

Testimony of

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Global Piracy of Intellectual Property Rights:  
Challenges, Enforcement Efforts and Results

Good afternoon Mr. Chairman, Senator Leahy and Members of the Committee. Thank you for the opportunity to speak to you today about the challenges posed by piracy of intellectual property rights (IPR), and the enforcement tools that USTR and other agencies are utilizing to protect U.S. IPRs in foreign markets.

The theft of intellectual property worldwide is an enormous and growing problem. As a result of this criminal activity, many foreign markets for products protected by IPRs are simply evaporating. In China, industry estimates that piracy levels in many sectors are close to or exceed 90 percent. In Russia, piracy levels for movies and music have also continued to increase, as well as overall losses to copyright-related industries. That said, the protection of IPRs in some countries has actually improved. Yet, while these improvements have sometimes been dramatic, the levels of piracy and counterfeiting in many countries remain unacceptably high.

We understand the growing sense of frustration among U.S. industry and Congress about the lack of enforcement of IPRs by our trading partners. USTR and other agencies are continuing to work to address this situation - one made complex not only by its sheer scale but by the multiple underlying causes.

A little over a year ago in testimony before this subcommittee, I outlined key challenges facing the United States on protection of IPRs such as the global nature of pirate operations and distribution chains and the lack of the rule of law that allow criminal enterprises to flourish in countries such as China and Russia without effective enforcement or deterrent penalties. These challenges still remain and in the case of piracy, technological advances have allowed pirates to further streamline and expand their operations. Over the past year USTR, working with other agencies, has vigorously utilized the Special 301 process and other tools at our disposal, and initiated new efforts to strengthen enforcement. I would like to provide an update on our recent efforts as well as some examples of success in combating and reducing levels of piracy and counterfeiting in our trading partners.

## Tools and Measures to Combat Piracy and Strengthen Enforcement

USTR has taken a comprehensive, multi-faceted approach to address the complexity of the global piracy problem. We have been vigorously employing all tools and resources at our disposal to bring pressure to bear on countries to reform their intellectual property regimes, and we will continue to do so.

## Special 301/Section 301

As we do in April of each year, USTR issued the 2005 Special 301 Report on April 29, which catalogues the IPR

problems in dozens of countries around the world and places them in a hierarchy - ranging from the lowest ranking of Watch List ("WL") to the mid-level Priority Watch List ("PWL") to the ranking reserved for the worst offenders, Priority Foreign Country. The 2005 report lists 52 trading partners and gives special attention to the need for significantly improved enforcement against piracy and counterfeiting. This year, we identified 1 Priority Foreign Country; 14 on the Priority Watch List and 36 on the Watch List (see attachment at the end for a list of the countries designated in the Special 301 Report). Two countries are being monitored under Section 306 and USTR will conduct 7 "Out-of-Cycle" reviews (OCRs), namely for Canada, EC, Indonesia, Philippines, Russia, Saudi Arabia and Ukraine.

As I just mentioned, Priority Foreign Country is the most serious designation; USTR is obligated to decide whether to initiate an investigation under section 301 against any country designated a PFC. Priority Watch List indicates that the United States has a high level of significant concerns. Watch List indicates that there are serious IPR issues in that country that warrant attention. "Section 306 monitoring" indicates that a country is taking action to address concerns raised in connection with a section 301 investigation and are monitoring whether that country is satisfactorily implementing those actions. USTR conducts OCRs for countries that appear to be on the verge of having their status on the Special 301 list changed because of either significant improvements or problems.

A country's ranking in the report sends a message to the world, including potential investors, about a country's commitment to IPR protection. We have used this exercise to great effect, as each year we see countries coming forward with reforms or reform proposals to avoid elevation on the list.

For example, after elevating Korea to PWL last year, it took significant steps over the past several months to strengthen protection and enforcement of IPR such as, introducing legislation that will explicitly protect sound recordings transmitted over the Internet (using both peer-to-peer and web casting services); implementing regulations to address film piracy; and increasing enforcement activities against institutions using illegal software. Taiwan is another example of where we achieved positive results utilizing the Special 301 process. In response to our out-of-cycle review, Taiwan's legislature approved a number of amendments to its copyright law that provide greater protection for copyrighted works and increase penalties for infringers. In addition, Taiwan authorities made permanent an IPR-specific task force that has increased the frequency and effectiveness of raids against manufacturers, distributors, and sellers of pirated products.

We have also used the Special 301 Report to highlight the longstanding and serious problems of optical media piracy in Pakistan, Malaysia and the Philippines. Over the past year both Malaysia and the Philippines have made measurable progress in enforcement against optical media piracy I am particularly pleased to report here today that five days after the release of this year's Special 301 Report, Pakistan officials raided six optical media plants in Karachi and seized over 150,000 discs of pirated software, movies and DVDs, and over 6000 stampers. In addition, authorities made several arrests and the plants have been sealed and placed under 24 hour police surveillance. A follow up raid on the registered office and warehouse of one of the plants seized another 5,500 stampers and more pirated optical media.

In yet another example, Canada RCMP officers recently seized more than \$800,000 worth of goods, including more than 30,000 DVDs, 3,000 video games and 1,600 multi-game cartridges, suspected of being bootlegged. The seizure came days after the United States put Canada on the watch list due to concerns over weak enforcement of IPR. Finally, Ukraine, which is designated as a PFC and has been under sanctions since 2001, has recently indicated that it is committed to address our long-standing piracy concerns as a result of the new government's desire to have these sanctions removed and is currently involved in reforming its optical disc laws.

## Trade Agreements

Another very useful tool is our free trade agreements and ongoing FTA negotiations. In the past three years, we have completed and received Congressional approval of free trade agreements with Chile, Singapore, Australia and Morocco, have concluded negotiations with Bahrain and CAFTA-DR and have launched free trade agreement negotiations with 13 more countries (Panama, Thailand, the Andeans, UAE, Oman, and SACU countries). Consistent with the guidance Congress provided in the Bipartisan Trade Promotion Authority Act of 2002, we require that our free trade agreement partners bring their IPR regimes up to standards consistent with U.S. law.

Our FTAs contain the highest level of IPR protection of any international agreements in the world, and they directly address many of the key challenges regarding enforcement which I discussed earlier. They contain provisions dealing with the whole range of IPR, including such issues as curbing the use of equipment used to circumvent anti-counterfeiting technology and dealing with sector-specific problems such as optical disk or broadcast piracy. They

also strengthen enforcement by streamlining procedural rules for bringing copyright claims, and providing for higher damage awards (including statutory damages), expeditious ex parte searches to gather evidence, and civil remedies to seize and destroy infringing goods. Our FTAs also provide for improved border enforcement to stop imports and exports of pirate and counterfeit goods and stronger criminal enforcement.

We recognize that in order for these FTA provisions to be effective, they must be properly implemented and enforced. Over the past year, we have directed our efforts in ensuring that our new FTA partners meet their obligations both in implementation and enforcement. We have spent many hours working closely with Australia, Singapore and Chile and have been successful in ensuring that their implementing legislation fully meets their FTA obligations to protect and enforce IPR. We have also - with support and cooperation from our embassies and industry - heightened our vigilance to quickly respond to concerns over possible lack of compliance or enforcement of FTA obligations. As we continue to make progress in concluding new FTAs, we realize that a key priority must be to enforce our FTA partners' compliance with their obligations to protect IPR.

## WTO

USTR has the lead in working closely with other agencies in addressing IPR issues multilaterally through the WTO.

The initiation of dispute settlement proceedings is the most forceful expression in the WTO of dissatisfaction with a country's IPR protection and can be an effective way to achieve reform. USTR has brought 12 TRIPS-related dispute settlement cases against 11 countries and the EC. Of these 12 cases, one is in consultations, eight were favorably resolved by mutually-agreed solutions between the parties, and three resulted in favorable rulings for the United States. Just a few months ago, a WTO panel upheld the U.S. WTO challenge against an EC regulation on food names - i.e., the EC regulation on geographical indications for food and agricultural products - that unfairly discriminated against foreign producers and products. This finding is an important victory for all American food producers of quality regional products - who are entitled to equal access to the EC system of protection for geographical indications - and also for all U.S. producers owning trademarks in Europe. In nearly all of the 11 cases, U.S. concerns were addressed via changes in laws or regulations by the other party.

We also regularly review countries' IPR laws and practices through the WTO Trade Policy Review Mechanism (TPRM). WTO members recently reviewed included China late last year. In addition, the TRIPS Council regularly reviews implementing legislation, providing a forum for USTR to provide comments on existing and draft legislation and an opportunity for bilateral meetings to discuss specific concerns.

## Preference Programs

USTR also administers the Generalized System of Preferences (GSP) program and other tariff preference programs. The "carrot" of preserving GSP benefits is an effective incentive for countries to protect IPR. In fact, the filing of a GSP review petition or the initiation of a GSP review has in some cases produced positive results. For example, in response to an extended GSP review of Brazil this past year, the Government of Brazil adopted a new National Action Plan to enforce copyrights and reduce piracy. According to our industry, the Brazilian Government appears to be moving in the right direction and is now committing significant fiscal and personnel resources to anti-piracy efforts. The recent efforts to integrate the enforcement efforts and informational exchange channels of the Federal Police, Federal Highway Patrol, and Internal Revenue Service, are evidence of that the Plan is being implemented. Over the past two months hundreds of thousands of pirated products have been seized and destroyed, and dozens of individuals have been arrested.

India, expressing its desire to have GSP benefits reinstated, just passed a new patent law, providing patent protection for pharmaceutical products thus providing this form of intellectual property to our innovative pharmaceutical companies.

## The Strategy Targeting Organized Piracy (STOP!) Initiative

Through a new initiative, the Administration is taking comprehensive action to block trade around the world in pirated and counterfeit goods. The Strategy Targeting Organized Piracy (STOP!) Initiative is a U.S. government-wide

initiative begun in October 2004 to empower U.S. businesses to secure and enforce their intellectual property rights in overseas markets, to stop fakes at U.S. borders, to expose international counterfeiters and pirates, to keep global supply chains free of infringing goods, to dismantle criminal enterprises that steal U.S. intellectual property and to reach out to like-minded U.S. trading partners in order to build an international coalition to stop counterfeiting and piracy worldwide.

Last month, a delegation representing the seven federal agencies participating in STOP! visited Singapore, Hong Kong, Japan and Korea generating much interest and fruitful discussions. A few countries proposed avenues of cooperation, one in particular in the area of peer-to-peer file sharing that may be useful to our copyright concerns. In the coming months, we will continue our outreach so as to determine the interests of other countries for activities that provide opportunities for cooperation. Next month we will be sending a similar delegation to Europe.

I would now like to turn to two particular countries that pose the greatest challenges to protecting and enforcing American IPRs.

## China

As Ambassador Portman stated in his confirmation hearing testimony, IPR is a top priority in our trade relationship with China. We have a number of challenges to resolve in this relationship that, as you are all aware, have been ongoing for some time. A chief concern among these challenges is the rampant piracy of our movies, music and software. Illustrative of this point are industry statistics showing that last year 85 percent of the sound recordings and 95 percent of films in China were pirate product. These are disconcerting figures which as Ambassador Portman stated we will focus on cutting. The reported loss of sales affecting U.S. industry ranges from \$2.5 to \$3.5 billion annually as described in our Special 301 Out-of-Cycle Review (OCR). Such losses are not sustainable and, as demonstrated by the report's more aggressive stance, are of significant concern. We want and look forward to working closely with you and your staff in combating the theft of American innovations in China.

## The Special 301 OCR

On April 29, USTR reported the results of its OCR on the IPR situation in China. In this report, we concluded that while China has undertaken a number of serious efforts at the national level to address our IPR concerns, particularly by amending laws and increasing raids against those selling pirated goods and operating illegal production facilities, China is still not deterring rampant piracy. Our industries report that piracy and counterfeiting remain at high levels, a situation hurting our individual right holders, and small and medium size businesses the hardest. As a consequence, we outlined five actions to address our concerns:

- 1) Working with U.S. industry and other stakeholders with an eye toward utilizing WTO procedures to ensure that China is in compliance with its WTO TRIPS obligations.
- 2) Invoking the transparency provisions of the WTO TRIPS Agreement, which will require China to produce detailed information on certain aspects of IPR enforcement that affect U.S. rights under the TRIPS Agreement.
- 3) Elevating China onto the Priority Watch List on the basis of serious concerns about China's compliance with its WTO TRIPS obligations and commitments China made at the April 2004 U.S.-China Joint Commission on Commerce and Trade (JCCT) to achieve a significant reduction in IPR infringement throughout China, and make progress in other areas.
- 4) Continuing to monitor China's implementation of its commitments under our 1992 and 1995 bilateral agreements (including additional commitments made in 1996).
- 5) Using the JCCT, including its IPR Working Group, to secure new, specific commitments to significantly improve IPR protection and the enforcement environment in China.

China must expend the political capital necessary to deliver on its promise to "substantially reduce IPR infringement." China's Vice Premier Wu Yi committed to this at the April 2004 JCCT and in our 1995 bilateral Memorandum of Understanding on IPR. In order to achieve this goal, China must resolve critical deficiencies in IPR protection and enforcement, while providing for a level of transparency that allows for a thorough accounting. We will work with our counterparts on the Chinese side, beginning with tomorrow's JCCT IPR Working Group, to impress upon China that patience within the Administration and on Capital Hill has run and that now is the time for results.

#### Working with Industry

On the domestic front, we are working with the U.S. copyright industry to identify problems and address trade complaints related to China, as we did during the OCR. This includes cooperating with companies and associations to monitor China's WTO TRIPS implementation, and using WTO procedures to address our serious concerns about China's compliance. Industry's daily operations throughout China provide insight into that country's IPR regime, particularly at the local and provincial levels, where piracy is most egregious. This dialogue points to serious concerns with China's implementation of Articles 41 and 61 of its TRIPS obligations to provide that for effective enforcement of IPR including remedies that produce deterrence against pirating.

#### TRIPS Transparency Provision

In the next couple of weeks, we will begin the process of filing a request for information under TRIPS transparency provisions (Article 63) so that China must provide information on its IPR regime and recognize the serious deficiencies in its system. The request will focus on specific judicial decisions and administrative rulings that pertain to IPR, including penalties, fines and prison terms actually imposed in individual IPR infringement cases. We believe such a request should address some of the concerns industry has had with complaints it has leveled in the Chinese system, while demonstrating to the Chinese our belief that a transparent IPR regime is a staple of good governance.

China's response to our request will be the first public test of whether it is serious about addressing rampant piracy and counterfeiting. It will also compel its officials to revisit China's enforcement practices, the IPR violations it pursues and the results of these cases. We look forward to China's earliest response to that request.

#### The Priority Watch List

China's placement on the Priority Watch List (PWL) indicates that particular problems exist in that country with respect to IPR protection, enforcement and market access. Copyright concerns include:

1. Market access and investment barriers that prevent the copyright industry from serving China's market in a timely manner.
2. China's exports of pirated movies, music and software.
3. China's failure to impose penalties that deter or punish, or incapacitate these thieves.
4. Rapid growth of Internet piracy.

#### Monitoring U.S.-China Agreements

We will continue monitoring China's yearly performance in the Special 301 process in part based upon commitments it made in our bilateral agreements. Although the importance of these agreements has decreased since China became a member of the WTO in December 2001 (requiring adherence to TRIPS), some of the provisions in these agreements remain significant.

#### The JCCT IPR Working Group

In our OCR Report, we identified for China six specific results that in our view would be evidence of promoting better IPR protection. During this week's JCCT IPR Working Group meetings, we will provide the Chinese suggestions on how to achieve the results we're seeking and impress upon them the importance of action. Among others, we are looking for China to enhance its criminal enforcement system, provide for a deterrent administrative enforcement system, allow for fair market access for legitimate products, secure its borders against exports of pirated products, protect copyrights in the context of the Internet, and increase the transparency of its legal system. China must now take ownership of these concerns and exercise the political leadership needed to show improvements in stopping piracy.

Simultaneously during the JCCT IPR Working Group's meetings, we will share our technical expertise with China on how to meet the many challenges in its IPR regime. Along with representatives from the Departments of Commerce (including the U.S. Patent and Trademark Office), Food and Drug Administration, Homeland Security (Customs and Border Protection), Library of Congress (Copyright Office), Justice, and State, we will cooperate where possible to ensure that China addresses the concerns raised.

Finally, we ask Congress to join us in encouraging industry's robust participation in each of these efforts through increased monitoring, data collection and devoting resources to this effort. Their engagement and support on IPR issues this year is key to our efforts to improve IPR protection in China.

## Russia

We also remain very concerned about high levels of piracy of optical media (CDs and DVDs) and the growing problem with Internet piracy of copyrighted works in Russia. Protection and enforcement of American IPRs in Russia is an issue that is of utmost concern to USTR and the Administration. Due to the importance of this issue and the prevalence of piracy in Russia, Presidents Bush and Putin have discussed improving protection of IPRs in Russia at several recent summits, including at their meeting earlier this month in Moscow. Successfully combating the rampant piracy and counterfeiting that currently exists in Russia is a top priority.

The level of copyright piracy in Russia has increased dramatically and the adverse effects on American owners of copyrights are compounded by the fact that Russia has become a major exporter of pirated materials. In addition to sales in Russia of illegal music, movies, and computer software, Russia's pirates are exporting large volumes of illegal products to other markets. As a result, Russia is on the 2005 Special 301 Priority Watch List. In addition, due to the severity of the problem in Russia, the Administration will conduct an out-of-cycle review this year to monitor progress by Russia on numerous IPR issues. We are also continuing interagency review of a petition filed by the U.S. copyright industries to withdraw some or all of Russia's GSP benefits.

## USTR Efforts

USTR and other agencies have been and will continue to be very engaged with the Russian Government at all levels to develop an effective IPR regime and strengthen enforcement in Russia. We have an ongoing bilateral working group with the Russian Federal Service on Intellectual Property, Patents, and Trademarks (Rospatent), the agency responsible for most IPR matters in Russia, which has convened several times this spring to discuss a wide range of IPR issues. Recent discussions have focused on Russia's enforcement regime, legislative deficiencies - including the need for a comprehensive regulatory regime on optical media production, and Internet piracy.

We are also working on IPR issues in the context of Russia's WTO accession negotiations. We have continuing concerns that Russia's current IPR regime does not meet WTO requirements related to protection of undisclosed pharmaceutical testing data, geographic indications and enforcement. We are raising these and other concerns in the accession negotiations and have made it clear to the Russian Government that progress on IPR will be necessary to complete the accession process.

Supplementing these efforts directly with Russia, the Administration is also seeking to address Russia's growing exports of pirated and counterfeit products as part the STOP! Initiative I mentioned earlier.

Our work has brought about some improvements, particularly with respect to the content of Russia's laws, but much more will need to be done in order to reduce the level of piracy and counterfeiting. As part of its effort to bring Russia's IPR regime into compliance with the obligations of the TRIPS Agreement, Russia amended its Copyright Law in 2004 to provide protection for pre-existing works and sound recordings. Russia has amended a number of other laws as well, including its laws on patents and protection of computer software and databases. Although these amendments demonstrate Russia's commitment to strengthening its IPR laws, further improvements in Russia's laws are necessary.

#### Stronger Enforcement Measures Necessary

On the enforcement side, we have seen far less progress. While Russian law enforcement agencies have taken some actions, including an increased number of raids by police, these actions have not deterred the significant increase in piracy that our industry has observed in Russia. Enforcement efforts in Russia must increase dramatically in order to combat rising piracy and counterfeiting levels. We need to see improvements in enforcement of Russia's criminal laws against piracy and counterfeiting, improved enforcement at the border to prevent exports of pirated and counterfeit products and better administrative and civil procedures for IPR enforcement, such as providing for ex parte procedures in civil cases.

We are very concerned with the amount of excess optical media capacity in Russia and with Russia's lack of a comprehensive regulatory regime to control illegal optical media operations. Our industry estimates that the capacity of known plants in Russia is 371.6 million discs while legitimate domestic demand is around only 30 million discs. Illegal optical media from Russia has been found in markets around the world. Russia lacks an effective system for inspection of optical media production plants to ensure that only authorized product is being made.

On the criminal enforcement side, we see frequent delays in prosecutions and then imposition of minimal penalties, including many suspended sentences. Frequently, pirated goods that have been seized in a case are not destroyed, but are returned to the market. The U.S. copyright industry estimates that 70 percent of seized pirated product goes back into the stream of commerce. We are also seeing an increase in piracy on the Internet. Several major illegal websites are operating out of Russia, one of which our industry reports is now the largest portal for pirated product in the world. We have raised these issues with Russia and are seeking decisive actions to address these growing problems, such as inspecting optical media plants, permanently shutting down illegal production, and taking down Internet sites that are spreading pirated material.

We share in our industries' frustration over the lack of significant progress on the part of Russia's authorities. USTR is committed to utilizing effectively the tools currently available to us to press Russia to act immediately to implement concrete measures to combat piracy and counterfeiting operations and reduce the losses to U.S. industries. Despite our close engagement and continued work with the Russian Government, Russia has made little progress in permanently closing down illegal production and bringing offenders to justice. Political will at the highest levels will be needed in order to see a reduction in piracy levels in the near term.

USTR will continue to monitor Russia's progress in bringing its IPR regime in line with international standards through the Special 301 out-of-cycle review, the ongoing GSP review, bilateral IPR working group discussion and WTO accession discussions. Progress will be critical for our bilateral relationship with Russia and will have implications for Russia's accession to the WTO. Ultimately, success will depend on the political will of Russia's leaders to tackle the underlying problems of corruption and organized crime. We remain committed to working with the Congress and this committee in particular in pressing Russia to combat and reduce the unacceptable levels of piracy and counterfeiting which plague our industry.

In conclusion, dealing with the problem of piracy requires a comprehensive, intensive and sustained effort. The new USTR Ambassador Portman has identified enforcement of IPR and ensuring compliance with obligations by our trading partners such as China and Russia as a top priority. We are strongly committed to continuing to bring all of USTR's weapons to bear on this issue and to maintain the pressure year after year. We have made progress, but enormous challenges remain.

I look forward to working with you and your staffs to continue to devise solutions for dealing with this critical matter.

Thank you.

## Special 301 Country Designations

### Priority Foreign Country

Currently, one country (Ukraine) is designated to be in this category and remains subject to \$75 million in sanctions.

Note: Countries identified as Priority Foreign Countries can be subjected to a Section 301 investigation and face the possible threat of trade sanctions. These are countries that fail to enter into good faith negotiations or make significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of IPR.

### Priority Watch List

Fourteen trading partners have been placed on the Priority Watch List. These countries are: Argentina, Brazil, China, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Pakistan, the Philippines, Russia, Turkey, and Venezuela.

Note: Countries on the Priority Watch List do not provide an adequate level of IPR protection or enforcement, or market access for persons relying on intellectual property protection.

### Watch List

Thirty-six trading partners are placed on the Watch List. These countries: Azerbaijan, Bahamas, Belarus, Belize, Bolivia, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Dominican Republic, Ecuador, European Union, Guatemala, Hungary, Italy, Jamaica, Kazakhstan, Korea, Latvia, Lithuania, Malaysia, Mexico, Peru, Poland, Romania, Saudi Arabia, Slovakia, Taiwan, Tajikistan, Thailand, Turkmenistan, Uruguay, Uzbekistan, and Vietnam.

Note: Countries on the Watch List merit bilateral attention to address underlying IPR problems.