

Question#:	1
Topic:	IP
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Tom A. Coburn
Committee:	JUDICIARY (SENATE)

Question: From your testimony, it appears the process of IP enforcement begins with CBP’s seizure of infringing goods. After you seize these products, how long does the forfeiture process take?

Response: The time frame depends on whether the seizure progresses administratively (administrative forfeiture decision is made by the agency) or judicially (judicial order of forfeiture ordered by a federal judge). On average an administrative forfeiture takes approximately 180 days, but this timeframe can be extended by the importer. The time frames may be extended in cases where the importer requests an extension of time to submit a petition to CBP or files a supplemental petition. If an importer or another interested party submits a “petition extension” to request an extension of time within which to request relief from the seizure, or if a party of interest or its designated representative submits a supplemental petition, and these submissions are granted (usually based upon an identified specific need for additional time by a claimant to make a legal defense), then the forfeiture may last closer to one year. The judicial forfeiture timeframes vary based upon the court docket, but they may extend beyond 1 year.

Question: Once CBP seizes counterfeit goods, it may assess penalties in the form of monetary fines. In 2008, GAO reported that between 2001 and 2006, while CBP assessed \$1.1 billion in fines, it only collected \$2.7 million, less than 1% of the total assessed. In your testimony, you note that since 2006, increased the assessment of penalties and collection of penalties, but collection only went up by 3%. Why does CBP collect so little of the total amount of fees it assesses?

Response: These penalties were assessed without regard to the importer’s ability to pay the fine, the *de minimis* value of the appraised Manufacturer’s Retail Suggested Price (MSRP) of the seized goods, the amount of CBP resources that would be expended in the collection of the fine or the litigation risk that the case would pose if referred to the Department of Justice. Since these types of civil penalty cases are not secured by a bond, CBP’s ability to collect is jeopardized. In addition, these penalties may pose a litigation risk as it is unlikely that the Department of Justice will accept these penalties for collection action. Consequently, these penalties are often deemed as uncollectible and are “written off” by CBP. As a result, the total amount of penalties actually collected by CBP may be significantly less than the assessed amounts.

Question: When fees are collected, where are those fees deposited? Why? Are they used to offset any of CBP’s seizure costs?

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Response: Civil fines and penalties are not fees. A fine or penalty is established when a violation of import/export law is discovered. When intellectual property rights (IPR) penalties are collected, the monies are deposited in the Treasury General Fund as revenue. The collected penalty amounts are not used to offset CBP's seizure costs.

CBP does recover some seizure costs from the Department of the Treasury Forfeiture Fund (TFF), which was established under section 9703.1, Title 31, United States Code (31 U.S.C. § 9703.1). The TFF provides for the payment of all proper expenses of seizure (including investigative costs incurred by a TFF law enforcement organization leading to seizure) or to the proceedings of forfeiture and sale, including the expenses of detention, inventory, security, maintenance, advertising, or disposal of property ...” In accordance with the United States Code, fines and penalties are not deposited into the TFF.

Question#:	2
Topic:	GAO report
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Tom A. Coburn
Committee:	JUDICIARY (SENATE)

Question: The 2008 GAO Report also noted CBP had not been analyzing the variations in its IP enforcement activity by port, or how successful each port has been in enforcement. Does CBP now examine IP enforcement by port? Why or why not?

Response: CBP analyzes enforcement data, including IPR enforcement data, by a variety of factors. Publicly, CBP publishes annual IPR seizure data that includes breakouts by various factors, including trends such as the type of transaction as commercial or consumer, and the environment in which it occurs, such as mail, express or commercial cargo. Internally, CBP analyzes IPR enforcement data on a number of additional factors, including by port, all in order to monitor major trends and shifts in IPR violations. CBP has monitored this data nationally and by port since approximately 2001, and has mechanisms for analyzing this data from headquarters (HQ) to the field, as well as for the field to monitor itself.

Question: If you do not, how can CBP be effective in allocating its limited resources and improving the use of those resources at ports that may not be performing as they should?

Response: n/a

Question#:	3
Topic:	IPEC's
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Tom A. Coburn
Committee:	JUDICIARY (SENATE)

Question: The IPEC's 2010 Annual Report notes the number of consumer safety and critical technology seizures at CBP increased 97%. Is this because public health and safety seizures were not a priority in the past or because of more importation of these types of products?

Response: The increase in consumer safety and critical technology seizures in fiscal year 2010 can be attributed to several factors. CBP and U.S. Immigration and Customs Enforcement have placed an increased emphasis on enforcing consumer safety and critical technology intellectual property violations. Greater enforcement against counterfeit products sold over the internet and shipped through mail and express courier facilities resulted in high-volume, low-value seizures. In addition, rights holders provided more training to CBP officers in these facilities to help them identify counterfeits.

Question: For how long have these types of seizures been a priority at CBP?

Response: Enforcement against products posing safety and security threats has long been a priority at CBP. We have been seizing these types of products since the 1990's. We began reporting on our increased focus in this area in 2007.

Question#:	4
Topic:	pilot program
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Tom A. Coburn
Committee:	JUDICIARY (SENATE)

Question: You note in your testimony that CBP has a Center for Excellence and Expertise, which is a pilot program focused on the pharmaceutical industry.

How does this program coordinate with the IPEC's working group on counterfeit pharmaceuticals?

Response: CBP was an integral member of the Intellectual Property Enforcement Coordinator's (IPEC) working group on counterfeit pharmaceuticals, helping to develop the Administration's plans for protecting American consumers against counterfeit medicines. The working group's report, which was sent to the Vice President and Congress in March 2011, includes CBP's Pharmaceutical Center for Excellence and Expertise (CEE) as one action the Administration is taking. The CEE's mission includes expanding the Agency's knowledge base about the pharmaceutical industry, creating a centralized source of expertise for pharmaceuticals, driving uniform implementation of policies and procedures, and working with the U.S. Food and Drug Administration (FDA) to improve targeting for counterfeit, substandard, and unapproved drugs.

Question#:	5
Topic:	law
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: Are there any additional tools that you'd like to see enacted into law that would assist you in your efforts to protect intellectual property rights, both here and abroad?

Response: In implementing the Administration's Joint Strategic Plan for IPR Enforcement, CBP worked with the IPEC on a comprehensive review of laws. IPEC issued a White Paper on Legislative Recommendations in March 2011 suggesting several legal authorities to enhance CBP's ability to protect IPR. A key recommendation would assist CBP with the challenge of determining whether a product is counterfeit or genuine. As the quality of counterfeit goods improves, it is increasingly difficult for CBP to make infringement determinations. Rights holders are the experts in their products and CBP values the information that rights holders can provide to assist CBP with infringement determinations. CBP is seeking passage of its legislative initiative which would provide the Agency with authority to share information contained on samples of suspected counterfeit and pirated goods with rights holders prior to seizure to assist infringement determinations.

Question#:	6
Topic:	resources
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: The federal government has a finite number of resources to conduct its law enforcement investigations and prosecutions. Yet piracy and counterfeiting are surging all over the world, as well as online. Do you think that rights holder actions can alleviate some of the burdens on federal law enforcement and effectively combat IP theft?

Response: CBP has excellent working partnerships with many rights holders who take the steps necessary to help CBP enforce their rights, including recording their rights with CBP, working with CBP to conduct port training to help our officers recognize counterfeit products, providing reference materials to CBP, which are posted on CBP's intranet and accessible to CBP employees, and submitting allegations of infringement through e-Allegations, CBP's online repository for allegations relating to violations of the customs laws.

While many rights holders do partner with CBP, many also do not, for different reasons. These include lack of resources on the part of rights holders, and in some cases, lack of knowledge on the part of rights holders that taking these fairly simple and straightforward steps can greatly enhance CBP's ability to target, detain, and seize counterfeit goods. CBP actively encourages rights holders to partner with CBP by taking these steps. Rights holders should also provide a knowledgeable contact who can respond timely to inquiries from CBP when suspect goods are detained, and should keep contact information current in CBP's recordation system.

CBP is working to develop IPR supply and distribution chain management programs as described in CBP's Five-Year IPR Strategy submitted to Congress in 2010. This program would expand CBP's partnership with the rights holders and importers in order to enhance CBP's risk analysis and targeting of shipments at high risk for IPR infringing goods while expediting the release into commerce of low risk shipments. CBP is actively seeking to encourage rights holders and importers to participate in the dialogue as we develop these programs because the success of these programs are dependant on significant input and buy-in from the private sector. Successful programs will be advantageous to rights holders and importers as well as to CBP. CBP's IPR enforcement would benefit from better targeting efficiency, which would lead to increased seizures. Importers would benefit from reduced costs associated with unnecessary inspections and the greater predictability in their supply chains that would result from increased targeting efficiency. Rights holders would benefit from the increased protection of their rights enabled by CBP's increased targeting efficiency.

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High quality counterfeit and pirated goods make IPR infringement determinations challenging, and many rights holders use overt and covert technologies for authentication purposes. However, when CBP is authenticating goods and making infringement determinations, it is impractical for the agency to know and employ the numerous technologies used by rights holders. Presently, approximately 25,000 trademarks and copyrights are recorded with CBP. Greater uniformity and standardization of authentication tools and technologies used to identify infringement of these rights would assist CBP in making infringement determinations.

Rights holders could help CBP and law enforcement to educate consumers and businesses about IPR infringement as this is as important step in the fight against counterfeiting and piracy both in the United States and overseas. If there are fewer consumers of counterfeit and pirated goods, there will be less production. There are also actions outside of the United States that rights holders can take such as working with foreign governments to deliver training.

Question#:	7
Topic:	civil penalties
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: In your opinion, how effective are civil penalties as an enforcement tool at the border, as opposed to criminal prosecutions by the Department of Justice?

Response: The Department of Homeland Security (DHS), through CBP and U.S. Immigration and Customs Enforcement (ICE), has worked with the Department of Justice (DOJ) in collecting civil penalties and in administering criminal IPR prosecutions. Civil penalties and criminal prosecutions complement each other and each process serves as an effective enforcement tool. There are, however, benefits and drawbacks with respect to using either process.

Successful criminal prosecutions result in the incarceration of willful IPR violators and the seizure of any assets that the violator accrued through his or her criminal actions. Criminal prosecutions are public. DOJ provides announcements advising the public of criminal indictments for IPR violators and of its successful criminal convictions. These announcements, which tell the public that the Government is serious about prosecuting trademark and copyright violators and that the courts are willing to impose stiff penalties against those parties, serve as a deterrent to the importation of IPR infringing goods. Conversely, criminal prosecutions are expensive and can divert valuable resources away from the investigation of narcotics violations, terrorism, and violent crimes. Successful civil penalties encourage negligent and unintentional importers of IPR infringing goods to adopt business practices that are consistent with the law, result in the collection of assessed or mitigated penalty amounts, and generate revenue for the Government. Civil penalties are less burdensome for the Government to process than criminal prosecutions because there are no *mens rea* requirements associated with the penalty. Unfortunately, the absence of *mens rea* requirements also makes it difficult for CBP to publish the names of the penalized parties. This limits the multiplying effect that is garnered from criminal prosecutions because the public is not privy to information regarding the effects of the penalty. Penalties that must be presented to DOJ for collections require significantly more time and resources to process, but the Government, if it prevails on the claim, would be able to collect the fully assessed penalty amount.

BACKGROUND:

Many of the criminal IPR cases that DOJ prosecutes stem from CBP's civil administrative seizure cases. In the criminal prosecutions, CBP employees, including, but not limited to auditors, attorneys, CBP Officers, Fines, Penalties and Forfeitures Officers, Import Specialists, and Seized Property Specialists may assist to process the

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underlying civil seizure—by reviewing the underlying IPR infringement determination, valuing the merchandise, ensuring the viability of the underlying seizure, and maintaining the seized property—while ICE Special Agents work closely with DOJ in continuing the underlying criminal investigation.

CBP is also a leading source of referrals to ICE for possible criminal investigations of IPR infringements. As a participating agency in the National Intellectual Property Rights Coordination Center (IPR Center), CBP leverages our targeting and interdiction successes to contribute to special operations. For example, CBP, in conjunction with the Federal Bureau of Investigation (FBI) and ICE, initiated Operation Network Raider in May 2010, which targets the illegal distribution of counterfeit network hardware manufactured in China. To date, referrals from this operation to ICE for criminal investigation have resulted in 30 felony convictions and 700 seizures of counterfeit Cisco network hardware. CBP is also participating in the recently announced IPR Center Operation Chain Reaction, a multi-agency effort to protect the military's supply chain from being infiltrated by counterfeit goods. In one recent criminal prosecution charging 18 U.S.C. § 2320 (trafficking in counterfeit goods) *U.S. v. Chong Lam and Joyce Chen*, CBP is now pursuing three civil penalties that were assessed under 19 U.S.C. § 1526(f), against the convicted criminal counterfeiters.

Although it has been difficult to collect civil penalties based on the manufacturer's suggested retail price, recent victories in the district courts may lead to greater collections as violators achieve a greater awareness that the government is serious about pursuing uncollected penalties. The Government has successfully litigated three civil penalties that were assessed under 19 U.S.C. § 1526(f). The cases are *United States v. Nguyen*, in which the violator was required to pay the fully assessed penalty amount and to pay much of the Government's attorney fees; *Able Time v. United States*, which affirmed the Government's ability to assess penalties under 19 U.S.C. § 1526(f) and required the violator to pay the assessed penalty amount; and *Sakar v. United States*, which was remanded to the U.S. Court of International Trade for dismissal, because the U.S. Court of Appeals for the Federal Circuit determined that the CIT did not have jurisdiction over penalties assessed under 19 U.S.C. § 1526(f). The awarding of the administrative penalty, which is again under review with CBP, affirmed the Government's position that penalties assessed under section 1526(f) were within the district courts jurisdiction. CBP is working to enhance the quality of the civil IPR penalty cases that it refers to DOJ for judicial collections.

Question#:	8
Topic:	increase
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
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Committee:	JUDICIARY (SENATE)

Question: Your testimony describes efforts to increase the number and severity of civil penalties. Is this proving to be a successful deterrent?

Response: CBP has taken preliminary steps to amend Treasury Decision 99-76 (T.D.), which will permit the issuance of a civil penalty pursuant to 19 U.S.C. 1526(f) to be assessed against any party who directs, assists financially or otherwise, aids or abets in the importation of merchandise seized under 19 U.S.C. 1526(e) at the domestic value, rather than the MSRP of the genuine article. It is CBP's position that assessing penalties at the domestic value would increase the penalty collection rates. This proposed policy will permit CBP Fines, Penalties, and Forfeitures Officers to assess civil fines at the domestic value of the merchandise seized for the first violation, and at not less than two times the domestic value and not more than the MSRP for the second and subsequent violations where CBP has previously assessed a civil penalty and the civil penalties will be issued concurrently with the seizure.

To deter IPR violators, CBP will continue to collaborate with ICE to identify assets that could be pursued for collection on IPR penalties. Additionally, in September 2011, CBP will be conducting an IPR Enforcement Conference for key field personnel which will add to our goal of increasing and improving the effectiveness of various trade enforcement processes and actions, including deterring IPR infringement and enforcing IPRs ; protecting the public from hazardous imports through effective Import Safety enforcement; increasing the penalties imposed on entities that attempt to defraud the U.S. government out of duties due through the use of our penalty provision; and improving the lines of communication among the front-line CBP field personnel and various components within CBP and ICE Headquarters.

Question#:	9
Topic:	negotiations
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Primary:	The Honorable Charles E. Grassley
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Question: Are you obtaining adequate cooperation from the Chinese government with regard to your ongoing negotiations? What are the prospects for actually improving customs enforcement through these negotiations?

Response: As described below, CBP conducts on-going negotiations with the Chinese government, reaches out to in-country organizations, and coordinates training opportunities with the Chinese government. Cooperation from the Chinese government has been sufficient to allow us to complete negotiations on two MOUs.

Negotiations

CBP signed a Memorandum of Cooperation (MOC) with the General Administration of China Customs (GACC) in May 2007 that created a framework for cooperation to enhance border enforcement of IPR between China and the United States. The MOC provides for sharing import information, sharing best practices, exchanging personnel and experiences, and engaging cooperatively with industry. On May 9, 2011, CBP and GACC signed and exchanged letters amending the MOC on Strengthening Cooperation in Border Enforcement of Intellectual Property Rights. The exchange was completed on the margins of the Strategic & Economic Dialogue (S&ED) to improve the information sharing provisions of the MOC.

Also on the margins of the May S&ED, CBP signed a Memorandum of Understanding (MOU) Regarding Cooperation in Law Enforcement Matters with the Ministry of Public Security (MPS) of the People's Republic of China. Among other things, the MOU provides for cooperation with MPS on IPR enforcement.

The prospect for improving customs enforcement beyond signing MOUs is yet to be determined and may be highly dependent upon the successful execution of follow-on action plans that focus on specific intellectual property rights such as copyright or trademark and identify specific goals and results.

Outreach and Developments

CBP Beijing, as part of the U.S. Mission's Intellectual Property (IP) Working Group, has participated in outreach to the American Chamber of Commerce of China (AmCham – China) and the Quality Brands Protection Committee (QBPC); and on June 24, 2011, attended the 11th Anniversary of Quality Brands Protection Committee of China Association of enterprises with Foreign Investment (CAEFI) which included the Recognition Ceremonies for 2010-2011 China IPR Best Practices and the Outstanding

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Agencies for Nation-wide Enforcement Operation. Such in-country organizations have well intentioned plans of protecting U.S. brands mainly inside the Chinese internal market. Members include many Fortune 500 companies. An effective IP protection agenda must bring together the brand owners, the business community and government authorities to include the law enforcement community and prosecutors.

Training Coordination

CBP Beijing has worked with GACC to nominate four attendees to the International Law Enforcement Academy's (ILEA) Seaport Interdiction / Cargo Targeting course held from June 6 – 17, 2011. These CBP sessions not only provide knowledge and relationship building, but also provide credibility for the Agency's efforts.

CBP Beijing worked with the Embassy Beijing Economics Section, U.S. Patent and Trademark Office (USPTO), and ICE Beijing to invite officials from MPS, GACC, and the Supreme People's Court (SPC) to attend State funded US – China – Japan intellectual property enforcement seminar scheduled for the first week of September 2011 at Qingdao, China. If all goes well and the seminar is ultimately conducted, the seminar will be the first U.S.-led forum that has had the ability to bring the legal and enforcement sides together. In late July, the proposed event was postponed in order to comply with the Leahy Amendments linked to the Bureau for International Narcotics and Law Enforcement Affairs (INL). The group is looking for an alternative training site outside China before offering the seminar to a wider spectrum of attendees from additional regional countries.

Question#:	10
Topic:	training programs
Hearing:	Oversight of Intellectual Property Law enforcement Efforts
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: The 2010 IPEC report mentions CBP's involvement in training programs in Africa, Europe, and other nations. How extensively is CBP involved in international training programs? What is the general substance of those trainings?

Response: Foreign IPR training is typically funded by the Department of State and conducted through other agencies, notably the U.S. Patent and Trademark Office and the Commercial Law Development Program at the Department of Commerce. CBP has been actively engaged in these IPR training programs by providing subject matter experts in the areas of targeting, risk management, border interdiction techniques, and legal aspects and issues in IPR enforcement.

In the last twelve months, CBP provided trainers for 11 programs conducted in El Salvador, Hong Kong, India, Mexico, Morocco, Russia, Thailand (twice), Trinidad and Tobago, Uganda, and Ukraine.