

Written Testimony of
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House Committee on Foreign Affairs
Sinking the Copyright Pirates: Global Protection of
Intellectual Property

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Mr. Chairman and Members of the Committee, good morning. First, I thank the Chairman and the Committee for the privilege and opportunity to address the very important issue of global intellectual property (IP) theft. This problem impacts our national economic security, consumer safety and the economic health of our employers and investors—the companies that research, develop, manufacture and distribute products that incorporate their trademarks, patents, copyrights, trade secrets and other IP assets that are being stolen to generate revenues for an illegal and underground economy.

It is unfortunate that since 2003 when I testified before the House Committee on International Relations regarding this same issue, the overall situation has not dramatically improved, but instead, may have deteriorated. Indeed, governments around the world have enacted new and stronger IP laws and thousands of seizures have occurred and removed hundreds of millions of dollars worth of counterfeit and pirated products from the stream of commerce. In addition, there have been successful prosecutions, yet, the overall picture of IP counterfeiting and piracy appears generally the same, if not worse.

While I understand that this may not be the most appropriate Committee to address with regard to funding requests, the ability to improve our efforts will require funding government efforts to combat this problem.

RECOMMENDATIONS

At the outset, the following recommendations to combat the scourge of counterfeiting and piracy are provided. First, the recommendations for domestic actions are to:

1. Instruct U.S. Customs and Border Protection (CBP) to adopt its proposed IP rules that were published on October 5, 2004, that will help IP owners and CBP improve overall enforcement;
2. Strengthen border and criminal enforcement to provide for clear ex officio IP enforcement by CBP and U.S. Immigration and Customs Enforcement (ICE), FBI and the Justice Department in accordance with our laws and Free Trade Agreements;
3. Improve consumer protection against counterfeit and pirate products by instructing CBP to take immediate steps to seize infringing goods before they are released and subject to redelivery, which may not be possible once goods are in the stream of U.S. commerce;
4. Amend relevant trademark, copyright and customs laws to clearly authorize enforcement actions against infringing goods that are being exported and moving in-transit;
5. Provide the Department of Homeland Security (DHS)/CBP attorneys the legal authority to collect administrative fines and pursue judicial forfeiture of infringing goods, including in cases when the Department of Justice refuses to pursue these cases;
6. Increase IP-dedicated CBP/ICE officers to IP enforcement;

7. Fund Executive Branch agency programs to specifically address the U.S. demand side for infringing goods with *new* and *creative* ways of educating consumers and raising IP awareness; and
8. Monitor the inter-agency cooperation and coordination of IP investigations and cases (re-dedicated effort through the National IPR Center).

Second, the recommendations for actions globally are to:

1. Continue efforts to raise IP enforcement standards in the territories of our trading partners regarding criminal and border enforcement;
2. Use inter-governmental organizations such as INTERPOL and the World Customs Organization, to promote increased enforcement activity and new standards;
3. Identify cases that strike at organized crime groups;
4. Provide better IP enforcement assistance programs that address the operational implementation of enforcement activity, not just changes in laws; and
5. Expand IP technical assistance programs to include IP awareness raising among the general public abroad by:
 - a) Balancing the emphasis on enforcement with more programs addressing the benefits of IP; and
 - b) Using technology to create more interesting IP education programs.

PIRACY & COUNTERFEITING—The Challenge

Initially, we should understand that the American consumer is bombarded by IP daily, but may have little knowledge of this fact. From the clothes that an individual chooses to wear at the beginning of the day, which bear labels that contain trademarks, until the time he or she goes to bed, setting the alarm on a radio or clock or cell phone, which also bear trademarks or logos, the individual has been exposed to so many forms of IP that it would be difficult to keep track of it all. Our cell phones, laptop computers and music devices all incorporate multiple forms of IP—copyrights, trademarks, patents and, most likely, some trade secrets. Basically everything has someone's logo or trademark as well as containing other IP.

Today's market reality provides counterfeiters and pirates with almost unlimited opportunities. Beyond the more obvious and usual products being pirated and counterfeited, today's piracy and counterfeiting problems pose serious public health and safety risks, some of which have been well-documented while others have not. Some recent examples include:

- construction cranes,¹
- toothpaste,²

¹ Eight TEREX crawler cranes found in China. Terex is a U.S.-based company. <http://www.cranelift.com.au/Article/Counterfeit-Terex-Demag-cranes-found-in-China/469323.aspx> (February 27, 2009).

² "2 NYC men plead guilty in fake-toothpaste caper," The pair was scheming to distribute half a million tubes of counterfeit toothpaste. Thomson Financial News (August 22, 2008).

- toothbrushes,³
- parts for space craft,⁴
- lifestyle drugs,⁵
- eye toner,⁶ and
- cosmetic lenses.⁷

These are just a few examples among thousands and the occurrences are around the world. Counterfeit cigarettes have been tested and found to contain arsenic, India and Uganda report growth in counterfeit auto spare parts, and Indonesia and other countries report that farmers are victimized by fake fertilizer and seeds, which will have damaging effects on their agricultural sector.

In addition, the role of the internet is implicated even where hard goods are involved. Although products must still be transported, the internet is used to offer counterfeit and pirate goods, to take orders for goods and to conduct the financial transaction. As a result, we face a situation where the counterfeiters and pirates use all of the old and new technological tools available to conduct their underground and illegal business while the resources available to industry and governments have not expanded to the same degree as the technology or as fast.

Counterfeiters and pirates can easily take advantage of increased bandwidth, an ever faster internet, a global digital system that grows hourly, and a global system of trade facilitation that promotes uninterrupted movement of goods. Given this situation, then adding on the current global economic crisis that causes companies to make massive cutbacks in personnel and budget, we have a global environment that pirates and counterfeiters could have only fantasized about when they were already profiting off the backs of legitimate companies before the economic crisis.

PIRACY & COUNTERFEITING—Volume and Simple Conclusions

During fiscal year 2008,⁸ CBP seized 14,992 shipments containing \$272.7 million dollars worth of counterfeit and pirate products.⁹ Among the customs administrations of the 27

³ “*Health Canada: Counterfeit Toothbrushes Found on the Canadian Market*,” Marketwire Canada (February 16, 2009). Counterfeit toothbrushes falsely labeled as Colgate Massager, Colgate Navigator, Oral B Classic 40, Oral B Contura and Colgate 360 were found in commerce. The toothbrushes posed a choking risk because bristles were inadequately fastened and were dislodging in the user's throat.

⁴ Stewart Powell “*Counterfeit parts bite NASA, hike costs Agency has worked years to track down fakes*,” Houston Chronicle (March 6, 2009).

⁵ Mark Waghorn, “*Coke Dealers Cash In with Fake Viagra*,” Daily Star (UK) (March 2, 2009). The co-founder of the European Alliance for Access to Safe Medicines stated that narcotics dealers were turning to pharmaceuticals because the profit margins are so much greater and the risks far smaller.

⁶ “*Don't fall victim to false eye toner claims*,” Toner reportedly causing serious eye infections by users of counterfeit products. New Straits Times (Malaysia) (March 19, 2009).

⁷ “*Blogshops warned to stop contact lens sales*,” Government issues a warning about cosmetic lenses causing corneal ulcers or conjunctivitis. Straits Times (Singapore) (March 10).

⁸ The U.S. Government's fiscal year was October 1, 2007, to September 30, 2008.

European Union member states, they engaged in over 43,600 cases involving IP violations in 2007.¹⁰ Japan's customs administration reported that it had 22,600 cases of suspected infringement in 2007.¹¹ These customs statistics are just a piece of the puzzle in fitting together the picture of global piracy and counterfeiting because not every customs administration has detailed statistics of its IP border enforcement activity.

The president of the Federation of the Swiss Watch Industry stated recently that his industry loses globally \$700-\$800 million dollars per year.¹² One UK warehouse raid in late 2008 resulted in the seizure of well over three million dollars worth of counterfeit Nike, Adidas, and Reebok sportswear, found in 15,000 boxes.¹³ In December 2008, police in Sydney, Australia, reported the largest ever DVD seizures as it confiscated a million copyright infringing items during coordinated raids on five locations the same day.¹⁴ Also in December, French Customs found 10 tons of counterfeit Ferrero Rocher chocolates in the back of a truck.¹⁵ In January 2009, UK Customs uncovered roughly three million dollars worth of counterfeit footwear.¹⁶

Poorer national markets are not overlooked by counterfeiters. During a 10-month period, Tanzanian authorities found and stored counterfeit goods--tube lights, energy savers, extension cables, bulbs and shoe polish--that were destroyed at the end of 2007.¹⁷ The real concern in Tanzania is that authorities believe that drug barons are moving into the lucrative market for counterfeit goods and importing the illegal products. Tanzanian officials admitted that the fight against counterfeits was a war against very powerful individuals with a lot of money who once engaged in illegal drug trafficking. Trafficking in counterfeit goods is a way to launder the money.¹⁸ The head of the country's Fair Competition Commission stated that the increased counterfeiting activity was a recent development and involves electrical goods, medicines, batteries, matches, tires, motor vehicle spare parts, shoe polish and toothpaste and is expanding. A Tanzanian industry group estimates that 20% of all goods available in the major trading centers are fake goods.¹⁹ In Uganda, Procter & Gamble, a U.S. multi-national, reported that it had lost

⁹ http://www.cbp.gov/xp/cgov/newsroom/news_releases/01082009.xml. As recently as 2005, CBP's seizures were just over 8,000 shipments.

¹⁰ http://www.cbp.gov/xp/cgov/trade/priority_trade/ipr/seizure/seizure_stats.xml.

¹¹ Statistics for 2008 were unavailable when preparing this testimony.

¹² http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/statistics/index_en.htm.

¹³ IPR Enforcement, The Role of Japan Customs, 2008 Report.

¹⁴ http://www.customs.go.jp/mizugiwa/chiteki/ipr_p.pdf.

¹⁵ "Hublot Turns to WISEkey's Smartcard Technology to Fight Counterfeiting of Its Luxury Watches," Business Wire (March 24, 2009).

¹⁶ "Warehouse raid nets pounds 3m in fake sportswear," Sunday Mercury (UK) (November 30, 2008).

¹⁷ "1m Pirated movie, music discs seized," ABC Premium News (Australia) (December 3, 2008).

¹⁸ "Customs officers seize 33,000 boxes of fake Ferrero Rocher chocolates worth £223,500,"

<http://www.dailymail.co.uk/news/worldnews/article-1100833/Customs-officers-seize-33-000-boxes-fake-Ferrero-Rocher-chocolates-worth-223-500.html>.

¹⁹ "2 million pounds fake shoe find," The Sun (UK) (January 12, 2009).

²⁰ Joseph Mwamunyage, "Drug Barons Now Enter Fake Goods Market," East African (Kenya) (January 1, 2008).

²¹ Id.

²² Sarah McGregor, "Tanzania: Cheap Imitation Goods Flood Markets in Capital," Inter Press Service (August 20, 2008).

20% of market share during a three-month period because of fake products. Counterfeit feminine hygiene products had entered the market and displaced P&G's products.²⁰

Of the many results from enforcement actions, some of the most startling have occurred more recently, years after IP enforcement has been highlighted globally and years after governments and industry have made it a priority issue. In February 2008, U.S. and EU authorities announced that a joint enforcement action had resulted in the seizure of over 360,000 integrated circuits and computer networking components, estimated to have a value of over 1.3 billion Euros (US \$1.7 billion dollars), illegally bearing over 40 different trademarks, including those belonging to Intel and Cisco.²¹ Within days of the U.S.-EU announcement, U.S. and Canadian authorities announced that a joint initiative had resulted in more than 400 seizures of counterfeit Cisco network hardware and labels with an estimated retail value of more than \$76 million.²² Because of the lengthy investigation, numerous defendants were identified and federal prosecutions pursued, including the indictment against one individual who is believed to have purchased and imported counterfeit computer network hardware from China and sold the counterfeit Cisco products to retailers of computer network products throughout the United States, but also shipped some of the counterfeit hardware directly to the Marine Corps, Air Force, Federal Aviation Administration, FBI, defense contractors, universities and financial institutions.²³

A 19-month long investigation by CBP and ICE resulted in charging 29 individuals with conspiracy to smuggle 950 shipments of counterfeit goods (watches, footwear, and other products) into the U.S. The defendants were in California, New Jersey and New York. The estimated value of the seized goods, had they been genuine, was \$700 million.²⁴ The cases against the defendants involved charges of money laundering, smuggling and conspiracy to import counterfeit goods.

The few cases mentioned here point to a global piracy and counterfeiting problem that goes far beyond the old notions of "mom and pop" operations. The quantities involved, the value of goods in these cases and the global distribution channels linking manufacturers on one continent to distributors and sellers on another point to a more sophisticated network. As the last case above demonstrates, today's global trade in counterfeit and pirate products is a business and includes people in the operation that know how to move products, but are rarely caught. The more troubling aspect of these cases is that after many years of highlighting this problem and attacking the problem with more raids, seizures and destruction of goods and imprisonment, we continue to see what seems to be a growing onslaught of illegal activity. The fact is that all the enforcement

²⁰ Caroline Batenga, "Fake Sanitary Towels Flood Market," New Vision (Uganda) (October 19, 2008).

²¹ "U.S., EU Announce Joint Operation in Combating Pirated Goods," http://useu.usmission.gov/Dossiers/IPR/Feb2208_Operation_Infrastructure.asp. See also, "Cracking down on high-tech fakes," Birmingham Post (UK) (February 26, 2008).

²² "Departments of Justice and Homeland Security Announce International Initiative Against Traffickers in Counterfeit Network Hardware," http://www.usdoj.gov/opa/pr/2008/February/08_crm_150.html (February 28, 2008).

²³ Id.

²⁴ <http://www.ice.gov/pi/news/newsreleases/articles/070626brooklyn.htm> (June 26, 2007).

actions by the U.S., EU, and other governments and their law enforcement authorities have not deterred criminals from engaging in massive scale counterfeiting and piracy.

ORGANIZED CRIME, TERRORISM OR BOTH?

1. Role of IP Owners

The owners of copyrights and trademarks have a role in pursuing those who steal their IP assets. Nevertheless, the question is how far are they expected to go with an investigation? What is their primary role in our economies?

We need to remember that companies are basically in the business of making products and offering services as well as a constantly creating new products and improving their products in order to improve economic performance. Companies are *not* in the business of engaging in criminal investigations and routinely running down bad guys. However, today, many companies do some of the basic evidence gathering relying on private investigators and other resources at their disposal.

Indeed, I know of IP owners who have spent hundreds of thousands of dollars in gathering evidence, conducting civil seizures, and identifying product drop points as well as off-shore banks involved in transactions in order to “package” a case for possible criminal investigation and having nothing really happen once the case is handed over to law enforcement. When, at the very least, an organization is clearly involved in trafficking in counterfeit goods, how far are IP owners expected to go with such “police” activities”?

There is no doubt that the CBP/ICE cases mentioned above involved a criminal organization and there is no doubt that my client had uncovered a group acting in an organized manner to traffic in counterfeit goods. Today, the real challenge is to determine if these criminal organizations mask a more dangerous activity by funding terrorist groups.

IP owners cannot be expected to pursue investigations to the point of identifying, without a reasonable doubt, that the funds are going to terrorist organizations. IP owners are companies putting products into the market place and are not in the business of conducting undercover police operations. While IP owners today are expected to provide assistance, there are limits to what can be expected of them.

2. Links to Terrorism

As a past president of the International AntiCounterfeiting Coalition (IACC) and primary drafter of the organization’s Special 301 submission to the Office of the U.S. Trade Representative, I can say that companies are extremely cautious regarding their reporting of direct terror group involvement in counterfeiting and piracy. We can appreciate the fact that information must be carefully guarded in order to prevent corporate employees from being placed in danger because of information obtained and shared. This is one

reason why I never made specific and direct statements about the involvement of terrorist groups in our submissions. Companies are willing to provide information as long as steps are taken to protect their on-the-ground employees. In general terms, I can say that there were IACC members who believed that the activities in some countries involved terrorist group members.

One of the early articles by the U.S. Government regarding possible links between counterfeiting and piracy profits and terrorist groups was published by U.S. Customs in late 2002.²⁵ Since then, there have been prominent law enforcement officials warning of the dangers that the massive trade in counterfeit and pirate activity provides funding for terror groups. INTERPOL's Ron Noble has not shied away from these warnings.²⁶

In 2006, a BBC article quoted a DHS official in the tri-border area (Argentina, Brazil, and Paraguay) expressing concern over the amount of money made from drug smuggling, gun-running and counterfeiting moving from a Lebanese national in the tri-border area to unknown individuals or groups.²⁷ The fund transfers have involved U.S. banks and there have been attempts to prosecute American banks for transferring funds to banks in the Middle East.²⁸

Toward the end of the holiday shopping season in 2007, an article warned consumers that the purchase of cheap CDs, DVDs, perfumes and other items may have helped to raise money for one of the world's most-notorious terror outfits – the group held responsible for the slaughter of US journalist Daniel Pearl.²⁹ The UK's MI5 was targeting British-based supporters of Jaish-e-Mohammed, a pro-Kashmiri group dedicated to gaining the independence of the disputed territory as well as aiming to destroy the United States and India.

In the United States, the Justice Department, coordinating with ICE, DEA, and the FBI, announced that it had charged six people with trafficking in counterfeit goods. Reviewing the ICE press release and a related story covering the case in the Los Angeles Times, it appears that a multi-year counter-terrorism and narcotics case turned up a major counterfeiting operation.³⁰ Although no one had been charged with terrorism related offenses, federal and local law enforcement sources said a focus of their investigation has been the possibility that proceeds from the alleged crime rings have gone for years to Lebanon and the militant Islamic group Hezbollah.³¹ The ICE press release stated that the group had arranged for the importation of nearly \$20 million in counterfeit goods.

²⁵ "Financing Terror," <http://www.cbp.gov/xp/CustomsToday/2002/November/interpol.xml> (November 2002).

²⁶ "Funds for Terrorism Through Counterfeit Goods," AP (May 25, 2004).

²⁷ "Tri-Border Transfers 'Funding Terror'," <http://news.bbc.co.uk/2/hi/americas/6179085.stm> (December 14, 2006).

²⁸ Id.

²⁹ "The Glasgow Connection," Scotland on Sunday (UK) (December 23, 2007).

³⁰ "U.S. charges six with trafficking in counterfeit designer clothing," <http://www.ice.gov/pi/news/newsreleases/articles/071115newyork.htm> (November 15, 2007); Greg Krikorian, "Six are Held in Bogus Labels Probe," Los Angeles Times (November 15, 2007).

³¹ Greg Krikorian, "Six are Held in Bogus Labels Probe," Los Angeles Times (November 15, 2007).

In March 2008, speaking at the Tech Museum of Innovation in San Jose, Attorney General Mukasey stated that counterfeiting and piracy generate huge profits for criminal syndicates, and in some cases even terrorist groups who view IP crime as a lucrative business, and see it as a low-risk way to fund other activities.³² But, in its 2008 Special 301 Report, the Office of the U.S. Trade Representative toned down the rhetoric as it reported about the tri-border area that “although Ciudad del Este remains the hub for pirate activities in Paraguay, industry reports that trade there has declined and that commercial concentrations are shifting to other cities.”³³

The overall levels of trade in counterfeit and pirate products are sobering and the reality is that the enforcement efforts undertaken over the past several years have done little to deter this type of crime. Thus, a simple “connecting the dots” of the global situation should lead us to the conclusion that criminal groups and organizations, including terrorist organizations, are not sufficiently concerned to abandon this mode of profiteering in order to fund their objectives. To the contrary, the fact that IP owners are not going to undertake criminal undercover operations and law enforcement is too thinly stretched and being segmented into placing priorities on health and safety related counterfeits leaves open a vast array of products that can be counterfeited and pirated with little attention paid.

As U.S. law enforcement begins to place greater emphasis on counterfeit products that pose a health and safety risk, it leaves to organized crime and terror groups a vast range of counterfeit products that they may profit from with little or no risk.

THE RECOMMENDATIONS--DOMESTIC

1. U.S. CBP, October 5, 2004 Proposed Rules

On October 4, 2004, the Bush Administration announced its “STOP” initiative at a press conference that included an Under Secretary for the Department of Homeland Security.³⁴ As part of DHS’s fact sheet about the STOP initiative, it stated that copyright protection by CBP would be enhanced.³⁵ The “enhancements” have never occurred because after the publication of the notice of proposed rules on October 5, 2004, the rules were never finalized and implemented.³⁶

³² Attorney General Michael B. Mukasey, San Jose, CA (March 28, 2008).
³³

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file553_14869.pdf.

³⁴ Strategy Targeting Organized Piracy (STOP), <http://www.america.gov/st/washfile-english/2004/October/20041004170546MBzemoG0.9298059.html> (October 4, 2004).

³⁵ Specifically, the Fact Sheet states “Enhancing the protection of sound recordings, motion pictures and other audio-visual works by allowing rights holders to record their intellectual property with CBP without first registering it with the U.S. copyright office.”
http://www.ice.gov/pi/news/factsheets/STOP_FS100404.htm.

³⁶ Proposed Rule, Recordation of Copyrights and Enforcement Procedures To Prevent the Importation of Piratical Articles, 69 Fed. Reg. 59562 (October 5, 2004).

Today, copyright owners still wait for the CBP proposed changes that would aid their quest for a higher level of protection at the U.S. border. Some of these enhancements would include greater disclosure of information about the pirates so that legal action can be taken or so that they can be pursued in the countries of export, pre-copyright registration recordation with CBP, and CBP's explicit authority and actions against the importation of circumvention devices. The copyright industries continue to wait for DHS to finalize the improvements that were proposed by the agency itself.

2. Ex Officio Enforcement

The copyright and trademark industries should be assured that they can receive the level of protection that the U.S. has negotiated in various free trade agreements (FTAs). In the sections dealing with border measures and criminal enforcement, there is clear language that the protection and enforcement of copyrights and trademarks shall not be dependent upon the filing of a formal complaint.³⁷ While IP owners have a responsibility for providing law enforcement authorities with training so that they may have sufficient information and knowledge to identify suspect goods either entering the U.S. territory or moving in the stream of commerce, enforcement authorities should have clear authority to take enforcement actions on their own when there is sufficient suspicion that goods may infringe copyrights and trademarks.

3. Improve U.S. consumer protection: CBP reliance on post-entry audits allows questionable products into the stream of commerce

One of the elements of ICE's (CBP) efforts to improve IP border enforcement under the STOP initiative is to conduct post-entry audits to verify that an importer is authorized to use the IP on the products that have been imported.³⁸ In view of the growing instances of counterfeit goods entering the U.S. market that pose direct consumer health and safety risks, attempts to conduct "enforcement" after goods have entered seem futile. Once goods are released and moving in the stream of commerce, CBP's authority to demand redelivery of the goods is an empty gesture.

The risk to the consuming public has increased in view of the expanded range of products being counterfeited. One Chicago-area company estimated that half a million counterfeit circuit breakers had entered the U.S. market³⁹ and the Consumer Products Safety Commission issued a recall order.⁴⁰ In June 2007, counterfeit Colgate toothpaste was

³⁷ The text of the U.S.-Morocco Free Trade Agreement includes examples of this level of protection, which can be found at 15.11.23 and 15.11.26(b)(iv).
http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/asset_upload_file797_3849.pdf.

³⁸ ICE Fact Sheet, http://www.ice.gov/pi/news/factsheets/STOP_FS100404.htm (October 4, 2004).

³⁹ Bob Tita, "Square D Hunts Knockoffs: Counterfeit Circuit Breakers from China Could be Fire Hazard," Crain's Chicago Business, Vol 30, Issue 51 (December 17, 2007).

⁴⁰ Release #08-054, <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml08/08054.html> (October 30, 2007).

found in four states prompting efforts to locate and remove the product from commerce.⁴¹ In announcing the 2008 IP seizures, CBP reported that the value of counterfeit goods posing public safety and security risks increased 124% over the previous year.⁴²

In view of the growing public safety risks posed by counterfeit goods, reliance on a detection method that allows goods to be entered into the stream of commerce then recalled seems to be a procedure that should be reversed. If CBP does not have sufficient staffing, then Congress should appropriate funds to increase CBP's ability to inspect and deny entry of goods that pose these risks at the time of entry, not after entry into commerce.

4. Clear Authority to stop exports and goods in-transit

First, I commend Congress on its passage of the PRO IP Act of 2008 that broadened the authority of CBP/ICE to enforce IP rights when goods are attempted to be exported or are moving in-transit through the U.S. The authority now exists in Title 17, U.S. Code, Section 602, for CBP to exercise its enforcement against attempts to export copyright infringing goods.

In addition, the PRO IP Act of 2008 broadened conduct that will be subject to criminal penalties under the trafficking in counterfeit goods provision by subjecting individuals who attempt to export or move goods-in transit to criminal sanctions.

Industry believes that this effort should continue by inserting similar language in relevant sections of the Trademark and Customs laws in order to make the legal authority explicit in all relevant laws.

5. Deterrence: Improve CBP's Penalty and Administrative Fine Collections

One of the weakest elements of our system is the current rate at which CBP collects administrative fines assessed as a result of IP violations. The Government Accountability Office (GAO) reported that CBP officials responded that the enforcement penalties are not an effective deterrent. Upon reviewing CBP penalty data for fiscal years 2001 through 2006, GAO found that less than 1 percent of the penalty amounts were collected.⁴³ A concrete example is that in 2006, CBP assessed \$136.6 million in penalties and collected \$600,000.

A related problem is judicial forfeiture of infringing goods and the administrative fines that CBP assesses for counterfeit goods. Offenders are able to avoid forfeiture of infringing goods and paying administrative fines when the Department of Justice fails to represent the Government's interest in the forfeiture proceedings. This, essentially, allows the goods to be returned to the offender and entered into commerce.

⁴¹ "Colgate Finds Fake Toothpaste in 4 States,"

http://money.cnn.com/2007/06/14/news/companies/colgate_poison/index.htm?cnn=yes (June 17, 2007).

⁴²

http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/seizure/fy08_final_stat.ctt/fy08_final_stat.pdf

⁴³ Loren Yager, Testimony, IP Risk and Enforcement Challenges, GAO-08-177T (October 18, 2007).

Industry believes that CBP/DHS need to be given the legal authority to step into the shoes of the Department of Justice to protect the interests of the U.S. Government when Justice declines to pursue forfeiture actions and Justice's declination should not prevent CBP/DHS attorneys from representing the Government in these proceedings.

6. Funding Additional Dedicated CBP/ICE Officers

Congress has, through previous legislation, identified funding for dedicated Justice Department attorneys and FBI agents. In view of the importance in protecting U.S. consumers and IP owners from a global threat, CBP and ICE should receive increased attention and additional dedicated officers in the field offices, laboratories, express consignment and mail facilities. The current flood of counterfeit and pirate products cannot be stopped by current staffing levels. Industry believes that CBP/ICE, as the gatekeepers to the U.S. market, need to be well staffed and trained to improve efforts to identify and stop counterfeit and pirate products.

This effort is supported by industry. For many years, dozens of IP owners have participated in programs to train CBP/ICE/FBI and other law enforcement officers. Industry will continue to provide training at its expense in order to assist enforcement officers in their efforts to identify and seize counterfeit and pirated goods.

7. Funding Executive Branch programs to address the U.S. demand side for infringing goods with new and creative ways of educating consumers and raising IP awareness

The public message from the U.S. Government and IP industries has been and continues to be a singular voice advocating enforcement. Despite all the initiatives, action plans, and training programs over the past 15 years, we appear to be where we began when it comes to the global level of counterfeiting and piracy. Thus, I am forced to ask if the enforcement message falls upon deaf ears.

We need to consider the messaging and whether it "plays" well with our audience. Personally, I know the answer as we have been negligent in conducting honest reassessments of our messaging.

Where is the "prevention" program? We have vaccinations to prevent illnesses, we have driver education programs to better prepare drivers, but we have next to nothing to prevent IP theft.

The U.S. Government and IP industries lack an active, creative program that describes and demonstrates the benefits of IP both here and abroad. It is not enough to develop clever undercover investigative techniques or smarter legal theories for filing lawsuits. Creativity and innovation should also be applied to programs for U.S. consumers and our foreign audiences.

All U.S. Executive Branch agencies, while busily funding enforcement training programs, should be required to fund programs that demonstrate how students, entrepreneurs and governments may benefit from IP. This is sorely lacking and needs greater attention. At a time when our economy is suffering and individuals are losing jobs, we need to communicate a message that demonstrates how new and old businesses may benefit from reliance on IP assets as a driver of growth. Therefore, I urge members of this Committee, working with your colleagues, to take steps that require our Government to do more to educate the public about the positive benefits of IP.

8. *Monitor the inter-agency cooperation and coordination of IP investigations and cases (re-dedicated effort through the National IPR Center).*

Any effort to combat global counterfeiting and piracy requires a dedicated effort by each responsible enforcement agency to coordinate efforts and cooperate in order to stretch limited resources and to bring all available expertise to the problem. The re-dedication of the National IPR Center in 2008 may be interpreted in different ways in light of the fact that the National IPR Center offered its first conference for members of Congress and industry in 2002.⁴⁴ In view of the re-dedication of the Center with more agencies now part of the Center, I encourage Congress to monitor its activities and inquire regularly about the level of coordination that occurs.

Today's IP cases are complicated and often involve foreign jurisdictions. Thus, the need to use the expertise and skills of individuals from different agencies is the only way to make any progress against the ongoing threat of IP crimes.

THE RECOMMENDATIONS—INTERNATIONAL

1. Raising IP Standards

The U.S. must continue to work with trading partners in raising IP enforcement standards. In the various FTAs that the U.S. has concluded, the Government has been successful in obtaining agreement that IP enforcement will be improved by expanding legal authority for border measures, criminal investigations and internet based activities. These efforts must continue

2. Inter-governmental organizations

U.S. law enforcement needs to continue to work with their counterparts in foreign countries in order to pursue the international organizations involved in IP crimes. The cases with EU authorities in detecting the computer components and with Canadian authorities are crucial to having any success against international crime rings involved.

In addition, the U.S. must continue to work with the World Customs Organization, INTERPOL, EUROPOL and other organizations in order to develop and encourage higher enforcement standards. These inter-governmental organizations may also be

⁴⁴ <http://www.fbi.gov/pressrel/pressrel02/outreach071702.htm>.

important conduits for the flow of information between law enforcement authorities of different countries and provide critical intelligence.

All these initiatives must have an industry component in order to encourage IP owner involvement and to encourage both sides to identify new trends and identify new “players” to the extent such exchanges are possible.

3. Training—IP Enforcement Authorities

The operational enforcement training that is being provided should look to lengthen the periods of training and target implementation. Many countries continue to struggle with the implementation aspect of IP enforcement. Legislative change, while long and difficult, results in changes of words in law whereas those changes must eventually be carried out in the field.

The current construct that effective training can be provided in a matter of days should be rethought. Many countries struggle in understanding how legislative changes are translated into action. As a result, governments abroad fail to appreciate the resources and time needed to train field officers in IP enforcement.

If the U.S. and its industries expect any substantial improvement, both government and private sector resources will need to be dedicated to this effort. U.S. agencies and industries may need to identify more personnel able to be placed on the ground for extended periods with customs, police, prosecutors and others in order to provide day-to-day assistance and training. The two or three day programs are insufficient in length and detail to expect that the result of such workshops will dramatically change the current situation.

Indeed, as the U.S. raises IP enforcement standards through the FTAs, we cannot expect that our trading partners will be able to deliver the level of IP enforcement they have agreed to simply because they have signed an FTA or because they have been given a transition period. They must be shown how to implement the new standards beyond the simple changes in legislation.

4. Broaden the IP Message

The U.S. Government and U.S. Industry must begin a shift in its foreign message by working toward a balance in its messaging. If the current counterfeiting and piracy levels have any meaning, one conclusion is that the overwhelming emphasis on enforcement has not achieved the desired objective.

The Government-industry message must begin to address broader IP issues. The message cannot focus on simply arresting individuals, destroying goods and conducting raids—all of which conjure up negative pictures in the minds of many in the general public.

Instead, we must work toward a positive IP message that clearly demonstrates that IP is for anyone in any country, not simply for the U.S. and its developed country allies. Our approach must become more positive, demonstrate IP benefits, and use technology to reach more people. While there is no guarantee that any strategy will work, the evidence now demonstrates that the emphasis on enforcement, while it provides some concrete results, has not worked in light of the current magnitude of infringement. The enforcement emphasis must be balanced by another approach. Absent some reassessment in the strategy to fighting global IP theft, we will be discussing the same issues again in five and ten years, except that the volume of infringing goods will have escalated beyond our estimates.

CONCLUSION

Governments and industry will have to find a way to continue funding their IP enforcement programs during this trying economic period. Moreover, governments and industry will have to find a way to increase their resources to combat IP theft. At the same time that we continue to conduct enforcement actions, it is absolutely necessary to improve our IP message to the rest of the world, helping them to understand the role of IP in economic improvement and growth.

I thank the Committee for allowing me to provide this testimony and will be happy to entertain any questions that Members may have.