

Testimony of

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Subcommittee on Intellectual Property
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"Piracy of Intellectual Property"

Mr. Chairman, Senator Leahy, Members of the Subcommittee, thank you for the opportunity to speak with you today about one of the most pressing issues in copyright today - international piracy. It is always a pleasure to appear before you, and I was pleased to see the reinstatement of the Subcommittee, and wanted to congratulate you on your Chairmanship.

I. Introduction

Mr. Chairman, in the nearly forty years that I have worked in the Copyright Office, piracy, and especially global piracy, is probably the most enduring problem I have encountered. As with some other illegal activities, there will always be at least a small segment of any population who cannot be deterred from this theft of others' creativity. Thus, I fear that it is simply not realistic to speak of eliminating all piracy around the world, or even within the United States.

What we can and should strive for is the reduction of piracy to the lowest levels possible; levels that will not rob authors and copyright owners of the incentive to create and distribute the works that have made America's creative industries the envy of the world. The Copyright Office has a long history of working toward this goal, both on its own initiative and in cooperation with the other agencies of the Federal Government. My testimony today will describe those efforts and their effectiveness.

II. Legal Framework

Broadly speaking, there are two elements to the protection of copyright. The first element is a legal framework that provides the basic rights to copyright owners and establishes procedures for the enforcement of those rights. Those procedures must provide the opportunity to obtain adequate remedies when those rights are violated as well as the possibility of punitive monetary judgments and, in appropriate cases, imprisonment of the infringer. The second element of copyright protection is the application of these legal rules to ensure that copyright owners have actual, effective protection against infringement of their rights.

In the ten years since the conclusion of the Uruguay Round of the WTO, and the concomitant adoption of the TRIPS Agreement, there has been tremendous improvement worldwide in countries' legal framework for copyright protection. By incorporating the substantive copyright obligations of the Berne Convention, and supplementing them with civil, criminal, and border enforcement obligations, TRIPS established a minimum standard against which all countries' copyright regimes could be judged.

Since 1995, the number of WTO member countries has nearly doubled. By including the TRIPS Agreement in the WTO obligations, and thus subjecting the obligations therein to international dispute resolution, we have been able to advance copyright protection in all 148 WTO member countries further and faster than would have been possible without it.

The Copyright Office is proud of its contributions to this success, which include participation in the negotiation of the TRIPS Agreement and other copyright treaties and agreements, as well as training of foreign officials. Our main program for training foreign copyright officials is our International Copyright Institute ("ICI"). This week-long program exposes foreign officials from developing countries and countries in transition to a wealth of copyright knowledge and

information, presented by U.S. Government, and foreign and domestic industry experts. Thanks to the Congress, we are able to attract the best participants from around the world by offering this training program at no cost to them or their governments.

Part of the reason the ICI is such a success is that it is not merely a week of lectures. We provide ample time for the delegates to interact and learn from each other. Similarly, we learn valuable information about the law in their countries, including new developments not necessarily available to the public. Perhaps most important of all, we strengthen the relationship with those countries. Many ICI participants have been high-ranking officials or have gone on to high-level government positions. The relationships we establish at the ICI enhance our ability to negotiate with the officials and countries we have hosted.

In addition to the ICI, the Copyright Office makes its experts available to speak around the world at various conferences and training programs. In the past twelve months, we have spoken at WIPO seminars, academic conferences, and events sponsored by other U.S. Government agencies, such as a State Department Intellectual Property Roundtable and the Patent and Trademark Office's Visiting Scholars program. I personally have been very active in the State Department's Distinguished Speaker program, giving presentations in Chile and Uruguay last year, and am scheduled to speak in Germany, Brussels, and Brazil this year.

We also supported USTR's free trade agreement ("FTA") negotiations by providing technical assistance to our negotiating partners. We were pleased to send experts to the two intellectual property and telecommunications programs that the State Department organized for its embassy officers throughout Europe and east Asia.

The Copyright Office is also a major contributor to the strengthening of copyright protection through international organizations, notably the World Intellectual Property Organization ("WIPO"). The Copyright Office played a key role in the negotiation of the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"). Those treaties supplemented the Berne Convention and the TRIPS agreement with updated obligations that are especially important in the digital age. As you know, the United States implemented the WCT and WPPT through the Digital Millennium Copyright Act ("DMCA"), which stands as a model for the world. Those treaties and the model of the DMCA have also been the source of a substantial improvement of the legal framework for the protection of copyright in numerous countries around the world. The work at WIPO neither began nor ended with the WCT and the WPPT, and the Copyright Office continues to work in support of the proposed treaties on audio-visual performances and on broadcasting, cablecasting, and webcasting, among many other initiatives.

There are also many opportunities to promote copyright protection through the World Trade Organization ("WTO"). The Copyright Office works closely with the U.S. Trade Representative's Office ("USTR") to take full advantage of each of them. As countries not currently in the WTO seek to join, we evaluate their existing copyright laws, advise USTR of TRIPS deficiencies, and support pre-accession negotiations. Once countries are WTO members, they are subject to a periodic review of their laws. Again, we advise USTR of any TRIPS deficiencies and draft questions for those countries, seeking explanations from their governments and highlighting the problems in a global forum. Most seriously, if and when the dispute resolution procedure of the WTO is invoked for a copyright issue, we support USTR in this litigation effort with our expertise.

The Copyright Office also works hand-in-hand with USTR on bilateral and regional trade negotiations, including negotiations and implementation of FTAs. In the past twelve months, we participated in bilateral negotiations with Russia, Saudi Arabia, China, South Korea, Japan, Taiwan, Philippines, Vietnam, Germany, Israel, Kazakhstan, Brazil, Yemen, and Kuwait. During that time, we played a key role in negotiating the intellectual property chapters of the FTAs with Panama, the Andean FTA group, Oman, United Arab Emirates, and Thailand. We have also worked hard to ensure the proper and full implementation of our FTAs, most notably with Singapore and Morocco.

I am confident that we have a lot to show for our efforts and I am proud of that. American creative industries now have improved legal regimes around the world, increasing their opportunity to sell their products and services on a level playing field. This generates an incentive to create and distribute new and better works for the benefit of Americans and the world. It also creates jobs, both here and abroad.

My discussion of the legal frameworks for protecting copyright would not be complete if I did not add a few words about the U.S. Copyright Act. While there are many ways to approach an issue and many good laws around the world, I believe that on the whole, the U.S. Copyright Act does the best job of providing appropriate protections to authors and copyright owners, while still allowing for fair and reasonable use of copyrighted materials.

But our law is not perfect, and when we go to other countries seeking improved copyright protection, they are quick to point out the deficiencies and gaps in our law. For example, the U.S. has not amended its law to remove a provision of section 110(5), an exemption for performing musical works in public places like bars and restaurants that was broadened in 1998. A dispute resolution panel of the WTO ruled that the expansion of the exemption was inconsistent with the United States' TRIPS obligations. Also, although we ask foreign governments to extend all the rights they afford under their law to their domestic right holders in sound recordings to American right holders as well, many countries point out that the scope of such rights under U.S. law is narrower than theirs, depriving their right

holders of the reciprocal protections in the United States. I know that these are controversial subjects, but if we are going to take a frank look at how to solve the problems of international piracy, we need to look at our own deficiencies as well.

III. Enforcement

The second element to the protection of copyright is the enforcement of the rights provided by the law. We all recognize that without adequate and effective enforcement, the laws are not worth very much. Accordingly, we place a great deal of emphasis on enforcement in our conversations with foreign officials.

The TRIPS agreement was the first international instrument to contain extensive copyright enforcement obligations, covering the necessary authority of policing, customs, and judicial authorities, setting standards for the application of criminal penalties, and establishing the overall standard that countries must provide "effective action against any act of infringement... and remedies which constitute a deterrent to further infringements." The TRIPS agreement has been a tremendously valuable tool in advancing the development of legal structures to support enforcement of copyright around the world. There remains, however, substantial work to be done in making sure that those structures provide effective enforcement of copyright.

Our FTAs have built upon the TRIPS enforcement text by adding specificity to what is found in TRIPS, and other obligations not found in TRIPS at all. For example, where TRIPS requires criminal penalties for all "wilful... copyright piracy on a commercial scale..." , the FTAs specify that criminal penalties must be available for all wilful infringements for purposes of commercial advantage or private financial gain, or significant wilful infringements, regardless of motivation. This reflects the experience in the U.S. in dealing effectively with various forms of piracy and is broader than many countries' existing criminal copyright provisions.

The FTAs also provide us with the flexibility to address enforcement problems that are particularly problematic in a given country or region. For example, some of our FTAs include a side letter imposing a unilateral obligation on our trading partner to regulate the manufacture of optical discs. This is a reflection of the fact that much of the world's pirated optical discs are manufactured in certain regions, perhaps most notably, southeast Asia.

In another example, one that is specific to a single country, there is a provision in the Singapore FTA which was carefully crafted to address the serious concerns with pirated products being trans-shipped through Singapore and out to the rest of the region and the world.

A. Serious Challenges Remain

Despite all these accomplishments, the fact remains that copyright enforcement in too many countries around the world is extremely lax, allowing staggeringly high piracy rates and massive losses to American companies. In its most recent Special 301 submission, the International Intellectual Property Alliance ("IIPA") estimated that global piracy cost U.S. copyright industries over \$13 billion in 2004 alone.

1. China

China is a good example of how laws are not enough -- enforcement is absolutely essential to the protection of copyright. As China joined the WTO in 2001, the Copyright Office worked with the USTR-led interagency team to provide technical advice and to urge the Chinese government to amend its law to be TRIPS-compliant. While it fell short in several important respects, the law is more than sufficient to provide some meaningful protection to copyrighted works if it is properly enforced. Unfortunately, China's enforcement efforts remain inadequate as is illustrated by the industry reports that the piracy rates continue to hover around ninety percent for all forms of copyrighted works, as they have for years.

Last year, China made a number of commitments to improve various aspects of its intellectual property regime, most notably in regards to enforcement. Shortly before the meetings at which those commitments were made, the Copyright Office hosted a delegation of Chinese copyright officials led by the National Copyright Administration of China ("NCAC"). We have enjoyed a cooperative relationship with the NCAC for nearly 25 years, and that relationship has helped to promote greater understanding between our governments. We have learned, though, that China's government is complex, and that the NCAC frequently does not have the final say on copyright policy and enforcement in China.

China's implementation of last year's commitments has been incomplete. For example, a major impediment to increased criminal copyright prosecutions has been a series of Judicial Interpretations of the criminal code, which set minimum monetary thresholds for the scope of infringements capable of giving rise to a criminal conviction. While a new set of interpretations with lower thresholds was issued, it contains several flaws, such as calculating whether the thresholds are met based on the artificially low pirate price, rather than the price of the legitimate version of the product being infringed. Further, while Vice Premier Wu Yi did hold public events to draw attention to the problem of piracy in China, the government has still not ratified the WCT or WPPT.

2. Russia

Russia has been on the Special 301 Priority Watch List since 1997. Today Russia's copyright piracy problem remains one of the most serious of any country in the world. According to the IIPA, piracy rates in Russia for most sectors are

estimated at around 80% in 2004 and losses exceed \$1.7 billion. In the past few years there has been an explosion in the growth of illegal optical media disc plants run by organized crime syndicates with widespread distribution channels. Russia has also developed a serious online piracy problem, as exemplified by the offering of pirated materials on the website, "allofmp3.com," which has yet to be taken down by Russian authorities.

The U.S. Copyright Office is a committed member of the United States Government interagency efforts to combat intellectual property violations in Russia. There have been some positive steps in Russia which include passing copyright amendments last year that, among other things, remedied a long-standing and serious deficiency in the protection of pre-existing works and sound recordings of U.S. right holders. Statements by President Putin and other high-ranking government officials indicate that the Government of Russia comprehends the serious adverse effects of piracy and counterfeiting on U.S. companies, Russia's domestic creative industry and its economy. Not all of these encouraging statements have produced the desired results, such as the Russian Government's statement that it would eradicate all music piracy within two years. Now, two years since then, piracy has not decreased, but instead has increased by 30%, and industry estimates that Russia is now the world's largest exporter of pirated music products. Nevertheless, we must encourage the Russian Government to remain committed, and meet its enforcement problems head-on. We will continue to work with USTR using every possible forum to build on the positive steps Russian lawmakers have taken.

B. Treaties Cannot Compel Enforcement

For all the progress that we have made through TRIPS, the WCT and WPPT, and our FTAs, the fact remains that enforcement requires action. Laws do not enforce themselves. In my experience, there are two causes of inadequate enforcement: lack of competent police, prosecutors, and/or judges and lack of political will to enforce copyright. We do our best through the training programs I have described to address the first problem. The second, lack of political will, is much more difficult.

I firmly believe that both history and logic demonstrate that a good system of copyright protection is a critical ingredient to developing vibrant domestic creative industries. Just recently, Bill Gates spoke at the Library of Congress and questions were raised concerning outsourcing. He responded that Microsoft would continue to operate out of the United States because the United States is the country with the most respect for intellectual property. That statement is a testament to how intellectual property goes hand-in-hand with substantial economic development. We must recognize the reality that some countries do not share this view. They sacrifice the long term social and economic development benefits in favor of instant gratification; pirate operations provide jobs and income in many developing countries. Some also take the unfortunate view that paying for legitimate copies of works is just an exercise in sending money out of their country to foreign right holders. This approach undermines the ability of copyright to encourage and develop a nation's own creative industries and culture. It also overlooks the benefits of tax revenue from legitimate business and the good jobs and income that come with the increase in foreign investment that is encouraged by a good regime of copyright protection.

Such countries are simply unwilling to commit resources to provide effective enforcement of copyright. At best, they will do the minimum they need to do in order to prevent excessive trade friction with the United States or other trading partners. In recent years, some like-minded countries have worked together to present arguments on the international level that seek to weaken existing international standards of copyright protection. Couched in terms of encouraging development or cultural diversity, these arguments are premised on the notion that copyright protection is antithetical to the interests of developing countries. What we are facing is an attempted backlash against the TRIPS agreement and our other successes. While we need to continue to work hard for short-term progress on enforcement in individual countries, we must also keep a close eye on these attempts to undermine established international standards of copyright protection.

IV. Not all Piracy is Alike

Before I conclude, Mr. Chairman, I would like to distinguish the type of piracy we see in the United States and what we see in many other countries. To be sure, piracy anywhere is serious and cause for concern. I have testified extensively on the very real dangers of domestic piracy, particularly the massive amount of piracy that dominates many peer-to-peer networks. As you know, these issues have given rise to the type of vigorous public debate on which the United States prides itself. But all too often, what we see abroad bears no resemblance to college students downloading their favorite songs and movies.

Much of the foreign piracy about which we are speaking today is done by for-profit, criminal syndicates. Factories throughout China, southeast Asia, Russia, and elsewhere are churning out millions of copies of copyrighted works, sometimes before they are even released by the right holders. These operations are almost certainly involved in other criminal activities. Several industry reports in recent years suggest that dueling pirate operations have carried out mob-style "hits" against their criminal competitors. And, although the information is sketchy at best, there have been a series of rumored ties between pirating operations and terrorist organizations.

What is problematic is that some American commentators who are prone to hyperbole about what they see as an

imbalance in the U.S. Copyright Act are providing arguments and rationalizations that foreign governments use to defend their failure to address this type of organized crime. The confusion wrought by the imprecision and lack of clarity in these commentators' statements is not helpful to our achieving the goal for which there is no credible opposition: dramatic reduction in organized piracy of U.S. copyrighted works abroad.

V. Conclusion

International piracy poses a tremendous threat to the prosperity of one of America's most vibrant economic sectors: its creative industries. Accordingly, it deserves our utmost attention. This attention must be consistent and long-term if it is to be successful. At the same time, we must be realistic in the goals that are set, lest we become discouraged in spite of our successes. While it is not realistic to expect to eliminate all piracy, I do believe that we can continue to improve the global situation, to the benefit of authors and right-holders here in the United States and throughout the world.