, such as in wireless networking technology, which limits introduction of legitimate products or mandate technology transfer. Is improvement possible? Many in industry look to the relative success of China's efforts to stem its export of pirated optical media in the mid-90's as an indication that this task can be accomplished. As my testimony has indicated, there are in fact numerous approaches at our disposal.

We recognize that IPR protection and enforcement face enormous challenges in China, and that the losses are mounting daily. At the same time, the pressures of the competitive global marketplace, criminal elements, protectionist and non-tariff barriers, make these challenges increasingly more sophisticated. While the USPTO does not have the lead on trade policy issues, which is the mandate of USTR, we have devoted

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[8] "2 Chinatown Stores Raided in Counterfeit Goods Sweep" http://www.nytimes.com/2003/12/03/nyregion/03RAID.html?ex=1082088000&en=457a005d61ad9144&ei=5070

[9] http://www.customs.gov/xp/cgov/import/commercial_enforcement/ipr/seizure/top_trading_partners.xml

significant resources to making progress in improving China's IPR regime for our industries, rights holders and this Administration.

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.

I am hopeful that with the continued support and partnership of this Committee, we will be able 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.

TESTIMONY
OF
FRANCIS GARY WHITE
UNIT CHIEF
COMMERCIAL FRAUD DIVISION
IMMIGRATION AND CUSTOMS ENFORCEMENT
DEPARTMENT OF HOMELAND SECURITY

BEFORE THE
SENATE GOVERNMENTAL AFFAIRS COMMITTEE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

APRIL 20, 2004

INTRODUCTION

Good morning, Chairman Voinovich and distinguished Members of the Subcommittee. It is my pleasure and privilege to be here today to testify about the efforts undertaken by the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) in investigating intellectual property rights (IPR) violations. I would like to note the strong interest of DHS's leadership in this area especially the Under Secretary and Assistant Secretary of the Border and Transportation Directorate and thank them for their support of this important ICE mission.

With the creation of the Department of Homeland Security in March 2003, the investigative and intelligence functions of the former U.S. Customs Service and the Immigration and Naturalization Service were merged into ICE, the second largest investigative agency of the Federal government. In part, ICE's mission is to protect the United States and its citizens by deterring, interdicting, and

investigating threats arising from the movement of people and goods into and out of the country, and to detect and shut down vulnerabilities in our nation's borders, aviation system, and economic systems.

BACKGROUND

In today's information age, we are increasingly dependent on the production and distribution of products protected by intellectual property rights. The increasing demand for these products has escalated the production of counterfeit and pirated goods throughout the world. As a result, IPR violations have grown in both magnitude and complexity, undermining the kind of innovation and creativity that America was built upon.

The losses to the U.S. economy in revenue and jobs due to IPR violations are staggering. In 1982, the International Trade Commission estimated losses from counterfeiting and piracy at $5.5 billion. In 1988, losses were estimated to be $60 billion. The International Chamber of Commerce estimated that, in 1998, five to seven percent of world trade was comprised of counterfeit goods, a market worth $350 billion.

Counterfeit software, sporting goods, and trademarked textiles all have a detrimental effect on the U.S. economy. Because the U.S. leads the world in producing intellectual property, a significant part of our economic growth over the

last decade has been largely fueled by these industries. Moreover, intellectual property exports play an important part in our balance of trade.

ICE investigators have noted that the growth in IPR violations has been driven by organized crime groups that smuggle and distribute counterfeit merchandise specifically for consumption in the U.S market. In many cases, the profits these criminal organizations realize from counterfeit merchandise are used to fuel additional criminal enterprises, such as the trafficking of drugs, weapons, or other contraband. Some of these illegal profits arelaundered and invested in legitimate business enterprises. More importantly, both the criminals and their organizations involved in these piratical ventures reap large profits with relatively low risks of prosecution.

Both of DHS enforcement agencies, ICE and the Customs and Border Protection (CBP), recognize the lucrative financial benefits to be found in trafficking counterfeit merchandise. Consequently, both ICE and CBP have modified enforcement strategies that were originally aimed at simply seizing counterfeit goods before they entered the U.S. market. Now, ICE and CBP coordinate targeted seizures with follow-up criminal investigations and forfeiture of assets associated with the criminal endeavors. Our ultimate goal is to dismantle the smuggling organizations and halt the flow of counterfeit merchandise into the commerce of the United States.

Between FY 1998 – 2003, the former U.S. Customs Service and its successor agencies --ICE and CBP-- effected over 26,223 IPR seizures, with an estimated domestic value of $470 million. During this time period, China, Hong Kong, and Taiwan were the source countries for over half of all the counterfeit merchandise seized. From FY 1998 – 2000, the top commodity seized was media, which includes videotapes, CDs, DVDs and computer software. In FY 2001, the top commodity seized was wearing apparel, and in FY 2002- 2003, the top commodity was cigarettes. DHS seizure statistics for FY 2003 show 6,500 seizures with a domestic value in excess of $94 million.

OPERATION CORNERSTONE

In July 2003, ICE created the financial investigative initiative identified as *Cornerstone.* This program is dedicated to U.S. economic security and highlights the DHS mission to protect the United States by securing its borders, transportation sector, ports, and critical infrastructure.

Cornerstone protects the integrity and security of the U.S. economy by identifying, targeting, and eliminating systematic vulnerabilities in the financial, commercial, trade, manufacturing, and transportation sectors that could be exploited by criminal and terrorist organizations. Each violation within the spectrum of ICE's investigative purview - Financial Investigations, Export and Arms Control, International Trade, Commercial Fraud, Intellectual Property

Rights, Cyber Crimes, Smuggling, and Immigration Violations - has a financial component that impacts U.S. economic integrity and security.

Cornerstone addresses these security vulnerabilities by not only investigating the crimes - targeting how criminal and terrorist organizations earn, move and store their illicit profits - but also by working with the private sector to spot and address financial vulnerabilities before a crime can be committed. In addition, *Cornerstone* is dedicated to fostering partnerships with the private sector and those industries involved in any aspect of financial, trade, and transportation matters.

ENFORCEMENT ACTIVITIES

To attack the counterfeiting problem, and at the direction of the National Security Council, Presidential Decision Directive/NSC-42 tasked the U.S. Customs Service and the Federal Bureau of Investigation (FBI) with developing a plan for coordinating a unified U.S. Government response in the area of intellectual property crime. As a result, a multi-agency National Intellectual Property Rights Coordination Center (IPR Center) was developed in 2000, comprised of both investigative and intelligence research personnel from ICE, CBP, and the FBI.

In addition to providing an operations budget, Congressional funding has been used to staff Intelligence Analysts and Criminal Investigators for the IPR Center and field offices in the U.S., as well as positions in various Customs Attaché

offices overseas. In FY 2004, Congress provided additional funding for the IPR Center that is presently earmarked for additional investigative positions and for a new state-of-the-art office and educational facility to house the Center. The new IPR facility will allow ICE and CBP analysts and attorneys to provide in-house training in the latest IPR trends and investigative techniques for both law enforcement and industry officials. In addition, the facility will foster the IPR Center's multi-disciplinary approach to identifying and dismantling organizations that are perpetrating IPR violations.

The IPR Center works with copyright owners and trade associations on an ongoing basis and has conducted outreach presentations to both trade associations and foreign governments. On April 28, 2004, the IPR Center will host its inaugural industry meeting with trade associations and businesses to better identify and address growing IPR issues and criminal trends. Subsequent meetings will be held quarterly throughout the U.S. In addition, IPR Center personnel have provided IPR training to ICE field offices, focusing on investigative techniques and the legal requirements necessary to successfully prosecute IPR violators.

Also, in FY 2004, the IPR Center will organize and chair an Industry Anti-Counterfeiting Working Group. This working group will serve as a forum to foster a working relationship between ICE and industry, while encouraging industry to share valuable information about IPR violators with ICE.

The IPR Center also plays a key international role in IPR enforcement by participating in worldwide IPR working groups and committees. For example, the IPR Center, representing ICE, is an active participant in the Interpol Intellectual Property Crime Action Group (IIPCAG). The IIPCAG is comprised of various national law enforcement agencies, international organizations, and industry associations. Its mission is to coordinate and enhance IPR enforcement around the world. Its goal is to raise the awareness of the economic and social impact of trade in counterfeit products; to create IPR crime investigation training programs; and to improve the enforcement coordination of IPR matters between police, worldwide customs organizations, and the private sector.

Our overseas offices are committed to the ICE mission of ensuring the economic security of the United States by protecting U.S. intellectual property rights overseas. Since the majority of counterfeit goods are produced in foreign countries, ICE Attaché offices around the world work closely with their host country law enforcement counterparts. Their efforts in developing information regarding the manufacture and shipment of counterfeit goods have resulted in numerous seizures of containers of these illegal goods in the U.S. Our Attaché offices have assisted their host country counterparts in combating the trafficking of counterfeit goods such as CDs, DVDs, textiles, and computer software, in particular in the tri-border area of South America (Argentina, Brazil and Paraguay), in the Philippines, and in China. In addition, at the request of the

Attaché offices, ICE IPR personnel have hosted conferences and provided training on IPR issues with the participation of officials from various countries.

Computer parts, toys, video games, wearing apparel, and watches are a few examples of counterfeit merchandise routinely seized by ICE and CBP. But IPR violations can take many forms and may also involve health and safety concerns. Counterfeit pharmaceuticals, tools, electrical cords, and aircraft or automobile parts all have a significant impact on public safety. For example, laboratory testing of imported counterfeit batteries has revealed inferior manufacturing practices that create improper ventilation, causing increased risk of explosions. In addition, some batteries were even found to contain mercury, creating a significant health risk to anyone in contact with these seemingly innocent items.

Recent successes of IRP enforcement involving public safety include seizures in New York and Houston of $8 million worth of merchandise including batteries, power cords and electrical accessories that bore counterfeit Underwriter Laboratories labels. Due to the significance of this discovery, ICE conducted a press conference in December 2003, warning consumers of the hazards of counterfeit goods. In another ICE case, a California resident was indicted in January 2004 by a Federal Grand Jury for smuggling counterfeit Viagra tablets from China.

IPR criminals are also exploiting technology to advance their criminal enterprises, as demonstrated by the recent increase in web sites offering counterfeit merchandise. In 1998, legacy Customs established the CyberSmuggling Center to more effectively focus resources to combat IPR over the Internet. Due to advances in technology, cyber-pirates are able to operate freely and openly on the Internet with relatively little risk of discovery. ICE's IPR Center works in conjunction with the CyberSmuggling Center to investigate and prosecute Internet IPR violators.

CASE EXAMPLES

The following are just three examples of ICE IPR enforcement successes.

In June 2003, ICE agents and local Chicago law enforcement arrested seven Italian nationals for selling counterfeit power tools in the Chicago metropolitan area. All seven individuals were subsequently indicted by a federal grand jury in the Northern District of Illinois for trafficking in counterfeit goods.

In December 2003, Pasquale Esposito and the other six co-defendants pled guilty to federal charges of trafficking in counterfeit goods. In February 2004, all defendants received federal custodial sentences, and due to the length of the judicial proceedings, were released with time served. In addition, the ICE investigation resulted in monetary seizures and forfeitures, to include the

contents of three bank accounts used by the defendants, which totaled $86,726.74.

In January 2004, Khoa Twan Do was indited by a Federal Grand Jury in Los Angeles, California, for trafficking in counterfeit Viagra tablets. ICE agents discovered that Do had imported at least 40,000 counterfeit Viagra tablets from Beijing into the United States through his business, Health Plus, from which he would resell the fake medication. If convicted, Do is facing potential criminal penalties of 18 years in federal prison, and up to $2 million in fines.

In September 2000, Lay Eng Teo, a citizen and resident of Singapore, was indicted in the Northern District Court of California on charges of conspiracy, trafficking in counterfeit software, and money laundering. Teo has also been identified as the supplier on hundreds of seizures of counterfeit software valued at more than $9 million. Furthermore, U.S. Customs and Microsoft Corporation identified Teo as one of the largest suppliers of counterfeit Microsoft products in the United States.

In October 2000, Hong Kong Customs officers arrested Teo on a provisional arrest warrant. In June 2003, Teo was extradited to the U.S. and plead guilty to Conspiracy to Traffic in Counterfeit Goods and Money Laundering in January 2004. In March 2004, Teo was sentenced in the Northern District Court of California to 46 months incarceration.

CLOSING

As much as we have done to protect our intellectual property rights, we must do more in staying ahead of the perpetrators. Greater interaction among ICE, industry, intellectual property right owners, and the public, as well as domestic and international law enforcement organizations, is critical to our efforts in combating the increasing threat posed by IPR violations. I would like to thank Chairman Voinovich and the distinguished members of this Subcommittee for their support and the opportunity to testify before you today. I will be glad to address any questions you may have.

COUNTERFEITING IN CHINA AND ITS EFFECT ON U.S. MANUFACTURING

April 20, 2004

Written Testimony of

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I.
Introduction

In terms of size, scope, and magnitude, trademark counterfeiting in China is considered by many to the most serious counterfeiting problem in world history. A recent study by the PRC State Council Research and Development Center reported that in 2001 the PRC economy was flooded with between $19-$24 billion worth of counterfeit goods. Brand owners in China estimate that 15 to 20% of all well-known brands in China are counterfeit and estimate their losses to be in the tens of billions of dollars per year. Counterfeiting is estimated to now account for approximately 8% of China's gross domestic product.

China has also become the platform for the export of counterfeit products to other countries in Asia, Europe, and the United States. In 2003, China accounted for 66% or over $62 million of the $94 million of all counterfeit and infringing goods seized by the US Customs Service at ports of entry into the United States. Of course, the value of what is seized can represent only a tiny fraction of what actually enters the US market. An ominous development is that beginning in 2004, exports of counterfeits from China to the United States and other parts of the world may begin to increase significantly for the foreseeable future.

II.
Origins and Causes of Counterfeiting

There are several explanations for the unprecedented size and scope of counterfeiting in China:

(1) *Foreign Direct Investment and Advanced Technology*. In recent years, China's economy has enjoyed unprecedented growth for an economy of its size with growth rates of 9.8% from 1980-92 and at 9% more recently. According to some estimates, China is on track to have the world's largest economy in the first decades of the twentieth first century. This is a remarkable achievement for a nation that was mired in backwardness and poverty just several decades ago.

This economic growth has been fueled in large part by foreign direct investment from multi-national enterprises. In the 1990s, China emerged as the world's second largest recipient of foreign direct investment behind only the United States and in 2002, China surpassed the United States to become the world's largest recipient of foreign direct investment with $50 billion of foreign capital inflows. FDI is the best means in the world today for the transfer of advanced technology, intellectual property, and other forms of valuable information. In many cases today the intellectual property component of a FDI in the form of patents, copyrights, and trademarks is the most important component of the foreign investment. For example, the value of the Coca-Cola trademark in

China is worth more many more times to that company than the millions of dollars in capital that it has invested in China. The same is true for the patents and copyrights owned by pharmaceutical companies and software companies doing business in China today. However, while MNEs are creating a transfer of technology through FDI that is being absorbed into China's legitimate economy through joint ventures and wholly foreign owned enterprises, some of this intellectual property is also being diverted into China's illegitimate economy as pirates steal this technology to engage in counterfeiting and other forms of commercial piracy. It is no coincidence that China, the world's largest recipient of FDI, advanced technology, and intellectual property also has the world's most serious commercial piracy problem.

(2) *State Support of Counterfeiting and Local Protectionism.* No problem of this size and scope could exist without the direct or indirect involvement of the state. In China, the national government in Beijing appears to be sincere in its recognition of the importance of protecting intellectual property rights, but national level authorities are policy and law-making bodies whereas enforcement occurs on the ground at the local level. At this level, local governments are either directly or indirectly involved in supporting the trade in counterfeit goods. Counterfeiting has become so important that this illegal trade now supports entire local economies and a crackdown on counterfeiting would result in a shutdown of the local economy with all of the attendant costs of unemployment, dislocation, social turmoil, and chaos. Because the costs of a crackdown at the local level can be so severe, counterfeiting is heavily defended at local levels.

(3) *Ineffective Legal Enforcement and Lack of Deterrence.* China has a developing legal system that is weak in many respects by comparison to legal systems in advanced industrialized countries such as the United States. While China's intellectual property laws are now considered by most observers to be in compliance with the standards set by TRIPS, enforcement of these laws remains inadequate and fails to create sufficient deterrence to counterfeiting.

The combination of these factors – the world's largest influx of foreign direct investment and widespread access to advanced technology, direct or indirect government involvement and support of the counterfeit trade, and a weak legal system that does not create sufficient deterrence for counterfeiters in a very lucrative trade – has resulted in a counterfeiting and commercial piracy problem that is unprecedented in world history.

III.
Overview of Counterfeiting in China

The illegal trade in counterfeit goods in China can be divided into two components: manufacture and distribution.

A. Manufacture and Organized Crime

The manufacture of counterfeits appears to be concentrated in the southeastern region of China, mostly in Fujian and Guangdong Provinces. Fujian, located across the China Straits from Taiwan, is the ancestral home of many Taiwanese. Guangdong Province is adjacent to Hong Kong and the ancestral home of many Hong Kongese. Both Guangdong and Fujian Provinces were some of the first areas opened to foreign investment in China and were some of the first locations for sino-foreign joint ventures and wholly foreign owned enterprises engaged in the manfacture of famous international brands of consumer products. Both of these areas were among the first areas in China to legally acquire foreign technology used in the production and manufacture of famous brands. Some of this technology and know-how has been acquired for illegal purposes. In a pattern that appears throughout other parts of China, an area where legitimate manufacturing is concentrated has given rise to illegal underground factories manufacturing counterfeits of the genuine products that are manufactured in nearby factories under the authority of the intellectual property owner.

Criminal organizations based in Hong Kong and Taiwan who have maintained connections with their ancestral homelands often provide the financing for the underground factories that manufacture illegal counterfeits in Guangdong and Fujian province. Anecdotal evidence indicates that these are the same criminal organizations that are involved in smuggling products into China, narcotics, prostitution, and pornography. The large sums of money that can be earned through counterfeiting and the relatively innocuous penalties by comparison to those imposed for other types of economic crimes such as smuggling and narcotics have lured these criminal organizations to the counterfeiting trade.

B. Distribution

The manfacture of counterfeit products is of little use if the products cannot be delivered to the end use consumer. For this reason, the distribution of counterfeit products to retail levels of commerce is crucial to the counterfeit trade in China as elsewhere in the world. Large, legimate wholesale distributors deliver products to state-owned stores or foreign-owned chain stores. Counterfeits cannot enter retail markets through these regular channels.

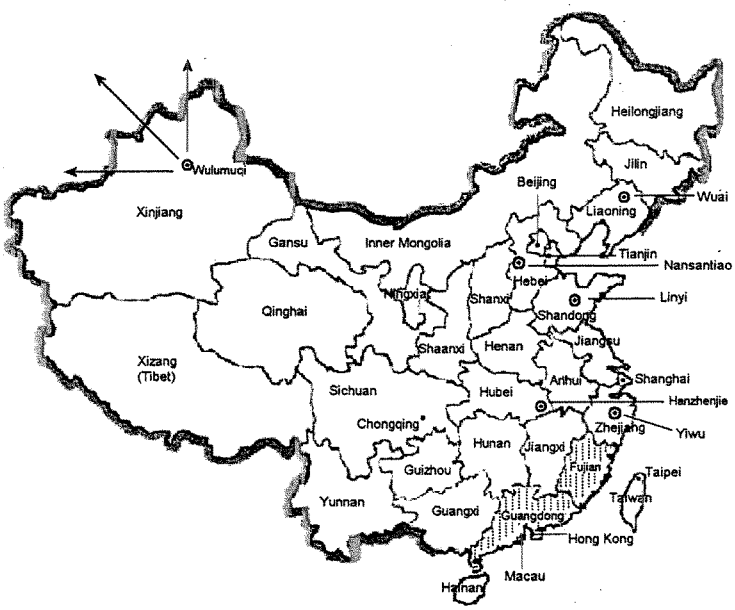
In China, the distribution of counterfeit products occurs through a series of large open air or partially enclosed wholesale markets located in densely populated areas with convenient transportation access. These markets are often massive in size and can contain more than one thousand outlets, each a wholesale distributor, occupying a stall or a semi-finished storefront. In the author's experience there is no wholesale market in China that does not carry counterfeit and infringing goods for sale. Many wholesale dealers have counterfeit goods on open display while others will display genuine products but have counterfeits in a back room or under the counter and available for the asking. In the heart

of Beijing, hundreds of small retail vendors swarm the Tianyi wholesale market everyday and use three wheel bicycles, lorries, and small trucks to furnish the street stalls, open air kiosks, and small retail stores with abundant supplies of counterfeit and infringing products.

These wholesale markets are established and regulated by the local Administration of Industry and Commerce (AIC), a branch of the local government responsible for promoting, regulating, and policing commercial activity. In a typical situation, AICs will invest their own funds in establishing the wholesale market and will collect rent from each of the individual wholesale distributors. In addition, AICs will issue business licenses for a fee to each individual proprietor. Once the business is in operation, AICs will also collect a management fee from each individual proprietor. In a large wholesale market such as Tianyi, the operating revenues to the local AIC can easily exceed $100,000 per year. As noted above, many if not most of these wholesale distributors deal in counterfeit goods. As AICs are also one of the primary government entities in China charged with the enforcement against counterfeiting, AICs are faced with a conflict of interest as they are charged with policing and enforcing the very markets in which AICs and the local government have a substantial investment and financial interest. Shutting down these wholesale markets would not only result in a direct loss of revenue to the AIC but would also have many reprocussions as many retail businesses, hotels, restaurants, and nightclubs are all supported by the trade in counterfeit goods. In some cities, such as Yiwu discussed below, the entire local economy is connected to the trade in counterfeits.

Based upon the author's working experience in China, there are at least five major wholesale markets in China: Hanzhen Jie in Wuhan City, Hubei Province; Linyi Market in Linyi, Shandong Province; Nansantiao Market in Shijiazhuang in Hebei Province; China Small Commodities City in Yiwu City, Zhejiang Province; and Wuai Market in Shenyang, Liaoning Province. Together these markets serve the entire coastal region of China and its most populous urban areas including Guangzhou in the south, to Shanghai in the east and Beijing and Tianjin in the northeast. A branch of the China Small Commodities City market of Yiwu located in Wulumuqui in Xinjiang Province serves as an export post for the Middle East and Eastern Europe. These markets (represented by circles) and their relationship to the manufacturing centers (shaded areas) are set forth in the map below:

Major Distributors and Manufacturers of Counterfeit Goods in China



IV.
Barriers to Effective Enforcement Against Counterfeiting

This section will briefly examine the major barriers that impede effective enforcement against counterfeiting.

a. Local Protectionism

Efforts by both the US government and industry lobbying groups have been largely directed at central level authorities in Beijing to make legislative changes and national commitments to combat counterfeiting. While it appears that central level leaders understand the importance of protecting intellectual property for promoting China's long-term economic development, central level authorities are legislative and policy-making bodies. Actual implementation and enforcement of the law occurs at the local level where there continue to be questionable commitments to suppressing counterfeiting, copyright piracy, and other forms of economic crimes.

Local level leaders are evaluated by the economic performance of their local political units and counterfeiting can be a boom to the local economy. The trade in counterfeit goods can absorb large numbers of unemployed workers, generate substantial revenues, provide tax revenues, and support other legitimate industries such as warehouses, hotels, restaurants, and nightclubs in the local economy. In the town of Yiwu in Zhejiang Province, well known as the center of commercial piracy in China, everyday at least 200,000 customers visit the over 33,000 wholesale stores and outlets selling over 100,000 varieties of products. Industry experts estimate that over 90% of the daily use and consumer products sold in Yiwu are counterfeit or infringing goods. Yiwu serves as a wholesale distribution center for products sold all over China. Yiwu also does a brisk export trade to countries in Africa, Asia, and South America. According to Yiwu government authorities, total sales of its wholesale business totaled $2.4 billion in 1997 – the last year that figures were made publicly available – more than the total business of most MNEs in China. These wholesale businesses also account for a substantial portion of the taxes paid to the local government supporting a host of public services. Most of the businesses that sell counterfeit and infringing goods in Yiwu negotiate a fixed amount of taxes to be paid to the local government in lieu of payment based upon graduated tax rates linked to revenue. It is no exaggeration to say that the entire local economy in Yiwu is built on the trade in counterfeit and pirated goods and that shutting this illegal trade would be tantamount to shutting down the local economy. The trade in counterfeit and pirated goods has transformed Yiwu from a poor farming town into an economic model that other towns are seeking to emulate.

Not only are local leaders reluctant to shut down productive economic activity, local government entities often have a direct financial interest in the illegal trade itself. For example, in Yiwu, the local administration of industry and commerce has invested millions of dollars in the construction of the wholesale markets that sell counterfeit and

infringing goods and charge monthly management fees to the businesses that sell these illegal goods. The AIC is also the same body that is in charge of enforcement against trademark counterfeiting and infringement. In Yiwu and in many other locations, the local AICs may have a financial interest in the very activity that they are supposed to suppress. In addition, the bulk of the wholesale and export of counterfeit products in Yiwu is owned and operated by a large corporate conglomerate that is owned by former and possibly some current government officials and Party leaders. These current or former government officials and Party leaders are able to exert enough influence on local enforcement authorities to protect the flourishing trade in counterfeit goods. Although Yiwu is an extreme example of the obstacles that are created by a local environment that is supported by counterfeiting, the same types of issues are present in many locations throughout China. In addition to having local officials that may have a direct or indirect financial interest in counterfeiting and piracy, local enforcement officials, prosecutors, and judges may be beholden to the local governments that appointed them and may face pressures to protect the local trade in counterfeit and pirated goods.

Overcoming local protectionism cannot be done simply through the drafting of new laws on intellectual property protection or the periodic "strike hard" campaigns initiated by central authorities against counterfeiting and piracy. While most of China's top leaders acknowledge that counterfeiting is a serious problem, China has a long list of problems of varying degrees of urgency. Any decision by central authorities to suppress local protectionism will involve significant political and social costs at a time when the PRC faces many difficult problems competing for the limited resources of the central government. Where local authorities are unwilling to shut down an economic activity that is perceived to be beneficial to their local economies, PRC central authorities will need to expend significant political resources to overcome the resistance of local authorities. Cracking down on counterfeiting may also result in serious social turmoil caused by the loss of employment, the shutting down of legitimate businesses, and other painful consequences. Faced with the significant costs involved in any serious nationwide campaign against counterfeiting, China's central authorities will naturally avoid incurring such costs, if possible. To date, it appears that China's central authorities lack the political resolve or commitment to launch a serious nationwide crackdown on counterfeiting.

b. Lack of Adequate Sanctions and Criminal Prosecutions

Local protectionism and the lack of mandatory guidelines for the imposition of serious fines and criminal sanctions have resulted in an enforcement system that does not adequately deter counterfeiting. Most brand owners in China are successful in using administrative authorities to bring raids and seizures, but many brand owners complain that counterfeiters and pirates are often back in business in a matter of weeks after an enforcement action has been completed. Set forth below are recent enforcement statistics reported by the State Administration of Industry and Commerce, the central level authority with primary authority over trademarks:

AIC TRADEMARK ENFORCEMENT ACTIVITY, 1997-2000

Year	Cases	Avg Fine	Avg Damages	Criminal Prosecutions
1997	15,321	$679	$40	57 total or 1 in 268 cases
1998	14,216	$699	$41	35 total or 1 in 406 cases
1999	16,938	$754	$40	21 total or 1 in 806 cases
2000	22,001	$794	$19	45 total or 1 in 489 cases

Source: State Administration of Industry and Commerce Annual Statistics

The average fine imposed on the counterfeiter or infringer in 2000 is $794, an increase of more than 15% over the 1997 figure but is still so low as to be considered a cost of doing business in a very lucrative trade. The amount of compensation awarded to brand owners in 2000 stands at $19, a negligible amount. Damages awarded by AICs seek to award the brand owner the profits earned by the counterfeiter after deducting all expenses (as represented by the counterfeiter) and are not based upon economic losses suffered.

Turning to the issue of criminal prosecutions, administrative authorities are to transfer cases that involve criminal liability to judicial authorities for criminal prosecution. The standards for criminal liability for counterfeiting are set forth in the Criminal Law of 1997. For example, under Article 140, a producer or distributor who has sales of inferior quality counterfeit goods exceeding RMB 50,000 ($6000) but below RMB 200,000 ($24,000) must be sentenced to a term of imprisonment of up to two years and must also pay fines. As the level of sales increases, so does the severity of the criminal punishment. Other provisions in the Criminal Law use a similar approach based on sales of counterfeit or inferior quality goods. *See* Criminal Law, Arts. 141-148. As the statistics above indicate, however, the number of cases transferred by administrative authorities for criminal prosecutions actually declined from 57 cases (1 in 268 cases) in 1997 to 21 cases (1 in 806 cases) in 1999. The 45 cases (1 in 489 cases) transferred for criminal prosecution is still below the 1997 figure even though the number of infringement cases brought in 2000 represents a 43% increase over the 1997 figure. These levels of criminal prosecutions are too low to serve as a deterrent to wrongdoers.

One reason for such a low criminal prosecution rate is that administrative authorities are often reluctant to transfer cases to judicial authorities. Administrative authorities expend time and resources in conducting raids and seizures but are unable to collect fines from the perpetrator when a case is transferred. AICs authorities will also have to transfer to judicial authorities confiscated products, machinery, and other evidence that might otherwise be sold at a public auction with the proceeds retained by the AICs. An additional reason is that the current practice in the PRC is to set a high

evidentiary bar for criminal cases by requiring physical evidence of completed sales in the form of sales orders, sales receipts, ledger and account books, and tax documents. Counterfeit goods seized on the premises, packaging, or the equipment used in the manufacture of counterfeit goods, no matter how large the quantity, are not considered evidence of sales. Few if any counterfeiters keep such physical records of their illegal activities and gathering probative evidence has proven to be a difficult burden for most brand owners.

V.
Exports from China

Recent changes indicate an ominous development: exports from China are likely to increase dramatically beginning in 2004.

a. Exports to the United States

In 2003, U.S. Customs seized a total of $94 million of counterfeit and infringing goods in ports of entry in the United States. Of this total, products originating in China accounted for 66% of the total and $62.4 million of the total. The 2003 figures for China represent a significant increase over comparable 2002 figures when China accounted for 49% of all counterfeiting and infringing products and $48 billion of the total $98 million of illegal product seized by US Customs.

United States Customs Service IPR Seizure Statistics 2003

Trading Partner		Domestic Value	Percent of Total
China	$	62,468,018	66%
Hong Kong	$	8,236,507	9%
Korea	$	3,219,268	3%
Pakistan	$	2,010,465	2%
Mexico	$	1,966,929	2%
Malaysia	$	1,331,925	1%
Philippines	$	1,224,058	1%
Canada	$	1,189,160	1%
Switzerland	$	676,197	Less than 1%
Thailand	$	662,112	Less than 1%
All Other Countries	$	11,024,588	12%
Total FY 03 Domestic Value	***$***	**94,019,227**	
Number of Seizures		**6,500**	

Counterfeits from China and Hong Kong (through which many counterfeits produced in China are transshipped) accounted for $80 million or 75% of the total. No other country accounted for more than 3% of counterfeit products. As it is well-known that many counterfeit products, such as auto parts, that originate in China are transshipped through other countries, such as those in South America and through Canada, before ultimately entering the United States, China accounts for a significantly higher percentage than the 66% set forth the 2003 US Customs statistics. It is possible that China accounts for as much as 80% or more of the counterfeits goods that enter the United States.

Note that the $94 million figure represents only the value of the products that are seized by US Customs in 2003, which can only be a tiny fraction of what enters the US market. If the total value of the products seized represents 1% of the counterfeiting and infringing product that enters the U.S. market then the total value of counterfeits that entered the US market in 2003 is approximately $10 billion with China accounting for between $6 and $8 billion of that total. It is possible that the actual figures are much higher.

b. Exports from China to Other Locations Around the World

While exports of counterfeits from China into the United States have a direct impact on the rights of IP owners in the U.S., exports by China to countries around the world also have an economic impact on U.S. IP owners for two reasons. First, exports of counterfeits may displace exports of legitimate products by U.S. IP owners. For example, if China exports counterfeit batteries to Canada that are then purchased by consumers, this might decrease demand for legitimate batteries that will deprive U.S. battery manufacturers of an export opportunity. Second, U.S. IP owners need to expend additional resources to combat a global counterfeiting problem that emanates in large part from China. The expenditure of significant resources in time, capital, and management is a drain on U.S. IP owners and a diversion of these resources from a more productive use in building additional business capacity in the United States and other locations that might lead to greater productivity, increase revenues, and the creation of new jobs.

c. Significant Rise in Exports from China

There is likely to be a significant increase in the amount of counterfeit products exported from China to the United States beginning this year (2004) and for the foreseeable future for several reasons.

First, in accordance with its WTO obligations, China has amended its foreign trade laws in December 2003 to eliminate the monopoly on export rights that had been limited to state trading companies. Under prior law, only certain designated state trading companies were permitted to lawfully export products from China to other countries. This restriction meant that counterfeiters had to find a compliant state trading company

that was willing to work together with the counterfeiter in exporting the illegal goods overseas. To be sure, there was no shortage of export companies willing to work with counterfeiters in exporting counterfeit and infringing products, but this requirement nevertheless created an additional obstacle and costs that have now been removed. The effect of the elimination of the monopoly on export rights means that anyone can now lawfully export products from China. Counterfeiters will now be able to export on their own without the need to find a suitable and willing partner and to pay the fees for its cooperation. As counterfeiters are likely to take full advantage of the elimination of this restriction, exports of counterfeits from China to the United States are likely to surge for the foreseeable future.

Second, counterfeiters in China have begun to make use of the Internet to sell counterfeit products to consumers from all over the world. The increase in the use of the Internet, combined with the elimination of restrictions on export privileges, is likely to result in a significant short-term increase in the export of counterfeit products to all parts of the world.

Third, China is now actively negotiating with its trading partners around the world to lessen customs requirements and other impediments for the importation of its products. China has of course legitimate national interests in seeing that its legitimate products are imported by other countries with the least amount of impediments but the lowering of these requirements will also benefit the trade in counterfeit goods as they will also enter into these countries with less scrutiny. China is currently negotiating with several countries on the north coast of South America from where counterfeit products, entering these countries will little scrutiny, might then be transshipped to other countries around the world, including the United States.

Finally, it should be emphasized that China does not have any current criminal laws that apply to the export of counterfeit products. As the earlier discussion indicated, China has criminal laws against commercial scale counterfeiting within China, although the effective enforcement of these laws is impeded by various obstacles. In the area of exports, however, as there are no applicable criminal laws at all, counterfeiters can export with impunity from both civil and criminal liability. While the enforcement of China's laws against counterfeiting within China has serious inadequacies at least these laws exist. In the area of exports there are no laws and given the choice between committing an activity that violates domestic law and being exposed to civil and criminal sanctions and the choice of exporting with impunity, it is likely that counterfeiters will increasingly turn to exports to earn profits.

Given these developments – the elimination of the state monopoly on export rights, the rise of the internet, China's pressure on its trading partners to reduce entry requirements, and the lack of criminal penalties – we are likely to see a significant rise in the export of counterfeits from China to the United States and locations around the world.

Counterfeiting in China and its Effect on U.S. Manufacturing

Professor Daniel C.K. Chow
The Ohio State University College of Law
Columbus, Ohio 43210

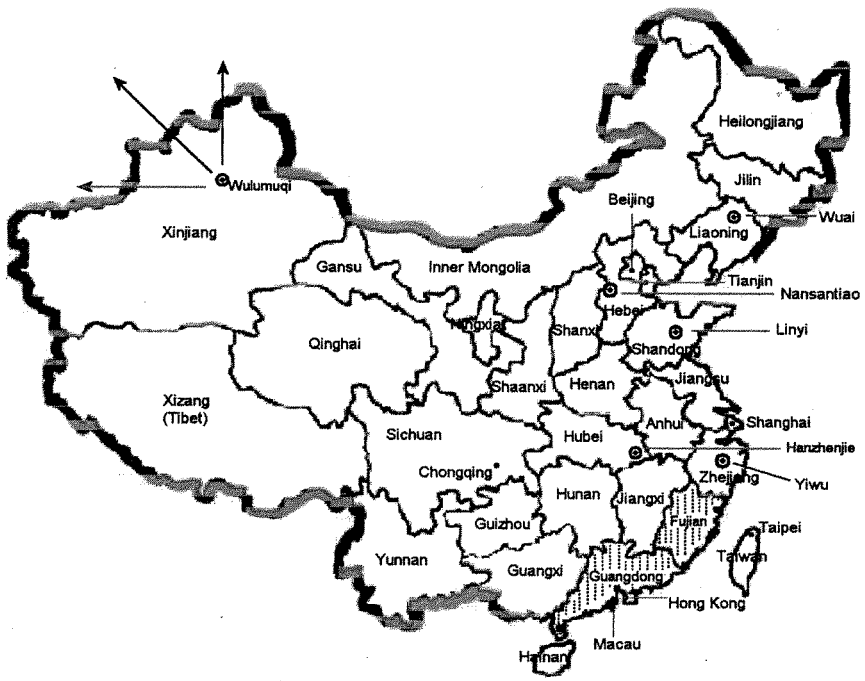
Overview

- MOST SERIOUS COUNTERFEITING PROBLEM IN WORLD HISTORY
- PRC ESTIMATES PUT COUNTERFEIT TRADE AT $19-24 BILLION PER YEAR AND 8% OF GROSS NATIONAL PRODUCT
- U.S. INDUSTRY GROUPS ESTIMATE LOSSES IN THE BILLIONS TO TENS OF BILLIONS PER YEAR
- 15-20% OF WELL-KNOWN BRANDS OF CONSUMER PRODUCTS ARE COUNTERFEIT
- DIRECT OR INDIRECT INVOLVEMENT OF GOVERNMENT ENTITIES
- EXPORTS FROM CHINA MAKE THIS A GLOBAL PROBLEM

Origins

- GROWTH OF CHINA'S ECONOMY
- ROLE OF FOREIGN DIRECT INVESTMENT AND TECHNOLOGY TRANSFER
- PROBLEMS OF POLITICAL AND LEGAL REFORM: LOCAL PROTECTIONISM AND INADEQUATE ENFORCEMENT

Major Distributors and Manufacturers of Counterfeit Goods in China



Harm to U.S. Brands in China

Figure One: Beijing Case Study

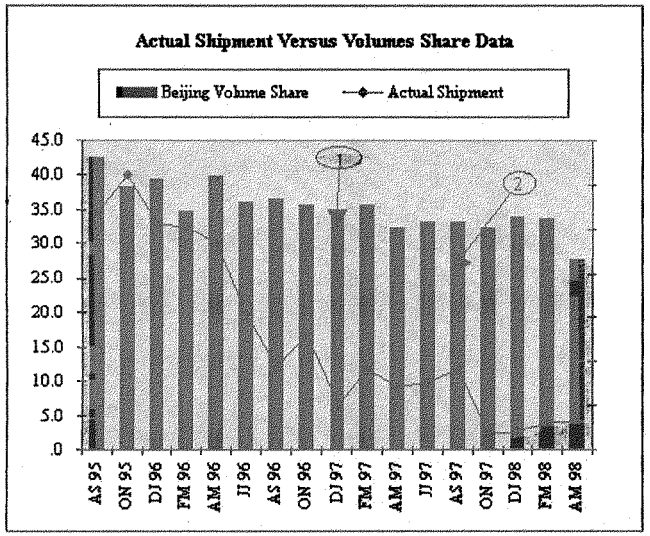
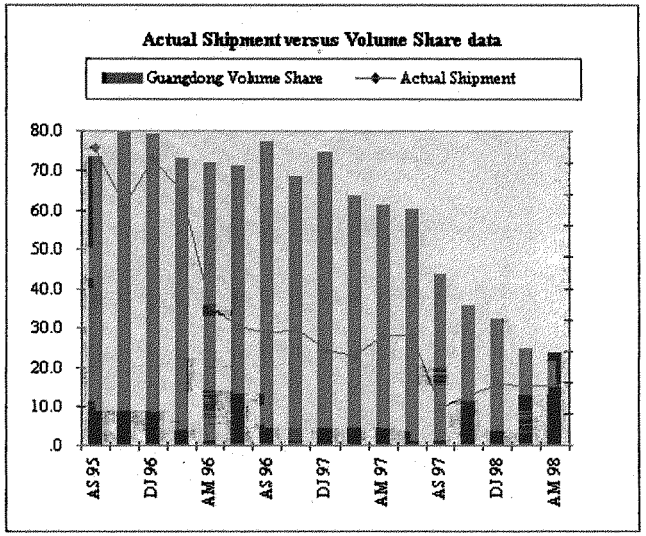


Figure Two: Guangdong Case Study



Administration of Industry and Commerce Trademark Enforcement Activity, 1997-2000

Year	Cases	Avg Fine	Avg Damages	Criminal Prosecutions
1997	15,321	$679	$40	57 total or 1 in 268 cases
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1999	16,938	$754	$40	21 total or 1 in 806 cases
2000	22,001	$794	$19	45 total or 1 in 489 cases

Source: State Administration of Industry and Commerce Annual Statistics

EXPORTS

- COUNTERFEITS FROM CHINA MAY ACCOUNT FOR 80% OF EXPORTS TO U.S. AND OTHER COUNTRIES
- COUNTERFEITS FROM CHINA SEIZED BY U.S. CUSTOMS IN 2003 VALUED AT $62.4 MILLION
- SIGNIFICANT INCREASE IN EXPORTS OF COUNTERFEITS FROM CHINA STARTING 2004

Future Trends

- POLITICAL WILL
- WORLD TRADE ORGANIZATION AND TRIPS

UNITED STATES SENATE

GOVERNMENTAL AFFAIRS COMMITTEE

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

HEARING

"Pirates of the 21st Century: The Curse of the Black Market"

Tuesday April 20, 2004
10:00 a.m.

WRITTEN STATEMENT OF THE GORMAN-RUPP COMPANY
Mansfield, Ohio

On behalf of The Gorman-Rupp Company, I would like to thank Chairman Voinovich and the members of the Subcommittee for conducting this hearing and giving me the opportunity to testify regarding an important issue facing our Company and many other United States manufacturers.

Overview of the Issue

There is an increasing number of unauthorized foreign-made duplicate and near-duplicate copies of U.S. manufactured products, including pumps manufactured by The Gorman-Rupp Company, being imported into the United States. We have seen a steady growth of imports of these copies which are aimed directly at stealing our product designs, after-market parts, and, on occasion, our identity in the market place. Importation of these copies is affecting job retention and growth in U.S. Manufacturing and is deceiving consumers.

The copies are often referred to as "counterfeit," "pirated" or "knock-off " products. These terms have also been applied to copied computer software, movies and music compact discs. However, the problem goes much further than just these products.

About The Gorman-Rupp Company

The Gorman-Rupp Company is a Mansfield, Ohio based manufacturer of pumps, pumping systems and related equipment for many applications including water, wastewater, construction, industrial, petroleum, original equipment, agricultural, fire protection, heating, ventilating and air conditioning and military applications.

The Company was founded in Mansfield, Ohio in 1933, during the Great Depression, by two unemployed engineers who had some new ideas about how to design, manufacture and sell

pumps. One of these gentlemen was my grandfather. They borrowed $1,500 and started The Gorman-Rupp Company. The $1,500 is the only external capital that has ever been brought into the Company. Today the Company has $200 million in annual sales and employs 1000 (600 in the State of Ohio). Gorman-Rupp and its products are recognized and respected throughout the world. The Company is truly an American manufacturing success story.

Competitive Environment in the Pump Industry

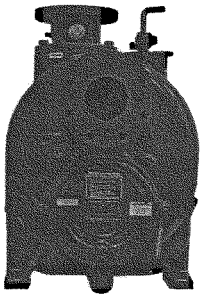
Competition has always been keen in the pump industry. Until recently, most competition was among manufacturers vying for market share with **their own** ideas, designs, engineering and manufacturing. Gorman-Rupp is not afraid of ethical competition. We welcome it. Competition has made us a better, smarter and more efficient company during our seventy-one years of operation.

Today, some foreign pump manufacturers have taken a less ethical approach to competition through stealing our designs, engineering and identity for monetary gain in pump and after-market part sales.

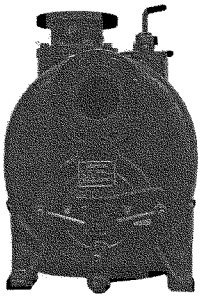
Comparative Examples of Gorman-Rupp and "Counterfeit" Pumps

Pictured below on the left are front and side views of the Gorman-Rupp T Series 4" self-priming centrifugal pump. This pump is one of our main products and is primarily used by municipalities for the handling of sewage.

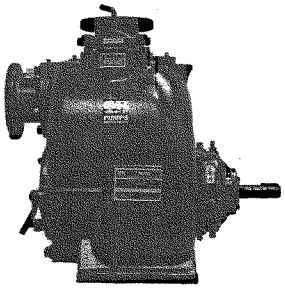
Pictured below on the right are front and side views of the "knock-off" of the Gorman-Rupp pump, the Gresco (Brazil) "Model T" "4" self-priming centrifugal pump. This pump is now sold in the U.S. as "Series XT." This pump is not only nearly visually identical to the Gorman-Rupp pump, but is also functionally identical in dimensions. Bombas Esco (Brazil), manufacturer of this pump, is a former distributor of Gorman-Rupp products. The introduction of the letters "GR" to the name of their line of pumps does not appear to be an accident.



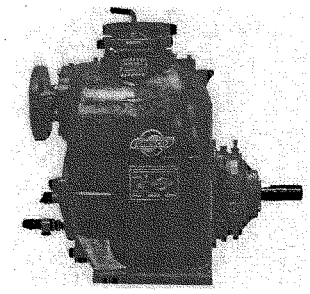
Gorman-Rupp



Gresco



Gorman-Rupp



Gresco

Imbil (Brazil) has also produced similar nearly visually and functionally identical copies of Gorman-Rupp pumps.

The Process of Product "Counterfeiting"

Current technology has simplified the process of copying the trade dress and engineering of products. It is much easier to do so than in the past. All that is needed is one of the original products, the proper measuring equipment and an unethical competitor can be in business without the need for expensive research and development costs. Foreign manufacturers also enjoy much lower labor and overhead expenses than their U.S. counterparts (such as wages, health insurance, litigation expense, excess regulations, etc.). As a result, foreign copiers can sell pumps and parts at a much lower cost than their U.S. competitors. All of this is at the expense of the U.S. manufacturer that originally developed the product.

Protection From "Counterfeiting"?

Patents are helpful, but they do not eliminate pirating. In some cases, they even help explain your proprietary information, technology and trade secrets to a pirating company. It is also cost-prohibitive to patent your product in every country in the world.

Recent U.S. Supreme Court opinions have made it more difficult to protect trade dress. Trade dress is the external shape or packaging of an article. The trade dress of the Gorman-Rupp T Series pumps is known throughout the world.

Legal recourse against copied products in foreign courts is very time consuming, expensive and in some cases, almost impossible.

Sales "Counterfeiting"

Pirating companies or their distributors many times use the sales tactic, "It's just the same as the original product or part." In some cases, they purposely confuse the customer into believing that what they are purchasing **is** a Gorman-Rupp product or part.

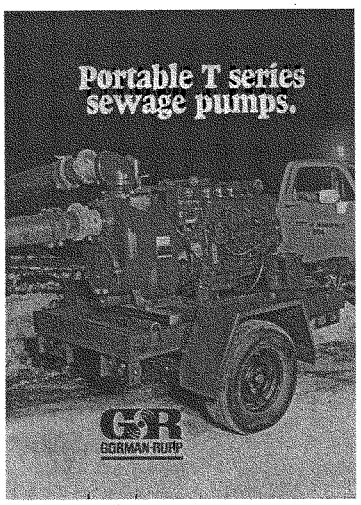
Pirates have deceived some Gorman-Rupp U.S. customers who have learned to their expensive dismay after purchasing copied pumps and parts that they are not truly interchangeable with, and do not possess the quality of, Gorman-Rupp products.

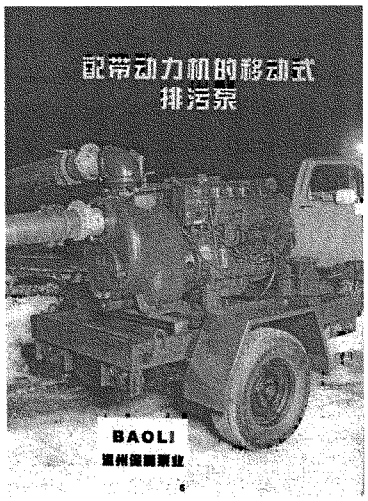
Advertising Literature "Counterfeiting"

Pirating does not stop with the copying of physical products. Gorman-Rupp recently became aware of a Chinese company, Baoli, that not only copied the trade dress and design of our pumps; they also copied our advertising literature.

Please note the familiar shape.

Baoli's brochure contains product pictures with the Gorman-Rupp trademark still displayed on them.





The Chinese knock-off pumps will find their way to the U.S. market if we do not have some form of legislative or administrative protection.

The Brazilian pirates have also copied Gorman-Rupp advertising material, product manuals and product performance specifications.

Gorman-Rupp's Dilemma

We have found that little or no assistance is available from existing legislation and administrative agency authority.

Gorman-Rupp's Recommendations:

Gorman-Rupp asks for the following to be considered:

1. Establish a single point of contact within the Department of Commerce that is specifically directed and funded to assist U.S. manufacturers that have had their products pirated.

2. Levy stiff import duties on proven importers of pirated U.S. products.

The Gorman-Rupp Company does not want to stand in the way of honest competition. As stated before, we welcome it. However, we need to level the playing field against pirating of our own products and identity.

Chairman Voinovich and members of the Subcommittee, we have a common goal: retention and creation of jobs. Through introduction of legislation and procedures that will seriously impede the importation of pirated products and parts, we will be able to expand and grow in the United States.

Thank you for the attention you have given our issue. I look forward to working with you and your staff in order to further address this problem.

Jeffrey S. Gorman
President and CEO
The Gorman-Rupp Company

WRITTEN TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, RESTRUCTURING AND THE DISTRICT OF COLUMBIA

Title: Pirates of the 21st Century: The Curse of the Black Market

PHILLIP A. ROTMAN II
ASSISTANT PATENT AND TRADEMARK COUNSEL
DANA CORPORATION

WASHINGTON, D.C.

APRIL 20, 2004

Statement Prepared by Phillip A. Rotman II, Esq., Assistant Patent and Trademark Counsel of Dana Corporation

INTRODUCTION

Mr. Chairman and Distinguished Members of the Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia, my name is Phillip Rotman and I am Assistant Patent and Trademark Counsel for Dana Corporation. I am testifying on behalf of Dana and will be sharing our views and experiences on dealing with counterfeiting of manufactured product.

First, I would like to thank the Subcommittee for the invitation. We are honored and delighted by the invitation and hope that we can help the Subcommittee with its important work on ascertaining the status and progression of the efforts of the National Intellectual Property Enforcement Coordination Council, which was created by the Bush Administration three years ago and overall government actions to address counterfeiting. We understand that this Council consists of the Commerce Department (including the Patent & Trademark Office), the U.S. Trade Representative's office, the Department of Justice and the Bureau of Customs and Border Protection. As will be detailed below, this is a very important topic for Dana and we are pleased that this hearing is being held and that a hearing was held last month before the Senate Judiciary Committee.

INTRODUCTION TO DANA CORPORATION

Dana Corporation is a global leader in the design, engineering, and manufacture of value-added products and systems for automotive, commercial, and off-highway vehicles. Delivering on a century of innovation, the company's continuing operations employ approximately 45,000 people worldwide dedicated to advancing the science of mobility. Based in Toledo, Ohio, Dana operates technology, manufacturing, and customer-service facilities in 22 states and 30 countries. Sales from continuing operations totaled $7.9 billion in 2003. Dana has been listed on the Fortune 500 every year since it was first published in 1954.

Intellectual Property is not new to Dana. In fact, Dana was founded on intellectual property rights. One hundred years ago this month, an engineer named Clarence Spicer began producing his encased universal joint, which effectively replaced the sprocket-and-chain power transmission of the day. The motor vehicles of the early 20th century transmitted engine power to the wheels through two sprockets connected by a chain – much like a bicycle. The parts were noisy, unreliable, and difficult to lubricate causing frequent breakdowns on the unpaved and bumpy roads of the day. Fortunately, Spicer had devised a better way to transmit engine power. He placed universal joints on the ends of a tubular shaft and, for the first time ever, encased the joints in bowl-shaped housings to retain their lubrication and shield them from road debris. And with that, Clarence Spicer had quite literally "unchained" the automotive industry.

Spicer's product was protected by two patents he earned while studying engineering at Cornell University. When his patents were published in the early automotive and patent journals, motor vehicle manufacturers quickly demanded the product.

One hundred years later, Dana is still in the business of providing innovative solutions for the vehicular industry. Intellectual property is still very important to Dana's business and its products. Dana has significant intellectual property holdings in the United States and abroad. Currently, Dana and its subsidiaries have 1094 active US patents and 497 pending US applications. Globally, Dana and its subsidiaries have 2718 patents and 2461 pending applications. Dana and its subsidiaries had 126 patents issued by the United States Patent and Trademark Office in 2003. Patents are not the only significant IP holding of Dana. Dana and its subsidiaries have 390 United States trademark registrations and 68 pending applications before the United States Patent and Trademark Office. On a global basis, Dana and its subsidiaries own 2543 trademark registrations and have 153 pending trademark applications.

Over the years, and even dating back to the early days of Dana, infringement of intellectual property rights has been an issue that Dana has confronted. However, counterfeiting of automotive components appears to be on the rise for us and others in the automotive industry in the last five years. As such, I am pleased that our written submissions and testimony will discuss counterfeiting of Dana products and brands, what we have been doing to combat it, and how we could be assisted.

DANA'S BRANDS AND TRADEMARKS

I am the attorney who serves as the chief intellectual property counsel for about half of Dana's operating divisions. I represent the product lines/divisions that have some of the highest frequency of counterfeiting, including PERFECT CIRCLE® piston rings and liners made in Michigan, Kentucky, Missouri, Indiana, and Arkansas (*a picture of the genuine product box is shown as Attachment A*), CLEVITE 77® and GLACIER VANDERVELL® engine bearings made in Ohio and Iowa (*a picture of the genuine product box is shown as Attachment B*), CLEVITE® engine hard parts, VICTOR REINZ® gaskets made in Illinois, Wisconsin, Kentucky and Tennessee *(a picture of the genuine product packaging is shown as Attachment C*), and SPICER® universal joints made in Ohio, Indiana, Virginia, Pennsylvania, Illinois, Tennessee, Michigan, North Carolina and Washington (*a picture of the genuine product box is shown as Attachment D*). These products are likely counterfeited because low quality versions are easy to make at substantially reduced costs.

OVERVIEW OF DANA'S ANTI-COUNTERFEITING ACTIVITY

As mentioned above, we have seen a significant increase in the counterfeiting of our brands and trademarks since 2000. During this 4 year time period, we have instituted over 40 actions against counterfeiters in numerous countries[1] to seize counterfeit

[1] Countries include China, Taiwan, United States of America, Venezuela, Iran, Bulgaria, South Africa, Nigeria, and Tunisia.

products of Dana's brands. We have had or currently have many ongoing investigations in many other countries.[2]

Dana has not been able to quantify the losses that it has suffered due to counterfeiting. Many organizations, such as the U.S. Customs Service, the International Anti-Counterfeiting Coalition and others, have attempted to estimate job losses and losses to the overall economy due to counterfeiting. These published numbers are staggering. The U.S. Customs Services has previously said that counterfeiting has resulted in the loss of 750,000 jobs and costs the United States around $200 billion annually. Some organizations estimate that more that $12 billion are lost in sales annually in the auto industry and 200,000 auto jobs have been lost due to counterfeiting.[3]

During this time, we have seized or prevented the entry into commerce of about 250,000 sets of parts valued at over $5 million. Fines against counterfeiters have only totaled about $25,000 and civil recoveries have only totaled around $200,000. Dana spends significant resources to fight this problem, including about $250,000 annually in outside counsel fees and expenses, as well as management time. These costs do

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[2] Countries include, among others, China, United States, Turkey, Algeria, United Arab Emirates, Israel, Morocco, and Venezuela.

[3] See www.iacc.org and George W. Abbott, Jr. and Lee S. Sporn, *Trademark Counterfeiting* § 1.03[A][2] (2001); Richard C. Noble, *From Brakes to Plugs to Engines, Counterfeiters Produce, Push Parts,* Flint J., September 3, 1995; H.R. Rep. No. 104-556 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1074, 1075.

not include fees and expenses for other infringement issues, such as patent infringement matters, trademark registration oppositions, and cybersquatting cases.

PROBLEMS WITH COUNTERFEIT PRODUCTS

Product counterfeiting is not limited to luxury consumer goods, such as watches, handbags, and clothing. It exists with all well known brands. Fighting the counterfeiters of Dana's products and brands is imperative. It cannot be ignored or left to exist unchallenged. Dana loses sales of its products when counterfeit products are sold. This has a cascading effect and many people are hurt by the sale of counterfeit products. As mentioned above, US manufacturing jobs are lost and our shareholders lose value. When inferior parts do not work as well as genuine parts, consumer typically blames us and may never buy another Dana product. These inferior performing products tarnish the value of our brands.

Trademark law exists to protect the consumer. Consumers have a right to know the source of the products they buy. They are harmed when mislead. Safety of the consumer is also a concern for Dana. People can be hurt or even killed when an inferior or the wrong product is used in a vehicle.[4] Finally, governments lose as well

[4] See www.iacc.org (In 1987, seven children died when the bus they were riding in flipped over. The brakes that were just installed on the bus bore a well-known trademark. Further examination, however, showed they were made of sawdust.) *A System Approach to the Counterfeit Problem, Genuine or Bogus: How Can You Tell?*, ASTM Standardization News, April 1990, at 38.

due to counterfeiters. The government loses tax revenues as well when counterfeit and not genuine parts are sold.[5] The only party who benefits is the counterfeiter.

Dana cannot enforce its rights against IP infringers and especially counterfeiters unless we become aware of the matter. Dana has people looking out for counterfeit products so that we can take action. We have spent time educating our sales force, especially in the service parts industry or aftermarket, on what to look for in counterfeit products. We have also educated investigators around the world. They are on the look out for us. We even have developed a CD-ROM presentation recently in both English and Chinese that explains our brands, how we package, what to look for in counterfeiting and then shows examples of very good counterfeits and very bad counterfeit products and packaging.

Now, we would like to share experiences in various countries and express our desires for changes to assist trademark and brand owners in fighting counterfeiting.

CHINA

About 2/3 of Dana's anti-counterfeiting activities have been focused in China. Beyond counterfeiting problems in China, other reasons are present for why Dana is

[5] See www.iacc.org and Lost tax revenue costs New York City alone approximately $350 million a year in lost revenue -- *Joseph Scott, He Is the Fashion Police, New York, March 6, 1995, at 38.* According to a 1993 Business Wire release, product counterfeiting is believed to cost California $7.5 billion a year and 25, 000 jobs. In Michigan, a piracy rate of 14.7% translates into $64.7 million in retail losses and $34.9 million in lost tax revenue. *BSA Seeks to Sink Software Pirates,* Grand Rapids Business Journal, vol. 20, No. 18, pg. 3 (May 6, 2002).

more active, and perhaps successful, in China. Dana obtains leads from numerous sources, including our distributors, sales representatives, a network of investigators, and local branches of the Chinese government itself. We are well organized in China to combat this problem and have good relations with various government agencies due to working within the Chinese system and our repeated actions before the same officials.

In China, we use local branches of the State Administration of Industry and Commerce (AIC) for administrative assistance in inspecting and raiding facilities when counterfeit product has been identified. We are not left to take action on our own. This government agency is responsible, among other things, for the enforcement of trademark infringement and unfair competition. Dana gathers as much evidence and information as we can in advance of taking our case to the AIC. In most instances, we have obtained product and/or packaging and have analysized it in advance of submitting our case to the AIC. We have only had a few instances where the AIC turned down our case. We believe that our success is due in large part to obtaining advance information and frequently working with the same local AIC offices.

Most of our raids have been against small shops that are either selling small quantities of goods, or repackaging shops. Dana has located a few factories making packaging or putting our trademarks on fake products. Unfortunately, many products found at factories are not marked with our trademarks and the packaging occurs at locations away from the manufacturing. We have not yet identified companies exporting

counterfeit Dana branded products from China, but are periodically provided with vague information that counterfeit Dana branded products are being exported to other parts of the world, such as Nigeria and North African countries.

Our concerns in China are not with the government's unwillingness to act; the Chinese government has taken prompt action in matters that Dana has identified. Furthermore, they have generally destroyed seized counterfeit goods. I attended a destruction ceremony last month outside Beijing where packaging seized in a 2003 raid was destroyed. Rather, our concern is with the way fines are calculated. At the end of the case, the AIC issues its findings in the form of a punishment decision, including destruction or alternation of the product and fines. These fines are calculated based on the counterfeit sales, not what was seized.

In a 2002 case in Shiyan, Hubai Providence, we not only found packaging that was being counterfeited, but products themselves were also being falsely marked. Attachment E shows a comparison of a genuine engine bearing and counterfeit engine bearing. We needed to enlist the help of some of our engine bearing experts to tell the difference. The physical differences were not visible to the naked eye. The counterfeit product was of a poor quality. In fact, the product could be bent by hand. As part of the same case, we found 10 different auto parts shop in the same auto market selling counterfeit Dana products. One of the shops had a cellar covered with plywood and a rug to hide the counterfeit product. Had one of our investigators not walked over the rug, we may never have found this cellar.

In another 2002 Chinese case, we seized over 60,000 empty counterfeit boxes that were ready to be packaged with counterfeit products. The AIC did not assess a very big fine, only about $6000, since the product has not been sold into the marketplace.

In a 2003 case in Beijing, Dana found a Chinese repackager with over 8,000 boxes ready to receive goods. The counterfeit packaging quality was very good. The counterfeiter even had display plaques prepared that would lead consumers to believe that he was an authorized Dana distributor. However, we raided him early. He had only several cases of product and had made minimal sales. His fine was only about $1500. Clearly, he was engaging in criminal activity, but was not punished as such. Although product and packaging destruction have a deterrent effect, the low level of fines does not have a more beneficial deterrent effect against future criminal activity. Besides fines being low, the fines are paid to the government, not the trademark owner. We would prefer if the fines were shared with the trademark owner.

Dana prefers using administrative actions before the AIC over civil judicial actions in the People's Courts. These procedures are quicker less expensive, and the AIC seizes the goods and records immediately. This quick action reduces the destruction of evidence possibility. However, there are some disadvantages to using the AIC. We depend on the AIC to review the books and records, and then identify the sales and source. The trademark owner does not get direct access to that information, or at best, gets limited access to that information. Dana would like to have access to that information so that we can identify the source and the distribution channel. We suspect that the Chinese are not hiding information from us, but rather, the exchange

of information, or discovery as we know it in the USA, is not a widely accepted part of their legal system. In fact, it is not widely accepted in many other legal systems. We have to bring civil actions in one of the People's Court against the counterfeiter to obtain damages. Discovery would be limited even in these cases. In most instances, the cost to bring a civil action exceeds the potential recovery or the infringer does not have sufficient assets to pay a judgment and as such, it is not worthwhile. It would be advantageous to trademark owners if the AIC could also provide restitution to the trademark owner.

Finally, the Chinese criminal authorities are typically unwilling to take criminal action against counterfeiters unless it is the third time they have been caught. Dana has raided several shops twice, and we revisit previously raided shops periodically.

UNITED STATES OF AMERICA

Dana's counterfeiting problems are not only a foreign issue. We also had a counterfeiting case last year in the United States of America. Upon completing an investigation, we filed a civil action in US District Court for trademark counterfeiting and trademark infringement, and requested an ex parte seizure order. However, the first question from the court was whether we had given the other side notice of the law suit. We view counterfeiters as criminals and are very concerned that they will destroy product and other evidence if they learn about an investigation or lawsuit. This could have been problematic if the defendant destroyed its records and products before the hearing. I am happy to report in this instance that the defendant cooperated

with us in our investigation, turned over all the counterfeit goods and even provided his off-shore source.

Although the United States criminalized counterfeiting of trademarks over 20 years ago[6], we do not see that the criminal laws are often enforced by the US government. If they are being enforced, then the federal government is not well publicizing it. For the most part, companies are left on their own to combat criminal enterprises that are likely well organized. Fortunately, Dana is a large company and can deal with this issue. The U.S. Customs Service, the FBI, and the Department of Justice have not done much on outreach to the manufacturing community to provide assistance. This is an area for improvement. We suspect that not many companies or attorneys would know who to contact at either agency to report criminal counterfeiting or request assistance. In fact, Dana was not even aware of the National Intellectual Property Rights Coordination Center and its role as an inter-agency clearing house to combat counterfeiting crimes until asked to testify at this hearing.

Dana has not used the U.S. Customs Service to assist us in combating counterfeiting. Several years ago, a potential case surfaced in the Buffalo, New York area. However, the communications with the U.S. Customs Service was sporadic and we were told that resources were being diverted to deal with terrorism and other issues. We cannot help but wonder whether intellectual property crimes are a priority for the U.S. Customs Service and the FBI as they claim.

[6] See 18 U.S.C. § 23018-2320 (1988).

United States criminal law on product and label counterfeiting could be stronger. Recently, the 10th Circuit Appeal Court overturned a conviction and found that a man could not be prosecuted for shipping fake labels to a buyer because the labels, while fake, were not "on or in connection with" any counterfeit goods.[7] While another part of Title 18 of the United States Code addresses counterfeit labels and packaging, it is limited to albums, computer programs, motion pictures and other audiovisual works. It does not extend to other products, such as vehicular parts.[8] These deficiencies in the law need to be addressed immediately by Congress.

Finally, product counterfeiting crimes need to be elevated to the same importance level as the distribution of narcotics and drugs. Penalties for counterfeiting need to be more severe than monetary fines and prison sentences. The government needs the right to seize assets used in the counterfeiting operation, such as equipment, tooling and computer, the right to seek assets forfeiture as a result of the counterfeiting operation, such as cars, houses, boats and jewelry.

In summary, the United States needs to become a leader in this area before it can ask others countries to enhance IP protections.

AFRICA AND THE MIDDLE EAST

Dana's experience in many of the North African countries, Nigeria, and Syria, has not been so good. Local attorneys do not appear as prepared to deal with the issues and

[7] See the interpretation of 18 U.S.C. §2320 in *United States v. Giles*, 213 F.3d 1247 (10th Cir. 2000). This case involved luxury purses.

[8] See 18 U.S.C. §2318.

the courts act very slowly. Courts acting slowly are especially problematic since acting quickly is important in taking action against counterfeiters. In a Tunisia case, the court took many months to act after we provided it with all the evidence. When it did act, however, it found no counterfeiting because the shop distributing the counterfeit product was not the manufacturer. Nigeria is especially problematic given the rampant criminal activity and the difficulty traveling in this area. Counterfeit products and packaging are not made in this part of the world. We are told that they are imported from China, Taiwan or India.

In contrast, South Africa appears to have a good system and procedures for dealing with counterfeiters. The attorneys are well qualified and the courts act swiftly to seize the counterfeit parts and records. In a 2002 case, Dana raided a shop selling counterfeit VICTOR REINZ® cylinder head engine gaskets. We were given access to the shop's records so that we could identify the source of the counterfeit products. Attachment F shows the counterfeit product seized and a side-by-side comparison of the genuine and counterfeit gasket products. Interestingly, the company who sold this product to the South African shop mixed both genuine and counterfeit products together.

TAIWAN

Dana's experience in Taiwan has been very favorable. We raided a factory in 2001 and seized over 147,000 sets of engine bearings values at over $2 million that were marked with one of our trademarks. The initiation of criminal prosecution for this blatant act of counterfeiting has led to a favorable civil settlement, including the

payment of damages and the destruction of all the goods and importantly the tooling used to make the counterfeit parts.

CLOSING REMARKS

Overall, the United States has to improve its laws and enforcement efforts. Otherwise, it cannot expect other countries to have more stringent laws and punishments.

One overall impediment to proceeding against counterfeiters in many countries, including China and Taiwan, is the archaic need for a legalized power of attorney for foreign companies. The legalization process requires that a power of attorney be notarized, then the notarization must be confirmed by the Secretary of State whereafter the document must obtain approval from that country's embassy. This process can take a month to 2 months. Needless to say, this procedural requirement can slow down a trademark owner trying to take action against a counterfeiter when speed of conducting the raid (since product can be moved easily or exhausted) is paramount. Dana has attempted to have these Power of Attorney documents executed in advance or to provide our firms with general Power of Attorney so that we have them when needed. In other words, we do not want to be slowed down by bureaucratic red tape. Many countries have eliminated this requirement. U.S. trademark owners would be able to more quickly take action against counterfeiters if other countries eliminated the requirement as well. Raids and legal action against counterfeiters could proceed more quickly. The U.S. government should seek change from other governments.

Each company previously fought counterfeiting on its own. In the last year or so, we have seen cooperation in our industry, even among competitors. Organizations such as MEMA have promoted such cooperation by sponsoring telephone conferences and seminars to educate the industry. We have worked together with others in policing trade shows for counterfeiters. By working together and discussing the issues, we share information. Dana has identified potential counterfeit products of its competitors during its investigations, and has advised its competitors about these findings. Government agencies should also be in communication with the manufacturing industry. With government agencies and the manufacturing industry being organized, working together and communicating, we can collectively fight this growing and serious problem more effectively.

Again, Dana would like to thank the members of the subcommittee for the invitation to testify. Your support on this matter strengthens our resolve to fight this significant problem that the manufacturing industry faces. Should the Subcommittee or its members like additional information, please let us know. I will be happy to answer any questions, except those that may relate to information on ongoing investigations.

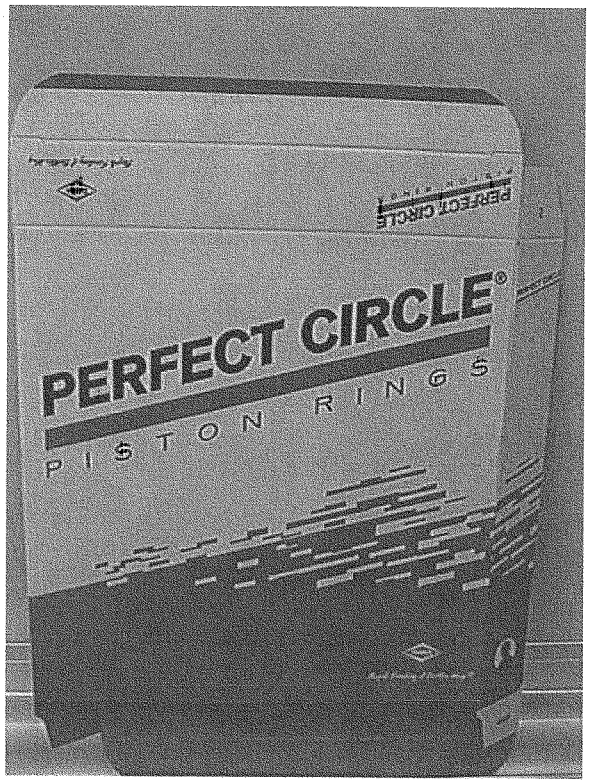
Respectfully submitted

Phillip A. Rotman II
Dana Corporation

INDEX OF ATTACHMENTS

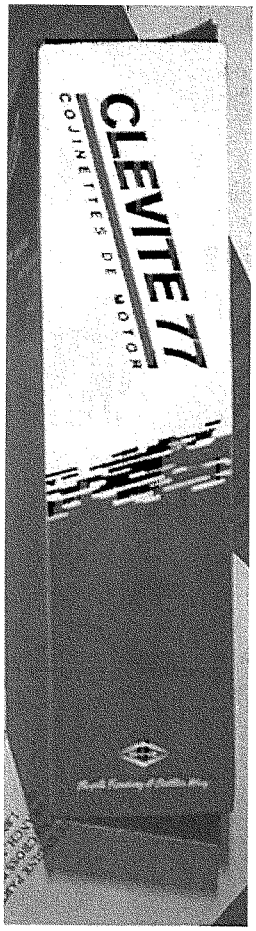
A	Genuine Perfect Circle® Box
B	Genuine Clevite 77® Box
C	Genuine Victor Reinz® packaging
D	Genuine Spicer® Box
E	markings on genuine and counterfeit engine bearings
F	South African seizure of counterfeit Victor Reinz® cylinder head engine gaskets

ATTACHMENT A



Genuine Box

ATTACHMENT B

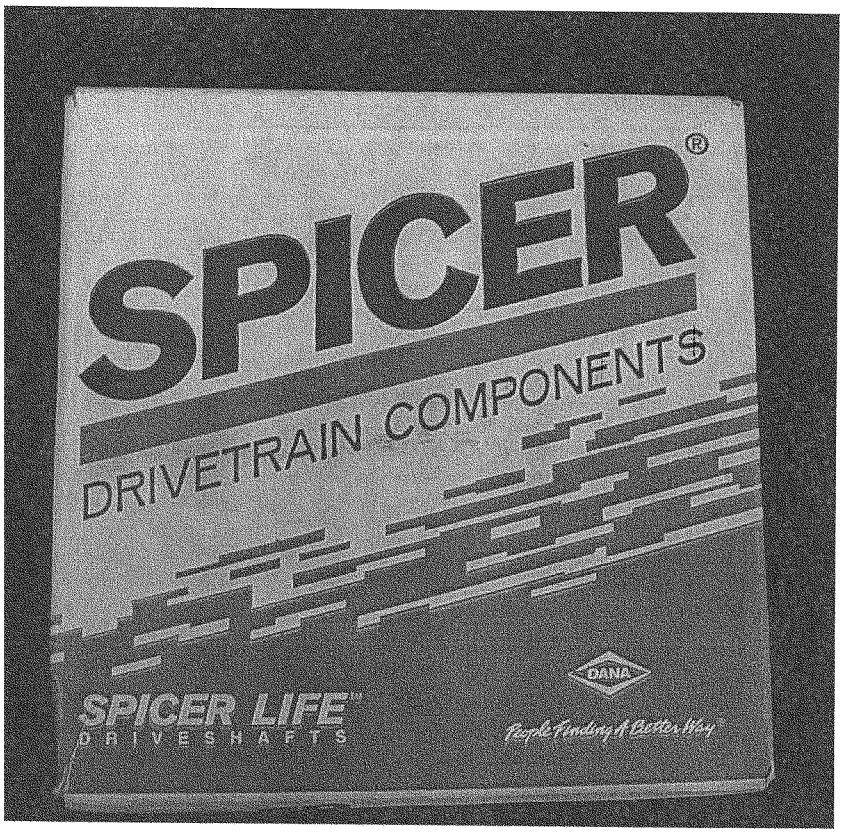


Genuine Box

ATTACHMENT C

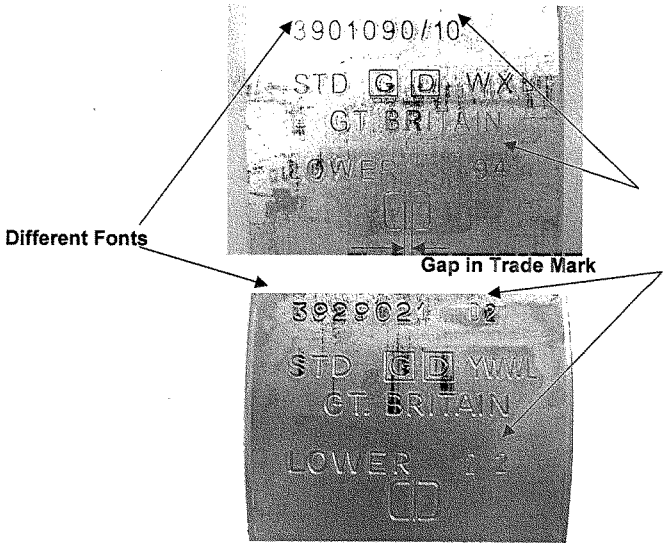
Genuine Packaging

ATTACHMENT D



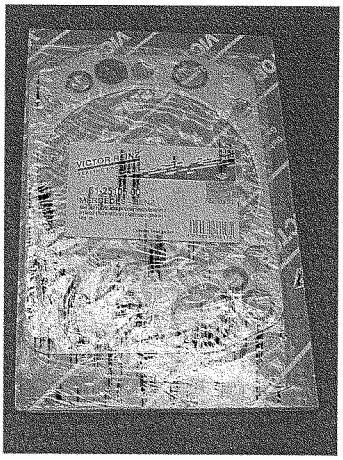
Genuine Box

ATTACHMENT E



Comparison of Genuine and Counterfeit Products

ATTACHMENT F



Side-by-side comparison of counterfeit and genuine VICTOR REINZ® cylinder head gasket

Follow-up Questions and Responses

The Honorable Jon W. Dudas
Acting Under Secretary of Commerce for Intellectual Property and
Acting Director of the United States Patent and Trademark Office

Questions from Chairman Voinovich

June 7, 2004

Question 1:
Please provide a written breakdown of the Department of Commerce personnel assigned to the handling of intellectual property issues. Include in this breakdown, where, in Commerce's organizational structure, these staff are located.

The Department of Commerce helps foster economic growth by promoting innovation and entrepreneurship, in part, by working to provide effective protection of intellectual property (IP) at the domestic and international levels. Secretary of Commerce Don 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. Accordingly, Secretary Evans, myself, and numerous Department officials and personnel are involved, to varying extents, in addressing intellectual property issues that face innovators and businesses both large and small. In organizational terms, those efforts are primarily undertaken by members of the Secretary's executive staff and personnel in the United States Patent and Trademark Office (USPTO) and the International Trade Administration (ITA). These agencies are within the Department of Commerce and headed by Under Secretaries who report to Secretary Evans.

The principal focus of the Department's efforts to promote protection of intellectual property, domestically and internationally, at the USPTO is the Office of External Affairs. The Office of External Affairs performs various functions regarding IP policy guidance, technical assistance, and enforcement training both domestically and abroad, as is detailed in my written statement before the Subcommittee. That Office is staffed by 43 full-time positions including 26 filled by attorneys. The Office of External Affairs works closely with other offices within the USPTO that also have IP-related policy functions including the offices of the General Counsel (52 attorney positions), the Solicitor (16), Patent Examination Policy (38), and Trademark Examination Policy (23).

In addition, within the USPTO, approximately 4200 of the agency's 6800 employees directly handle intellectual property issues. These personnel include more than 3400 patent examiners, more than 265 trademark examiners, as well as supervisory patent examiners, trademark law office directors, group directors, subject matter experts, administrative law judges for the Board of Patent Appeals and Interferences and the Trademark Trial and Appeal Board, personnel within External Affairs and Office of

General Counsel, and policy staff within the Patents and Trademarks business areas and the Office of the Director. The remaining roughly 2600 of the agency's staff provide support critical to the operation of the Office. These include support and administrative staff, including those within the Patent and Trademark business areas, the Office of Chief Financial Officer/Chief Administrative Officer, Chief Information Officer, and certain other personnel. While these personnel do not directly handle intellectual property issues, without them, the USPTO could not function, or would operate only at a very low level of efficiency.

The ITA's intellectual property rights (IPR) efforts are ingrained in the fabric of our work around the world. There are several principal relevant business units within ITA. First, the Trade Compliance Center helps American exporters overcome foreign trade barriers and works to ensure that foreign countries comply with their commitments to the United States. The Market Access and Compliance unit evaluates the nature of trade-related problems, establishes the appropriate team of experts, reviews all possible options to resolve the problem and then works through towards a solution. Finally, the Foreign Commercial Service provides market research, promotes trade events, introduces manufacturers to distributors, and provides counseling. While our Trade Development and Market Access and Compliance staff (see below) have dedicated staff to IPR, our worldwide Foreign Commercial Service staff are well attuned to the IPR issues in the countries where they work. However, the Department does not capture or account for the specific level of effort supplied by these foreign-stationed staff.

(The organizational chart for the Department may be found at http://www.commerce.gov/DOCOrg_Chart2004.pdf.)

Question 2:
Please provide a written breakdown of the Department of Commerce's budget designated for intellectual property monitoring and/or enforcement.

As you know, the USPTO is funded by its users' fees, rather than by taxpayers' dollars. It receives no tax-payer money from the general treasury The overall budget for the USPTO for FY 2004 was $1.22 billion, with the Office of External Affairs budget set at $6.8 million.

The ITA's specific IPR resource commitment is summarized as follows:

Trade Development	5 FTE	$ 535,000
Market Access and Compliance	17 FTE	$1,819,000
Total	22 FTE	$2,354,000

As indicated in the previous response, numerous other Department personnel are, to varying degrees, involved with intellectual property issues including intellectual property monitoring and enforcement.

Not all Department positions and respective offices with some intellectual property responsibilities are entirely dedicated to intellectual property monitoring and enforcement. Therefore, we are unable to specifically quantify all budgetary resources of the Department that are attributable to those efforts. For example, in my role as Acting Under Secretary and Acting Director, I am statutorily directed to co-chair the National Intellectual Property Law Enforcement Council (NIPLECC) launched in 1999. As an interagency group, NIPLECC has proven itself valuable by performing IP monitoring and enforcement functions, such as reporting on all USG IP-related monitoring and enforcement programs conducted in a given year. Its goal is the effective and efficient enforcement of domestic IP rights. However, it operates without any funding or dedicated staff and has no budget *per se*; instead it must draw on the staff and resources of other business units within the organization for support. It is difficult, therefore, to associate a dollar figure with the work devoted to NIPLECC projects by various business units.

Question 3:
Please detail the procedure an Ohio manufacturer should follow with Commerce if he believes that one of his products has been counterfeited by a foreign competitor. Please include in your answer the contact information for any Commerce office that would provide assistance to this manufacturer.

Response

Secretary of Commerce Don 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. The Department fully appreciates the crucial role of intellectual property development to the economic competitiveness of the United States. The primary line of defense for any small business or entrepreneur is to make sure that they have secured the available protections for their products through copyright, patent, and trademark that U.S. law or the law of the jurisdiction in which they seek protection makes available. The USPTO, through the Department of Commerce, continues its leadership in its core mission here at home through examining patent applications and registering trademarks. We believe that in our pivotal role we are at the center of the intellectual property regime by enabling American inventors and small businesses to secure intellectual property rights and thus facilitate commerce, stimulate the economy, and create jobs.

If the manufacturer's trademarks are not registered with the U.S. Patent and Trademark Office, we would suggest this as a first step. Information on registering a trademark with the USPTO can be found at http://www.uspto.gov/main/trademarks.htm. Inasmuch as trademarks are territorial, we would also encourage the manufacturer to explore registering the trademarks in at least the countries in which the foreign competitor is producing/distributing counterfeits. The U.S. Commercial Service can provide the manufacturer with information on the benefits of registering a trademark in a particular

foreign country and information on how and where to register his intellectual property. The U.S. Commercial Service has a network of export and industry specialists located in more than 100 U.S. cities and over 80 countries worldwide. These trade professionals provide counseling and a variety of products and services to assist small and mid-sized U.S. businesses export their products and services. The U.S. Commercial Service through the business service providers listing can assist in providing the manufacturer with a list of trademark law specialists in the country in which the foreign competitor is producing counterfeit goods. The manufacturer can locate the trade specialist nearest to him or her at http://www.export.gov/comm_svc/eac.html.

The Trade Compliance Center, within the Commerce Department's International Trade Administration, helps American exporters overcome foreign trade barriers and works to ensure that foreign countries comply with their commitments to the United States. Information on the Trade Compliance Center is located at www.export.gov/tcc. The manufacturer might also consider recording his registered trademark with the U.S. Bureau of Customs and Border Protection, Intellectual Property Rights Branch. Information on recording trademarks and enforcement efforts conducted by Customs relating to intellectual property protection is located at http://www.customs.gov/xp/cgov/import/commercial_enforcement/ipr/. Additionally, the U.S. Customs and Border Patrol enforces exclusion orders that prevent the importation into the United States of goods bearing an infringing mark. These exclusion orders are issued by the International Trade Commission. Information on exclusion orders can be found at http://www.usitc.gov/us337.htm.

In closing, I wish to emphasize that in these matters, as is often the case, the best defense is a good offense. As I testified before the Subcommittee, we have placed an emphasis on enforcement training programs for our business people in the United States, to better enable them to forcefully address the Intellectual Property Rights challenges they experience in China and, when necessary, bring well-founded complaints to our attention. Typically in conjunction with the Department of Commerce, we have held programs in such cities as: Cincinnati, Ohio; Grand Rapids and Pontiac, Michigan; Wichita, Kansas; St. Louis, Missouri; New York City; Long Island; Waterbury, Connecticut; Boston, Massachusetts; Providence, Rhode Island; Portsmouth, New Hampshire; Fresno, San Jose and San Francisco, California; Salt Lake City, Utah; and Washington, D.C. As I indicated at the hearing, a major focus of these efforts has been to address problems of small and medium enterprises, although larger enterprises have also participated in many of these programs and have benefited from them.

* * *

Thank you for the opportunity to respond to these questions from the Subcommittee. Please do not hesitate to contact my office if you would like further information or to request a briefing.

Follow-up Questions and Responses

Mr. Francis Gary White
Unit Chief
Commercial Fraud, Immigration and Customs Enforcement
U.S. Department of Homeland Security

Questions from Senator Voinovich

1. Please provide a written breakdown of the Department of Homeland Security personnel assigned to the handling of intellectual property issues, both before and after the creation of the Department. Include in this breakdown, where, in DHS' organizational structure, these staff are located.

Answer:

Within the Department of Homeland Security (DHS) resides the Border and Transportation Security (BTS) Directorate. The Under Secretary for Border and Transportation Security oversees the operations of U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), Transportation Security Administration (TSA), the Federal Law Enforcement Training Center (FLETC), and the Office of Domestic Preparedness. Within DHS-BTS, intellectual property rights enforcement is a responsibility shared by both CBP and ICE.

Prior to the establishment of DHS in March 2003, the enforcement of IPR violations at the border was the responsibility of the U.S. Customs Service, which had provided such enforcement for decades. The establishment of DHS divided the former U.S. Customs Service into two separate bureaus, CBP and ICE. Today, although IPR enforcement has been divided between the two bureaus, the same duties as before are being carried out. The protection of IPR remains a priority for DHS, and, given the sustained level of violations, IPR enforcement has been identified as a Priority Trade Issue.

As regards staffing, for the most part, CBP's IPR enforcement program is administered by three offices: the Office of Field Operations, the Office of Regulations & Rulings, and the Office of Strategic Trade. Personnel from CBP's Office of Laboratory and Scientific Services and Office of International Affairs also contribute to the effort. Each CBP Inspector is charged with IPR enforcement as part of his/her responsibilities, and, at major ports of entry, specialized IPR enforcement teams have been established specifically to detect and interdict IPR violative goods. Import Specialists and Fines, Penalties and Forfeiture Officers also have IPR-related responsibilities among their duties. There are 21 positions that are exclusively assigned to IPR enforcement in CBP: 8 attorneys and 2 paralegals in the Office of Regulations and Rulings, and 11 positions at the Los Angeles Strategic Trade Center.

Personnel assigned to investigate criminal violations of intellectual property rights are assigned to Immigration and Customs Enforcement's Office of Investigations. Positions exclusively

assigned to Intellectual Property Rights (IPR) enforcement include current staffing at the National Intellectual Property Rights Coordination Center, located in Washington D.C. and additional staff hours related to IPR investigations in the field offices of the Special Agents in Charge. The IPR Center is a multi-agency center responsible for coordinating a unified U.S. Government response regarding criminal IPR enforcement issues. The core staffing for the IPR Center is provided for from both ICE and the Federal Bureau of Investigation (FBI). The ICE IPR Center staffing includes one Supervisory Special Agent, seven Special Agent/Program Managers, five Intelligence Research Specialists, one Management Information Specialist and one Staff Assistant. The FBI IPR Center staffing includes two Supervisory Special Agents and five Intelligence Research Specialists.

Additionally, during Fiscal Year (FY) 2003, ICE staff hours related to IPR investigations in the field offices of the Special Agents in Charge equated to approximately 190 FTEs. It should be noted that the identified IPR related investigative staff hours can involve other violations as well as IPR. Currently, it is not possible to delineate a percentage of effort to either the predicate IPR violation or other IPR related or unrelated violations.

Midyear FY 2004, ICE staff hours related to IPR investigations in the field represented approximately 140 FTEs on an annualized basis. As with FY 2003 data, the identified IPR related investigative staff hours may involve other violations as well as IPR.

Working in concert, ICE and CBP officers from these various disciplines effected over 6,500 IPR seizures valued at over $94 million in FY 2003. As of mid-year FY 2004, the agencies effected nearly 3,700 seizures valued at nearly $65 million. It should be noted that these seizure values are calculated at "domestic value" (import price); if valued at retail, the figures would be exponentially higher.

2. Please provide a written breakdown of the Department of Homeland Security's budget designated for intellectual property monitoring and/or enforcement.

Answer:

Although CBP maintains an aggressive posture in fulfillment of its IPR enforcement responsibilities, CBP does not receive funding specifically dedicated to the enforcement of IPR. Because our field officers are tasked with a myriad of responsibilities, we cannot quantify in dollar terms what percentage of the workload of our 20,000 field officers, scientists and chemists, or other related officials is devoted to IPR enforcement. However, we can state that CBP's Office of Strategic Trade devotes $1.6 million (LA-STC) annually and CBP's Office of Regulations & Ruling devotes approximately $950,000 (IPR Branch) annually to IPR enforcement. These amounts are primarily attributed to salaries and expenses of 21 positions and periodic field training and outreach.

In FY 2004, the Department of Homeland Security Appropriations Conference Report designated $6.4 million dollars for ICE to continue funding the IPR Center/intellectual property rights program.

The ICE IPR Center staffing level of 15 positions plus operating costs is expected to total approximately $2.8 million in FY 2004. In addition, IPR related investigative staff hours in field offices equate to about 140 FTEs. While these hours can involve other violations as well as IPR, and it is not possible to delineate a percentage of effort to IPR *per se*, nevertheless, the estimated cost of the field effort brings the total IPR budget to well over $6.4 million.

3. Please detail the procedure an Ohio manufacturer should follow with DHS if he believes one of his products has been counterfeited by a foreign competitor. Please include in your answer the contact information for each of the local Customs offices in Ohio that would provide assistance to this manufacturer.

Answer:

The manufacturer who believes one of his products has been counterfeited by a foreign competitor should contact the ICE or CBP office located in the geographic area of their business or the area where the IPR violation occurred. While there is cooperation and coordination between the two agencies, time exigencies may make it advisable to contact both.

At this time, ICE has three investigative offices located in the State of Ohio. The ICE offices, addresses and contact telephone numbers are detailed below:

Cleveland
Office of the Resident Agent in Charge
DHS - ICE
8370 Dow Circle, Tech 2 Office Park
Strongsville, OH 44136
Office number: 216-706-4292

Cincinnati
Office of the Resident Agent in Charge
DHS – ICE
550 Main Street, Room 4001
Cincinnati, OH 45202
Office number: 513-684-2930

Columbus
Office of the Resident Agent
170 N. High Street, Room 206
Columbus, OH 43215
Office number: 614-469-5705

In addition, Ohio-based manufacturers can report IPR violations to:

National Intellectual Property Rights Coordination Center (IPR Center)

1300 Pennsylvania Ave. NW, Room 3.5a
Washington D.C. 20229
(202) 927-0810
or via email at www.ice.gov

The IPR Center is a multi-agency center responsible for coordinating a unified U.S. Government response regarding IPR criminal enforcement issues. Particular emphasis is given to the investigation of major criminal organizations involved in IPR violations, as well as those individuals using the Internet to facilitate IPR crime. Industry, manufacturers, and trade associations are encouraged to make referrals to the IPR Center by contacting them at 202-927-0810 or visiting the ICE Internet web site at www.ice.gov/enforcement and clicking on the "National IPR Referral Form." Referrals sent to the IPR Center are analyzed, and when appropriate, referred to ICE and FBI field offices for coordination and criminal investigation.

To report an IPR infringement allegation to CBP, an Ohio manufacturer could contact the following CBP offices:

Los Angeles Strategic Trade Center
(562) 980-3119 ext. 252
or via email at ipr.helpdesk@dhs.gov

CBP OR&R IPR BRANCH
1300 Pennsylvania Ave., NW
Mint Annex Bldg.
Washington DC 20229
(202) 572-8710
or via email at hqiprbranch@dhs.gov

Ohio-based manufacturers can also report IPR violations to the CBP Director of Field Operations located in Chicago, IL or directly to the CBP Port Director located at any of the six Ohio Ports of Entry. The CBP offices of the Director of Field Operations and the six Ohio Ports of Entry, together with their addresses and contact telephone numbers are detailed below.

Management Center
Office of Field Operations
Director
610 Canal Street, Room 900
Chicago, IL 60607
312-983-9100

Astabula
Office of the Port Director
4314 Main Ave., Suite 100
Astabula, OH 44004-6853
440-998-3073

Cincinnati
Office of the Port Director
P.O. Box 752011
Cincinnati, OH 45275-2011
859-767-7002

Cleveland
Office of the Port Director
6747 Engle Road
Middleburg Heights, OH 44130
440-891-3804

Columbus
Office of the Port Director
6431 Alum Creek Drive, Suite A
Groveport, OH 43215
614-497-1865

Dayton
Office of the Port Director
3800 Wright Drive
Vandalia, OH 45377
937-890-7633

Toledo
Office of the Port Director
420 Madison Avenue, Suite 500
Toledo, OH 43604
419-259-6424

Ohio-based manufacturers should also be encouraged to report IPR violations to their local law enforcement authorities. In addition to federal law, Ohio also has felony state statutes, Ohio Rev. Code Ann. Section 2913.34, for trafficking in counterfeit merchandise and Sections 1333.52, 1333.99(E)-(F) and 2913.32 for piracy. Many local law enforcement offices are currently working in federal IPR Task Force settings or may work in concert with ICE offices to pursue joint federal and state IPR investigations to reach the most effective and expeditious response to IPR violations.

When providing complaints to the ICE, CBP, or local law enforcement office, the Ohio manufacturer should provide detailed information concerning the copyright and/or trademark, the violator, importer, manufacturer, to include details of any addresses and contact numbers that would assist in the investigation.

4. On average, how long does a DHS investigation into alleged counterfeiting take to complete, if you measure from the day that an individual contacts DHS for assistance to the day that any form of resolution occurs.

Answer:

Due to the nature of investigations, it is difficult to provide a quantitative answer. However, a short-term immediate, although somewhat incomplete solution can be achieved via identification and seizure of counterfeit merchandise at the ports of entry. The seizures can be effected within hours or days of the attempted entry of the counterfeit goods into the commerce of the United States and the subsequent forfeiture and destruction of the merchandise provides for a definitive solution to that entry.

The seizure alone does not address nor include the larger and more complex criminal investigation and prosecution of the targets of the IPR and commercial smuggling investigation. In smaller less complex investigations, with one or very few subject violators, an investigation may come to a successful conclusion in a relatively short time period. Conversely, large multinational, multi level, commercial smuggling conspiracies involving significant IPR violations may take thousands of man-hours and years to conclude. How long a criminal investigation takes depends on a variety of factors. A myriad number of circumstances and issues may impact the length of time that it takes to successfully complete an investigation and prepare it for prosecution by the U.S. Attorney's Office. Those factors and circumstances may include, but are not limited to: the quality of the information received in the allegation; attempts of the subject(s) of the investigations to conceal their criminal activity; whether there is an informant; the case load of the office for other investigative priorities; staffing levels detailed to other investigative emergencies; and the commitment of the United States Attorney's Office to pursue an IPR prosecution.

Criminal investigations are a commitment of resources to pursue and obtain evidence to substantiate allegations that an IPR violation occurred and that the subject committed the violations to the point that government may prove beyond a reasonable doubt that the defendant committed the crime. In the situation where the information does not warrant a federal criminal investigation, the allegation may be shared with state and local law enforcement to pursue possible state violations.

A recent case illustrates the complexity and length of time that can be involved in IPR investigations. In June 2004, a fifteen-month undercover IPR investigation conducted by the office of the Special Agent in Charge, New York culminated in the arrests of thirteen individuals, the execution of five federal search warrants and the subsequent seizure of multiple containers of counterfeit merchandise. During the course of the investigation, defendants paid an ICE agent, who was acting in an undercover capacity, to clear shipments of counterfeit goods through CBP without inspection. The investigation demonstrated the complex issues associated with multi-national IPR and commercial smuggling criminal investigations, as well as the significant successes that result from those long-term commitments.

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