U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 11, 2007

The Honorable Patrick J. Leahy
Chairman
Committee the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of United States Attorney Kevin J. O'Connor before the Committee on November 7, 2007, at a hearing entitled "Examining U.S. Government Enforcement of Intellectual Property Rights."

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

"Examining U.S. Government Enforcement of Intellectual Property Rights"

November 7, 2007

Questions for the Hearing Record
for
Kevin J. O'Connor
United States Attorney for the District of Connecticut
Chairman, Department of Justice Task Force on Intellectual Property
United States Department of Justice

LEAHY

(To the Panel)

Q: Your testimony speaks a good deal about efforts on the international stage, which is clearly important, but I want to ask about piracy within our own borders. I am interested, as are other Senators, in leveraging the efforts of state and local law enforcement through the strategic use of federal aid and personnel. How can we best do that? Through a fund at the Justice Department, perhaps?

A: State and local law enforcement authorities play an important role in effective intellectual property ("IP") enforcement within the United States. Every State has laws to address counterfeit goods, and State authorities around the country are active in enforcement operations against manufacturers and sellers of counterfeit products. Similarly, State trade secret laws often provide criminal penalties for the most serious instances of trade secret theft. Additionally, some jurisdictions have used creative means, such as business licensing and tenancy regulations, to disrupt markets where counterfeits are sold, while other State authorities have developed expertise in combating the theft of trade secrets and high-tech IP offenses. There are no State prosecutions of copyright offenses because copyright law is an exclusively Federal matter; however, many States have labeling laws for commercially-distributed CDs and DVDs, which State authorities use to help combat piracy.

The efforts of State and local law enforcement are a vital component of an overall strategy to combat counterfeiting and piracy. State law enforcement often works with Federal officials to increase the level of IP enforcement beyond what either could accomplish alone. In several areas of the country, State, Federal and local law enforcement officials have formed task forces to address IP and high-tech crime, and the results have been encouraging. For example, in the Northern District of California, three defendants were prosecuted federally as part of

Operation Remaster for their involvement in the largest CD manufacturing piracy scheme ever uncovered in the United States. Operation Remaster was investigated by the Rapid Enforcement Allied Computer Team ("REACT") Task Force in the San Francisco Bay Area, a partnership of 16 local, State, and Federal law enforcement agencies, with the FBI designated as the lead agency.

There are five similar task forces in California alone, and others spread across the country, that are in a position to provide critical resources for fighting IP and high-tech crimes. We will continue to encourage the creation of such task forces where appropriate, especially in regions where there is a high incidence and/or reporting of IP crime.

Q: As the testimony each of you has provided makes clear, there are numerous agencies necessarily involved in protecting U.S. intellectual property.

How should resources and assets be distributed to provide the greatest level of protection? In which agencies are more assets needed?

A: [We understand that the International IPR Enforcement Coordinator, Department of Commerce, will respond to this question.]

(To Mr. O'Connor)

Q: Mr. O'Connor, your testimony provides some very helpful examples of criminal prosecutions related to piracy. Clearly not all incidents of piracy deserve a criminal response. In fact, one of the tools the law provides intellectual property owners is the right to seek damages in court through civil actions. Do you agree that not all Americans who commit infringement should be prosecuted criminally and, if so, shouldn't the Department be given civil enforcement authority?

A: The right of copyright owners to enforce their rights in court through civil actions is critical to the protection of IP rights. In fact, civil enforcement has been the predominant method of copyright enforcement throughout the history of U.S. copyright law. Copyright owners are in the best position to identify potential infringements of their works and to determine whether a particular use of their work is authorized. If unauthorized, they are in the best position to decide whether the unauthorized use warrants legal action for infringement, or other action falling short of filing a lawsuit (such as sending a cease and desist letter or other warning).

To strengthen copyright protection, U.S. law provides copyright owners with a wide array of tools to enforce their rights. An owner may recover actual damages (where they can be proven), or opt instead for substantial statutory damages of up to $150,000 per infringed work in cases where the infringement is willful, in addition to costs and attorneys' fees. Copyright owners also may obtain injunctions against infringement, and courts, in considering preliminary injunction motions, generally presume irreparable harm in copyright cases. The Digital Millennium Copyright Act also provides a "notice and takedown" mechanism giving copyright owners an expedited mechanism to get infringing materials removed from the Internet and to obtain identifying information about infringers.

The Department continues to believe that its resources and criminal enforcement efforts are most effectively applied to criminal violations of the intellectual property laws, including cases that pose a direct threat to public health and safety or which present the greatest risk of harm to copyright owners. This avoids duplication of civil remedies and maximizes the deterrent value of Federal enforcement efforts. For example, it permits the Department to focus its efforts on the very types of cases that rights holders generally find most difficult to pursue civilly – including but not limited to sophisticated multi-district and international conspiracies that require compulsory criminal process such as pen registers, search warrants, and electronic intercepts to successfully investigate.

HATCH

(To the Panel)

#1: Do you think that the current interagency process for the enforcement of intellectual property rights is working effectively?

As you are aware, there are at least three cooperative groups devoted to help coordinate enforcement of intellectual property rights:

1) the Strategy Targeting Organized Piracy, or "STOP!" initiative;

2) the National Intellectual Property Law Enforcement Coordination Council (NIPLECC); and,

3) the Trade Policy Review Group ("TPRG").

Despite all of these important programs, it seems that we are in an upward trajectory in intellectual property theft. In other words, it does not seem that we have slowed down
the rate of intellectual property rights violations.

Do you think it is time to rethink the fundamental approach to protecting our IPR both here and abroad?

A: [We understand that the International IPR Enforcement Coordinator, Department of Commerce, will respond to this question.]

#2: I believe any solution to curtailing intellectual property rights abuse will take an integrated approach with both domestic and international prongs which incorporate educational, judicial, and enforcement components to halt this insidious attack on our intellectual property.

With that said, what role do you think the Federal government should have in this important endeavor?

A: The Federal government takes a leadership role in pursuing an integrated approach to IPR protection, one that includes domestic and international criminal enforcement, education, and legislative reform. The Department's Task Force on Intellectual Property ("Task Force") recognized the need for an integrated approach when it published its 31 recommendations in 2004, and the Task Force has since led and coordinated the Department's implementation of those recommendations.

Criminal enforcement was at the core of the Task Force's work, and many of its recommendations were focused on increasing criminal prosecutions. Since 2004, the Department has substantially increased both the number of Federal IP prosecutions and the number of prosecutors who are specially trained on IP crimes. During these three years, the Department has more than doubled the number of defendants charged with IP offenses per year, and it has significantly expanded its Computer Hacking and Intellectual Property ("CHIP") program to include specialized units in 25 United States Attorney's Offices – an increase of nearly 100% since 2004 -- and at least one CHIP prosecutor in each United States Attorney's Office nationwide, for a total of approximately 230 CHIP attorneys.

The Task Force's *Criminal Recommendation #11* called for the Department to "Enhance Victim Education Programs and Increase Cooperation." On November 28, 2007, the Department co-hosted a victim education conference with the U.S. Chamber of Commerce in Miami, Florida. This was the fourth such program the

Department has hosted in the past two years, intended to educate and encourage victims of intellectual property offenses to report IP crime and cooperate in criminal investigations.

Another example is the Task Force's *International Recommendation #1*, which called for the Department to deploy Intellectual Property Law Enforcement Coordinators ("IPLECs") in Asia and Eastern Europe, to coordinate intellectual property enforcement operations and capacity building in those important regions. In January 2006, the Department deployed the first IPLEC to Bangkok, Thailand, and in November 2007, a second IPLEC was stationed in Sofia, Bulgaria. Both IPLEC positions are filled by experienced Federal prosecutors with a background in enforcing U.S. intellectual property laws.

Moreover, as the Task Force recommended in *International Recommendation #4,* the Department has significantly increased its international outreach and training efforts. In 2006, the Criminal Division trained over 3300 prosecutors, investigators, judges, and IP experts from over 107 nations on IP enforcement matters, which represented a 50% increase from the previous year.

These are but a few examples of the many ways that the Department is pursuing an integrated approach to IP enforcement. The *Progress Report of the Department of Justice's Task Force on Intellectual Property* (June 2006) provides a more complete picture of the Department's overall enforcement programs in the areas of domestic and international criminal enforcement, civil enforcement, education, and legislative reform. The *Progress Report* can be found online at http://www.usdoj.gov/opa/documents/ipreport61906.pdf.

(To Mr. O'Connor)

Question #1:

Mr. O'Connor, the Administration has garnered widespread commendation for initiating and pursuing the Strategy Targeting Organized Piracy, or "STOP!" initiative. The Government Accountability Office has noted that the Initiative has no permanent basis, and could, in fact, be discontinued at any time.

Based on its success, do you believe that Congress should explore ways to make the STOP! Initiative permanent?

A: Prosecuting IP crime has been and will remain one of the Department of Justice's top priorities. Market and technological developments have converged to create an environment where IP theft is increasing dramatically despite ramped-up enforcement efforts. Under the umbrella of the STOP! initiative and led by the

Department of Justice's Task Force on Intellectual Property, we have significantly increased our domestic enforcement efforts with special emphasis on organized criminal operations and counterfeiting crimes that threaten the health and safety of Americans. For example, in the past three years, the Department has more than doubled the number of defendants prosecuted federally for IP offenses. Despite the success of these increased enforcement efforts, we are under no illusion that the IP crime problem has been significantly reduced. We are committed to doing more.

The STOP! initiative has indeed helped to coordinate and improve the U.S. government's overall response to protecting intellectual property rights. One of the reasons it has been effective is that it has sought to work through existing interagency coordinating mechanisms and statutory regimes. In 2005, Congress created the Office of the International IPR Enforcement Coordinator, and made the head of that office also the Director of the National IP Law Enforcement Coordination Council ("NIPLECC"). Because the STOP! initiative provides a government-wide strategy for protecting American intellectual property, the Office of the International IPR Enforcement Coordinator, working through NIPLECC and other agencies, has been uniquely situated to coordinate implementation of the STOP! strategy initiatives.

To the extent that there is a need to create more "permanence" than the statutory regime already in place, we think it especially important that due care be taken not to create additional bureaucracy and rigidity at the expense of actual enforcement. The STOP! initiative, as coordinated by the International IPR Enforcement Coordinator, has been successful in large part because it has allowed agencies the necessary flexibility to maximize the effective use of their resources to best fulfill their individual statutory missions.

Question #2

Mr. O'Connor, thank you for your testimony. I found the section on the need for new enforcement tools particularly interesting. It appears to be very comprehensive in scope.

What do you think are the root causes for IPR abuse?
How do your enforcement measures address these root causes?
Do you think that these measures alone will incentivize good behavior?

A: Intellectual property plays an increasingly important and valuable role in the health of our economy. IP crime offers the opportunity to make high profits with relatively low risks. In many countries, even significant commercial transactions in counterfeit goods are punished with administrative fines - merely a cost of doing business. High profits and low risks may be motivation enough for most criminals. However, certain types of IP crime may have different objectives. For instance, economic espionage may be motivated by a desire to gain a competitive advantage in the marketplace, or a desire to provide an economic advantage to a foreign government, whereas selling counterfeit pharmaceuticals may be motivated by pure greed at the expense of public health and safety.

Regardless of its root cause, one thing is certain: the Internet and other technological advancements have all contributed to a dramatic increase in intellectual property crime on a global scale. Federal prosecutors must have an arsenal of tools to combat this growing threat, and U.S. criminal laws must be updated and strengthened to respond to emerging crime trends and technologies.

The Department of Justice's IP legislative package, the Intellectual Property Protection Act of 2007 ("IPPA"), which was transmitted to Congress on May 14, 2007, is intended to better equip law enforcement with the tools necessary to protect IPR and deter IP crime. It provides for tougher penalties, stronger forfeiture provisions, and new investigative tools. These legal tools, combined with our existing and ongoing enforcement, training, and education efforts, will help make IP crime a less profitable and higher risk activity, which in turn should provide stronger *disincentives* for *bad behavior.*

COBURN

Q: What is the status of the Article 63 request for IP enforcement information made by the U.S. of China earlier this year?

Q: What is the current level of engagement with China regarding IP enforcement and what specific steps has the US taken to address longstanding concerns regarding China's record on IP enforcement. Please include in your general response specific updates on the following issues:

- **US efforts to train Chinese customs and borders agents to improve their ability to catch counterfeit products before they leave the Chinese borders.**
- **US efforts to gain commitments and implementation from the Chinese to actually destroy counterfeited products and the equipment used to manufacture them.**
- **US efforts to gain commitments and implementation from the Chinese to make counterfeiting punishable as a criminal offense and not an administrative fine.**

Q: What can Congress do to help the Administration's strategy for continuing to work with China on IP matters?

Q: It is often said that China's laws on IPR are not being effectively enforced at the local level. What is the United States doing to influence IPR enforcement at the local level in China?

Q: Is the United States working with other nations who are also adversely affected by Chinese piracy and counterfeiting to jointly pressure the Chinese government to do more to protect intellectual property rights?

Q: Is the United States working to modify existing WTO laws, including the TRIPS agreement, in order to strengthen accountability for weak IPR enforcement?

A: I would like to briefly highlight some of the ways in which the Department of Justice has pursued bilateral efforts with China to improve law enforcement cooperation, and in particular, how we have sought to develop more joint operations against IP criminal syndicates and manufacturers of counterfeit goods.

China remains a major production center for pirated and counterfeit goods, and the STOP agencies have pursued an integrated approach to this massive enforcement problem. As part of that approach, the Department of Justice has sought greater bilateral cooperation and coordination on joint criminal investigations and prosecutions. In March 2007, the Criminal Division hosted and chaired the inaugural meeting of the Intellectual Property Criminal Enforcement Working Group ("IPCEWG") of the U.S.-China Joint Liaison Group for Law Enforcement Cooperation ("JLG"), which included 15 Chinese law enforcement officials and the Ministry of Public Security's Vice Director General of the Economic Crimes Investigation Department, as well as officials from the FBI and the Department of Homeland Security (Customs and Border Protection ("CBP") and Immigration and Customs Enforcement ("ICE")). The IPCEWG met again alongside the annual JLG Plenary meeting in Beijing, China in June 2007. The working group's focus has been on the development of more U.S.-China joint operations to combat transnational IP crime, in particular crimes committed by organized criminal groups and crimes that threaten public health and safety.

The Criminal Division's leadership of the IPCEWG has already yielded unprecedented results. On July 23, 2007, 25 Chinese nationals were arrested along with the seizure of more than half a billion dollars worth of counterfeit software, as a result of the largest ever joint investigation conducted by the FBI and the People's Republic of China. This operation, code-named Operation Summer Solstice, was one of several cases nominated to the IPCEWG for joint investigation and prosecution. China's Ministry of Public Security ("MPS") searched multiple businesses and residential locations, seized more than $7 million in assets, and confiscated over 290,000 counterfeit software CDs and Certificates of Authenticity. MPS and FBI dismantled a criminal piracy syndicate that is believed to be the largest of its kind in the world, estimated to have distributed more than $2 billion in counterfeit Microsoft software.

The Department will continue to work with the MPS in the IPCEWG in order to develop more joint enforcement operations like Summer Solstice. Integral to the success of these bilateral efforts will continue to be the offices of the FBI Legat and ICE Attache in Beijing, China, which serve as the primary investigative liaisons with the MPS.

[We understand that the International IPR Enforcement Coordinator, Department of Commerce, will provide additional responses to these questions.]